KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-CC-PR-2017-01**
Before:	**The Specialist Chamber of the Constitutional Court** Judge Ann Power-Forde, Presiding Judge Vidar Stensland Judge Roland Dekkers
Registrar:	Fidelma Donlon
Date:	26 April 2017
Original Language:	English
File name:	**Referral of the Rules of Procedure and Evidence Pursuant to Article 19(5) of the Law**

PUBLIC

JUDGMENT

on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office

---

The Specialist Chamber of the Constitutional Court

Composed of

Ann Power-Forde, Presiding Judge
Vidar Stensland, Judge
Roland Dekkers, Judge

having deliberated in private on 29 and 30 March, and on 10, 11, 22, and 23 April 2017 delivers the following Judgment.

PART I - PRELIMINARY

The Referral

1. On 17 March 2017, the Plenary of the Judges of the Kosovo Specialist Chambers (the 'Plenary') in accordance with Article 19(1) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (the 'Law'), adopted the Rules of Procedure and Evidence ('the Rules').

2. On 27 March 2017, the Rules adopted by the Plenary were referred to the Specialist Chamber of the Constitutional Court (the 'Court') pursuant to Article 19(5) of the Law (the 'Referral').[1] On the same day, the President of the Specialist Chambers assigned the above Panel pursuant to Article 33(3) of the Law. Judge Antonio Balsamo was assigned as Reserve Judge.

Admissibility

3. For the Court to adjudicate on the Referral it is necessary to examine whether the admissibility requirements as laid down in the Law have been fulfilled.

4. The Court, in the first instance, is required to examine whether the Referral has been made by an authorised person and, secondly, whether it has jurisdiction to review the Rules.

5. The Court recalls that, pursuant to Article 19(1) of the Law, the Plenary shall adopt Rules of Procedure and Evidence for the conduct of proceedings before the Specialist Chambers as soon as possible following the appointment of the Judges.

6. Pursuant to Article 19(5) of the Law, the Rules, as adopted, shall be referred to the Specialist Chamber of the Constitutional Court for a review as to their

[1] KSC-CC-PR-2017-01, F00001, Referral of the Rules of Procedure and Evidence Pursuant to Article 19(5) of the Law, Referral of the Rules of Procedure and Evidence to the Specialist Chamber of the Constitutional Court, 27 March 2017.

compliance with Chapter II, including Article 55, of the Constitution of the Republic of Kosovo (the 'Constitution').

7. Article 49(1) of the Law provides that the Specialist Chamber of the Constitutional Court shall be the final authority for the interpretation of the Constitution as it relates to the subject matter jurisdiction and the work of the Specialist Chambers and the Specialist Prosecutor's Office.

8. The Rules have been adopted pursuant to law and relate to the conduct of proceedings before the Specialist Chambers. Thus, they come within the subject matter jurisdiction and the work of the Specialist Chambers and the Specialist Prosecutor's Office.

9. Since the Rules have been referred following their adoption by the Plenary and since the Court, as the final authority for the interpretation of the Constitution, has jurisdiction to review the Rules which have been adopted in accordance with the Law, the Referral made herein on 27 March 2017 is declared admissible.

Scope of Review

10. The Court recalls that its jurisdiction in this matter is limited to a review of the Rules in order to determine their compliance with Chapter II of the Constitution. In this regard, it is not the Court's function to prescribe how the Rules should be or might have been improved or to anticipate scenarios that may or may not transpire. It is, rather, entrusted with answering the more limited question of whether the Rules, as adopted, comply with Chapter II, including Article 55, of the Constitution.

11. It is acknowledged that, in certain respects, the only way to ascertain, unequivocally, whether a provision in the Rules is in compliance with the Constitution would be to examine the manner in which the specific provision is applied in a given case. For the most part and subject to the guiding principles set out below, the Court places reliance upon the fact that when the Rules are to be interpreted and applied, regard will be had to Article 3(2)(a) and (e) of the Law. This requires that the Specialist Chambers adjudicate and function in accordance with the Constitution and with international human rights law, which sets criminal standards, including those required under the European Convention on Human Rights and Fundamental Freedoms (the 'Convention') and the International Covenant on Civil and Political Rights.

Guiding Principles

12. In conducting its review of the Rules, the Court's starting point has been to note that Article 19(2) of the Law requires that the Rules shall reflect the highest standards of international human rights law with a view to ensuring a fair and expeditious trial. It acknowledges that the Plenary's intention was to comply with this requirement. The Court does not hold a rule to be unconstitutional unless the unconstitutionality of a provision is clear. Slight implication or vague conjecture are not grounds endorsed by this Court for finding any provision of the Rules to be non-compliant with the Constitution.

13. In addition, the Court's review has been guided by the actual language of the text of the Rules as adopted by the Plenary. Where the plain meaning of a provision, as stated, is manifestly contrary to the tenor of the Constitution, the Court will find that such a provision is not in compliance with the Constitution.

14. To the extent possible, the Court has incorporated the doctrine of 'harmonious interpretation' into its review of the Rules. Subject to its being bound by the plain meaning of the text, it has proceeded upon the assumption that the provisions of individual rules should not be construed in isolation from other parts of the Rules but rather should be construed so as to harmonise therewith.

15. Where a specific rule or a provision within the Rules raises no issue as to its compliance with the Constitution, then no mention is made of such a provision or rule within this Judgment.

16. Where a rule engages a question of fundamental human rights as guaranteed under Chapter II, including Article 55, of the Constitution, it is subjected to heightened scrutiny in order to determine its overall compliance with Chapter II of the Constitution. The Court observes that Article 53 of the Constitution provides that human rights and fundamental freedoms, as guaranteed by the Constitution, shall be interpreted in a manner consistent with the court decisions of the European Court of Human Rights (the 'ECtHR').[2]

17. Where the Court determines that a provision within the Rules is inconsistent with the Constitution, it makes a finding to that effect. It does not arrive, lightly, at such a determination.

18. The Court now turns to its review of the Rules on a Chapter by Chapter basis.

[2] In this regard, all references in this Judgment are to the case-law of the ECtHR, unless otherwise specified.

PART II – THE RULES

CHAPTER 1

GENERAL PROVISIONS

19. Save for the rules referred to hereunder and its finding as set out in paragraph 29 of this Judgment, the Court has no comment to make on the general provisions contained in Chapter 1 of the Rules.

20. **Rule 8(4) Working Languages**

This provision, as adopted by the Plenary, provides as follows:

> *The Registrar shall make the necessary arrangements for interpretation and translation into and from the working language(s) and a language used by the Accused or suspect, as provided for in the Rules or ordered by the Panel.*

The Court observes that, potentially, four languages are expressly envisaged in this rule, namely, the three official languages of the Specialist Chambers plus the language of the accused/suspect. It notes that whereas a *witness* may be authorised to testify in a language which he or she speaks, there is no express provision in Rule 8 for such an authorised language (where it is neither the language of the accused nor one of the official languages) to be interpreted and translated into and from the language of the accused or suspect.

21. The Court recalls that Article 30 of the Constitution on the 'Rights of the Accused' guarantees that a person charged with a criminal offence enjoys, as one of the minimum rights, the right

> *(4) to have free assistance of an interpreter if she/he cannot understand or speak the language used in court.*

This right is recognised as a fundamental right of an accused person under Article 6 of the Convention and is expressly reiterated in Article 21(4)(g) of the Law.

22. As noted in relation to Rule 8(4), only four potential languages are expressly envisaged in this provision. The Constitution, by contrast, refers to 'the language used in court' thereby providing for a situation in which a witness may testify in a language that is neither an official language nor the language used by the accused.

23. The right to have the free assistance of an interpreter has been held by the ECtHR to mean that an accused person who cannot understand or speak the language used in court has the right to have free translation and/or interpretation of all those documents or statements in the proceedings which

it is necessary for an accused to understand or to have rendered into the court's language in order to have the benefit of a fair trial.[3] While the ECtHR held that this right does not require a written translation of all items of written evidence or official documents in the procedure, it clarified that '[t]he interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events'.[4]

24. Whilst Rule 8(4) does not expressly provide for interpretation and translation from an authorised language used by a witness into the language used by the accused, the Court is satisfied that, having regard to the obligation under Article 3(2) of the Law, any orders made in respect of interpretation and translation services in proceedings before the Specialist Chambers will meet the requirements of the Constitution and of international human rights law. Accordingly, the Court accepts that such interpretation and translation as is necessary for an accused to participate fully in the proceedings will be included in any order made by a Panel seized of proceedings or of any part thereof and that the Registrar will make the necessary arrangements therefor, as required.

25. **Rule 9(6) Calculation and Variation of Time Limits**

This provision, as adopted by the Plenary, reads as follows:

> *Unless otherwise ordered by a Panel, and where no prejudice is caused to the opposing Party or Victims' Counsel, a motion for variation of time may be disposed of without giving the opposing Party or Victims' Counsel, where applicable, the opportunity to be heard.*

26. The disposal of any motion (other than an urgent *ex parte* motion) without affording an opposing party an opportunity to have knowledge of and comment upon the observations of the other party, raises an 'equality of arms' issue—a fundamental requirement of fair proceedings. Whilst the provision as adopted is predicated upon there being 'no prejudice' caused to an opposing or another party in proceedings, the Court considers that it may, in practice, be difficult to ascertain whether, in fact, any prejudice is caused to another party without having afforded that party an opportunity to comment.

27. Equality of arms and the right to an adversarial hearing are inherent features of a fair trial guaranteed under Article 31 of the Constitution.[5] Equality of arms requires that each party be afforded a reasonable opportunity to present its case under the conditions that do not place it at a substantial disadvantage vis-

[3] See, for example, *Protopapa v. Turkey*, no. 16084/90, 24 February 2009, para. 79; *Luedicke, Belkacem and Koç v. Germany*, 28 November 1978, Series A no. 29, para. 48.
[4] *Kamasinski v. Austria*, 19 December 1989, Series A no. 168, para. 74.
[5] See Kosovo Constitutional Court, Case no. KI10/14, Judgment of 26 June 2014, paras 39, 41.

à-vis the opposing party.[6] The right to an adversarial hearing requires that, in principle there has been an opportunity for the parties to a criminal trial to have knowledge of and comment upon all evidence adduced or observations filed.[7] In *Wynen v. Belgium*, an unequal application of time limits for different parties (appellant and respondent in that case) to submit pleadings to a cassation court contributed to a finding that the applicant's right to a fair trial under Article 6 of the Convention had been breached. As a general rule, it is for the parties alone to decide whether observations filed by another participant in the proceedings call for comment.[8]

28. The Court observes that a motion for variation of time under Rule 9(6) will only be disposed of in the absence of an opposing party where 'no prejudice' is caused. The Court is satisfied that this sets a high threshold and must rest upon the presumption that opposing and other parties will have the opportunity to decide whether a motion for a variation of time limits calls for comment on their part.

29. **Finding on Chapter 1 of the Rules**

Subject to adherence to the principles enunciated above and mindful of the obligation on the Specialist Chambers to adjudicate and function in accordance with Article 3(2) of the Law, the Court finds that the general provisions contained in Chapter 1 of the Rules are not inconsistent with Chapter II of the Constitution.

CHAPTER 2

ORGANISATION AND ADMINISTRATION OF THE SPECIALIST CHAMBERS

30. Save for the rules set out hereunder and for the finding set out in paragraph 57 of this Judgment, the Court has no comment to make on the provisions contained in Chapter 2 of the Rules.

31. **Rule 12 Consultations of the President with the Registrar and the Specialist Prosecutor**

This rule, as adopted by the Plenary, provides that:

> *Without prejudice to the independent performance of their functions, where necessary, the President and the Registrar shall consult and coordinate on the*

[6] See Kosovo Constitutional Court, Case no. KI10/14, Judgment of 26 June 2014, para. 41.
[7] *Gregačević v. Croatia*, no. 58331/09, 10 July 2012, para. 50. See also *Ruiz-Mateos v. Spain*, 23 June 1993, Series A no. 262, para. 63.
[8] *Wynen v. Belgium*, no. 32576/96, ECHR 2002-VIII, para. 32; *Ferreira Alves v. Portugal* (no. 3), no. 25053/05, 21 June 2007, para. 41.

administration of judicial activity of the Specialist Chambers. The President may also consult with the Specialist Prosecutor when necessary on the same subject-matter.

32. Insofar as Rule 12 provides for unilateral consultations between the President and the Specialist Prosecutor, this rule may engage Article 31 of the Constitution which guarantees the right to a fair and impartial trial. The Court emphasises that in all *inter partes* proceedings natural justice requires adherence to the principles of '*audi alteram partem*' and equality of arms. This necessarily requires that the other party is heard during the course of any proceedings. Thus, having regard to the provisions of Article 3(2) of the Law, all parties and not only the Specialist Prosecutor should be consulted on any administrative issues which arise within and influence the course of specific proceedings.

33. **Rule 13 Functions of the President**

Rule 13 sets out the functions of the President of the Specialist Chambers in the exercise of his or her duties in accordance with Article 32(3) of the Law.

34. Article 32(3) of the Law provides that the President shall be responsible for 'the judicial administration of the Specialist Chambers and other functions conferred upon him or her by this Law'. At the same time the Court observes that Article 31(1) confirms that the Judges of the Specialist Chambers shall be independent in the performance of their functions. In the light of the obligation on the Specialist Chambers to adjudicate and function in accordance with the Constitution and international human rights law pursuant to Article 3(2) of the Law, the Court is satisfied that Rule 13 will be applied with due regard to Article 31(1) of the Law, the requirement of which is an intrinsic element of a fair trial, as guaranteed under Article 31 of the Constitution.

35. **Rule 19 Absence of a Judge**

Paragraphs (3), (5) and (6) of Rule 19, as adopted by the Plenary, require particular scrutiny.

36. Rule 19(3) provides as follows:

Where a Judge, for reasons of illness, exceptional personal circumstances or force majeure circumstances, is absent in a part-heard case for a period which is likely to be of short duration, and where the remaining Judges of the Panel are satisfied that it is in the interests of a fair and expeditious trial, having heard the Parties, they may order that the hearing continue in the absence of that Judge for a period of no more than five (5) working days.

37. The Court considers that an issue is raised by Rule 19(3) as to whether the continuation of proceedings before two Judges of the Panel may be said to

constitute a hearing by 'a tribunal established by law' as guaranteed under Article 31.2 of the Constitution.

38. The term 'established by law' is intended, primarily, to ensure that the judicial organization does not depend upon the discretion of the executive but rather that it is regulated by law emanating from Parliament.[9] The assessment of the notion, however, does involve an examination of the statutory structure upon which the tribunal is set up. The requirement that a tribunal be 'established by law' is infringed where a tribunal does not function in accordance with the particular rules that govern it,[10] including, with the rules pertaining to the composition of the bench in each case.[11]

39. Examining the relevant statutory structure herein, the Court observes that under Article 25(1) of the Law establishing the Specialist Chambers, reference is made to the fact that Trial Panels, Court of Appeal Panels and Supreme Court Panels are comprised of 'three' Judges. While Articles 25(1), 33(1), 33(2) and 33(7) of the Law also provide for the assignment of a Single Judge, as necessary, and for the election of a Presiding Judge of a Panel, nowhere does the Law provide that hearings may be conducted before a 'Panel' of two Judges.

40. Consequently, the Court finds that, notwithstanding the limited duration of a Judge's absence or the views of the parties to the proceedings, the continuation of a hearing before two Judges of a Panel has no basis in law and, thus, such a hearing would not constitute a hearing before a tribunal established by law. Accordingly, Rule 19(3) is inconsistent with Article 31.2 of the Constitution.

