

**ANNEX I to**

**REFERRAL**

**of Revised Rules of the Rules of Procedure and Evidence  
to the Specialist Chamber of the Constitutional Court**

**CONFIDENTIAL**

**Rule 19****Absence of a Judge**

- (1) [unchanged]
- (2) [unchanged]
- (3) Where a Judge is permanently unable to continue sitting in a case, the President shall assign the Reserve Judge or, where appropriate, another Judge to continue hearing the case.
- (4) Where a Judge is absent from hearings in a part-heard case, the Panel or the remaining Judges, as applicable, shall adjourn proceedings for a period not exceeding thirty (30) consecutive working days. If the Judge remains unable to sit following the adjournment, paragraph (3) shall apply. 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.
- (5) [unchanged]

**Rule 19**

**Focus and content:** paragraphs (1) and (2) remain unchanged. Initial paragraph (3) has been deleted. The subsequent two paragraphs (initial (4) and (5), as renumbered (3) and (4)) have been amended to reflect the change. Initial paragraph (6) (as renumber (5)) remains unchanged.

**Findings addressed:** the amendment specifically addresses the findings of the Constitutional Court Panel in relation to the lawfulness of a two-Judge Panel (para. 40).

## Chapter 3 Investigation

### *Section I: Investigative Measures*

#### *Sub-Section 1: General*

#### Sub-Section 1

**Focus and content:** Rule 30 was elaborated as explained below. Three new Rules (31-33) were added to address the findings of the Constitutional Court Panel. The three new Rules are in Sub-Section 1 (General) so as to clarify that they apply to any measures undertaken under Sub-Sections 2, 3 and 4.

#### Rule 30

##### General Provision

- (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;
  - (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 Rules 34 to 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 30

**Focus and content:** paragraphs (1)(b), (d) and (2) have been amended to reflect the work to be undertaken by the Specialist Prosecutor and in particular the limits thereof, as regulated in the subsequent Rules when investigative activities of the Specialist Prosecutor may infringe upon fundamental human rights. Initial paragraph (3) was removed as its rationale has now been reflected in new Rule 31.

**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 Rules 34 to 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 Rules 34 to 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.

**Rule 31 (new)**

**Focus:** Rule 31 was added to set out the general minimum safeguards applicable for measures under Sub-Sections 2, 3 and 4 dealing with: special investigative measures (Rules 34-36), search and seizure (Rule 37-39), exhumation (Rule 40) and collection of bodily material (Rule 41).

**Content:** Paragraph (1) sets out that such measures shall only be undertaken pursuant to an authorisation by the Panel or directly by the Specialist Prosecutor, where the conditions apply. The same paragraph then puts forward the general conditions that need to be met regardless of whether the measures are authorised by a Panel or undertaken by the Specialist Prosecutor without prior authorisation. Rule 31 also establishes a general requirement of reporting on the implementation of the measures and collected or seized material to the Panel, if it so decides (para. (2)). It also puts forward a safeguard for privileged material (para. (3)). Paragraph (4) is a broad provision, allowing the Panel to impose any other safeguards as necessary, considering the specificities of the case at hand.

**Findings addressed:** Rule 31 specifically addresses the findings of the Constitutional Court Panel in relation to the applicable standards: accessibility and foreseeability of the law, necessity, proportionality, measure not denying the essence of the guaranteed right (paras 60-64) and other safeguards as may be applicable (paras 71, 74). Rule 31 also draws upon the case-law of the European Court of Human Rights in relation to Article 8.

**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 Rules 34 to 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 32 (new)**

**Focus:** Rule 32 was added to put forward the general requirements for the storage, retention and protection of material collected or seized in the implementation of investigative measures pursuant to Rules 34-41, namely: special investigative measures (Rules 34-36), search and seizure (Rule 37-39), exhumation (Rule 40) and collection of bodily material (Rule 41).

**Content:** Rule 32 requires that any decision of a Panel authorising measures under Rules 34 to 41 (whether there is prior authorisation or subsequent approval of the measures) shall provide specific procedures and precautions in relation to storage, retention, transfer and protection of collected or seized material as well as instructions on the duration of the retention (para. (1)). Rule 32 also provides for a framework for cooperation related to collected or seized material (para. (2)).

