



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-CC-PR-2017-03

Before: **The Specialist Chamber of the Constitutional Court**
Judge Ann Power-Forde, Presiding
Judge Roland Dekkers
Judge Antonio Balsamo

Registrar: Fidelma Donlon

Date: 28 June 2017

Original

Language: English

File name: **Referral of the Revised Rules of the Rules of Procedure and Evidence Pursuant to Article 19(5) of the Law**

PUBLIC

JUDGMENT

**on the Referral of Revised Rules of the Rules of Procedure and Evidence
Adopted by Plenary on 29 May 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

Roland Dekkers, Judge

Antonio Balsamo, Judge

having deliberated in private on 8, 9, 23 and 24 June 2017, delivers the following Judgment.

PART I - PRELIMINARY

Procedural History

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'). The Constitutional Judges did not participate in the adoption of the Rules.
2. On 27 March 2017, the President of the Specialist Chambers referred the Rules to the Specialist Chamber of the Constitutional Court (the 'Court') pursuant to Article 19(5) of the Law for a review as to their compliance with Chapter II, including Article 55, of the Constitution of the Republic of Kosovo (the 'Constitution').¹
3. By a judgment of 26 April 2017,² the Court found that Rules 19(3), 31, 32, 33, 35(1)(b) and (c), 35(3), 36(1) and (2), 38(1) and (5), 54(4), and 158(2) of the Rules were inconsistent with Chapter II of the Constitution, and that it was unable to declare Rule 134(3) to be consistent with Chapter II of the Constitution. The Court found that the remaining provisions of the Rules were not inconsistent with Chapter II of the Constitution.

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.

² KSC-CC-PR-2017-01, F00004, 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, 26 April 2017 (the 'Judgment of 26 April 2017').

The Referral

4. On 29 May 2017, the Plenary adopted revised rules of the Rules of Procedure and Evidence (the 'Revised Rules'). The Constitutional Judges did not participate in their adoption.
5. On 31 May 2017, the Revised Rules were referred to the Court pursuant to Article 19(5) of the Law (the 'Referral').³ On the same day, the President of the Specialist Chambers assigned the above Panel pursuant to Article 33(3) of the Law.

Admissibility

6. 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.
7. 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 Revised Rules.
8. The Court recalls that pursuant to Article 19 of the Law, the Plenary shall adopt Rules of Procedure and Evidence for the conduct of proceedings before the Specialist Chambers and that it shall take action on any affected provisions found by this Court to be inconsistent with Chapter II of the Constitution.
9. Following the Court's review of the Rules, they were returned to the Plenary, which revised the affected provisions. Subsequently, the Revised Rules were referred to this Court for review.
10. The Revised Rules 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.
11. 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.
12. Since the Revised Rules have been referred to this Court following their adoption by the Plenary and since this Court, as the final authority for the interpretation of the Constitution, has jurisdiction to review the Revised Rules

³ KSC-CC-PR-2017-03, F00001, Referral of the Revised Rules of the Rules of Procedure and Evidence Pursuant to Article 19(5) of the Law, Referral of Revised Rules of the Rules of Procedure and Evidence to the Specialist Chamber of the Constitutional Court, 31 May 2017.

which have been adopted in accordance with the Law, the Referral made herein on 31 May 2017 is declared admissible.

Introductory Remarks

13. The Court's jurisdiction in the present Referral is limited to a review of the Revised Rules. It is required to determine whether the Revised Rules, as adopted, comply with Chapter II, including Article 55, of the Constitution.
14. The Court reiterates that, in certain cases, 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.
15. That said, the Court recalls that in reviewing the Rules, it places reliance upon the fact that when they are to be interpreted and applied, regard will be had to Article 3(2)(a) and (e) and Article 19(2) of the Law. These provisions require that the Specialist Chambers adjudicate and function in accordance with the Constitution and with international human rights law, which sets standards relevant to criminal proceedings, including those under the European Convention on Human Rights and Fundamental Freedoms (the 'Convention') and the International Covenant on Civil and Political Rights.

General Observations

16. Before turning to its findings on specific provisions of the Revised Rules, the Court makes the following general observations.

The Specialist Prosecutor's Powers

17. Article 35 of the Law imposes upon the Specialist Prosecutor the responsibility to investigate and prosecute persons responsible for the crimes falling within the jurisdiction of the Specialist Chambers. It further provides that the Specialist Prosecutor and other Prosecutors working in the Specialist Prosecutor's Office shall have not just the responsibility but also the *authority* to perform the functions of the Office.
18. The Court recognises that in discharging the responsibility to investigate and prosecute crimes within the jurisdiction of the Specialist Chambers, the Specialist Prosecutor, necessarily, requires a degree of freedom and a margin of discretion, without which the fulfilment of the Office's mandate to seek justice could not be achieved. The Specialist Prosecutor is, of course, authorised to undertake a range of investigative measures, which, in themselves, do not require prior judicial authorisation. In certain cases, safeguards less stringent than judicial control may be required, such as, for example, the presence of counsel during the questioning of an accused. Much

will depend upon the nature of the measures in question. In principle, however, the higher the degree of interference with human rights, the stricter the safeguards must be.

19. In reviewing the Revised Rules, the Court discerns that in response to its Judgment of 26 April 2017, the Plenary has amended a number of rules in such a manner as to delimit, at times, quite considerably, the powers of the Specialist Prosecutor in relation to the investigation of crimes. It has, for example, curtailed significantly the categories of persons in respect of whom special investigative measures may be imposed or from whom certain evidentiary materials may be obtained.
20. The Court considers it necessary to underscore that the object of its Judgment of 26 April 2017 was not to call for restrictions to be placed, generally, upon the Specialist Prosecutor's investigative capacities. To do so would risk frustrating the Specialist Prosecutor's exercise of his or her lawful powers and statutory obligations. Rather, the said Judgment was aimed at ensuring that where the exercise of prosecutorial investigative powers encroaches upon constitutionally guaranteed fundamental human rights and freedoms, such exercise is required to be subject to adequate safeguards, including, where necessary, judicial oversight and control. In this way, an appropriate balance is to be achieved between the competing public and private interests in issue.

Confidential Relationships and Investigative Measures

21. In its Judgment of 26 April 2017, the Court observed the absence of specific provisions governing the interception of communications between a suspect and his or her counsel.⁴ Its consideration reflected the importance of the general principle of legal professional privilege. This privilege protects communications passing between a professional legal adviser and his or her client from being disclosed without the permission of the client. The privilege vests in the client and its purpose is to safeguard an individual's ability to access the justice system.⁵
22. The Court observes that in adopting Rule 31(3), the Plenary has, understandably, imposed a near general prohibition on the application of investigative measures to information deriving from a lawyer-client relationship. It further observes, with some reservation, that the Plenary has extended this near general prohibition to cover all 'professional or other

⁴ Judgment of 26 April 2017, para. 71.

⁵ Cf., for example, *Campbell v. the United Kingdom*, 25 March 1992, Series A no. 233, para. 46; *Michaud v. France*, no. 12323/11, ECHR 2012, paras 117-118. All references in this Judgment are to the case-law of the European Court of Human Rights (the 'ECtHR').

confidential' relationships as provided for in Rule 111.⁶ It applies, for example, to both doctor-patient and counsellor-client relationships.