41. Turning to Rules 19(5) and 19(6), the Court notes that these provisions, as adopted by the Plenary, provide as follows:

> *(5) If a Judge is unable to continue sitting for more than thirty (30) working days or permanently in a part-heard case, the remaining Judges of the Panel, having heard the Parties, shall report to the President, who shall assign the Reserve Judge or, where appropriate, another Judge to continue hearing the case. Pursuant to Article 33(4) of the Law, the substituted Judge shall not be reassigned to another Panel at a different phase of the same proceedings.*
>
> *(6) If a Single Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of short duration, the President may assign another Single Judge to the case and, after hearing the*

[9] Kosovo Constitutional Court, Case no. KO26/15, Judgment of 15 April 2015, para. 48, citing *Fruni v. Slovakia*, no. 8014/07, 21 June 2011, para. 134.
[10] *Pandjikidzé and Others v. Georgia*, no. 30323/02, 27 October 2009, para. 104; *Posokhov v. Russia*, no. 63486/00, ECHR 2003-IV, para. 39; *Buscarini v. Saint-Marin* (dec.), no 31657/96, 4 May 2000.
[11] *Pandjikidzé and Others v. Georgia*, cited above, para. 104; *Posokhov v. Russia*, no. 63486/00, ECHR 2003-IV, para. 39.

Parties, order either a rehearing or continuation of the proceedings from that point.

42. As with Rule 19(3), these provisions engage Article 31.2 of the Constitution, which guarantees the right of an accused person to a fair hearing.

43. Rules 19(5) and 19(6) raise the issue of a change in the composition of a Panel or a change of a Single Judge Panel during the course of a case.

44. At the outset, the Court confirms that an essential element of fair criminal proceedings is the possibility of an accused to be confronted with a witness in the presence of the judge who ultimately decides the case.[12] This 'principle of immediacy' is an important guarantee in criminal proceedings because observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused.[13] Essentially, it requires that decisions made in a criminal case should be reached by judges who were present throughout the proceedings.[14]

45. However, the Court acknowledges that, in exceptional circumstances, a judge's continued participation in a case may not be possible. In such an event, the interests of justice and, in particular, the accused person's right to trial within a reasonable time, may require that the proceedings continue before a reconstituted Panel.[15]

46. Where any change in the composition of a Panel occurs, important measures must be taken to ensure that no want of fairness arises for the accused. The Panel should be satisfied that adequate safeguards are in place which compensate for the lack of immediacy arising from the reconstitution of the Panel. Such measures may include the making of transcripts and audio-video recordings of the proceedings available to the new judge or the rehearing of relevant arguments before the newly composed Panel.[16] Any change in the composition of the Panel in a part-heard case should occur only in exceptional circumstances and should lead to the rehearing of important witnesses.[17] It must be established that the judge who continues hearing the case has an appropriate understanding of the evidence and arguments.

---

[12] *P.K. v. Finland* (dec.), no 37442/97, 9 July 2002.
[13] *Pitkänen v. Finland*, no. 30508/96, 9 March 2004, para. 58; *P.K. v. Finland*, cited above.
[14] See *Mellors v. the United Kingdom* (dec.), no. 57836/00, 30 January 2003.
[15] See *Cutean v. Romania*, no. 53150/12, 2 December 2014, para. 61.
[16] See, *mutatis mutandis*, *Pitkänen v. Finland*, cited above, para. 65; *Mellors v. the United Kingdom*, cited above.
[17] See *Pitkänen v. Finland*, cited above, para. 58; *P.K. v. Finland*, cited above.

47. **Rule 20(4) Recusal or Disqualification of Judges**

This provision, as adopted by the Plenary, is concerned with the recusal or disqualification of a Judge and provides, in the relevant part, as follows:

> *The Panel shall decide in each particular case whether the circumstances allow for the Judge in question to continue to participate in the proceedings whilst the matter is pending.*

48. The Court considers that an issue raised by Rule 20(4) is whether a Judge's continued participation in proceedings pending the outcome of the application for his or her disqualification is consistent with an accused person's right to a hearing by an independent and 'impartial' tribunal. Thus, Article 31 of the Constitution is engaged.

49. It is a principle of fundamental importance that courts inspire confidence in the public and, where criminal proceedings are concerned, in the accused person standing trial.[18] Where an application for the disqualification of a judge is made, a question inevitably arises in relation to the judge's impartiality. The Court acknowledges that an application for disqualification may be groundless or meritorious but the important issue for determination is whether a judge may continue to participate pending the outcome thereof.

50. Rule 20(4) affords the Panel the discretion to make that determination in the light of the circumstances of each particular case. In exercising the discretion conferred by this rule, the Panel is obliged to have regard to Article 3(2) of the Law.

51. The existence or absence of impartiality for the purposes of fair trial requirements is to be determined by a subjective and an objective test. The former examines the personal convictions or interests of a judge in a particular case whilst the latter assesses whether sufficient guarantees exist to exclude any legitimate doubt as to a judge's impartiality.[19] The Court considers that in applying the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary.[20] Thus, permitting the participation of a judge pending the outcome of the disqualification application may not, in itself, be incompatible with the right of an accused to a fair trial. However, the Court underscores that a Panel must ensure that no appearance of partiality is conveyed and must bear in mind that proceedings

---

[18] *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII, para. 118; *Padovani v. Italy*, 26 February 1993, Series A no. 257-B, para. 27. See also Kosovo Constitutional Court, Case no. KI 06/12, Judgment of 27 June 2012, para. 47.

[19] *Kyprianou v. Cyprus*, cited above, para. 118; *Hauschildt v. Denmark*, 24 May 1989, Series A no. 154, para. 46. See also Kosovo Constitutional Court, Case no. KI 06/12, Judgment of 27 June 2012, para. 46.

[20] *Kyprianou v. Cyprus*, cited above, para. 119; *Hauschildt v. Denmark*, cited above, para. 47.

flawed by the participation of a judge who should have been disqualified cannot normally be considered to be fair or impartial.[21]

52. **Rule 27(3) Responsibilities of the Registrar for Witness Protection and Support**

This provision, as adopted by the Plenary, provides that:

> *The Witness Protection and Support Office may, on order of a Panel or proprio motu, conduct a psychological assessment, prior to a court appearance, on a person's fitness to appear and on any necessary protective measures.*

53. The Court observes that the conduct of any psychological, psychiatric or medical assessment engages a person's constitutional rights to personal integrity and to private life, as guaranteed under Articles 26 and 36.1, respectively, of the Constitution.

54. The Court affirms that the psychological examination of a person without consent amounts to an interference with that person's rights to personal integrity and privacy.[22] Any such interference would constitute a violation of these constitutional rights, unless the provisions of Article 55 of the Constitution are respected. This requires that such interference is in accordance with the law; necessary for the fulfilment of its purpose in an open and democratic society; limited to the purposes for which it was provided; and that it does not deny, in any way, the essence of the guaranteed right.

55. The Court further observes that Rule 27(3) refers to the psychological assessment being conducted by the 'Witness Protection and Support Office'. The Court underscores that for this rule to comply with an individual's rights under Articles 26 and 36.1 of the Constitution, any such assessment must be conducted by a medical professional, duly qualified to examine the individual and to provide an expert opinion on his or her psychological fitness or needs.

56. Whilst the Rule does not expressly set out all the necessary safeguards pertaining to the medical examination of a person who has withheld his or her consent, the Court observes that a Panel making any order under Rule 27(3) is bound to comply with the Constitution and international human rights law pursuant to Article 3(2) of the Law.

---

[21] See United Nations Human Rights Committee (the 'HRC'), *Karttunen v. Finland*, Communication no. 387/1989, 23 October 1992, para. 7.2.

[22] See HRC, *M.G. v. Germany*, Communication no. 1482/2006, 2 September 2008, para. 10.1; *Matter v. Slovakia*, no. 31534/96, 5 July 1999, para. 64; *Peters v. the Netherlands* (dec.), no. 21132/93, 6 April 1994.

57. **Findings on Chapter 2 of the Rules**

The Court finds that Rule 19(3) is inconsistent with Chapter II of the Constitution.

Apart from that finding, the Court considers that, subject to adherence to the principles enunciated above and mindful of the obligation on the Specialist Chambers to adjudicate and function in accordance with the Constitution and international human rights law pursuant to Article 3(2) of the Law, the remaining provisions contained in Chapter 2 of the Rules are not inconsistent with Chapter II of the Constitution.

CHAPTER 3

RIGHTS OF PERSONS DURING INVESTIGATION

58. The Court considers that several provisions contained in Chapter 3 engage fundamental human rights and thus require heightened scrutiny when considering the question of their compliance with the Constitution. Save for the rules discussed hereunder and subject to its findings as set out below in paragraph 107 of this Judgment, the Court has no comment to make on the remaining provisions contained in Chapter 3 of the Rules.

59. **Sub-Section 2: Special Investigative Measures**

Rules 31, 32 and 33, as adopted by the Plenary, insofar as they are relevant for the present assessment, provide as follows:

> ***Rule 31 Grounds for Special Investigative Measures***
>
> *(1) Special investigative measures may be authorised … pursuant to Rule 32 and Rule 33, where:*
>
> *(a) there is a grounded suspicion that a crime within the jurisdiction of the Specialist Chambers has been committed, is being committed or is about to be committed; and*
>
> *(b) information obtained from such measures, if applied, would assist the investigation of the crime and cannot be obtained by any other investigative measure or without a real risk of harm to persons or property.*
>
> *(2) A reasonable suspicion of the identity of a suspect committing or participating in the commission of the crime under paragraph (1) is not required for the authorization of such measures.*

Rule 32 Special Investigative Measures Authorized by a Panel

(1) The Specialist Prosecutor shall request authorisation from a Panel to undertake special investigative measures.

(2) Where the Panel is satisfied that the requirements under Rule 31(1) are met, it shall issue a decision authorizing the requested special investigative measures which shall include:

(a) the period for which the authorisation is granted depending on the specific circumstances of the investigation, which may not exceed sixty (60) days;

…

Rule 33 Special Investigative Measures Ordered by the Specialist Prosecutor

(1) The Specialist Prosecutor may order special investigative measures where:

(a) the requirements under Rule 31(1) are met;

(b) exceptional circumstances require the immediate implementation of such measures; and

(c) the delay in seeking authorisation from a Panel would jeopardise the investigation or the safety of a witness, victim or other persons at risk.

(2) The Specialist Prosecutor shall file a request to a Panel for approval of such measures immediately, and no later than twenty-four (24) hours after their initiation.

(3) The Panel seized with the request shall approve the special investigative measures only if satisfied that the conditions under paragraph (1) were met. If an approval is denied the Specialist Prosecutor shall immediately terminate the measures applied.

60. The Court observes that a wide range of special investigative measures, as defined under Rule 2(1), may be carried out by the Specialist Prosecutor, including covert video surveillance, covert monitoring of conversations and the interception of telecommunications and communications by a computer network. Such measures constitute an interference with a person's right to respect for privacy as guaranteed under Article 36 of the Constitution and by Article 8 of the Convention.[23]

[23] See, among other authorities, *Szabóet and Vissy v. Hungary*, no. 37138/14, 12 January 2016, paras 52-53; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2001-IX, para. 59. See also *Uzun v. Germany*, no. 35623/05, ECHR 2010, paras 49-52.

61. As noted above,[24] any interference with a person's constitutional right to privacy can only be justified if, pursuant to Article 55 of the Constitution, it is in accordance with the law; necessary for the fulfilment of its purpose in an open and democratic society; limited to the purposes for which it was provided; and does not deny, in any way, the essence of the guaranteed right.

62. Fundamental rights and freedoms guaranteed by the Constitution may only be limited 'by law'.[25] The phrase 'by law' under Article 55.1 of the Constitution or 'in accordance with the law' under Article 8(2) of the Convention requires that the measures have a basis in law and are compatible with the rule of law. The law, therefore, must meet certain quality requirements: it must be accessible to the person concerned and foreseeable as to its effects.[26]

63. As to the requirements of 'accessibility' and 'foreseeability' in the context of covert measures of surveillance, the Court confirms that the law must be sufficiently clear in its terms to give individuals an adequate indication of the circumstances in and conditions under which the authorities are empowered to resort to any such measures.[27] In addition, in the context of secret measures of surveillance by the authorities, because of the lack of public scrutiny and the risk of misuse of power, compatibility with the rule of law requires that the law provides adequate protection against arbitrary interference with the right to respect for privacy. In other words, there must exist effective guarantees against abuse. This will depend on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them and the kind of remedies that are provided by the law.[28]

64. In examining cases involving secret surveillance, the ECtHR has held that the 'lawfulness' of an interference may be closely related to the question of its 'necessity'. The Court considers that it is, therefore, appropriate in its review of Rules 31 to 33 to address, jointly, what is required when examining whether a given measure is 'in accordance with the law' and whether it is 'necessary'. The 'quality of law' in this sense implies that the domestic law must not only be accessible and foreseeable in its application but it must also ensure that secret surveillance measures are applied only when they are 'necessary in a democratic society'. This means that the law must provide adequate and effective safeguards and guarantees against abuse.[29]

---

[24] See above para. 54.
[25] See, for example, *Roman Zakharov v. Russia* [GC], no. 47143/06, ECHR 2015, para. 228; *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V, para. 52.
[26] *Roman Zakharov v. Russia*, cited above, para. 228, with further references; *Uzun v. Germany*, cited above, para. 60.
[27] *Uzun v. Germany*, cited above, para. 61, with further references.
[28] *Uzun v. Germany*, cited above, para. 63, with further references.
[29] See *Roman Zakharov v. Russia*, cited above, para. 236.

65. In reviewing Rules 31 to 33, the Court has had regard to international human rights standards applicable to the covert interception of communications, particularly, those developed by the ECtHR in its case-law on point. It is right that strict standards be required of the authorities to obviate the risk of abuse and arbitrary interference with the constitutionally protected right to privacy. The Court is aware that not all special investigative measures provided for in the Rules will involve the same level of interference with the right to respect for privacy. The higher the degree of interference, the stricter the safeguards against abuse must be. Thus, in *Uzun v. Germany* the ECtHR distinguished GPS surveillance from other methods of visual or acoustical surveillance. As a rule, the latter are more likely to involve a higher degree of interference with a person's right to respect for private life, because they disclose information, not just on a person's whereabouts but on his or her conduct, opinions and feelings.[30] Thus, it held that the rather strict standards which are necessary in the specific context of surveillance of telecommunications are not applicable to measures of GPS surveillance in public places since the latter must be regarded as constituting a lesser interference with the private life of the person than the interception of his or her telephone conversations.[31] It, therefore, applied the more general principles on adequate protection against arbitrary interference with the right to respect for privacy.[32]

66. Mindful of the magnitude of the interference with the right to privacy which secret surveillance and covert interceptions involve, the Court considers that in this area essential minimum safeguards must be in place and must be specified, clearly, in law if the potential for an abuse of power is to be avoided. It endorses the view of the ECtHR that any law on covert interception and surveillance measures must contain the following minimum safeguards:

- specification of the nature of offences which may give rise to an interception order;
- a definition of the categories of people liable to have their telephones tapped;
- a limit on the duration of telephone tapping;
- the procedure to be followed for examining, using and storing the data obtained;
- the precautions to be taken when communicating the data to other parties; and
- specification of the circumstances in which recordings may or must be erased or destroyed.[33]

[30] *Uzun v. Germany*, cited above, para. 52.
[31] Ibid., para. 66.
[32] Ibid.
[33] See, *Roman Zakharov v. Russia*, cited above, para. 231, with further references.

67. The Court observes that the Rules, as adopted by the Plenary, distinguish between different types of special investigative measures. However, it notes with some unease that there is no distinction in the Rules as to the conditions under which resort may be had to certain measures, particularly, those that involve a very high degree of interference with a person's right to respect for privacy. In view of the fact that the Rules clearly permit the interception of telecommunications and other forms of invasive surveillance, the Court finds it necessary to examine the provisions permitting special investigative measures in the light of the stricter standards referred to above.