**Findings addressed:** Rule 32 addresses the findings of the Constitutional Court Panel in relation to the storage and retention of such material (paras 66, 73).

**Rule 33****Return or Destruction of Material Collected or Seized Pursuant to Rules 34 to 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 Rules 36 or 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 Rules 34 to 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.

#### Rule 33 (new)

**Focus:** Rule 33 was added to put forward the general requirements for the return or destruction of material collected or seized in the implementation of the investigative measures pursuant to Rules 34-41, namely: special investigative measures (Rules 34-36), search and seizure (Rule 37-39), exhumation (Rule 40) and collection of bodily material (Rule 41).

**Content:** Rule 33 provides three main options as regards the moment of the destruction and return of the collected or seized material, depending on the specific circumstances (para. (1)). Paragraph (2) clarifies that whereas collected or seized material can be returned by the Specialist Prosecutor *proprio motu* or upon decision by a Panel, material can only be destroyed if so authorised by the Panel. Paragraph (3) provides a safeguard to any concerned person in respect of a planned destruction or return of relevant material, in addition to other safeguards already provided by the Law or the Rules (Article 49(3) of the Law; Rule 29).

**Findings addressed:** Rule 33 specifically addresses the findings of the Constitutional Court Panel in relation to the lack of provisions regarding the duration of the retention and the destruction of collected or seized material (paras 66, 73, 105). Rule 33 also draws upon the case-law of the European Court of Human Rights in relation to Article 8.

*Sub-Section 2: Special Investigative Measures***Rule 34 (formerly Rule 31)****Conditions for Undertaking Special Investigative Measures**

- (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 Rules 34 to 36 as long as the objective of the measure or the conduct of proceedings are not likely to be jeopardised.

**Rule 34 (formerly Rule 31)**

**Focus: Rule 34 (formerly Rule 31) puts forward the specific requirements for special investigative measures (to be applied together with Rules 31-33).**

**Content: Paragraph (1) provides a list of specific crimes in respect of which special investigative measures may be undertaken. In selecting these crimes, the specific context and environment in which the Specialist Chambers operate was taken into consideration. In revising Rule 34(1), special attention was paid to the potential threats that persons interacting with the Specialist Chambers might face and which may result in serious harm to persons or may substantially obstruct proceedings. Further consideration was given to the likelihood of special investigative measures being efficiently used to uncover, investigate and prosecute the commission of such crimes that might obstruct the mandate of the Specialist Chambers. The crimes listed in revised Rule 34(1) were selected accordingly. Paragraph (2) lists the categories of persons in respect of whom special investigative measures may be undertaken. Paragraph (3) was added to impose an obligation upon the Specialist Prosecutor to notify persons in respect of whom such measures were undertaken.**

**Findings addressed:** Rule 34 specifically addresses the findings of the Constitutional Court Panel in relation to the lack of provisions regarding the nature of offences (para. 69), the categories of persons (para. 70) and the notification of concerned persons (para. 73) in respect of special investigative measures. Rule 34 also draws upon the case-law of the European Court of Human Rights in relation to the obligation of notification.

### Rule 35 (formerly Rule 32)

#### 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 Rules 31(1) and 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;
  - (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 Rules 31(1) and 34(1) 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 35 (formerly Rule 32)

**Focus:** Rule 35 (formerly Rule 32) puts forward the specific conditions to be met when a Panel authorises special investigative measures (to be applied together with Rules 31-33 and 34).

**Content:** Rule 35 was amended so that it regulates only conditions specific to special investigative measures (hence, a part of former paragraph (2) was moved in new Rule 32, and thus it applies to all measures in Sub-Sections 2, 3 and 4). Further, paragraph (2)(b) establishes compulsory reporting to the Panel on the implementation of the measures and collected



material. Paragraphs (2)(a), (3) and (4) of Rule 35 set out a system of three levels, through which special investigative measures may be put in place and extended. The first level (paragraph 2(a)) sets an initial time-frame of utmost sixty days; the second level (paragraph (3)) permits the extension of such measures up to twelve months, but only where the objective of the measure, despite due diligence, has not been achieved, and the applicable requirements are still met; the third level (paragraph (4)) sets the possibility for an exceptional further extension, but only as determined by stringent circumstances reflected in para. 72 of the decision of the Constitutional Court Panel. In addition, at this level of extension, a periodic review of no later than every sixty days is compulsory with a view to terminate the measures where the requirements are no longer met and the respect for human rights so requires.