23. The Court is cognisant of the onerous responsibility imposed upon the Specialist Prosecutor to investigate crimes within the jurisdiction of the Specialist Chambers and of the importance of ensuring that the Office is not fettered in the discharge of its functions. Prohibiting the possibility of seeking to apply investigative measures to a wide range of confidential relationships beyond that of a lawyer-client may restrict, unduly, the Specialist Prosecutor in the discharge of his or her functions under the Law. Lawyer-client communications are always privileged and, thus, should not, in principle, be subjected to covert interception. However, information deriving from other professional or other confidential relationships, whilst subject to a high degree of protection may – depending on all the circumstances of a given case – be of considerable importance in the investigation of serious crimes.
24. In the Court's view, whether investigative measures shall be applied to relationships that are 'professional' or 'confidential' (other than lawyer-client relationship) is, as a general principle, a matter to be assessed by an independent tribunal on a case-by-case basis, bearing in mind the necessity for and proportionality of any such interference. Provided that adequate safeguards exist, it is for an independent tribunal to assess whether the private and public interests in respecting the confidentiality attaching to a particular relationship should prevail over the public interest in the investigation and prosecution of serious crimes.
25. Again, it is important to underscore that the object of the Court's earlier Judgment was not to call for restrictions to be placed, generally, upon the Specialist Prosecutor's powers, but, rather, to ensure that where the exercise of such powers encroaches upon human rights and freedoms, it is subject to adequate safeguards, including, where necessary, judicial oversight and control.
26. The Court will now turn to its assessment of the Revised Rules in the order in which they are set out in the Referral.

⁶ Rule 111 identifies professional and other confidential relationships in respect of which provision is made for the non-disclosure of communications and information.

PART II – THE REVISED RULES

CHAPTER 2

ORGANISATION AND ADMINISTRATION OF THE SPECIALIST CHAMBERS

27. Section II: Chambers

Sub-Section 2: Judges

Rule 19 Absence of a Judge

The Court observes that Rule 19 has been amended to exclude the possibility of a hearing proceeding before two Judges of a Panel. It is now clear that any hearing conducted before a judicial composition of the Kosovo Specialist Chambers will be a hearing before a tribunal established by law, as is required under Article 31.2 of the Constitution.

28. The Court finds that Rule 19 is not inconsistent with Chapter II of the Constitution.

CHAPTER 3

INVESTIGATIONS

29. Section I: Investigative Measures

Sub-Section 1: General

The Court recalls that in its Judgment of 26 April 2017, it found that a number of rules on investigative measures were inconsistent with Chapter II of the Constitution because they failed to meet the ‘quality of law’ and ‘necessity’ requirements under Articles 36 and 55 of the Constitution.⁷ In response to the Court’s Judgment of 26 April 2017, the Plenary has introduced a number of new rules in addition to revising the existing provisions of Chapter 3.

30. Rules 30 and 31

The Plenary has revised Rule 30 on ‘General Provisions’ and has adopted a new Rule 31 providing for ‘General Minimum Safeguards’ which are applicable to all investigative measures that may infringe upon fundamental human rights. These provisions read as follows:

Rule 30 General Provisions

(1) *In the conduct of an investigation of a crime falling within the jurisdiction of the Specialist Chambers, the Specialist Prosecutor may:*

(a) *question victims, witnesses and suspects, and record their statements;*

⁷ See Judgment of 26 April 2017, paras 75, 88, 95, 106-107.

- (b) *conduct on-site investigations, collect evidence, undertake expert examinations thereof and conduct such other investigative activities as necessary;*
 - (c) *seek the assistance of Third States and international organisations or other entities;*
 - (d) *undertake investigative measures pursuant to Rule 34 to Rule 41.*
- (2) *During an investigation, the Specialist Prosecutor shall act at all times in a manner consistent with fundamental human rights provided for in Chapter II of the Constitution and shall ensure:*
- (a) *the safety and protection of victims, witnesses and other persons at risk on account of information provided to or cooperation with the Specialist Prosecutor; and*
 - (b) *the protection of the privacy of any person.*

Rule 31 General Minimum Safeguards

- (1) *Investigative measures that may infringe upon fundamental human rights provided for in Chapter II of the Constitution shall be authorised by a Panel or undertaken by the Specialist Prosecutor, where applicable. Such measures may be authorised or undertaken, as applicable, when in light of all relevant circumstances the following minimum safeguards are satisfied:*
 - (a) *the applicable requirements pursuant to Rule 34 to Rule 41 are met;*
 - (b) *the investigative measures are necessary for the investigation; and*
 - (c) *the resulting interference with any concerned person's right to personal integrity, privacy or property is proportionate to the legitimate aim of the investigation and does not negate the essence of the guaranteed right.*
 - (2) *Where a Panel authorises investigative measures pursuant to paragraph (1), it may order the Specialist Prosecutor to provide information on the implementation of such measures and material collected pursuant to Rule 34 to Rule 41, in a manner and within the time limits set by that Panel.*
 - (3) *Information deriving from a professional or other confidential relationship as provided for in Rule 111 shall be privileged and shall not be subject to investigative measures, unless the privilege is abused to perpetrate a crime within the jurisdiction of the Specialist Chambers and the evidence sought was in furtherance of that crime. In this case, Rule 33(1)(a)(ii) shall apply mutatis mutandis.*
 - (4) *The Panel may impose other safeguards as necessary.*
31. The Court observes that the Plenary has introduced into Rule 30 a 'Chapeau-type' regulation containing a number of 'General Provisions' applicable to all investigations and which, *inter alia*, oblige the Specialist Prosecutor to act at all times in a manner consistent with fundamental human rights.

32. The Court also notes that the Plenary has included in Rule 31 certain ‘General Minimum Safeguards’ that are to apply to all investigative measures that may infringe upon fundamental human rights, including, special investigative measures, searches and seizures, exhumations and post-mortem examinations, and the collection of bodily material—all of which involve a clear interference with fundamental human rights.
33. The Court welcomes the additional provisions contained in the Rules which are designed to secure enhanced protection of fundamental human rights.
34. The Court recalls that fundamental rights and freedoms that are guaranteed under the Constitution may only be limited ‘by law’. This implies, *inter alia*, that the law must be foreseeable as to its effects, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his or her conduct. On this point, the Court notes that, in Rule 31(1), the demarcation line between measures which are ‘*authorised by a Panel*’ on the one hand and those which may be ‘*undertaken by the Specialist Prosecutor, where applicable*’ on the other, is not immediately identifiable but becomes clear when read in conjunction with the other rules of Chapter 3.
35. Rule 31(1), therefore, applies to all investigative measures conducted by the Specialist Prosecutor that may infringe upon fundamental human rights, whether they: (i) require prior judicial authorisation; (ii) can be undertaken without prior judicial authorisation but require *ex post facto* judicial approval; or (iii) can be undertaken without either judicial authorisation or *ex post facto* approval. This approach is consistent with Article 55 of the Constitution.
36. Rule 31(2) empowers a Panel to order the Specialist Prosecutor to report back to it on the implementation of measures authorised, in a manner and within ‘the time limits set by that Panel’. For the avoidance of doubt, the Court understands that the reference to ‘time limits’ in this provision refers solely to the time limits imposed on the Specialist Prosecutor for providing information on the implementation of the investigative measures and materials collected and not to the time limits for the carrying out of investigative measures or retention of materials collected.
37. Rule 31(3) provides that information deriving from ‘a professional or other *confidential relationship*’ (as set out in Rule 111) shall be privileged and ‘*shall not be subject to investigative measures*’ save in only one instance, namely, where the privilege is abused to perpetrate a crime. The Court recalls its earlier observations on the Plenary’s extension of privilege (and, therefore, exclusion from investigative measures) to all ‘professional or other confidential relationships’ as provided for in Rule 111.⁸ Whilst the Rules may contain exceptionally high standards of human rights protection, their application, in

⁸ See above, paras 21-26.

practice, must not inhibit or fetter the Specialist Prosecutor in the discharge of his or her lawful duties.