68. In the Court's view, it is doubtful that Rules 31 to 33 permitting covert interception of communications, as adopted by the Plenary, are sufficient to meet the relevant standards required to ensure their compliance with Chapter II, including Article 55, of the Constitution.

69. The Court recalls that one of the minimum safeguards required in the area of covert interception is that sufficient detail be provided in relation to the nature of the offences which may give rise to such a special investigative measure.[34] In this connection the Court notes that Rule 31(1)(a) provides that special investigative measures may be authorised with regard to crimes within the jurisdiction of the Specialist Chambers. Thus, all offences under Article 6 of the Law, fall within the category of offences in respect of which interception orders may be made. Whilst this undoubtedly satisfies the requirement of clarity concerning the nature of the offences which may give rise to such an order, it is doubtful, in the Court's view, whether all offences, including those that may be punishable by a fine, would warrant such a degree of interference with the right to respect for privacy.[35]

70. More importantly, the Court observes that Rules 31 to 33 do not define the categories of persons in respect of whom the special investigative measures may be applied. This is a serious omission. In their current form, the rules make it permissible for the most intrusive of measures to be carried out with respect to *any* person provided that the conditions under Rule 31(1) are met.

71. Additionally, Rule 31(2) provides that the measures may be authorised without there being a reasonable suspicion as to the identity of a suspect. The Court accepts that in certain cases, a measure may be sought so as to identify or locate a potential suspect. However, a general provision permitting a serious interference without requiring any reasonable suspicion as to the identity of a suspect and without determining that a person falls within a specified category of persons whose communications are liable to be intercepted, appears problematic on its face and the absence of such a

[34] See *Kennedy v. the United Kingdom*, no. 26839/05, 18 May 2010, para. 159.
[35] See *Roman Zakharov v. Russia*, cited above, para. 244; *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, paras 43-44.

determination must be considered to raise serious concerns as to the justification for the imposition of such a measure.[36] Furthermore, insofar as intercepted communications may involve information passing between an individual suspect and his or her counsel, the Court notes the absence of any provisions governing such circumstances.[37]

72. The Court considers that Rules 31 to 33 also lack sufficient precision in terms of the duration of an intercepted communication. While Rule 32(2)(a) imposes a limitation of sixty days, there are no provisions preventing the Specialist Prosecutor from repeatedly obtaining a new decision after the expiry of the said period.[38] The Court accepts that it is not unreasonable to leave the overall duration of interception to the discretion of the relevant authorities which have competence to issue and, if necessary, renew interception warrants, having regard to the seriousness of an offence. It also accepts that a longer duration of interception may be warranted in more serious and complex cases. However, the Court considers that such measures cannot be indefinite in character. The Rules must specify, at a minimum, the circumstances under which a warrant may be renewed and the conditions under which it must be cancelled.[39] The rules, as adopted, contain no such safeguards.

73. With respect to the procedures for examining, using and storing the data obtained, the Court observes that there are provisions in other Chapters of the Rules which provide certain safeguards making it possible to minimise the risk of unauthorised access or disclosure. Rule 43, for example, provides that the Specialist Prosecutor shall be responsible for the retention, storage and security of information obtained during investigations unless and until such information or material has been tendered into evidence at trial.[40] At the same time, the Court is not convinced that the rules are clear in relation to the period(s) in respect of which obtained data may be retained nor do they specify the procedures to be followed for the destruction thereof. The rules also lack clarity concerning the procedures to be followed in circumstances where the data secured is not, in fact, relevant to the purpose for which it was obtained nor do they make provision for notification to be made to a person whose data is retained but who is not charged subsequently with any criminal offence.[41]

---

[36] See *Roman Zakharov v. Russia*, cited above, paras 243, 245.
[37] See *Iordachi and Others v. Moldova*, cited above, para. 50.
[38] Ibid., para. 45. See also *Weber and Saravia v. Germany* (dec.), no. 54934/00, ECHR 2006-XI, para. 98.
[39] See *Kennedy v. the United Kingdom*, cited above, para. 161; *Klass and Others v. Germany*, 6 September 1978, Series A no. 28, para. 52.
[40] See also, for example, Rule 105(1) and Rule 24.
[41] See *Roman Zakharov v. Russia*, cited above, paras 255, 286 *et seq.*; *Kennedy v. the United Kingdom*, cited above, paras 162, 167; *Klass and Others v. Germany*, cited above, paras 52, 57-58; *Weber and Saravia*, cited above, para. 135.

74. Undoubtedly, there are other safeguards which are required and which must be observed whenever data is obtained by covert surveillance and by other special investigative measures that involve a high degree of interference with an individual's right to respect for privacy.[42] These safeguards, as noted above, are outlined, in some detail, in the case-law of the ECtHR.[43]

75. At this stage of its analysis and bearing in mind the limited scope of its review, the Court is satisfied that, in view of the shortcomings identified above, Rules 31, 32 and 33, as adopted by the Plenary, are inconsistent with the requirements of the Constitution. Specifically, the Court finds that they do not meet the 'quality of law' requirement under Article 55.1 of the Constitution. Furthermore, the said Rules, as adopted, are incapable of demonstrating that the permitted 'interference' is kept to what is 'necessary' in a democratic society. Consequently, the Court finds that Rules 31, 32 and 33 do not comply with Article 36 of the Constitution as qualified by Article 55.1 thereof in that they lack adequate safeguards against abuse of power in the field of special investigative measures and, particularly, as regards the interception of communications.

76. **Sub-Section 3**: **Searches and Seizures**

Rules 34 and 35

Rules 34 and 35, as adopted by the Plenary, and insofar as they are relevant for the present assessment, read as follows:

> ***Rule 34 Search and Seizure Authorised by a Panel***
>
> *(1) The Specialist Prosecutor shall request authorization from a Panel for search and seizure where on the basis of the supporting material submitted with the request, a grounded suspicion has been established that:*
>
> *(a) a crime within the jurisdiction of the Specialist Chambers has been committed, is being committed or is about to be committed; and*
>
> *(b) the search is likely to result in the arrest of a person responsible for the crime or in the discovery and seizure of evidence essential for the investigation.*
>
> *(2) The Panel seized with the request may authorise the search and seizure if it is satisfied that the requirements under paragraph (1) are met.*
>
> *(3) The Panel shall set the timeframe, duration and scope for the execution of the search and seizure. The Panel may impose other conditions as deemed necessary.*

[42] See above para. 66.
[43] See *Roman Zakharov v. Russia*, cited above.

> ***Rule 35 Search and Seizure by the Specialist Prosecutor***
>
> *(1) In accordance with Articles 35 and 39 of the Law, the Specialist Prosecutor may, without an authorization of a Panel, search any person or property and temporarily seize any items found during the search, if:*
>
> *(a) the person knowingly and voluntarily consents to the search and seizure;*
>
> *(b) a person caught in the act of committing a crime under the jurisdiction of the Specialist Chambers, is to be arrested after a pursuit;*
>
> *(c) a person against whom an arrest warrant has been issued by a Panel is on the property to be searched; or*
>
> *(d) it is necessary to avoid an imminent risk of serious and irreversible harm to other persons or property.*
>
> *(2) The Specialist Prosecutor shall file a request to a Panel for approval of the search and seizure...*
>
> *(3) The Panel shall approve the search and seizure only if satisfied that the conditions under paragraph (1) were met. If an approval is denied the Specialist Prosecutor shall immediately terminate the search and seizure.*
>
> *(4) Rule 36(3) to (5) shall apply mutatis mutandis.*

77. The Court observes that the above rules on searches and seizures engage the right to personal integrity and the right to respect for privacy as guaranteed by Articles 26 and 36, respectively, of the Constitution and by Article 8 of the Convention.[44]

78. It notes that under Articles 36.2 and 55.2 of the Constitution and pursuant to Article 8(2) of the Convention, any interference with the fundamental rights and freedoms resulting from searches and seizures must comply with the requirement of 'necessity'.[45]

79. 'Necessity' implies that the specific interference with or limitation of the rights in question corresponds to a pressing social need and must be proportionate to the legitimate aim pursued.[46] In this connection, Article 55.4 of the Constitution provides that in cases of limitations of human rights the authorities shall pay special attention to the nature and extent of the limitation, the relation between it and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.

---

[44] See, for example, *Camenzind v. Switzerland*, 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, para. 35.

[45] See, for example, *Posevini v. Bulgaria*, no. 63638/14, 19 January 2017, para. 66, with further references.

[46] See, among other authorities, *Rozhkov v. Russia (no. 2)*, no. 38898/04, 31 January 2017, para. 116; *Camenzind v. Switzerland*, cited above, para. 44.

80. In assessing whether Rules 34 and 35, as adopted by the Plenary, comply with the requirement of 'necessity' under the Constitution, the Court observes at the outset that searches and seizures may be carried out both with and without a prior judicial authorisation in certain defined conditions.

81. In terms of searches and seizures conducted on foot of judicial authorisation, the Court observes that Rule 34 is drafted in broad terms. It does not specify the categories of persons in respect of whom searches and seizures may be ordered. On its face, therefore, such orders may be made in respect of persons suspected of having committed a criminal offence as well as persons in respect of whom no such suspicion arises. Furthermore, such an order may relate to the search of a suspect's property or the property of any third person. It may even include the search of a lawyer's office or the seizure of electronic devices. Clearly, if Rule 34 is to comply with Article 55.4 of the Constitution, it will require that particular considerations be assessed by a Panel when authorising different types of searches and seizures in order to ensure that the resulting interference is proportionate to the legitimate aim pursued.[47]

82. Furthermore, the Court observes that Rule 34 imposes no specific obligation on the Panel to consider the 'necessity' of a search and seizure operation. However, the Court underscores that in order for Rule 34 to be compliant with the Constitution, a Panel to whom a request is made must assess the necessity of any search-and-seizure operation, having regard to the provisions of Article 36.2 of the Constitution. This includes an obligation to assess, where relevant, whether the evidence sought could be obtained by other, less intrusive but equally effective means for obtaining the evidence[48] or whether the evidence is already in possession of the investigating authority.[49]

83. The Court is satisfied that the provisions of Rule 34(3), including that which permits the Panel to impose conditions as it deems necessary, aim to ensure that the order is drafted, as far as practicable, in a manner calculated to keep the impact of the operation within reasonable bounds.[50]

84. In terms of searches and seizures conducted in the absence of judicial authorisation, the Court affirms that particular vigilance must be invoked where the authorities are empowered, under law, to order and effect searches without prior judicial warrant. A clear legal framework and strict limits on

---

[47] See, for example, *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008, paras 38, 41; *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, ECHR 2007-IV, paras 63, 65.

[48] See *Saint-Paul Luxembourg S.A. v. Luxembourg*, no. 26419/10, 18 April 2013, para. 44; *Buck v. Germany*, no. 41604/98, ECHR 2005-IV, para. 49.

[49] See also *Rozhkov v. Russia (no. 2)*, cited above, paras 125-126.

[50] See *Misan v. Russia*, no. 4261/04, 2 October 2014, para. 55 *in fine*.

such powers are required if individuals are to be protected from arbitrary interference by the authorities with the right to respect for privacy.[51]

85. With that in mind, the Court observes that Rule 35(1) allows the Specialist Prosecutor to carry out searches and seizures *without* prior judicial authorisation in the conditions specified under sub-paragraphs (a) to (d) inclusive. The Court notes with some concern that pursuant to paragraph (1), the Specialist Prosecutor may search '*any*' person or property and seize '*any*' items found where one of the said conditions exists. On its face, these permissive powers of the Specialist Prosecutor are extensive. The Court is prepared to accept that sub-paragraph (a) and sub-paragraph (d) place limits on those broad powers to circumstances where either the person concerned has given consent or to where the operation in question is necessary to avoid an imminent risk of serious and irreversible harm to persons or property.

86. The Court's concern, however, remains in relation to the provisions of sub-paragraphs (b) and (c). Rule 35(1)(b), for example, allows the Specialist Prosecutor to search 'any' property on which a person caught in the act of committing a crime is to be arrested after a pursuit. Similarly, Rule 35(1)(c) allows the Specialist Prosecutor to search 'any' person and to seize 'any' items if a person against whom an arrest warrant has been issued is on the property to be searched. The Court considers that a provision which accords such extensive powers to the Specialist Prosecutor cannot but raise an issue as to its compliance with Article 36.2 of the Constitution which expressly provides that the authorities conduct searches only 'to the extent necessary' and where they are 'deemed necessary for the investigation of a crime'.

87. Admittedly, under ECtHR case-law, the absence of a requirement of prior judicial authorisation resulting in the authorities having unfettered discretion to assess the expediency and scope of a search may, to a certain extent, be counterbalanced by the availability of an *ex post facto* judicial review where such review deals with issues relating to both the legality and proportionality of the measure and to the manner in which it had been implemented.[52] The Court acknowledges that Rule 35(3) does provide for an *ex post facto* judicial review. However, under its terms, the Panel shall approve the search and seizure if satisfied that the 'conditions under paragraph (1) were met'. While such a review clearly addresses the legality of the search and seizure, the Court cannot turn a blind eye to the fact that Rule 35(3) makes no provision for the review to include an assessment of the proportionality of the measure. Consequently, it follows that the *ex post facto* judicial review provided for in Rule 35(3) does not confine the impact of searches and seizures

[51] See *Camenzind v. Switzerland*, cited above, para. 45.
[52] See *Rozhkov v. Russia (no. 2)*, cited above, para. 122.

to what is 'necessary' in a democratic society. It is, therefore, inconsistent with Article 36.2 of the Constitution.

88. In the light of the above, the Court concludes that the broad powers accorded to the Specialist Prosecutor under Rule 35(1)(b) and (c), notwithstanding the *ex post facto* judicial review under Rule 35(3) do not meet the requirement of 'necessity' under Articles 36.2, 55.2 and 55.4 of the Constitution. Consequently, the Court finds that Rules 35(1)(b) and (c) and 35(3) are inconsistent with the Constitution.

89. **Rule 36 Execution of Search and Seizure**

The Court finds that the following provisions of Rule 36 require a closer scrutiny from a different angle of the Constitution:

> *(1) Prior to the execution of search and seizure, the Specialist Prosecutor shall:*
>
> *(a) provide the person against whom the decision is directed with a certified copy thereof;*
>
> *(b) inform the person of his or her rights under Rule 39 or Rule 40, as applicable; and*
>
> *(c) ensure that the search and seizure is executed in the presence of the person's counsel, unless the person waives this right.*
>
> *(2) Paragraph (1) may not apply if exceptional circumstances require immediate search and seizure where any delay would jeopardise the investigation or cause serious and irreversible harm to other persons or property. In such cases, the Specialist Prosecutor shall request the approval of a Panel immediately and no later than twenty-four (24) hours after the initiation of the search and seizure. If authorization is not granted, the seized items, if any, may not be admitted as evidence.*

90. The Court refers to the principles noted above in that the wording 'by law' under Article 55.1 of the Constitution or 'in accordance with the law' under Article 8(2) of the Convention requires the measures both to have some basis in law and to be compatible with the rule of law. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual - if need be with appropriate advice - to regulate his or her conduct.[53]

91. The Court is not persuaded that paragraphs (1) and (2) of Rule 36 are formulated with the requisite degree of precision. At the outset, it is unclear whether these provisions are intended to govern the execution of searches and seizures following a judicial authorisation or those executed without such authorisation. Rule 36(1)(a) provides that the Specialist Prosecutor shall

[53] See, for example, *Gillan and Quinton v. the United Kingdom*, no. 4158/05, ECHR 2010, para. 76.

provide the affected person with 'a certified copy' of the decision prior to the execution of an operation. This may suggest that Rule 36(1) concerns only the execution of searches and seizures authorised by a panel. Alternatively, it may imply that the Specialist Prosecutor must issue a written decision and furnish it to the affected person where the search and seizure is conducted without prior judicial order. It may be that Rule 36(1) is intended to cover only judicially authorised searches and Rule 36(2) is intended to provide for non-judicially authorised operations. If that is so, then a problem still remains, nevertheless.