38. Finally, the Court considers that the phrase '*unless ... the evidence sought was in furtherance of that crime*' in Rule 31(3) requires a brief comment. The first part of the sentence provides, essentially, that information deriving from confidential relationships shall not be subject to investigative measures. That is '*unless*' the privilege is 'abused' to perpetrate a crime, in which case, presumably, the information deriving from the confidential relationship is not privileged and *may* be the subject of investigative measures. However, how 'the evidence sought' could be 'in furtherance of that crime' is difficult to discern. Presumably, in such a situation the 'evidence sought' is being sought by the Specialist Prosecutor and would be the otherwise 'privileged' information arising from the confidential nature of the relationship. How that information sought by the Specialist Prosecutor could be '*in furtherance*' of the crime under investigation is difficult to envisage. The Specialist Prosecutor does not seek evidence *in furtherance of a crime*. He or she seeks evidence indicative of a crime. The Court understands that the intention was to refer to the evidence sought being corroborative or indicative of the commission of a crime. Insofar as the last sentence of Rule 31(3) is concerned, the Court interprets it to refer to the first part of the previous sentence, namely, evidence that is obtained in breach of a privilege that ought to have been respected.
39. In the light of the Court's observations the Plenary may wish to review, at some later date, the provisions of Rule 31. However, the Court finds that, on their face, Rules 30 and 31 do not contain anything which, in itself, is inconsistent with Chapter II of the Constitution.

40. **Rules 32 and 33**

Rules 32 and 33 provide for the retention, storage, protection, return and destruction of material collected or seized by the Specialist Prosecutor pursuant to Rules 34 to 41. In its Judgment of 26 April 2017, the Court made findings about the absence of sufficient safeguards pertaining to these matters, particularly, in relation to data obtained on foot of covert surveillance and bodily materials collected in the context of investigations.⁹ Such safeguards are necessary under Article 36.4 of the Constitution, which provides that every person enjoys 'the right of protection of personal data' and that the '[c]ollection, preservation, access, correction and use of personal data are regulated by law'.

41. The Plenary has responded to the Court's findings about the insufficiency of safeguards in the diverse areas identified in the Judgment by adopting what

⁹ Judgment of 26 April 2017, paras 66, 73-75, 105-106, referring to *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008, paras 120, 122.

might be described as 'catch-all' or across-the-board provisions. Rules 32 and 33, relating to the retention, storage, protection, return and destruction of material, are now to be applied to all materials obtained as part of special investigative measures, searches and seizures, exhumations and post-mortem examinations and to the collection of bodily material.

42. Rules 32 and 33 provide as follows:

Rule 32 Retention, Storage and Protection of Material Collected or Seized Pursuant to Rules 34 to 41

- (1) *Material collected or seized as a result of any measure pursuant to Rule 34 to Rule 41 shall be appropriately retained, stored and protected. Any decision by a Panel authorising such measures shall include:*
- (a) *the procedure and precautions for the storage, protection and transfer, where applicable, of the collected or seized material;*
 - (b) *the duration of the retention of the collected or seized material and, where applicable, the procedure for their preservation under Rule 71; and*
 - (c) *instructions and a timeline for the return or destruction, where applicable, of the collected or seized material.*
- (2) *Rule 206 shall apply mutatis mutandis. Requests from the authorities of Kosovo may be granted subject to protective measures, where necessary.*

Rule 33 Return or Destruction of Material Collected or Seized Pursuant to Rule 34 to Rule 41

- (1) *Material collected or seized pursuant to Rules 34 to 41 shall be returned or destroyed:*
- (a) *immediately,*
 - (i) *if such material falls outside the scope of the investigation for which it was obtained, unless it is of relevance to the investigation of another crime within the jurisdiction of the Specialist Chambers; or*
 - (ii) *if such material is unlawfully obtained, in particular where a Panel denies approval or fails to render a decision on an order of the Specialist Prosecutor pursuant to Rule 36 or Rule 38;*
 - (b) *where such material is no longer relevant for the purpose for which it was obtained, taking into account:*
 - (i) *the nature and gravity of the crime;*
 - (ii) *the necessity for ongoing investigations; and*
 - (iii) *whether the person concerned is a suspect, a convicted, acquitted or third person; or*

- (c) *at the elapse of the statutory limitations provided for in Article 106 of the Kosovo Criminal Code.*
- (2) *Subject to paragraph (1), material collected or seized pursuant to Rule 34 to Rule 41 shall be:*
- (a) *returned by the Specialist Prosecutor proprio motu or upon decision of a Panel; or*
- (b) *destroyed by the Specialist Prosecutor only upon decision of a Panel.*
- Any such return or destruction must be recorded.*
- (3) *A person concerned shall be notified of any decision to return or destroy material at least ninety (90) days prior thereto, or as otherwise decided. The person concerned may seek reconsideration of this decision.*
43. The Court recalls that in its previous Judgment, it specified that, because of the magnitude of the interference with the right to privacy involved, any law on covert interception and surveillance measures must contain, *inter alia*:
- 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.¹⁰
- The Court also highlighted the need in the Rules for adequate safeguards concerning the retention of bodily materials collected by the Specialist Prosecutor.¹¹
44. The Court observes that the Plenary, in Rule 32(1), has stated that material collected or seized as a result of any measure pursuant to Rules 34 to 41 shall be ‘appropriately’ retained, stored and protected but it has not set out the procedures that would allow for such ‘appropriate’ retention, storage and protection. The Plenary has chosen to delegate these functions to a Panel. It is the Panel that must, in its order authorising relevant measures, include directions on ‘the procedure and precautions for the storage, protection and transfer’ of the material in question. It is the Panel that must specify time limits governing the retention and preservation of data. It is the Panel that must issue instructions concerning the return or destruction of materials.
45. The Court acknowledges that significant time and expertise would be required in order to develop detailed procedures as to how, for example, cellular data,

¹⁰ Judgment of 26 April 2017, para. 66, referring to *Roman Zakharov v. Russia* [GC], no. 47143/06, ECHR 2015, para. 231.

¹¹ See Judgment of 26 April 2017, paras 105-106.

recordings of private communications or other sensitive materials are to be 'appropriately retained'. A Panel, in all likelihood, may require expert guidance in respect of procedures for storing and protecting such material if it is required to specify such procedures in its order. In practice, delegating to a Panel the duty to outline procedures on how, for example, bodily tissues should be stored, will not be sufficient.

46. The Court cannot overlook the risk that if each Panel is free to set its own procedures in these respects, the requirement of foreseeability of the law may be jeopardised.¹² For the law to meet this requirement, it must indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise.¹³ The threshold to meet is all the higher given that Rules 32 and 33 cover *all* types of data obtained and materials collected or seized pursuant to Rules 34 to 41, including highly sensitive personal data, such as DNA samples.
47. The Court considers that the approach adopted may foster an impression of imprecision in terms of 'quality of law' and may leave the Specialist Chambers open to the risk of imposing inconsistent standards depending on the procedures directed by any given Panel. It is, therefore, apparent that specific regulatory guidelines (whether by way of future policies, directives or rules) will be necessary in order to supplement the existing provisions of Rule 32, particularly, insofar as technical issues, such as, the storage and retention of certain types of data, are concerned.
48. That said, the Court welcomes the fact that Rules 32 and 33 contain express provisions as to the circumstances in which materials collected or seized may or must be destroyed. In keeping with the core principles identified in the Judgment of 26 April 2017, Rules 32 and 33 require that the retention of materials containing personal data is (i) relevant to the investigation; (ii) proportionate in relation to the purpose of collection; and (iii) limited in time.
49. Finally, given that constitutional rights may be engaged by a decision to return or destroy materials under Rule 33(3), the Court finds it important to underline that, apart from the right to 'seek reconsideration' of such a decision, other remedies are available under the Law and the Rules, including, as applicable, the right to appeal the decision before the Court of Appeals or to petition this Court.
50. Notwithstanding the Court's finding that further procedures will be required, in practice, to supplement the provisions of Rule 32, the Court finds that

¹² See Judgment of 26 April 2017, paras 62-63, 90.

¹³ See *S. and Marper v. the United Kingdom*, cited above, para. 95.

Rules 32 and 33, on their face, are not inconsistent with Chapter II of the Constitution.

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

In its Judgment of 26 April 2017, the Court considered that essential minimum safeguards were required in relation to special investigative measures. It endorsed the view of the ECtHR that not only should safeguards be in place but they must also be specified, clearly, in the law if the potential for an abuse of power is to be avoided.¹⁴ In addition to the general provisions discussed above, the Plenary has adopted Rules 34, 35 and 36 in response to the Court's Judgment.

52. **Rule 34 Conditions for Undertaking Special Investigative Measures**

Rule 34 provides as follows:

- (1) *Subject to Rule 31(1), special investigative measures may only be undertaken when there is a grounded suspicion that a crime in Article 13 or 14 of the Law, or a crime in Article 388(2) and (3), 393, 394(1), (4) and (5), 395, 396, 397(1), 400(2) to (4), 409, 410, 423 or 424 of the Kosovo Criminal Code, as referred to in Article 15(2) of the Law, has been, is being or is about to be committed.*
- (2) *Special investigative measures may be undertaken where evidence cannot be obtained by other, less intrusive but equally effective means, and in respect of a person or a specific location, where there is a grounded suspicion that:*
 - (a) *the person has committed, is committing or is about to commit any of the crimes under paragraph (1) which fall within the jurisdiction of the Specialist Chambers;*
 - (b) *the person receives or transmits communication intended for or emanating from the suspect or Accused, or whose communication device the suspect or Accused is using;*
 - (c) *a specific location is being used or is about to be used for the commission of a crime under paragraph (1) which falls within the jurisdiction of the Specialist Chambers; or*
 - (d) *evidence of a crime under paragraph (1) can be found in a specific location and the evidence sought is necessary for the investigation.*
- (3) *A person referred to in paragraph (2) shall be notified by the Specialist Prosecutor of any measure undertaken in respect of that person pursuant to Rule 34 to Rule 36 as long as the objective of the measure or the conduct of proceedings are not likely to be jeopardised.*

¹⁴ See Judgment of 26 April 2017, paras 62-64.

53. In compliance with what is required by the principles enunciated in the Judgment of 26 April 2017,¹⁵ Rule 34 specifies the nature of the offences which may legitimately give rise to the ordering or execution of special investigative measures, including, interception orders. It also defines, in sub-paragraph (2), the categories of persons in respect of whom special investigative measures may be ordered.
54. Whilst the Court, in its Judgment of 26 April 2017, noted the omission of categories of persons who may be subject to special investigative measures, it observes that the Revised Rules identify very limited categories in respect of whom such measures may be undertaken. These are (i) suspects; (ii) those who receive or transmit communication intended for or emanating from the suspect or accused; and (iii) those whose communication device the suspect or accused is using. However, it may be that much could be obtained from the covert surveillance of the conduct or communications of others (including, other criminals) who may have relevant information. These, however, may be excluded from the current categories. A question may, therefore, be raised as to whether this narrow list risks fettering the Specialist Prosecutor in the fulfilment of his or her responsibilities under the Law. The Court recalls the strong procedural obligation on the Specialist Prosecutor to carry out an effective and thorough investigation into allegations of violent death, ill-treatment or disappearances in life-threatening circumstances.
55. Whereas the narrow categories of persons who may be subject to special investigative measures appear to the Court to be restrictive and may require reconsideration by the Plenary to allow for thorough investigations, this Court's task is limited to ensuring that the Revised Rules comply with Chapter II of the Constitution. The Court can conclude that, on its face, Rule 34 is not inconsistent with Chapter II of the Constitution.

56. **Rules 35 and 36**

Rules 35 and 36 read as follows:

Rule 35 Special Investigative Measures Authorised 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) and Rule 34 are met, it may issue a decision authorising 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;*

¹⁵ See Judgment of 26 April 2017, paras 66, 69-71.

- (b) *the procedure for reporting on the implementation of the authorised measures and the collected material, within regular time periods or at the termination of the measures, as decided by the Panel, in accordance with Rule 31(2);*
 - (c) *an authorisation, where necessary, to enter a specific location as necessary to execute, maintain or terminate the investigative measure in question. Notice to the suspect or Accused for such authorisation is not required, unless the Panel determines, in the particular circumstances of the case, that notification shall not jeopardise the effectiveness of the requested measure.*
- (3) *The period pursuant to paragraph (2)(a) may be extended for up to 12 months if the objective of the measure, despite due diligence by the Specialist Prosecutor, is not achieved and the requirements under Rule 31(1) and Rule 34 are still met.*
- (4) *In exceptional circumstances, as determined by factors such as the seriousness of the offence, the complexity of the investigation or the discovery of new circumstances by the Specialist Prosecutor shortly before the termination of the measure despite due diligence, the period pursuant to paragraph (3) may be further extended. The Panel shall conduct periodic review of the measures no later than every sixty (60) days, and shall, at any time, terminate them, where the applicable requirements are no longer met and the respect for human rights so requires.*