92. If Rule 36(2) is to be interpreted as applying to non-judicially authorised searches and seizures then it provides that paragraph (1) may not apply. On its face, this would mean that in 'exceptional circumstances' the Specialist Prosecutor would be relieved of the duty to 'inform the person of his or her rights' since that obligation is contained in paragraph (1)(b). The Court considers that, regardless of whether a search or seizure is conducted with or without prior judicial authorisation, a person who is the subject thereof should, in principle, be informed of his or her rights.

93. Further, Rule 36(2) raises the question as to whether the existence of 'exceptional circumstances' is to be considered as another ground for a non-judicially authorised search and seizure in addition to those grounds set out in Rule 35(1)(a) to (d).

94. While Rule 36(2) provides for judicial review of the Specialist Prosecutor's action carried out under the same paragraph (2), given the lack of clarity as to applicability and operation of this and the preceding provision, it is not clear to the Court what such a review would entail.

95. In conclusion, the Court considers that the powers provided for in the execution of searches and seizures under Rules 36(1) and 36(2) are not formulated with the requisite degree of precision. These provisions, therefore, do not comply with the quality of law requirement inherent in the term 'by law' as provided for under Article 55.1 of the Constitution.

96. **Sub-Section 4: Other Measures**

Rule 38 Expert Examinations

This rule, as adopted by the Plenary, insofar as it is relevant for the present assessment, provides as follows:

> *(1) Expert examination for the collection of hair, saliva or other swab samples, which can be undertaken without bodily intrusion, may be ordered by the Specialist Prosecutor.*

> (2) *Expert physical examinations for the collection of blood samples, body tissue, DNA or other similar material, which cannot be undertaken without bodily intrusion, shall be undertaken by the Specialist Prosecutor only upon:*
>
> (a) *voluntary written consent of the person concerned; or*
>
> (b) *authorisation by a Panel.*
>
> …
>
> (4) *The molecular or genetic examination of materials … shall be authorised by a Panel.*
>
> (5) *Materials referred to in paragraphs (1) and (2) shall not be used for any purpose other than the investigation and prosecution of crimes within the jurisdiction of the Specialist Chambers. Such material shall be destroyed upon the conclusion of the mandate of the Specialist Prosecutor's Office or at such other time as decided by a Panel, the Specialist Prosecutor or a Residual Mechanism pursuant to Article 60 of the Law, as applicable.*

97. Rule 38 engages the right to personal integrity and the right to respect for privacy under Articles 26 and 36, respectively, of the Constitution and Article 8 of the Convention.

98. The Court considers that the manner in which the phrase 'without bodily intrusion' is used in Rules 38(1) and 38(2) is unclear. At the outset, the Court confirms that the collection of hair, saliva or other swab samples from a person on foot of 'expert examination' necessarily involves a degree of physical contact, however slight, with the person concerned and, consequently, involves a 'bodily intrusion' as, indeed, does the collection of blood samples, body tissue or DNA.

99. In this regard, the Court confirms that respect for private life entails respect for a person's physical integrity. The direct collection of a sample of any bodily material from a person by way of expert examination constitutes an intrusion into that person's physical integrity which, however minor it may be, must, consequently, be considered as an interference with that person's right to privacy.[54]

100. The Court notes that Rule 38(1) permits the Specialist Prosecutor to order expert examination for the collection of hair, saliva and other swab samples, which can be undertaken without bodily intrusion, without first seeking authorisation from a Panel. To the very limited extent that the collection of bodily samples is possible without bodily intrusion (for example, by removing a hair from the floor or saliva from the rim of a glass), the Court considers that

[54] See *Schmidt v. Germany* (dec.), no. 32352/02, 5 January 2006.

such a power does not give rise to an appearance of non-compliance with the Constitution at least insofar as the 'collection' as distinct from the 'retention' of such samples is concerned.

101. However, the Court confirms that any interference with the right to respect for privacy which touches upon the bodily integrity of the person during the course of an expert examination for the purpose of collecting hair, saliva, blood samples or any other bodily materials, does engage constitutionally protected rights. Such an interference must, therefore, be provided 'by law' and must satisfy the requirement of 'necessity' if it is to comply with the provisions of Articles 55.1 and 55.2 of the Constitution and Article 8(2) of the Convention. Furthermore, the Court observes that Article 55.4 of the Constitution requires that the authorities pay special attention to the relation between the limitation of the right and the purpose to be achieved and to the review of the possibility of achieving the purpose with a lesser limitation.

102. To the extent that Rule 38(1) purports to permit the Specialist Prosecutor to order an expert examination for the collection of hair, saliva or other swab samples in circumstances where the person concerned does not give consent thereto, the Court finds that there are insufficient safeguards in this regard.

103. The Court confirms that, in principle, judicial authorisation is required prior to any non-consensual contact with or intrusion into a person's body. The Court further confirms that the more intrusive the procedure in question, the greater will be the degree of judicial scrutiny required when it comes to the Specialist Prosecutor's actions in this regard, including, an assessment of the seriousness of the offence in issue, any alternative methods of obtaining the materials sought, together with a close examination of the procedures to be followed in conducting the expert examination, all with a view to ensuring the proportionality of the interference in question. At the same time, it acknowledges that there may be exceptional or urgent circumstances in which it is not possible for the Specialist Prosecutor to seek prior judicial authorisation for the collection of bodily materials such as those specified in Rule 38(1). However, as currently adopted, the provision contains no procedural safeguards with a view to ensuring the proportionality of the interference, nor does it provide for an *ex post facto* judicial review in respect thereof.

104. Insofar as the conditions attaching to the use of the bodily materials collected in the course of expert examinations is concerned, the Court is satisfied that, having regard to the provisions of Rule 38(5), such materials may

only be used for the purpose of the investigation and prosecution of crimes within the jurisdiction of the Specialist Chambers.[55]

105. At the same time, however, the Court notes with concern that Rule 38(5) provides for the retention, for a considerable period of time, of all materials, including cellular samples,[56] collected under paragraphs (1) and (2) without any particular assessment of the specific circumstances arising in each case. It would appear, for instance, that the material may be retained irrespective of the nature or the gravity of the offence with which an individual was originally suspected and irrespective of whether the individual concerned is a suspect, an acquitted individual, or a third person.[57] In this connection, the Court notes that under Article 6 of the Law, the jurisdiction of the Specialist Chambers extends to offences which relate to its official proceedings and to its officials. Rule 38 contains no specifications as to the categories of persons in respect of whom the expert physical examinations may be ordered. Nor does it provide safeguards to ensure that the materials collected are not retained for longer than is necessary for the purpose.

106. In view of the foregoing, the Court considers that the absence in Rule 38(1) of adequate safeguards for the conduct of non-consensual expert examinations, and for the retention, under Rule 38(5), of materials obtained, fails to strike a fair balance between the competing public and private interests at stake, in contravention of Article 55.4 of the Constitution. Accordingly, it finds that these provisions fail to comply with the requirement of 'necessity' under Article 55.2 of the Constitution.

107. **Findings on Chapter 3 of the Rules**

The Court finds that Rules 31, 32, 33, 35(1)(b) and (c) and (3), 36(1) and (2), and 38(1) and (5) are inconsistent with Chapter II of the Constitution.

Apart from those findings, the Court considers that subject to adherence to the principles enunciated above and mindful of the obligation on the Specialist Chambers to adjudicate and function in accordance with the Constitution and international human rights law pursuant to Article 3(2) of the Law, the remaining provisions contained in Chapter 3 of the Rules are not inconsistent with Chapter II of the Constitution.

---

[55] See *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008, paras 98-99.
[56] Ibid., para. 120.
[57] Ibid., para. 122.

CHAPTER 4

SUMMONSES, ARREST AND DETENTION

108. Save for the rules discussed hereunder and for the findings set out in paragraph 123 of this Judgment, the Court has no comment to make on the provisions contained in Chapter 4 of the Rules.

109. The provisions contained in Chapter 4 of the Rules relate to the circumstances and conditions under which the fundamental right to liberty as guaranteed under Article 29 of the Constitution may be curtailed.

110. The Court recalls that the right to liberty and security of person is of the highest importance in a democratic society.[58] In applying the provisions set out in Chapter 4 of the Rules, a Panel is obliged, pursuant to Article 3(2) of the Law to have due regard to the relevant constitutional provisions and to the well-established legal principles enshrined in international human rights law.

111. At the outset, the Court affirms that any deprivation of liberty must conform to the substantive and the procedural rules established by law and should be in keeping with the key purpose of protecting the individual from arbitrariness.[59] Both Article 29 of the Constitution and Article 5(1) of the Convention contain an exhaustive list of permissible grounds upon which persons may be deprived of their liberty. In line with the ECtHR, the Court confirms that any deprivation of liberty which does not fall within one of those specified grounds will not be lawful. Only a narrow interpretation of the stated exceptions is consistent with the aim of Article 29 of the Constitution, and Article 5(1) of the Convention, namely, that no one is deprived arbitrarily of his or her right to liberty.[60]

112. In applying the provisions of Chapter 4 that engage a person's right to liberty, the Specialist Chambers is obliged to give due regard to the principle of the rule of law, and, connected to that, the principle legal certainty, the principle of proportionality and the principle of the protection against arbitrariness.[61]

113. In particular, any deprivation of liberty ordered for the purpose of bringing a person to trial, must be a proportionate measure to achieve the stated aim.

---

[58] *Medvedyev and Others v. France* [GC], no. 3394/03, 2010, para. 76; *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, Series A no. 12, para. 73.

[59] See, for example, *McKay v. The United Kingdom* [GC], no. 543/03, ECHR 2006-X, para. 30; *Witold Litwa v. Poland*, no. 26629/95, ECHR 2000-III, para. 78; *Simons v. Belgium* (dec.), no. 71407/10, 28 August 2012, para. 32.

[60] See *Labita v. Italy* [GC], no. 26772/95, 2000-IV, para. 170; *Giulia Manzoni v. Italy*, 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, para. 25.

[61] See, among other authorities, *Simons v. Belgium* (dec.), no. 71407/10, 28 August 2012, para. 32.

The Court underscores that the continued detention of a person pending trial can only be justified if there are specific indications of a genuine requirement of public interest, which, notwithstanding the presumption of innocence, outweigh the individual's right to liberty under Article 29 of the Constitution. Panels will, therefore, have the responsibility to ensure that the detention on remand of an accused person does not exceed a reasonable time. This will involve an assessment of all the relevant facts for and against the public interest justifying a restriction upon the right to liberty and having due regard to the principle of the presumption of innocence.

114. In this respect, whilst the persistence of reasonable suspicion that the person arrested has committed a criminal act is a condition *sine qua non* for the lawfulness of any detention under Article 29.1(2), the Court emphasises that, after a certain lapse of time, this ground alone no longer suffices. In such cases, Panels should then establish whether other grounds exist which would justify the continuation of an accused person's deprivation of liberty.[62] To fully accord with the Constitution, Panels should also consider alternative measures of ensuring the person's appearance at trial when deciding whether a person should be released or detained.[63]

115. As part of the protection against arbitrariness, the Court also highlights the importance of specific reasoning and concrete grounds which are required to be relied upon by any Panel in its decisions authorising detention on remand for a prolonged period of time.[64] Quasi-automatic prolongation of detention or a decision that is lacking in reasoning would fail to provide the required standard of protection.[65] Likewise, the Court recalls that it is not incumbent upon the detained person to demonstrate the existence of reasons warranting his or her release. [66] The presumption must be in favour of liberty.

116. The Court observes that Article 41(12) of the Law provides that, in addition to detention on remand, other measures may be ordered to ensure the presence of an accused during proceedings, to prevent his or her reoffending, or to ensure the successful conduct of a criminal trial. To the extent that more lenient measures are included in paragraphs (a) to (h) of Article 41(12), the Court

---

[62] See *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012, para. 140; *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009, paras 61-64; *McKay v. The United Kingdom*, cited above, paras 41-45.
[63] See *Idalov v. Russia*, cited above, para. 140; *Jablonski v. Poland*, no. 33492/96, 21 December 2000, para. 83.
[64] *Khudoyorov v. Russia,* no. 6847/02, ECHR 2005-X, para. 173; *Stašaitis v. Lithuania*, no. 47679/99, 21 March 2002, para. 67. See also, in relation to the right to a reasoned decision, Kosovo Constitutional Court, Cases no. KI99/14 and KI100/14, Judgment of 8 July 2014, para. 86.
[65] *Tase v. Romania,* no. 29761/02, 10 June 2008, para. 40; *Khudoyorov v. Russia,* cited above, para. 157.
[66] *Bykov v. Russia*, cited above, para. 64; *Ilijkov v. Bulgaria*, no. 33977/96, 26 July 2001, para. 85.

observes that the Rules contain no provisions in respect of how such measures are to be applied.

117. **Rule 52(5) Execution of Arrest Warrants**

The Court observes that Rule 52(5) provides that the Kosovo authorities shall not afford a detained person 'any means of relief not expressly ordered' in an arrest warrant. Whilst initially struck by the wording of this provision, it is nevertheless reassured by the fact that Rule 49(2) requires that a Panel before whom such an arrested person is brought shall satisfy itself that the person has been informed of the reasons for his or her arrest and of his or her rights under the Law and the Rules.

118. **Rule 54 Review and Reconsideration of Detention on Remand**

The Court considers that Rule 54 requires examination. This rule sets out guidelines for the review and reconsideration of detention on remand. In the Court's view, there is a provision in paragraph (4) (see below with emphasis added), which calls for particular attention.

> *(3) Where sufficient grounds require the release of the detained person, subject to Article 41(6) of the Law, a Panel may, upon request by the detained person or proprio motu and having heard the Parties, at any stage of the proceedings, release the detained person.*
>
> *(4) Upon request under paragraphs (2) or (3), the Panel may impose such conditions upon the release as deemed appropriate to ensure the presence of the Accused during proceedings, in accordance with Article 41(12) of the Law. The Panel shall hear the Third State to which the detained person seeks to be released. A detained person shall not be released without the consent of that State. A decision shall be rendered as soon as possible and no later than three (3) days from the last submission.*

119. The Court recognises that some delay in carrying out a decision to release a detainee may be understandable and often inevitable. Nevertheless, the authorities must keep such delay to a minimum.[67] Thus, an eleven hour delay in executing a decision to release an applicant 'forthwith' was found by the ECtHR to be incompatible with Article 5(1) of the Convention.[68]

120. That said, it is inconceivable that in a State subject to the rule of law, a person should continue to be deprived of his or her liberty despite the existence of a court order for his or her release.[69] On its face, the phrase contained in Rule 54(4) to the effect that 'A detained person shall not be released without the consent of that State' is, clearly, problematic. Applying

[67] *Giulia Manzoni v. Italy*, cited above, para. 25.
[68] *Quinn v. France*, 22 March 1995, Series A no. 311, paras 39-43.
[69] *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II, para. 173.

the 'plain meaning' test, this provision would make the release of a detained person entirely dependent upon the consent of a State even in circumstances where a Panel has found sufficient grounds requiring his or her release. If such consent were to be withheld then, applying the provision as it stands would mean that the detained person '*shall not be released*'. The Court considers that any detention in those circumstances would lack the necessary legal basis and would not be a lawful detention.

121. The Court acknowledges that, in conformity with Article 41(11) of the Law expressly referred to in Rule 54(1), this provision could be interpreted to mean that the detained person shall not be released 'in the Third State' which has withheld its consent. However, such an interpretation would require the Court to read into the text the phrase 'in the Third State' notwithstanding the fact that the provision contains no such express qualification.