Rule 36 Special Investigative Ordered by the Specialist Prosecutor

- (1) *The Specialist Prosecutor may order special investigative measures without the authorisation of a Panel where the requirements under Rule 31(1) and Rule 34 are met, and:*
 - (a) *the immediate implementation of such measures is required to secure the collection of evidence that could not be collected otherwise; and*
 - (b) *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) *Within three (3) days of the request, the Panel seized with the request may approve the special investigative measures only if satisfied that the conditions under paragraph (1) were met. Rule 35 shall apply mutatis mutandis.*
- (4) *If approval is not requested, denied or the Panel fails to render a decision, the order of the Specialist Prosecutor for special investigative measures shall cease to have effect and the Specialist Prosecutor shall immediately terminate the measures applied. The collected material, if any, may not be used for investigation or prosecution.*

57. Rules 35 and 36 provide for important safeguards that were omitted from the initial version of the rules relating to special investigative measures.¹⁶ Specifically, through an express reference to the requirements of Rules 31(1) and 34, the revised provisions on special investigative measures ensure that, in compliance with Article 55 of the Constitution, such measures will be authorised and conducted only when: (i) they are necessary for an investigation; (ii) the resulting interference is proportionate to its legitimate aim; and (iii) the resulting interference does not negate the essence of the guaranteed right.
58. Rule 35 provides for special investigative measures that are authorised by a Panel. It sets clear limits on the duration of such measures, which may include covert surveillance and the interception of communications, and it obliges the Panel to indicate the period for which an authorisation may be granted. Whilst Rule 35 leaves the overall duration of any special investigative measure to the discretion of the Panel, it provides for effective safeguards, such as, a clear limitation of the initial periods for which a special investigative measure may be authorised (sixty days), the conditions under which the period initially granted may be extended, the circumstances in which the measures authorised must be terminated,¹⁷ and the necessary judicial control and supervision of the execution of the measure.¹⁸
59. Rule 36 provides for special investigative measures that may be ordered or undertaken by the Specialist Prosecutor in defined circumstances and which are subjected, *ex post facto*, to judicial control by way of an application for judicial review and approval. Where such a process is followed, the provisions of Rule 35 are to be applied *mutatis mutandis*.
60. The Court is satisfied that Rules 35 and 36, on their face, are not inconsistent with Chapter II of the Constitution.

¹⁶ See Judgment of 26 April 2017, paras 64-69, 72, 75 in particular.

¹⁷ See *Roman Zakharov v. Russia*, cited above, para. 250; *Kennedy v. the United Kingdom*, no. 26839/05, 18 May 2010, para. 161.

¹⁸ See *Roman Zakharov v. Russia*, cited above, para. 233; *Greuter v. the Netherlands* (dec.), no. 4004590, 19 March 2002; *Klass and Others v. Germany*, 6 September 1978, Series A no. 28, para. 55.

61. Sub-Section 3: Searches and Seizures

Rule 37 Search and Seizure Authorised by a Panel

In its Judgment of 26 April 2017, the Court remarked that the earlier version of this provision (formerly Rule 34) was drafted in broad terms and that it did not impose an obligation on the Panel to consider the ‘necessity’ of a search and seizure operation.¹⁹ The Plenary has adopted Rule 37, which provides as follows:

- (1) *The Specialist Prosecutor shall request authorisation from a Panel for search and seizure, where in the specific circumstances evidence may not be otherwise obtained and the requested search and seizure appears to be the only effective means for the purposes of the investigation.*
- (2) *The Panel may authorise the search of the property of a person or such other locations, premises or objects in respect of which that person has a reasonable expectation of privacy, and the seizure of items found during the search, where:*
 - (a) *there is a grounded suspicion that that person has committed, is committing or is about to commit a crime within the jurisdiction of the Specialist Chambers; and that the search will result in his or her arrest or in the discovery and seizure of evidence necessary for the investigation;*
 - (b) *there is a grounded suspicion that the search will result in the arrest of a suspect; or*
 - (c) *the search is necessary to collect and preserve evidence of a crime within the jurisdiction of the Specialist Chambers and there is a grounded suspicion that such evidence is on the property, location, premises or object to be searched.*
- (3) *The Panel may authorise the search of a person if there is a grounded suspicion that the search will result in the discovery of evidence of a crime within the jurisdiction of the Specialist Chambers and seizure thereof accordingly.*
- (4) *Where the Panel is satisfied that the requirements pursuant to paragraph (1) to (3), as applicable, and Rule 31(1) are met, it may issue a decision authorising the requested search and seizure, which shall include:*
 - (a) *the time, duration and scope for the execution of the search and seizure, including an indication of the person or property, location, premises or object in relation to which the measure is authorised; and*
 - (b) *procedure for reporting on the implementation of the authorised measures and the seized material, in accordance with Rule 31(2).*

¹⁹ Judgment of 26 April 2017, paras 81-82.

(5) *The Panel may impose other conditions as deemed necessary.*

The Test of Necessity

62. At the outset, the Court observes that Rule 37(1) provides a very strict necessity test with regard to conditions under which the Specialist Prosecutor requests authorisation from a Panel for search and seizure. In particular, the Specialist Prosecutor may only do so where the evidence sought (i) 'may not be otherwise obtained' and (ii) where the investigative measure 'appears to be the only effective means for the purposes of the investigation' (emphasis added). The Court takes note of the high threshold which the Specialist Prosecutor has to reach. Indeed, in its explanatory note on this provision, the Plenary has confirmed that this rule 'was amended to include a *heightened test* to be applied as regards the necessity of search and seizure (the only effective means...)'.²⁰
63. The Court recalls that its earlier Judgment did not find that a 'heightened test' of necessity was required. It noted 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'".²¹ It also stated that this requirement of necessity 'includes an obligation to assess, where relevant, whether the evidence sought could be obtained by other, less intrusive but equally effective means...'.²² Thus, not every case will require an examination of whether other means of obtaining the evidence are available. This is required only in cases where this question is relevant, having regard to all prevailing circumstances.²³ Necessity also implies that a specific interference with or limitation of the rights in question should correspond to a pressing social need and should be proportionate to the legitimate aim pursued.²⁴
64. Several elements may be relevant when assessing the proportionality of an interference in any given case. These include: the severity of the offence in connection with which the search and seizure is effected; the manner and circumstances in which the order is issued, in particular, whether any further evidence is available at that time; the content and scope of the order—having particular regard to the nature of the premises searched — and the safeguards

²⁰ Referral, Annex I, p. 11 (emphasis added).

²¹ Judgment of 26 April 2017, para. 78.

²² Judgment of 26 April 2017, para. 82 (emphasis added).

²³ In the case of *Buck v. Germany*, the ECtHR found it relevant that the search and seizure carried out in that case had not been the only means of establishing who was liable for the offence in question. In finding that interference had not been proportionate, the ECtHR noted the 'special circumstances of [the] case...' where 'the search and seizure in question had been ordered in connection with a minor contravention of a regulation purportedly committed by a third person and comprised the private residential premises of the applicant...'. See *Buck v. Germany*, no. 41604/98, ECHR 2005-IV, para. 52.