122. In view of the foregoing and relying upon the plain meaning of the text, stricto sensu, Rule 54(4), if left unqualified, would result in the continued detention of a person in the absence of any justifiable grounds authorised under Article 29 of the Constitution in flagrant violation of the right of the detained person to liberty. The Court is, therefore, bound to conclude that, on its face, this specific provision of Rule 54(4) is not consistent with Article 29 of the Constitution.

123. **Findings on Chapter 4 of the Rules**

The Court finds that Rule 54(4) is not consistent with Chapter II of the Constitution.

Apart from this finding, the Court considers that subject to adherence to the principles enunciated above and mindful of the obligation on the Specialist Chambers to adjudicate and function in accordance with the Constitution and international human rights law pursuant to Article 3(2) of the Law, the remaining provisions contained in Chapter 4 of the Rules are not inconsistent with Chapter II of the Constitution.

CHAPTER 5

PROVISIONS RELATED TO VARIOUS STAGES OF THE PROCEEDINGS

124. Save for the rules referred to hereunder and its finding as set out in paragraph 140 of this Judgment, the Court has no comment to make on the provisions contained in Chapter 5 of the Rules.

125. **Rule 65(6) Absence of the Accused**

This provision, as adopted by the Plenary, reads as follows:

> *(6) Where the Accused is detained but is not physically fit to be present at the proceedings, the Panel shall make provisions for the Accused to follow the proceedings and instruct Specialist Counsel from outside the courtroom.*

126. Rule 65(6) engages the right to a fair trial as guaranteed under Article 31 of the Constitution. Although not expressly mentioned in Article 31, the Court considers that the object and purpose of that constitutional provision, when taken as a whole, shows that the accused is entitled to participate effectively in his or her criminal trial, which includes the right to be present at the hearing, and to hear and follow the proceedings.[70]

127. The Court considers that the conduct of criminal proceedings in the absence of the accused such as in the circumstances as contemplated in Rule 65(6) is not necessarily contrary to Article 31 of the Constitution. It accepts that alternative forms of participation in proceedings, such as by means of video-conferencing, are not, as such, incompatible with the notion of a fair hearing.[71] However, it is incumbent on the Trial Panel to ensure that such an alternative form of an accused person's participation in proceedings serves a legitimate aim and that the accused is able to follow the proceedings, to be heard without technical impediments and to have the benefit of effective and confidential communication with his or her counsel.[72]

128. The Court draws attention to the fact that a distinction must be made between an accused being physically fit to be present at his or her trial and being physically capable of attending such proceedings. If an accused is not physically present and has not waived, unequivocally, his or her right to attend the hearing, then it is incumbent upon the Trial Panel, prior to ordering the continuation of proceedings under Rule 65(6), to satisfy itself that the accused

---

[70] See, in relation to Article 6 of the Convention and among other authorities, *Stanford v. the United Kingdom*, 23 February 1994, Series A no. 282-A, para. 26. See also *Colozza v. Italy*, 12 February 1985, Series A no. 89, para. 27.

[71] See *Sakhnovskiy v. Russia* [GC], no. 21272/03, 2 November 2010, para. 98; *Marcello Viola v. Italy*, no. 45106/04, ECHR 2006-XI, para. 67.

[72] See ibid.

person, nevertheless, has the requisite physical 'fitness' or capacity or wellbeing to participate, effectively in the hearing, albeit from outside the courtroom, if his or her right to a fair trial is not to be infringed. Therefore, before ordering the continuation of proceedings in the absence of the accused in circumstances envisaged under Rule 65(6), a Panel must not only ensure that the conduct of the hearing in the absence of the accused serves a legitimate aim but must also ensure that the accused person, while not physically capable of being present in the courtroom, is, nevertheless, sufficiently fit to exercise, fully, his or her right to participate effectively in the hearing.

129. **Rule 66 Medical Examination of the Suspect or the Accused**

This rule, as adopted by the Plenary, provides as follows:

> *(1) The Panel may, upon request by a Party or proprio motu, order a medical, psychiatric or psychological examination of a suspect or Accused. In such a case, the Panel shall call an expert to assist it in its determination.*
>
> *(2) Where the Panel determines that the Accused is unfit to stand trial, the proceedings shall be adjourned. An order for adjournment shall be reviewed by the Panel every four (4) months, or at any time earlier, upon request by the Parties or proprio motu, if justified by compelling reasons. If necessary, the Panel may order further examinations of the suspect or the Accused.*

130. The Court reiterates that the conduct of any medical, psychiatric or psychological examination engages a person's constitutional rights to personal integrity and to private life, as guaranteed under Articles 26 and 36.1 of the Constitution.[73] Any interference with the person's rights to personal integrity and privacy that fails to adhere to the provisions of Article 55 of the Constitution would constitute a violation of these fundamental constitutional rights.[74]

131. Rule 66(1) is drafted in very broad terms permitting, as it does, the Panel to order a medical, psychiatric or psychological examination of an accused person or suspect without reference to either its legal or medical necessity or to whether the person consents thereto. It also fails to make any express provision for the essential safeguards required under Article 55 of the Constitution. The Court underscores that, in view of the obligation to adjudicate and function in accordance with the Constitution and international human rights law, a Panel could only order a non-consensual medical, psychiatric or psychological examination of an accused or a suspect pursuant to Rule 66, where it is satisfied that such an assessment is required by medical or legal necessity and is proportionate to the aim pursued in conducting such

[73] See above para. 53.
[74] See above para. 54.

an assessment. Any failure to satisfy itself in this regard would result in such an order being non-compliant with the Constitution.

132. **Rule 77(4)(e) Protective Measures**

Rule 77 as adopted by the Plenary provides for the ordering of protective measures in the context of the protection of witnesses, victims participating in the proceedings and others at risk on account of testimony given by witnesses. As part of Rule 77, provision is made for the non-disclosure of the identity of a witness or for a grant of total anonymity to a witness. It reads as follows:

> *(4) A Panel may hold an in camera hearing to determine whether to order, inter alia:*
>
> *…*
>
> *(e) in exceptional circumstances, and subject to any necessary safeguards:*
>
> *(i) non-disclosure to the Parties of any material or information that may lead to the disclosure of identity of a witness or victim participating in the proceedings; or*
>
> *(ii) total anonymity of a witness.*

133. The non-disclosure of information or material that may lead to knowledge of the identity of a witness or the granting of total anonymity to a witness constitutes a clear encroachment upon an accused person's right to a fair trial and, more specifically, upon his or her right to examine witnesses as guaranteed under Article 31.4 of the Constitution. Any such encroachment calls for careful scrutiny as to its justification and for the existence of important counterbalancing safeguards if a fair trial is to be guaranteed.

134. It is a fundamental right of an accused in a criminal trial to have an effective opportunity to challenge the evidence against him. This principle requires not merely that 'a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings.'[75]

135. The principles applicable to the duty to disclose evidence to an accused, including evidence as to the identity of a witness, in criminal proceedings were set out by the ECtHR in the case of *Rowe and Davis v. the United Kingdom*.[76] The right to an adversarial criminal trial requires, *inter alia*, that the prosecutrial authorities disclose to the Defence all material evidence in their possession for or against the accused. However, the Court acknowledges that

---

[75] *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011, para. 127.

[76] *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, ECHR 2000-II, paras 60-62.

the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal trial, there may be important competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime and these must be weighed against the rights of the accused. The Court can accept that, in some cases, it may be necessary to withhold certain evidence from the Defence in order to preserve the fundamental rights of another individual or to safeguard an important public interest. Thus, it acknowledges that the principles of a fair trial guaranteed under Article 31 of the Constitution may also require that, in appropriate cases, the interests of the accused are balanced against those of witnesses or victims called upon to give evidence.[77]

136. The Court, therefore, considers that the non-disclosure of the identity of a witness or the granting of total anonymity thereto as contemplated under Rule 77(4)(e) will not always be incompatible with the Constitution.

137. However, in line with the ECtHR, this Court considers that only such measures restricting the rights of the Defence which are 'strictly necessary' are permissible under Article 31 of the Constitution.[78] Moreover, it confirms that in order to ensure the overall fairness of an accused person's trial, any difficulties caused by a restriction on the rights of the accused must be sufficiently counterbalanced by the procedures adopted by the judicial authorities.[79]

138. In this regard, the Court notes that the provision of Rule 77(4)(e) will apply only 'in exceptional circumstances'. Consequently, it considers that such exceptional circumstances would make the contemplated restrictions 'strictly necessary'. It also observes that the restrictions in question are 'subject to any necessary safeguards'. This reflects the requirement that any handicaps caused to the accused be sufficiently counterbalanced to ensure the overall fairness of the proceedings. Such safeguards include, adducing relevant and sufficient reasons for keeping the identity of a witness secret, permitting the Defence to test the reliability of an anonymous witness, and, in principle, not basing a

---

[77] See, *mutatis mutandis*, *Rowe and Davis v. the United Kingdom*, cited above, paras 60-61; *Van Mechelen and Others v. the Netherlands*, 23 April 1997, *Reports of Judgments and Decisions* 1997-III, paras 52-53; *Doorson v. the Netherlands*, 26 March 1996, *Reports of Judgments and Decisions* 1996-II, para. 70. See also *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paras 118, 146.

[78] See *Rowe and Davis v. the United Kingdom*, cited above, para. 61; *Donohoe v. Ireland*, no. 19165/08, 12 December 2013, para. 74.

[79] See *Al-Khawaja and Tahery v. the United Kingdom* [GC], cited above, paras 144, 145; *Rowe and Davis v. the United Kingdom*, cited above, para. 61; *Birutis and Others v. Lithuania*, nos. 47698/99 and 48115/99, 28 March 2002, para. 29.

conviction solely or to a decisive extent upon evidence by a witness whom the Defence has not been able to examine.[80]

139. In view of the foregoing and mindful of the obligation of the Specialist Chambers pursuant to Article 3(2) of the Law, the Court is satisfied that the provisions of Rule 77(4)(e) comply with the Constitution having regard to the qualifications contained therein as well as to other specific safeguards provided for under Rule 137(4) and Rule 144.

140. **Finding on Chapter 5 of the Rules**

Subject to adherence to the principles enunciated herein and mindful of the obligation on the Specialist Chambers pursuant to Article 3(2) of the Law to adjudicate and function in accordance with the Constitution and international human rights law, the Court finds that the provisions contained in Chapter 5 of the Rules are not inconsistent with Chapter II of the Constitution.

CHAPTER 6

INDICTMENT AND PRE-TRIAL PROCEEDINGS

141. Save for the rules referred to hereunder and its finding as set out in paragraph 167 of this Judgment, the Court has no comment to make on the provisions contained in Chapter 6 of the Rules.

142. **Rule 83(4)(c) Submission, Review and Confirmation of the Indictment**

This provision, as adopted by the Plenary, provides that:

> *(4) The Pre-Trial Judge shall examine the supporting material in relation to each of the charges and shall determine whether a well-grounded suspicion has been established against the suspect. During such examination, the Pre-Trial Judge may:*
>
> *…*
>
> *(c) request the Specialist Prosecutor to reduce or narrow the charges.*

143. The Court recalls that as part of their obligation to ensure the fairness of the proceedings pursuant to Article 31 of the Constitution, a Panel, including a Panel consisting of a Pre-Trial Judge, must indicate with sufficient clarity the grounds upon which decisions taken are based. This not only allows a party to

[80] See, *mutatis mutandis*, *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paras 119-147; *Birutis and Others v. Lithuania*, nos. 47698/99 and 48115/99, 28 March 2002, para. 29; *Visser v. the Netherlands*, no. 26668/95, 14 February 2002, para. 47; *Doorson v. the Netherlands*, cited above, paras 71-74.

proceedings to exercise, usefully, any right of appeal that he or she may enjoy, but it is also necessary to permit public scrutiny of the administration of justice.[81] Whereas the extent of the duty to give reasons may vary from case to case and according to the nature of the decision and the circumstances in issue,[82] the Court underlines the importance of furnishing reasons where, pursuant to Rule 83(4)(c), a Pre-Trial Judge requests the Specialist Prosecutor to reduce or narrow charges brought against an accused.

144. **Rule 88 Withdrawal of the Indictment or Charges**

Rule 88 of the Rules as adopted by the Plenary provides for the withdrawal of the indictment or charges and it reads as follows:

> *(1) The Specialist Prosecutor may, in accordance with Article 40(7) of the Law, withdraw an indictment or charges in an indictment:*
>
> *(a) at any time before its confirmation, without leave;*
>
> *(b) between its confirmation and the assignment of the case to a Trial Panel, with leave of the Pre-Trial Judge who confirmed the indictment; and*
>
> *(c) after the assignment of the case to a Trial Panel, with leave of that Panel.*
>
> *(2) The withdrawal of the indictment or any of the charges in the indictment shall be promptly notified to the Defence.*
>
> *(3) Notwithstanding paragraph (1)(b) and (c), the Specialist Prosecutor may withdraw charges without leave as part of a plea agreement pursuant to Rule 91.*
>
> *(4) Following a withdrawal, the Specialist Prosecutor shall not be precluded from subsequently submitting an indictment pursuant to Rule 83, where he or she provides new evidence which was not known or available regarding the withdrawn indictment, or additional charges.*

145. Paragraphs (1) and (3) of Rule 88 provide, in particular, for the withdrawal of an indictment or charge either at the sole initiative of the Specialist Prosecutor or as part of a plea agreement reached between the prosecution and the Defence. The Court observes that paragraph (4) provides for the subsequent submission of a withdrawn indictment or charge based on new evidence which was not known or available regarding the withdrawn indictment or charge. The provision is unclear as to whether such a possibility

[81] See *Tatishvili v. Russia*, no. 1509/02, ECHR 2007-I, para. 58; *Hadjianastassiou v. Greece*, 16 December 1992, Series A no. 252, para. 33.
[82] See *Ruiz Torija v. Spain*, 9 December 1994, Series A no. 303-A, para. 29; *Helle v. Finland*, 19 December 1997, *Reports of Judgments and Decisions* 1997-VIII, para. 55.

of resubmission of a withdrawn charge arises only where the withdrawal occurred at the sole initiative of the Specialist Prosecutor or whether it could also arise where the withdrawn charge had formed part of a plea agreement.

146. The Court notes that Rule 91 makes provision for essential safeguards concerning plea agreements, namely that: (i) the agreement has been accepted by the accused voluntarily in full awareness of the facts of the case and the legal consequences; and (ii) the content of the agreement and the fairness of the manner in which it had been reached between the parties have been subjected to judicial review.[83]

147. To the extent that Rule 88(4) may be interpreted as allowing for the subsequent submission of a withdrawn charge in circumstances where the withdrawal formed part of a plea agreement, the Court considers that this may raise an issue as to the overall fairness of the proceedings against an accused person and thus engage Article 31 of the Constitution. However, it can accept that whilst Rule 88(4) does not expressly preclude the subsequent submission of charges specifically withdrawn as part of a plea agreement, the resubmission of any charges is subject to review by a Pre-Trial Judge who in confirming or dismissing the charges is obliged to have regard to the Constitution and international human rights law pursuant to Article 3(2) of the Law.

148. The Court acknowledges that the issue of plea bargaining gives rise to important debate in the context of proceedings before international or internationalised tribunals. Plea agreements raise the question of whether negotiated outcomes in criminal proceedings compromise the goals of international or internationalised criminal justice, including, *inter alia*, the duty to prosecute serious wrongdoing, the establishment of a historical record and the realization of the interests of victims. From the perspective of victims, plea bargaining may relieve them of the ordeal of giving evidence in a lengthy trial but it deprives them of having their voice heard in court. However, the drawbacks of using such agreements in internationalised criminal justice may be outweighed by securing efficiency in otherwise complex and costly proceedings. The ECtHR has observed that 'plea bargaining, apart from offering the important benefits of speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers, can also, if applied correctly, be a successful tool in combating corruption and organised crime and can contribute to the reduction of the number of sentences imposed and, as a result, the number of prisoners'.[84]

149. The Court confines itself to observing that the Rules as adopted by the Plenary make provision for the possibility of plea bargaining. Without

[83] See *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, ECHR 2014, para. 92.
[84] Ibid., para. 90.

expressing itself on the desirability or otherwise of such agreements in the context of internationalised criminal justice, the Court's duty in this referral is limited, as noted above, to reviewing the Rules as adopted by the Plenary in order to ensure their compliance with the Constitution.