²⁴ Judgment of 26 April 2017, para. 79.

implemented in order to confine the impact of the measure to reasonable bounds. Finally, the extent of possible repercussions on the reputation of the person affected by the search may be relevant.²⁵

65. The Court observes that several of the Revised Rules already contain provisions geared towards ensuring compliance with the requirements of necessity and proportionality in the circumstance of any given case. In addition to the safeguards contained in Rule 37(2), (3), (4) and (5), the 'Chapeau' Rule 31, applicable to all investigative measures, requires in paragraph (1)(c) that the Panel assess whether the resulting interference is proportionate to the legitimate aim of the investigation, and in paragraph (4) permits the Panel to impose other safeguards 'as necessary'.
66. In view of the foregoing, the Court reiterates that a 'heightened test' of necessity in seeking judicial authorisation for search and seizure operations is not required by the highest standards of international human rights law. There are several provisions in the Rules that aim to ensure that the Panel assess both the necessity and proportionality of a search and seizure operation and these are sufficient to meet the requisite standards.
67. The Court finds it relevant to underscore that when interpreting and applying Rule 37, in practice, the Panel, while ensuring that any interference is in accordance with the law, should bear in mind the fair balance that is to be struck between, on the one hand, the exercise by a person of the constitutional rights to personal integrity and privacy and, on the other, the necessity for the Specialist Prosecutor to take effective measures for the investigation of the serious crimes within the jurisdiction of the Specialist Chambers.²⁶

'A reasonable expectation of privacy'

68. The Court observes that Rule 37(2) provides that the Panel may authorise the search of property and objects 'in respect of which that person has a reasonable expectation of privacy'. Given the Specialist Prosecutor's authority under the Law, the Court considers that he or she may need to search and seize properties and objects other than those in respect of which persons identified in paragraphs (2)(a) and (b) have a reasonable expectation of privacy.
69. In connection with the criterion of 'reasonable expectation of privacy' under Rule 37(2), the Court remarks that the concept of 'private life' under Article 36 of the Constitution, as interpreted in line with the case-law of the ECtHR, is a

²⁵ *Buck v. Germany*, cited above, para. 45. See also *Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania*, cited above, para. 91; *Camenzind v. Switzerland*, 16 December 1997, Reports of Judgments and Decisions 1997-VIII, para. 46.

²⁶ See, *mutatis mutandis*, *Murray v. the United Kingdom*, 28 October 1994, Series A no. 300-A, para. 91; *Klass and Others v. Germany*, cited above, Series A no. 28, para. 59.

broad term not susceptible to exhaustive definition. There is a zone of a person's interaction with others, even in a public context, which may fall within the scope of 'private life'. There are several elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. In this respect, a person's reasonable expectation as to privacy may be a significant, though not necessarily conclusive, factor.²⁷ The notion of 'private life' under the Constitution, as interpreted in line with the case-law of the ECtHR, should inform the Panel's approach to the 'reasonable expectation of privacy' in Rule 37(2).

70. Regard being had to 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, on its face, Rule 37 is not inconsistent with Chapter II of the Constitution.

71. Rule 38 Search and Seizure Ordered by the Specialist Prosecutor

The Court notes that Rule 38 (formerly Rule 35) governs search and seizure operations conducted without prior judicial authorisation. The Court in its Judgment of 26 April 2017 found that Rule 35(1)(b),(c) and (3) was not consistent with Articles 36.2, 55.2 and 55.4 of the Constitution, since it lacked safeguards to ensure that certain extensive powers exercised by the Specialist Prosecutor were limited to what was 'necessary' for the legitimate aim pursued and that such operations were not counterbalanced by an appropriate *ex post facto* judicial review.²⁸ Rule 38 gives effect to the Court's findings in this regard. It provides as follows:

- (1) *In accordance with Articles 35 and 39 of the Law, the Specialist Prosecutor may, without an authorisation of a Panel, search a person or property, location, premises or object and temporarily seize items found during the search under the conditions specified in Rule 37(1) to (3), if:*
- (a) *the person knowingly and voluntarily consents to the search and seizure;*
 - (b) *the person is caught in the act of committing a crime under the jurisdiction of the Specialist Chambers and, is to be arrested after a hot pursuit; or*
 - (c) *it is necessary to avoid an imminent risk of serious and irreversible harm to other persons or property.*

²⁷ *Gillan and Quinton v. the United Kingdom*, cited above, para. 61. See also *Uzun v. Germany*, cited above, para. 44.

²⁸ Judgment of 26 April 2017, paras 86-88.

- (2) *The Specialist Prosecutor shall file a request to a Panel for approval of the search and seizure immediately, and no later than twenty-four (24) hours after their initiation.*
- (3) *Within three (3) days of the request, the Panel seized with the request may approve the search and seizure only if satisfied that the conditions under paragraph (1) were met.*
- (4) *If approval is not requested, denied or the Panel fails to render a decision, the order of the Specialist Prosecutor for search and seizure shall cease to have effect and the Specialist Prosecutor shall immediately terminate them. The seized material, if any, may not be used for investigation or prosecution.*

72. At the outset, the Court observes that Rule 38 clearly defines the circumstances in which and conditions under which the Specialist Prosecutor may carry out search and seizure without prior judicial authorisation. By reference to Rule 37(1) to (3), Rule 38(1) requires the Specialist Prosecutor to consider the necessity of the operation. In addition, such obligation on the Specialist Prosecutor is placed under Rule 31(1)(b). Importantly, Rule 31(1)(c) requires the Specialist Prosecutor to consider the proportionality of the resulting interference. Furthermore, Rule 38(3) provides for an *ex post facto* judicial review, dealing with issues relating to both the legality and proportionality of the measure and the manner in which it was implemented. In that light, the Court is satisfied that the Plenary has addressed the findings made in the Judgment of 26 April 2017.
73. The Court notes that Rule 38(1) sets out the circumstances in which the Specialist Prosecutor may conduct search and seizure without prior judicial authorisation. However, this provision does not provide, expressly, for a situation in which there is a risk of evidence being lost unless an immediate search and seizure operation is conducted. The Court recognises that it may be necessary for the Specialist Prosecutor to act in such a situation without prior judicial authorisation in order to comply with his or her statutory obligations.
74. The legal basis for the Specialist Prosecutor's power to carry out an operation in such circumstances is to be found in Article 36.2 of the Constitution, which reads, in its relevant part, as follows:

Searches of any private dwelling or establishment that are deemed necessary for the investigation of a crime may be conducted ... after approval by a court Derogation from this rule is permitted if it is necessary ... to collect evidence which might be in danger of loss or to avoid direct and serious risk to humans and property as defined by law

75. In addition, the Court finds it relevant that, under Article 110(3) of the Criminal Procedure Code of Kosovo (the 'CPCCK'), authorised police officers may begin a search without a prior written order and pursuant to a verbal permission of a competent judge where there is '*a substantial risk of delay which could result in the loss of evidence...*'. Regard is had to this provision because Article 162.6 of the Constitution provides that the '*Specialist Chambers may determine its own Rules of Procedure and Evidence ... and be guided by the Kosovo Code of Criminal Procedure...*'.
76. The Court recalls that the Rules are to be construed in a manner consistent with the Constitution. In view of the foregoing, the Court considers that the reference to 'irreversible harm to ... property' in Rule 38(1)(c) should be interpreted to include a situation where evidence is in danger of being lost.
77. 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 Rule 38 is not inconsistent with Chapter II of the Constitution.
78. **Rule 39 Execution of Search and Seizure**