150. In addition, the Court recalls that, as with Articles 2 and 3 of the Convention, Articles 25 and 27 of the Constitution impose positive procedural obligations upon the Specialist Prosecutor and the Specialist Chambers to ensure effective protection of the most fundamental of human rights, namely, the right to life and the right to be protected against ill-treatment. These rights, read in conjunction with Article 21 of the Constitution, require adherence to the procedural obligation to conduct an effective investigation into allegations of violent death, ill-treatment, or disappearances in life-threatening circumstances.[85] The essential purpose of such investigation is to secure the effective implementation of domestic laws that protect the right to life and prohibit ill-treatment and to ensure that perpetrators are held accountable.[86]

151. Thus, notwithstanding the fact that the Rules, as adopted, make provision for plea agreements to be reached, the Court considers it important to stress that such provisions must be applied strictly in accordance with the requirements of human rights law. The ECtHR has consistently held that there should be an effective official investigation capable of leading to the identification and punishment of those responsible when individuals have been killed or seriously ill-treated in breach of the law as a result of the use of force.[87] If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice.

152. The requirements of Article 2 of the Convention go beyond the stage of the official investigation; the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law.[88] The Court, therefore, considers that, by extension, the requirements of Articles 25 and 27 of the Constitution go beyond the stage of the investigation and require prosecution of breaches of fundamental human

---

[85] See, among other authorities and *mutatis mutandis*, *Marguš v. Croatia* [GC], no. 4455/10, ECHR 2014, para. 125; *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV, paras 132, 136; *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII, para. 151; *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324, para. 161. See also *Assenov and Others v. Bulgaria*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, para. 102.

[86] See, *mutatis mutandis*, *Marguš v. Croatia*, cited above, para. 125.

[87] See *Marguš v. Croatia*, cited above, para. 125; *M.C. v. Bulgaria*, cited above, para. 151; *Assenov and Others v. Bulgaria*, cited above, para. 102; *McCann and Others v. the United Kingdom*, cited above, para. 161

[88] See, *mutatis mutandis*, *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII, para. 95; *Dölek v. Turkey*, no. 39541/98, 2 October 2007, para. 75; *Zavoloka v. Latvia*, no. 58447/00, 7 July 2009, para. 34.

rights such as intentional killing, torture and rape in certain circumstances.[89] Trial Panels should not, under any circumstances, be prepared to allow life-endangering offences to go unpunished.[90]

153. Whereas neither Rule 88(3) nor Rule 91 expressly sets out the positive procedural obligation to prosecute grave breaches of the fundamental human rights, the Court is prepared to accept that, subject to compliance with the principles outlined above and having regard to the obligations imposed pursuant to Article 3(2) of the Law, the negotiation, review or approval of a plea agreement does not fall, *per se*, foul of Articles 25 and 27 of the Constitution.

154. **Rules 89(2)(c) and 90(3)(b)**

Rule 89(2)(c), as adopted by the Plenary, pertains to the initial appearance of an accused and provides that:

> ***Rule 89 Initial Appearance of the Accused***
>
> ***...***
>
> *(2) Pursuant to Article 39(5) of the Law, the Pre-Trial Judge shall:*
>
> *…*
>
> *(c) inform the Accused that, within thirty days of the initial appearance, he or she will be called upon to admit guilt or plead not guilty on each charge, or, if the Accused wished to do so, that he or she may immediately admit guilt or plead not guilty;*
>
> ***...***

Rule 90(3)(b), as adopted by the Plenary, relates to the admission of guilt by an accused person and reads as follows:

> ***Rule 90 Admission of Guilt***
>
> ***...***
>
> *(3) The Trial Panel assigned by the President may pronounce a finding of guilt and set a date for the sentencing hearing, as soon as practicable, if, after hearing the Accused, it is satisfied that:*
>
> *…*
>
> *(b) the Accused understands the nature and consequences of the admission of guilt;*

[89] See *Marguš v. Croatia*, cited above, paras 127, 139; *Öneryıldız v. Turkey*, cited above, paras 95-96; *M.C. v. Bulgaria*, cited above, para. 153.
[90] *Öneryıldız v. Turkey*, cited above, para. 96.

155. Both provisions concern the accused person's decision as to whether or not to make any admission as to guilt. Considering the significance of such a decision and its impact on many of the 'fair trial' rights under Articles 30 and 31 of the Constitution, the Court finds it necessary, in the absence of express reference thereto in Rules 89(2)(c) and 90(3)(b), to underscore the right of the accused to have access to legal advice by counsel prior to his or her initial or further appearance.

156. Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a counsel is one of the fundamental features of a fair trial. [91] The ECtHR has frequently held that in order to determine whether a fair trial has been achieved, regard must be had to the entirety of the proceedings, including, the pre-trial proceedings.[92] That the right of access to counsel is 'triggered' as from the first interrogation of a suspect by the police is also firmly established in the case-law.[93] Indeed, the concept of fairness enshrined in Article 6 of the Convention 'requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation'.[94] This principle reflects the Court's recognition of the fact that evidence obtained during the investigation stage can determine the framework in which the offence charged will be considered at the trial.[95] The Court confirms that from the moment of arrest until the handing down of sentence, criminal proceedings form an organic and interconnected whole and an event that occurs at one stage may influence and, at times, determine what transpires at another. This 'holistic' approach to criminal proceedings is reflected in the ECtHR's Grand Chamber finding in *Salduz v. Turkey* that neither the legal assistance provided subsequently nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the time spent in police custody.[96]

157. The Court confirms that in providing for the accused's right to legal counsel, Articles 30(3) and 30(5) of the Constitution, necessarily implies, as a rule, that this right arises from the first interrogation of a suspect by the police or from the moment the suspect is taken in pre-trial detention.[97] This principle

---

91 See *Salduz v. Turkey*, [GC] no. 36391/02, ECHR 2008, para. 51; *Poitrimol v. France*, 23 November 1993, Series A no. 277-A, para. 34; *Demebukov v. Bulgaria*, no. 68020/01, 28 February 2008, para. 50.

92 See *Panovits v. Cyprus*, no. 4268/04, 11 December 2008, para. 64; *Imbrioscia v. Switzerland*, 24 November 1993, Series A no. 275, para. 38.

93 See, among other authorities, *Panovits v. Cyprus*, cited above, para. 66; *Salduz v. Turkey*, cited above, para. 55.

94 *Panovits v. Cyprus*, cited above, para. 66. See also *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, ECHR 2016, para. 253.

95 *Salduz v. Turkey*, cited above, para. 54.

96 *Salduz v. Turkey*, cited above, para. 58.

97 See, for example, *Salduz v. Turkey*, cited above, para. 55; *Dayanan v. Turkey*, no. 7377/03, 13 October 2009, para. 31.

is at the core of the concept of a fair trial. It not only protects the accused from making decisions which the accused may not fully understand, but also contributes to the prevention of miscarriages of justice and to the fulfillment of the aims of the provisions on the rights of the accused.[98]

158. The Court observes that the Rules contain a number of safeguards in this respect, including, *inter alia*, (i) the right of the suspect and accused to Specialist Counsel (see Rules 26, 40 and 41); (ii) legal representation at the initial and further appearances (see Rule 89(1)); (iii) the obligation on the Pre-Trial Judge during the initial appearance to be satisfied that the right to counsel of the accused is respected (see Rule 89(2)(a)); and (iv) the obligation on the Trial Panel to be satisfied that the accused understands the nature and consequences of any admission of guilt (see Rule 90(3b)). Against this background and subject to the observance of the principles outlined herein, the Court is satisfied that the Rules impose an obligation on a Pre-Trial Judge and Panel to ensure that the accused has been able to exercise his or her right to benefit from legal assistance prior to any hearing wherein a plea has been invited or entered.

159. **Rule 91 Plea Agreement**

As adopted by the Plenary and insofar as it is relevant, Rule 91 provides that:

> *(1) At any time before the closing of the case, and preferably before the opening of the case, the Specialist Prosecutor and the Defence may reach a written plea agreement.*
>
> *…*
>
> *(6) … [The Trial Panel] may propose amendments for consideration to the Specialist Prosecutor and the Defence.*

160. The Court has already made certain observations in relation to plea agreements when considering Rule 88(4) above. The Court notes that, pursuant to Rule 91(6), the Trial Panel may propose to the Specialist Prosecutor and the Defence 'amendments for consideration'. The Court considers that, to the extent that a Trial Panel is empowered to propose amendments in this regard, the right of an accused to an impartial hearing before an impartial tribunal under Article 31.2 of the Constitution is engaged. On this point, the Court observes that Article 6 of the Convention likewise requires a tribunal falling within its scope to be impartial.[99]

161. As noted earlier in this Judgment, impartiality denotes the absence of prejudice or bias on the part of the trial panel and its existence or otherwise can be established by both a subjective and an objective test.[100] To the extent

[98] See *Salduz v. Turkey*, cited above, para. 53.
[99] See, for example, *Kyprianou v. Cyprus*, cited above, para. 118.
[100] See above para. 51.

that Rule 91(6) permits a Trial Panel to propose amendments with regard to a plea agreement, the Court underscores that any such steps taken by the trial Panel in this regard must respect, fully, its duty to remain an impartial tribunal if the requirements of a fair trial are to be met.

162. Rule 92 Functions of the Pre-Trial Judge after Confirmation of the Indictment

This rule, as adopted by the Plenary, insofar as relevant, reads as follows:

…

(2) The Pre-Trial Judge shall ensure that the proceedings are not unduly delayed and shall take all necessary measures for the expeditious preparation of the case for trial. The Pre-Trial Judge shall, inter alia:

(a) set out a calendar and working plan for any pre-trial obligations of the Parties;

(b) set time limits for disclosure in accordance with Chapter 7, take any measures to ensure timely disclosure, and prepare a disclosure report for the Trial Panel;

(c) take steps to identify and narrow down the list of issues subject to dispute between the Parties and those which are not;

(d) hold any hearing necessary to ensure fair and expeditious proceedings;

(e) set time limits for motions, until the transmission of the case file to the Trial Panel, including objections from the Parties to the admissibility of evidentiary material disclosed pursuant to Rule 99;

(f) decide on preliminary motions filed pursuant to Rule 94 before the transmission of the case file to the Trial Panel;

(g) decide on filed motions pursuant to Rule 49, Rule 53 and Rule 54;

(h) decide on motions related to protective measures filed before the transmission of the case file to the Trial Panel;

(i) decide on applications for admission as victim participating in the proceedings filed before the transmission of the case file to the Trial Panel; and

(j) set a target date for the readiness of the case for trial.

In performing these functions, the Pre-Trial Judge may hear the Parties and, where applicable, Victim's Counsel in the absence of the Accused and other persons. Such a hearing may take place in camera. Minutes of the hearing shall be taken by the Registrar.

163. Insofar as Rule 92(2) provides that in deciding on the issues listed under paragraph (2) the Pre-Trial Judge may hear the Parties and, where applicable, Victim's Counsel *in the absence of the Accused*, it raises an issue of equality of

arms, an inherent feature of a fair trial. Thus, Article 31.2 of the Constitution is engaged, as is Article 6(1) of the Convention.

164. As the case-law of the ECtHR confirms, equality of arms requires that each party is given a reasonable opportunity to present its case under conditions that do not place him at a substantial disadvantage vis-à-vis the opposing party. In other words, a fair balance must be struck between the parties. Importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice.[101]

165. Furthermore, the Court reiterates that the concept of a fair hearing implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision.[102] It is possible that a procedural situation which does not place a party at any disadvantage vis-à-vis the opposing party still represents a violation of the right to adversarial proceedings if the party concerned did not have an opportunity to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision.[103]

166. As noted above, Article 3(2)(e) of the Law provides that the Specialist Chambers shall adjudicate in accordance with international human rights law. Thus, the above principles are matters to which regard must be had by a Pre-Trial Judge in deciding whether to hold a hearing in the absence of the accused when discharging any of the functions listed in Rule 92(2).

167. **Finding on Chapter 6 of the Rules**

Subject to adherence to the principles enunciated above in relation to the rules contained in Chapter 6 and mindful of the obligation on the Specialist Chambers to adjudicate and function in accordance with the Constitution and international human rights law pursuant to Article 3(2) of the Law, the Court finds that the provisions contained in Chapter 6 of the Rules are not inconsistent with Chapter II of the Constitution.

---

[101] *Bulut v. Austria*, 22 February 1996, *Reports of Judgments and Decisions* 1996-II, para. 47.
[102] *Gregačević v. Croatia*, no. 58331/09, 10 July 2012, para. 50. See also *Ruiz-Mateos v. Spain*, cited above, para. 63.
[103] Ibid.

CHAPTER 7

DISCLOSURE

168. Save for the rules referred to hereunder and its findings as set out in paragraph 183 of this Judgment, the Court has no comment to make on the provisions contained in Chapter 7 of the Rules.

169. **Rule 99 Disclosure by the Specialist Prosecutor**

This rule sets, *inter alia*, the time limit of no later than 30 days prior to the opening of the case for the Specialist Prosecutor to furnish the statements of all witnesses he or she intends to call at time. Paragraph (1)(b)(iii) of Rule 99, however, refers to the statements of additional witnesses '*upon the decision to call those witnesses*'. By contrast, the Defence is obliged, pursuant to Rule 101(6) to make available to the Specialist Prosecutor the statements of any additional witnesses '*upon the decision to call those witnesses and, in any event, no later than 15 (fifteen) days prior to the date appointed for any such witness to give evidence*'. The Court observes that the time limit set for the Defence to introduce additional witnesses is, therefore, different in that it contains the stricter condition of '*in any event, no later than 15 days … '*. The Court has already observed that, pursuant to Article 31 of the Constitution, the parties to criminal proceedings must be afforded an equality of arms, including, in relation to procedural time limits. Therefore, when applying the provisions of Rules 99 and 101, the Court underscores that a Panel must bear in mind this important principle and, where necessary, ensure that the Defence suffers no prejudice because of the permitted difference in time limitations, if the requirements of equality of arms—an intrinsic element of a fair trial—are to be met.

170. **Rule 100 Disclosure of Exculpatory Evidence**

This rule, as adopted by the Plenary, reads as follows:

> *Subject to Rule 104 and Rule 105, the Specialist Prosecutor shall immediately disclose to the Defence any information as soon as it is in his or her custody, control or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor's evidence.*

171. The rule raises an issue under Article 31.2 of the Constitution, in conjunction with Article 6(1) of the Convention, namely, the duty on the Specialist Prosecutor to make disclosure to the Defence, a fundamental requirement of fair proceedings.

172. Pursuant to Rule 100, the Specialist Prosecutor is obliged to make disclosure of information 'which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist

Prosecutor's evidence'. The Court observes that the wording of Rule 100 does not conform entirely to the full scope of the disclosure obligation under international human rights law in that it appears to allow the decision as to what is relevant and what is not, to lie with the Specialist Prosecutor. In particular, the ECtHR has held that Article 6(1) of the Convention requires that the prosecution authorities disclose to the Defence '*all material evidence in their possession for or against the accused*'. This duty is limited only in cases where it is permissible to withhold evidence on the basis of strict necessity in order to preserve the fundamental rights of another individual or to safeguard an important public interest and where any difficulties caused to the Defence by this limitation on its rights, are sufficiently counterbalanced by procedural safeguards followed by the judicial authorities.[104]

173. Notwithstanding its observations on Rule 100, the Court recalls that Article 21(6) of the Law provides that all material and relevant evidence or facts in possession of the Specialist Prosecutor's Office which are for or against the accused shall be made available to the accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counterbalance protections are applied. It further notes that Rule 99(2) provides that the Specialist Prosecutor shall, pursuant to Article 21(6) of the Law, provide *detailed* notice to the Defence of any material and evidence in his or her possession. In so doing, the Court is satisfied that the Defence will be afforded an opportunity to query any material contained in that detailed notice and, accordingly, may seek disclosure thereof in the event that such material is not included in that which is disclosed pursuant to Rule 100, accordingly.

174. Therefore, the Court can accept that when read in conjunction with Rule 99(2) and Article 21(6) of the Law, Rule 100 does not raise an issue in terms of its compliance with the Constitution.

175. **Rule 104 Protected Information not Subject to Disclosure**

This rule deals with protected information that is not subject to disclosure and, as adopted by the Plenary, it reads as follows:

> *(1) If the Specialist Prosecutor has custody or control over information which has been provided on a confidential basis and solely for the purpose of generating new evidence, such information and its origin shall be protected under Article 58 of the Law. The initial material or information shall not be disclosed without the consent of the provider and shall, in any event, not be tendered into evidence without prior disclosure to the Accused.*

[104] *Rowe and Davis v. the United Kingdom*, cited above, paras 60-61; *Fitt v. the United Kingdom* [GC], no. 29777/96, ECHR 2000-II, paras 44-45; *Donohoe v. Ireland*, cited above, para. 74.

(2) Where the information is subject to disclosure, the Specialist Prosecutor shall apply confidentially and ex parte to the Panel to be relieved in whole or in part of his or her obligation under Rule 99 and Rule 100 to disclose the initial material. The application shall include the information in question. The Specialist Prosecutor may also apply for counterbalancing measures pursuant to Rule 105(2).

(3) If, after obtaining the consent of the provider of the initial material or information under paragraph (1), the Specialist Prosecutor chooses to present any of it as evidence, the Panel, notwithstanding Rule 118, Rule 119 and Rule 129, may not:

(a) order either Party to produce additional evidence received from the provider of the initial material or information;

(b) summons the provider of the initial material or information as a witness or order their attendance in accordance with the Rules, for the purpose of obtaining such additional evidence; or

(c) order the attendance of other witnesses or require the production of documents, for the purpose of obtaining such additional evidence.

(4) If the Specialist Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Panel may not compel that witness to answer any question relating to the information or its origin if the witness declines to answer on grounds of confidentiality.

(5) The right of the Accused to challenge the evidence presented by the Specialist Prosecutor shall remain unaffected, subject to the limitations contained in paragraphs (3) and (4).

(6) The provisions of this Rule shall apply mutatis mutandis to specific information in the custody or control of the Defence.

(7) Nothing in paragraphs (3) and (4) shall affect the power of the Panel to exclude this evidence or to take any measures necessary to ensure the fairness of the proceedings.

176. The above rule relates to information that is protected under Article 58 of the Law, which permits Third States and international institutions to apply for necessary measures to be taken to protect their servants or agents and their confidential or sensitive information. The Court notes with some concern that Rule 104(1) appears to confer a 'blanket' prohibition on the disclosure of such information in circumstances where the provider withholds consent. An assertion to the effect that information is 'confidential' is not sufficient to discharge the Specialist Prosecutor of the duty to disclose. The non-disclosure of any information that is helpful to the accused or that undermines the prosecution's case, regardless of its status, raises an issue of fairness of proceedings and thus engages Article 31.2 of the Constitution, in conjunction with Article 6(1) of the Convention.

177. The Court has already referred to the governing principles in international human rights law in relation to the Specialist Prosecutor's disclosure obligation outlined above.[105] It reiterates that any order made, whether pursuant to Rule 104(2) or otherwise, which relieves the Specialist Prosecutor of the duty to disclose must comply with those governing principles and must further ensure that sufficient counterbalancing safeguards are in place so as to ensure that an accused person's right to a fair trial has not been compromised by such an order.

178. The Court, thus, acknowledges that the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be important competing interests, such as, national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases, it may be necessary to withhold certain evidence from the Defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.[106] However, as noted above, a mere assertion that the information has been provided on a confidential basis is not sufficient, in itself, to establish that an important competing interest is in issue. For the purpose of the present analysis of Rule 104, the Court finds it important to underline that only such measures restricting the rights of the Defence which are 'strictly necessary' are permissible under Article 6(1) of the Convention, as under Article 31.2 of the Constitution. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the Defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[107]

179. Insofar as the Rule 104 also relates to the summoning and questioning of witnesses and permits restrictions thereupon, the Court considers that Article 31.4 of the Constitution in conjunction with Article 6(3)(d) of the Convention is engaged.

180. It follows from the principles established in the case-law of the ECtHR, that, in view of the potential unfairness caused to the Defence by a limitation on the right to examine a witness, there must be adequate and sufficient justification for the non-disclosure of sources or the assertion of privilege by the prosecution. Such justification may include the effective protection of persons and State security as well as the effective prosecution of serious and complex crime.[108] Likewise, there must be good reasons both for keeping secret the identity of witnesses and for their non-attendance at the trial. These may

[105] See above para. 172.
[106] See, among other authorities, *Donohoe v. Ireland*, cited above, para. 74.
[107] Ibid.
[108] See Ibid., paras 80-81.

include the need to protect life and limb.[109] The Court confirms that excusing a witness from testifying at the trial and maintaining his or her anonymity be a measure of last resort.[110] Where a witness is excused from testifying or is granted anonymity in respect of his or her evidence, sufficient counterbalancing factors, including, where necessary, the existence of strong procedural safeguards must be in place to ensure that the proceedings, when judged in their entirety, are fair within the meaning of Article 31 of the Constitution and Article 6 of the Convention.[111]

181. While Rule 104 does not confine the non-disclosure in question to that which is strictly necessary, the Court points out that this higher threshold is required under Article 21(6) of the Law. Article 21(6) of the Law also specifies the application of 'necessary counterbalance protections'. The Court confirms that where, pursuant to Rule 104, a Panel permits a restriction upon the fair trial rights of an accused, then counterbalancing factors, including, where necessary, strong procedural safeguards must be in place in order to ensure that the disadvantage caused does not restrict the accused's rights to an extent incompatible with the requirements of Article 31 of the Constitution in conjunction with Article 6 of the Convention.112

182. Subject to the foregoing guiding principles and when read in conjunction with Article 21(6) of the Law, the Court can accept that Rule 104 raises no issue as to its compliance with the Constitution.

183. **Finding on Chapter 7 of the Rules**

Having regard to the principles enunciated in its observations on Chapter 7 of the Rules and subject to adherence thereto and mindful of the obligation on the Specialist Chambers to adjudicate and function in accordance with Article 3(2) of the Law, the Court finds that the provisions contained in Chapter 7 of the Rules are not inconsistent with Chapter II of the Constitution.

---

[109] See *Scholer v. Germany*, no. 14212/10, 18 December 2014, paras 52-56.
[110] Ibid., para. 57
[111] See *Donohoe v. Ireland*, cited above, para. 76.
[112] See *Donohoe v. Ireland*, cited above, paras 87 *et seq*.

CHAPTER 8

PARTICIPATION OF VICTIMS IN THE PROCEEDINGS

184. With regard to Rule 111(5) set out in Chapter 8, the Court notes that this provision appears to suggest the possibility of a limited disclosure. As such wording engages Article 31.2 of the Constitution, the right to a fair trial, in conjunction with Article 6(1) of the Convention, the Court finds it necessary to refer to the principles applying to the Specialist Prosecutor's disclosure obligations outlined above.[113] It is further prepared to accept that Rule 111(5), as read in conformity with Article 21(6) of the Law, is in compliance with Chapter II of the Constitution.

185. The Court has no other comment to make on the provisions contained in Chapter 8 of the Rules.

CHAPTER 9

TRIAL PROCEEDINGS

186. Save for the rules referred to hereunder and its findings as set out in paragraph 206 of this Judgment, the Court has no comment to make on the provisions contained in Chapter 9 of the Rules.

187. **Rule 124(3) Presentation of Evidence**

In relevant part, this provision, as adopted by the Plenary, provides that:

> *Direct examination and cross-examination shall be allowed in each case. The Panel may allow redirect examination as deemed necessary.*

188. This provision, relating as it does to the examination of witnesses, engages the accused's rights under Articles 31.2 and 31.4 of the Constitution.

189. In relation to these rights, the Court reiterates that the accused in a criminal trial shall have an effective opportunity to challenge the evidence against him[114] and that the principle of an adversarial hearing requires that the parties to a criminal trial be given the opportunity to comment on all evidence adduced or observations filed.[115] Giving full effect to these rights may necessitate, in certain circumstances, that a party who has called and examined a witness be given an opportunity to further examine that witness if new issues have arisen during the course of cross-examination. The Court observes the

---

[113] See above paras 172-173, 176-181.
[114] *Al-Khawaja and Tahery v. the United Kingdom*, cited above, para. 127.
[115] See, among other authorities, *Gregačević v. Croatia*, cited above, para. 50; *Ruiz-Mateos v. Spain*, cited above, para. 63.

Panel's obligation to adjudicate and function in accordance with the Constitution and human rights law. This will require that it exercises its discretion in order to allow redirect examination, where necessary, having regard to the aforementioned principles.

190. **Rule 134(3) General Provisions**

This provision, as adopted by the Plenary, provides that:

> *A Panel shall not apply laws governing evidence, other than in accordance with Article 12 of the Law.*

191. The Court observes that Article 12 of the Law provides, *inter alia*, that the Specialist Chambers shall 'apply customary international law and the substantive criminal law of Kosovo insofar as it is in compliance with customary international law, both as applicable at the time the crimes were committed, in accordance with Article 7(2) of the [Convention…]'.

192. It is clear from both a plain and contextual reading of Article 12 of the Law that it does not relate to laws governing evidence, but to substantive criminal law.

193. The Court, therefore, is at a loss to understand the Plenary's intended meaning of this provision and its impact, if any, upon the rules governing evidence as set out in Chapter 9 of the Rules. In these circumstances, the Court is not in a position to rule that this provision complies with Chapter II of the Constitution.

194. **Rule 158(2) Status of the Acquitted Person**

This provision, as adopted by the Plenary, reads as follows:

> *If the Specialist Prosecutor notifies the Panel that he or she intends to appeal an acquittal at the time of its pronouncement, the Panel may, on application by the Specialist Prosecutor and after hearing the Parties, under exceptional circumstances, order the continued detention of the Accused in accordance with Article 41(6)(b)(i) and (ii) of the Law, pending the determination of the appeal.*

195. Rule 158(2) raises an issue concerning the continued detention of a person who has been acquitted following trial and, more specifically, whether such a deprivation of liberty could ever be lawful having regard to the expressly permitted grounds for detaining a person as set out in Article 29.1 of the Constitution and Article 5(1) of the Convention.

196. Article 29.1 of the Constitution sets out the five permitted grounds for the deprivation of a person's right to liberty to be lawful. For the purpose of the Court's analysis of Rule 158(2), only two of those grounds are relevant:

> 1. *Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:*
>
> *(1) pursuant to a sentence of imprisonment for committing a criminal act;*
>
> *(2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law;*
>
> *. . .*

Article 29.1 must be read in conjunction with Article 29.2 of the Constitution which, in relevant part, provides that:

> 2. *… Everyone who is arrested shall be entitled to trial within a reasonable time and to release pending trial, unless the judge concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial.*

197. The Court concurs with the view of the ECtHR on Article 5(1) of the Convention and underscores the paramount importance of the right to liberty in a democratic society, its relationship with the rule of law and the principles of legal certainty and proportionality, and its overall purpose which is to ensure that no one should be deprived of his or her liberty in an 'arbitrary fashion'.[116]

198. Consistent with this, and to the extent that this is relevant, the jurisprudence on the specific grounds for detention listed under Article 5(1)(a) -(f) of the Convention emphasises the importance of both the procedural and substantive lawfulness of any detention. Where a person has been arrested or detained on reasonable suspicion of having committed an offence or in order to prevent his or her committing an offence or fleeing having done so, Article 5(3) of the Convention, like Article 29.2 of the Constitution, provides that such a person shall be brought promptly before a judge and is entitled to trial within a reasonable time and to release pending trial. The architecture of Article 5, like that of Article 29, requires that the detention is justified at every stage of the criminal proceedings and that the detainee be released unless there are good reasons for continuing with the deprivation of liberty. As noted earlier, the presumption is in favour of liberty.

[116] See above paras 110-112 and authorities cited. See also *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, ECHR 2012, paras 230-233; *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22, para. 58.

199. The Court reiterates that the grounds listed under Article 5(1) of the Convention, and under Article 29.1 of the Constitution, are exhaustive and permit only of a narrow interpretation. This is consistent with the aim of that provision, namely, that no one is deprived, arbitrarily, of his or her liberty. Consequently, no deprivation of liberty will be lawful unless it falls within one of the listed grounds.[117]

200. For our present purposes, the Court is concerned with examining the lawfulness of a deprivation of liberty on two grounds. Either an accused is in pre-trial detention pending the determination of the charges against him by the trial court[118] ***or*** an accused is in detention following a conviction for those charges by the trial court.[119] Either way, there is a legal basis for the deprivation of liberty. There is no provision within the Constitution or the Convention, which permits the detention of a person who has been acquitted following a trial. Based on a plain reading of the grounds required for a detention to be lawful, the deprivation of an accused person's liberty following his or her acquittal after a trial cannot reasonably be said to fall within any of the grounds listed in the relevant constitutional or Convention provisions.

201. Regarding pre-trial detention, the lawfulness of an accused person's deprivation of liberty *prior* to trial may be found in paragraph 2 of Article 29. The Court observes that this ground requires, as a condition *sine qua non,* the existence of a 'reasonable suspicion' that the person deprived of liberty has committed a criminal act. In the same vein, pre-trial detention is also provided for under Article 5(1)(c) of the Convention and this, too, requires the existence of a 'reasonable suspicion' if the deprivation of liberty is to be rendered lawful under this ground. 'Reasonable suspicion' has been found in the jurisprudence of the ECtHR to presuppose the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.[120] The purpose of the trial is to test the reasonable suspicion attaching to an accused, and the prosecutor presents all admissible evidence in support of that reasonable suspicion. If the burden of proof beyond reasonable doubt is not discharged by the prosecution, then the accused person must be acquitted. Unless an accused is suspected of and charged with having committed some other offence which was not tried at trial, it is difficult to conceive of any remaining 'reasonable suspicion' within the meaning of

---

[117] See above paras 110-112 and authorities cited. See also *Quinn v. France*, cited above, para. 42; *Wassink v. the Netherlands*, 27 September 1990, Series A no. 185-A, para. 24; *Van der Leer v. the Netherlands*, 21 February 1990, Series A no. 170-A, para. 22.

[118] Article 5.1(c) of the Convention or Article 29.1(2) of the Constitution.

[119] Article 5.1(a) of the Convention or Article 29.1(1) of the Constitution.

[120] *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014, para. 88; *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, Series A no. 182, para. 32.

Article 29.1(2) of the Constitution concerning the accused after his or her acquittal following a criminal trial.

202. As to detention following conviction, the purpose of the deprivation of liberty in this case is the execution of the sentence of imprisonment imposed by a court judgment. The conviction under Article 29.1(1) of the Constitution, as under Article 5(1)(a) of the Convention, covers both a finding of guilt after it has been established in accordance with the law that an offence has been committed by the accused and the imposition of a penalty or other measure involving deprivation of liberty.[121] The reference to detention 'after' conviction entails the need for there to be a causative link between an on-going detention and a conviction for a particular offence, as opposed to merely a chronological requirement that detention follows conviction.