The Court notes that Rule 39 (formerly Rule 36) governs the execution of search and seizure operations. In its Judgment of 26 April 2017, the Court found that paragraphs (1) and (2) of Rule 36 were not consistent with Article 55.1 of the Constitution, since they were not formulated with the requisite degree of precision.²⁹ The Plenary has adopted Rule 39 to give effect to those findings. This provision reads as follows:

- (1) *Subject to paragraph (2), a search and seizure pursuant to either Rule 37 or Rule 38 shall be executed in the presence of the person concerned by the Specialist Prosecutor, who shall, prior thereto:*
- (a) *provide the person concerned with a certified copy of the decision of the Panel or the order of the Specialist Prosecutor;*
 - (b) *inform the person of his or her rights under Rule 42 or Rule 43, as applicable;*
 - (c) *ensure the presence of counsel, unless the person waives this right or counsel's presence cannot reasonably be awaited; and*
 - (d) *ensure the presence of an independent observer for the purpose of witnessing the execution of the search and seizure.*
- (2) *A search and seizure may be executed in the absence of the person concerned if that person cannot be found or refuses to attend the execution of the search, and if the delay in executing the search and seizure would jeopardise the investigation or the safety or property of a witness, victim or other persons at*

²⁹ Judgment of 26 April 2017, paras 90-95.

risk. Paragraph (1)(c), where practicable, and (d) shall apply. The person concerned shall be informed of the execution of the search and seizure as soon as he or she has been located.

- (3) During the execution of a search and seizure, care shall be taken to avoid unnecessary damage to property.*
- (4) The Specialist Prosecutor shall record the time, duration, scope and all other relevant details of the search and seizure. Where the Panel has imposed additional conditions on the execution of the search and seizure, the implementation of such conditions shall also be recorded. The Specialist Prosecutor shall prepare an inventory with a detailed description of and information regarding each item seized. The Specialist Prosecutor, the independent observer, the person concerned and his or her counsel, if present, shall sign the inventory and may comment in writing on the execution of the search and seizure. A refusal to sign by the person concerned and the reasons therefor shall be recorded.*
- (5) The Specialist Prosecutor shall retain and preserve the seized items in accordance with Rule 32.*

79. At the outset, the Court observes that Rule 39 clearly specifies that it governs both search and seizure operations conducted with prior judicial authorisation and those conducted without it. It also specifies with the requisite degree of precision the procedures to be followed in the execution of search and seizure operations. The Court is, therefore, satisfied that the Plenary has addressed the findings made in the Judgment of 26 April 2017.

80. That said, the Court considers that certain observations on Rule 39 are apposite. In particular, the Court observes that Rule 39(2) defines the circumstances in which the Specialist Prosecutor may depart from some of the procedural steps which he or she is obliged to follow in executing searches and seizures under paragraph (1). Under Rule 39(1)(a) the Specialist Prosecutor must, prior to operation, provide the person concerned with a certified copy of the decision of the Panel or the order of the Specialist Prosecutor. The Rules recognise that such a measure is not possible, however, if the person concerned is not present and, in such circumstances, the provisions of Rule 39(2) shall apply.

81. Where the person is absent, the Specialist Prosecutor is obliged, under Rule 39(2), to ensure the presence of counsel, where practicable, and of an independent observer. The Court recognises that the presence of an independent observer is a safeguard against abuse and arbitrariness, especially, in cases, such as, those involving the search of a lawyer's office.³⁰ The Court considers that, in exceptional circumstances, the Specialist

³⁰ See *Lindstrand Partners Advokatbyrå AB v. Sweden*, no. 18700/09, 20 December 2016, para. 95, with further references.

Prosecutor may need to proceed with a search notwithstanding the delayed arrival of an independent observer. Such a factor may not necessarily be decisive in assessing whether a person's constitutional right to privacy has been violated. Such an assessment will depend upon the circumstances of a particular case.

82. 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 Rule 39 is not inconsistent with Chapter II of the Constitution.

Remote interceptions and searches

83. In the context of investigative measures and, more particularly, the carrying out of searches of property belonging to a suspect, the Court observes that the Rules do not provide, expressly, for remote searches of computerised devices with the aim of searching them for the purpose of obtaining relevant evidence or copying data. Increasingly, investigating authorities deem such remote searches of suspects' devices to be an important and necessary investigative tool in efforts to combat serious and complex crimes as it allows them to look for and obtain evidence that may not otherwise be accessible. Such remote searches are to be distinguished from a more routine search of a suspect's computer's hard drive or mobile device following its physical seizure. They can also be distinguished from covert interception of communications passing by way of computer. For example, remote searches may involve, with the appropriate software, the input of a key word in order to locate evidence that may be relevant to the investigation of a suspect.
84. In some instances, remote searches can provide investigative authorities with access to all data held on an individual's device together with information flowing to and from that device. This type of investigative search is likely to enable the authorities to collect significantly greater quantities of data, much of which may be highly personal or of a sensitive nature. It has the potential for increased levels of invasiveness when compared to traditional covert activities, such as, wiretapping. Consequently, remote access searches may pose particular challenges insofar as the right to privacy is concerned.
85. In the event of an application by the Specialist Prosecutor for an order permitting a remote online search, the Rules contain a number of provisions that oblige the Panel to balance the interests at stake. Rule 31, for example, requires the Panel to assess the necessity and proportionality of an interference. In several rules minimum safeguards are provided in the area of technical infiltration. Rules 34 and 35, on special investigative measures, specify the nature of offences which may give rise to such an order, the categories of persons in respect of whom such a measure may be applied, a

limit on the duration of the measure and the obligation to notify the subject thereof.

86. Notwithstanding such existing safeguards, remote access is a highly intrusive measure which calls for stricter conditions in order to ensure that the resulting interference remains within the confines of what is constitutionally permissible. These may include specific procedures for data related to a core area of private life, a narrowing of the categories of offences that may give rise to such an order and a shorter duration permitted for the taking of such a measure. Other safeguards might include a requirement that any changes to the targeted information technology system be automatically reversed as far as technically feasible, that a device's security level is not reduced and that key information related to the technical means used is recorded and logged.
87. In connection with higher standards required in the area of technical infiltration, the Court notes that the strict condition set out in Rule 37(1) on search and seizure operations – that the search may be carried out where evidence 'may not be otherwise obtained' and 'appears to be the only effective means for the purposes of the investigation' – would be an appropriate standard for remote searches. At the same time, the obligation placed on the Specialist Prosecutor under Rule 39(1)(a) to provide, prior to search, the person concerned with a certified copy of the decision thereof would require reconsideration so as to avoiding frustrating the very purpose of a remote search.
88. In that light and in order to enable the Specialist Prosecutor to resort to remote searches in the course of his or her investigations, the Plenary may wish to give further consideration to such measures while ensuring that any amendments to the Rules are articulated with a view to striking a balance between, on the one hand, the significant benefits to be gained by the use of remote access tools in terms of investigative efficiency and, on the other, their heightened interference with the right to privacy.
89. Notwithstanding the foregoing, the Court finds that Rule 39, on its face, is not inconsistent with Chapter II of the Constitution.