203. In this regard, the Court observes that the ECtHR clarified that detention ceases to be justified under Article 5(1)(c) of the Convention on *'the day on which the charge is determined*' even if only by a court of first instance.[122] Consequently, it held that 'detention after acquittal is no longer covered by [Article 5(1)(c)]'.[123]

204. The Court further notes that, under Article 41(6)(a), the Law requires for any detention the existence of a corresponding 'grounded suspicion' that the person has committed a crime within the jurisdiction of the Specialist Chambers. Although Rule 158(2) refers to Article 41(6)(b)(i) and (ii) of the Law, the fact that the conditions for detention of a person set out in Article 41(6)(a) and (b) are cumulative seems to have been overlooked. In other words, both the grounded suspicion in Article 41(6)***(a)*** and the grounds articulated in Article 41(6)***(b)*** must be present if the order for arrest and detention is to be lawful. In the absence of any grounded suspicion that the person has committed a crime after his or her acquittal, the Court considers that insofar as Rule 158(2) provides for the deprivation of liberty after acquittal, this is not only impermissible under the Constitution but is also not foreseen by law.

205. On this basis, the Court finds that, regardless of the circumstances, the continued detention of an acquitted person pending the determination of the appeal against his or her acquittal in the absence of reasonable suspicion of his or her having committed a separate criminal act in respect of which a charge has been laid, is not foreseen by law and does not fall under one of the

---

[121] See *Grosskopf v. Germany*, no. 24478/03, 21 October 2010, para. 43; *M. v. Germany*, no. 19359/04, ECHR 2009, para. 87.

[122] See *Labita v. Italy*, cited above, para. 171. See also ibid., para. 147; *Wemhoff v. Germany*, Judgment of 27 June 1968, Series A no. 7, pp. 19-20, para. 9. See also, *mutatis mutandis*, *Assanidze v. Georgia*, cited above, para. 172; *Mahamed Jama v. Malta*, no. 10290/13, 26 November 2015, para. 156.

[123] *Labita v. Italy*, cited above, para. 171; *Mahamed Jama v. Malta*, cited above, para. 156. See also, *a contrario*, *Wemhoff v. Germany*, cited above, Individual Opinion of Judge A. Favre.

permissible grounds for deprivation of liberty. Consequently, the Court concludes that Rule 158(2) is not in compliance with the Constitution.

206. **Findings on Chapter 9 of the Rules**

The Court finds that it is unable to declare that Rule 134(3) is consistent with Chapter II of the Constitution.

It also finds that Rule 158(2) is not consistent with Chapter II of the Constitution.

Apart from those findings, the Court considers that subject to adherence to the principles enunciated above and mindful of the obligation on the Specialist Chambers to adjudicate and function in accordance with the Constitution and international human rights law pursuant to Article 3(2) of the Law, the remaining provisions contained in Chapter 9 of the Rules are not inconsistent with Chapter II of the Constitution.

CHAPTER 10

APPELLATE PROCEEDINGS

207. Save for the rules referred to hereunder and its finding as set out in paragraph 213 of this Judgment, the Court has no comment to make on the provisions contained in Chapter 10 of the Rules.

208. **Rule 175 Pre-Appeal Conference**

This rule, as adopted by the Plenary, provides that:

> *Within twenty-one (21) days of a notice of appeal, and when deemed necessary thereafter, the Presiding Judge, or the Judge Rapporteur, if designated, shall convene a conference to allow any person in custody pending appeal the opportunity to raise issues in relation thereto, including the person's mental and physical condition.*

209. Insofar as this rule relates to detention pending appellate proceedings, the Court recalls its finding in relation to Rule 158(2) that the continued detention of an acquitted person pending the determination of the appeal against his or her acquittal in the absence of reasonable suspicion of having committed another criminal act is inconsistent with Article 29 of the Constitution.

210. **Rule 176 Appellate Briefs**

Paragraphs (1) and (2) of this rule, as adopted by the Plenary, provide for time limits for the filing of the Appeal Brief and the Brief in Response:

> *(1) The Appellant shall file an Appeal Brief setting out all the arguments and authorities in support of his or her grounds of appeal within sixty (60) days or, where the appeal is limited to sentencing, within thirty (30) days of the notice of appeal.*
>
> *(2) The Respondent may file a Brief in Response setting out all arguments and authorities within thirty (30) days, or where the appeal is limited to sentencing, within fifteen (15) days of the Appeal Brief.*

211. To the extent that Rule 176(2) provides for a shorter time limit for the preparation of the Brief in Response than for the preparation of the Appeal Brief, it raises an issue of equality of arms. As recalled above, equality of arms is an inherent feature of a fair trial guaranteed under Article 31 of the Constitution. It requires that each party be afforded a reasonable opportunity to present its case under the conditions that do not place it at a substantial disadvantage vis-à-vis the opposing party.[124]

212. The Court is of the opinion that, where the Specialist Prosecutor lodges an appeal against an acquittal, the acquitted person may, to be able to prepare a complete and meaningful Brief in Response, need in certain circumstances as much time as the Specialist Prosecutor has to prepare his or her Appeal Brief. Having regard to Rule 9(5) that allows for the extension of any time limit prescribed by the Rules upon a showing of good cause, the Court is nonetheless satisfied that Panels will be able to ensure equality of arms by varying the time limit prescribed for the filing of the Brief in Response where required.

213. **Finding on Chapter 10 of the Rules**

Subject to adherence to the principles enunciated and mindful of the obligation on the Specialist Chambers to adjudicate and function in accordance with the Constitution and international human rights law pursuant to Article 3(2) of the Law, the Court finds that the provisions contained in Chapter 10 of the Rules are not inconsistent with Chapter II of the Constitution.

CHAPTERS 11-13

214. After having examined the rules set out in Chapters 11, 12 and 13, the Court finds that these provisions are not inconsistent with Chapter II of the Constitution.

[124] See above para. 27.

PART III – CONCLUSION

215. In conclusion, the Court determines that:

Rule 19(3)

Rule 31

Rule 32

Rule 33,

Rule 35(1)(b) and (c) and 35(3)

Rule 36(1) and (2)

Rule 38(1) and (5)

Rule 54(4), and

Rule 158(2)

are not consistent with Chapter II of the Constitution.

216. In addition, the Court is unable to find that Rule 134(3) is consistent with Chapter II of the Constitution.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, that the Referral is admissible;

2. *Holds*, unanimously, that Rule 31, Rule 32, Rule 33, Rule 35(1)(b) and (c) and 35(3), Rule 36(1) and (2), Rule 38(1) and (5), and Rule 54(4) are inconsistent with Chapter II of the Constitution;

3. *Holds*, by majority, that Rule 19(3) and Rule 158(2) are inconsistent with Chapter II of the Constitution;

4. *Holds*, unanimously, that it is unable to declare Rule 134(3) to be consistent with Chapter II of the Constitution; and

5. *Holds*, unanimously, that the remaining provisions of the Rules are not inconsistent with Chapter II of the Constitution.

Done in English and notified, in writing, on 26 April 2017, at The Hague, the Netherlands

Judge Ann Power-Forde
Presiding

Judge Vidar Stensland

Judge Roland Dekkers

The partly dissenting opinion of Judge Stensland is annexed to this Judgment.

PARTLY DISSENTING OPINION OF JUDGE VIDAR STENSLAND

1. Except for Rules 19(3) and 158(2), I agree with the conclusions reached as regards the Rules.

2. I will now turn to the reasons for my disagreement with the majority on Rules 19(3) and 158(2).

3. **Rule 19(3)**

4. Under this rule, the Panel, after having heard the Parties and where it is in the interests of a fair and expeditious trial, may order that a hearing in a part-heard case continue for up to five working days in the absence of a Judge who is unavailable due to exceptional circumstances.

5. For the assessment of Rule 19(3) it is relevant to note that under Rule 19(5) the President shall assign a Reserve Judge or, where appropriate, another Judge to a part-heard case if a Judge is unable to continue sitting for more than 30 working days or permanently. The Judgment finds that this rule is not inconsistent with the Constitution.

6. The reassignment of the Reserve Judge as a full judge does not raise any issue since he or she has been present in the proceedings. As stated in the Judgment with regard to Rules 19(5) and (6), it is only in exceptional circumstances and provided that appropriate measures are taken to ensure the fairness of proceedings that the assignment of a new Judge to a part-heard case during the proceedings would be acceptable under the Constitution. Normally, such a change of the Panel would require that the trial be started from the beginning (see, for example, Article 311 of the Kosovo Criminal Procedure Code (the 'CCP')). In my opinion, when it comes to the right to a fair trial, the situation where a totally new Judge is assigned to a case during the proceedings is more concerning than a situation where a Judge has been absent from a hearing for a short period of time.

7. The majority holds that the absence of a Judge for up to five working days as prescribed in Rule 19(3) is not in accordance with the Law and therefore the Panel is not established by law as required by Article 31.2 of the Constitution and Article 6(1) of the Convention.

8. As a starting point, Article 25 of the Law provides for Panels of three judges. Therefore, such Panels are established by law, as required by the Constitution and the Convention. The question arises as to whether a particular Panel is still a Panel established by law where one of the Judges assigned to the Panel is absent for a short period of time.

9. Under Article 19(1) of the Law, the Plenary is given the authority to adopt Rules of Procedure and Evidence. Pursuant to Article 19(2), the Rules shall reflect the highest

standards of international human rights law with a view to ensuring a fair and expeditious trial. Further, Article 19(3) provides that the Rules must be consistent with the Law. In my opinion, Rule 19(3), as adopted, falls within the authority given to the Plenary by the Law.

10. By way of comparison, similar provisions may be found in rules of procedure and evidence of international criminal tribunals who have been applying the highest standards of international human rights law. It is a fact that the ICTY Rules of Procedure and Evidence contain in Rule 15*bis*(A) provisions similar to those in Rule 19(3). Likewise, the rules governing the proceedings before the ICTR, the SCSL, the STL and the MICT allow for the continuation of proceedings for a period of a short duration in the absence of one of the judges.[125] Even though the Constitution of Kosovo and the Convention are not binding on these courts, they were all created by or under the aegis of the United Nations, whose International Covenant on Civil and Political Rights (the 'ICCPR'), under Article 14(1), grants the same right to a hearing by a 'tribunal established by law'.

11. The statutes of these international criminal tribunals, adopted by the UN Security Council or as part of an agreement with the UN, must be regarded as 'law' and, as such, are comparable to the Law establishing the Kosovo Specialist Chambers. While regulating the composition of the courts' chambers, these statutes are silent when it comes to the absence of a judge, except when they discuss the participation of reserve judges. Notwithstanding this silence, the rules of procedure and evidence of these international criminal courts allow for a trial to continue in the absence of one of three trial judges where it is in the interests of justice.

12. I consider that the approach endorsed by these five international criminal tribunals is further demonstrative of the limits of the majority's reasoning and narrow interpretation of the right to be heard by a 'tribunal established by law'.

13. Further, I find it clear that any such absence as envisaged under Rule 19(3) can take place only if all adequate and necessary safeguards are observed to ensure that the right to a fair trial as guaranteed under Article 31 of the Constitution is complied with. This, however, would be a matter of application of this provision, as would be for Rules 19(5) and (6), which were not found to be inconsistent with Article 31 of the Constitution.

14. This leads me to the conclusion that Rule 19(3) is not inconsistent with Chapter II of the Constitution.

[125] See ICTR Rules of Procedure and Evidence, Rule *15bis*(A); SCSL Rules of Procedure and Evidence, Rule 16(A); STL Rules of Procedure and Evidence, Rule 26(A); MICT Rules of Procedure and Evidence, Rule 19(A).

15. **Rule 158(2)**

16. The question related to Rule 158(2) is whether, in exceptional circumstances, a person may be held in detention on remand following his or her acquittal by the first instance court. In my opinion, the answer to this question will not be different whether we are to apply Article 29 of the Constitution or Article 5 of the Convention.

17. Article 29 of the Constitution guarantees a person's right to liberty and provides in which exceptional cases a person may be deprived of his or her liberty. When it comes to detention with the purpose of bringing a person before the court, Article 29 of the Constitution must be interpreted similarly to Article 5(1)(c) of the Convention. It is relevant to note that under Article 187 of the CCP detention on remand may be applied where there is grounded suspicion that the person concerned has committed a criminal offence and, in addition, where there is a risk of flight, tampering with evidence or reoffending. This provision has been applied by the Kosovo courts and its constitutionality has not been disputed.

18. In my view, the conclusion that detention on remand following an acquittal is unconstitutional has no support in the wording of Article 5 of the Convention. Neither has this matter been established with certainty in the case-law of the ECtHR.

19. It goes without saying that detention on remand following an acquittal cannot be based on Article 5(1)(a) of the Convention, which covers detention after conviction. According to the case-law of the ECtHR, detention may be ordered following a conviction in the first instance, and Article 5(3) does not apply to such detention.

20. Detention on remand after an acquittal by the first instance court must be assessed under Article 5(1)(c) of the Convention, which is reflected in Article 29.1(2) of the Constitution. For the detention on remand to be lawful, it must be in compliance with that provision. The purpose of bringing a person 'before the competent legal authority' is not limited to a trial before the first instance court. Such limitation, irrespective of particular circumstances of each case, could in some cases render an appeal process futile.

21. I am aware that the ECtHR has stated that for the purposes of Article 5(1)(c) detention ceases to be justified '*on the day on which the charge is determined*' and that '*detention after acquittal is no longer covered by [Article 5(1)(c)]*'.[126] However, this was stated by the ECtHR with regard to situations different from the present one.

22. Those cases did not concern the question of whether Article 5(1)(c) could justify a detention for the purpose of bringing a person before a court following his or her acquittal in first instance where appeal proceedings are pending. For example, in the case of *Labita v. Italy*, there was an order for release of a person following the acquittal,

[126] *Labita v. Italy* [GC], no. 26772/95, 2000-IV, para. 171; *Mahamed Jama v. Malta*, no. 10290/13, 26 November 2015, para. 156. See also *Wemhoff v. Germany*, Judgment of 27 June 1968, Series A no. 7, pp. 19-20, para. 9.

and the issue at stake was the belated execution of the release order. The remark about 'the day the charge is determined' in that case refers to the relevant period under Article 5(3) of the Convention[127] and cannot be given particular weight when assessing the question of whether bringing a person 'before the competent legal authority' is limited to the proceedings before the first instance court where appeal proceedings are pending.

23. Rule 158(2) provides that only under '*exceptional circumstances*', and only if the prosecutor '*at the time of the pronouncement*' of the judgment declares his or her intention to appeal, the Panel may order continued detention.

24. It has to be noted that a potential detention ruling where the acquittal is not final must be based merely on a 'reasonable suspicion' in accordance with Article 29.1(2) of the Constitution—or 'grounded suspicion' in accordance with Article 41(6) of the Law—, in order not to violate the presumption of innocence.[128] It may not be excluded that this degree of suspicion may remain after a not final acquittal in first instance.

25. Lastly, weight must given to the fact that a similar rule is not unknown in other jurisdictions.[129] I find it particularly convincing that the ICTY, the ICTR, the SCSL, the STL, the MICT, and the ICC, all guided by the highest international standards, have a similar provision in their Rules of Procedure and Evidence or Statute.[130]

26. After an overall assessment, I cannot find Rule 158(2) – in abstract – in contradiction with Chapter II of the Constitution.

[127] *Labita v. Italy*, cited above, paras 171, 147.
[128] *Garycki v. Poland*, no. 14348/02, 6 February 2007, para. 67.
[129] *See* Norwegian Criminal Procedure Code, Article 187.
[130] See ICTY Rules of Procedure and Evidence, Rule 99(B); ICTR Rules of Procedure and Evidence, Rule 99(B); SCSL Rules of Procedure and Evidence, Rule 99; MICT Rules of Procedure and Evidence, Rule 123(B); STL Rules of Procedure and Evidence, Rule 170; and ICC Statute, Article 81(3)(c). See also ICCPR, Article 9(2).