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

Rule 41 Collection of Bodily Material for Expert Examinations

The Court notes that the collection of bodily material for expert examinations was governed under former Rule 38(1). In its Judgment of 26 April 2017, the Court found that Rule 38(1) was inconsistent with Articles 55.2 and 55.4 of the Constitution, since that provision lacked adequate safeguards for the conduct

of non-consensual expert examinations.³¹ The Plenary has adopted Rule 41 to give effect to those findings. This provision states as follows:

- (1) *The collection of hair, saliva, blood samples, body tissue or other similar material, which cannot be undertaken without physical contact with or bodily intrusion on the person concerned, may be carried out where the person gives his or her voluntary and written consent, having consulted or having knowingly waived consultation with his or her counsel.*
- (2) *In the absence of such consent, a measure under paragraph (1) may be authorised by a Panel in respect of a person:*
 - (a) *where there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; or*
 - (b) *insofar as establishing the truth involves ascertaining whether his or her body shows a particular trace or consequence of a crime within the jurisdiction of the Specialist Chambers.*
- (3) *In rendering its decision, having heard the person, as necessary, the Panel shall take into consideration, inter alia:*
 - (a) *the nature and gravity of the crime;*
 - (b) *whether any alternative measures for obtaining the material sought are available;*
 - (c) *the procedure to be followed in conducting the expert examination; and*
 - (d) *the effect on the person's health.*
- (4) *Blood samples, body tissue or other similar material may only be collected by a qualified medical professional.*
- (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.*

91. By way of preliminary observation, the Court notes that the Specialist Prosecutor's powers to collect bodily material for expert examinations have been delimited considerably. In particular, paragraph (2) provides only two categories of persons in respect of whom the Panel may authorise the collection of bodily material in circumstances where the subject concerned refuses to give his or her consent. One category is a suspect and the other is a person on whose body there could be a trace or consequence of a crime. These categories are, particularly, narrow and may impact upon the Specialist Prosecutor in the performance of his or her obligation to conduct effective investigation. For example, there could be a need for the Specialist Prosecutor to examine the bodily material of a witness or any other person who was present at the scene of a crime. In that connection, the Court remarks that the purpose of the Judgment of 26 April 2017 was not to restrict the possibility for

³¹ Judgment of 26 April 2017, para. 106.

the Specialist Prosecutor to carry out investigations, but to show that there was absence in the Rules of sufficient safeguards where the person concerned refused his or her consent for the collection of bodily material. The Plenary, therefore, may wish to consider extending the categories of persons in paragraph (2).

92. As regards the lack of sufficient safeguards noted by the Court in its Judgment of 26 April 2017, the Court observes that, in case where the person concerned refuses his or her consent, Rule 41(2) requires the Panel's authorisation for the collection of the person's bodily material. The Court also notes that Rule 41(3) requires the Panel to assess the specific circumstance of each particular case. In that light, the Court is satisfied that the Plenary has addressed the findings made in the Judgment of 26 April 2017.
93. The Court concludes that, 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, Rule 41 is not inconsistent with Chapter II of the Constitution.

CHAPTER 4 SUMMONSES, ARREST AND DETENTION

94. Section III: Detention

Rule 57(4) Review and Reconsideration of Detention on Remand

In its Judgment of 26 April 2017, the Court found that former Rule 54(4) was not consistent with Article 29 of the Constitution on the right to liberty and security. The Court found that the plain meaning of the text of that provision made the release of a detained person entirely dependent upon the consent of the Third State even where the person's release was required.³² The Plenary has adopted Rule 57(4) to give effect to that finding. It reads as follows:

(4) ... The Panel shall hear a Third State if the detained person seeks to be released on its territory. A detained person shall not be released in the Third State 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.

95. While the Court is satisfied that the Plenary has addressed its findings, it notes that the new provision allows for detention of a person for up to three days, after the Panel has taken a decision to release him or her. This may appear excessive.³³ Whilst some delay in carrying out a decision to release a person is

³² Judgment of 26 April 2017, paras 118-123.

³³ For example, in the case of *Labita v. Italy*, the applicant complained about his detention for twelve hours after acquittal. Having noted that the applicant's continued detention had not amounted to a first step in the execution of the order for his release, the ECtHR found a

often inevitable, it must be kept to a minimum.³⁴ However, the Court recognises that, in the circumstances envisaged in Rule 57(4), the delay in releasing a person may not be attributable to the Specialist Chambers, but may result from the person's own request to be released in a Third State.

96. The Court concludes that Rule 57(4) is not inconsistent with Chapter II of the Constitution.

CHAPTER 9 TRIAL PROCEEDINGS

97. Section III: Evidence

Sub-Section 1: Admissibility and Assessment of Evidence

Rule 137 General Provisions

In its Judgment of 26 April 2017, the Court held that it was not in a position to find that former Rule 134(3) complied with Chapter II of the Constitution for the reasons set out therein.³⁵ The Court notes that the Plenary has deleted that provision. The Court finds that Rule 137 (formerly Rule 134) is not inconsistent with Chapter II of the Constitution.

98. Section IV: Trial Judgment

Rule 161 Status of the Acquitted Person

In the Judgment of 26 April 2017, the Court found that former Rule 158(2) was not consistent with Articles 29.1 and 29.2 of the Constitution on the right to liberty and security. In particular, it held that continued detention of an acquitted person pending the determination of an appeal against his or her acquittal, in the absence of reasonable suspicion of his or her having committed a separate criminal act, was not foreseen by law and did not fall within one of the permissible grounds justifying deprivation of liberty.³⁶

99. The Court notes that Rule 161 (formerly Rule 158) provides that, where the detained person is acquitted, he or she shall immediately be released, unless he or she is either lawfully detained or serving a sentence in relation to other crimes. The Court concludes that Rule 161 is not inconsistent with Chapter II of the Constitution.

violation of Article 5(1) of the Convention. See *Labita v. Italy* [GC], no. 26772/95, ECHR 2000-IV, paras 166, 172-174.

³⁴ *Giulia Manzoni v. Italy*, 1 July 1997, Reports of Judgments and Decisions 1997-IV, para. 25.

³⁵ Judgment of 26 April 2017, paras 190-193.

³⁶ Judgment of 26 April 2017, paras 194-205.

PART III – CONCLUSION

100. In conclusion, the Court determines that Rules 19, 30 to 39, 41, 57, 137 and 161 are not inconsistent with Chapter II of the Constitution.

101. Having completed its review of all provisions of the Rules, the Court is satisfied that the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, as adopted by the Plenary on 17 March 2017 and revised by the Plenary on 29 May 2017, comply with Chapter II of the Constitution.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* that the Referral is admissible;
2. *Holds* that Rules 19, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 57, 137 and 161 are not inconsistent with Chapter II of the Constitution;
3. *Holds* that the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers comply with Chapter II of the Constitution.

Done in English and notified, in writing, on 28 June 2017, at The Hague, the Netherlands.



Judge Ann Power-Forde
Presiding



Judge Roland Dekkers



Judge Antonio Balsamo