**Findings addressed:** Rule 35 specifically addresses the findings of the Constitutional Court Panel in relation to the duration and extension of special investigative measures (para. 72). Rule 35 also draws upon the case-law of the European Court of Human Rights in relation to the duration and extension of such measures.

### Rule 36 (formerly Rule 33)

#### Special Investigative Measures Ordered by the Specialist Prosecutor

- (1) The Specialist Prosecutor may order special investigative measures without the authorisation of a Panel where the requirements under Rules 31(1) and 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.

#### Rule 36 (formerly Rule 33)

**Focus:** Rule 36 (formerly Rule 33) was amended to clearly delimit the scenarios where the Specialist Prosecutor may undertake special investigative measures without prior authorisation of the Panel (to be applied together with Rules 31-33 and 34).

**Content:** Rule 36 now sets both the timeline for the Specialist Prosecutor to request authorisation (para. (2)) and the time for the Panel to render its decision (para. (3)). Paragraph (4) serves as a safeguard in situations where the undertaken measure is not approved by the Panel. The Rule

indicates that both the general minimum safeguards (Rule 31) and the specific requirements (Rule 34) have to be met.

Findings addressed: Rule 36 addresses the findings of the Constitutional Court Panel expressed in paras 60-75.

### *Sub-Section 3: Searches and Seizures*

#### **Rule 37 (formerly Rule 34)**

##### **Search and Seizure Authorised by a Panel**

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

### Rule 37 (formerly Rule 34)

**Focus:** Rule 37 (formerly Rule 34) sets out the specific requirements for search and seizure when authorised by a Panel (to be applied together with Rules 31-33).

**Content:** Rule 37 was amended to include a heightened test to be applied as regards the necessity of search and seizure (the only effective means; para. (1)), the categories of persons or locations (paras (2) and (3)) in respect of which search and seizure may be undertaken as well as the instructions the Panel must provide when authorising such a measure (para. (4)). The Rule also provides for a general safeguard clause in paragraph (5) which allows the Panel to impose other conditions as the specific circumstances may require.

**Findings addressed:** Rule 37 specifically addresses the findings of the Constitutional Court Panel in relation to the lack of provisions regarding the categories of persons (para. 81) and the necessity test (para. 82).

### Rule 38 (formerly 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 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.
- (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.

### Rule 38 (formerly Rule 35)

**Focus:** Rule 38 (formerly Rule 35) puts forward the specific requirements for search and seizure when undertaken by the Specialist Prosecutor without prior authorization by a Panel (to be applied together with Rules 31-33 and 37(1)-(3)).

**Content:** Rule 38 was amended to delimit the scenarios where the Specialist Prosecutor may undertake search and seizure without prior authorisation of the Panel. Paragraph (1) incorporates the requirements of Rule 37(1)-(3) in addition to the specific requirements of this Rule. The Rule now regulates both the timeline for the Specialist Prosecutor to request authorisation (para. (2)) and the time for the Panel to render its decision (para. (3)). Paragraph (4) serves as a safeguard in situations where the undertaken measure is, in one way or another, not approved by the Panel.

**Findings addressed:** Rule 38 specifically addresses the findings of the Constitutional Court Panel as regards the limits of the Specialist Prosecutor's authority to undertake search and seizure without prior authorization (para. 85), the scenarios in which such measures could be undertaken (para. 86) and the assessment of the necessity (and proportionality) of the measures (para. 87).

### Rule 39 (formerly Rule 36)

#### Execution of Search and Seizure

- (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 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) <sup>1</sup>The Specialist Prosecutor shall record the time, duration, scope and all other relevant details of the search and seizure. <sup>2</sup>Where the Panel has imposed additional conditions on the execution of the search and seizure, the implementation of such conditions shall also be recorded. <sup>3</sup>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.

#### Rule 39 (formerly Rule 36)

**Focus:** Rule 39 (formerly Rule 36) puts forward the requirements for the execution of search and seizure (to be applied together with Rules 31-33 and Rule 37 or Rule 38, as applicable).

**Content:** Rule 39 was amended to indicate its applicability for both Rule 37 (formerly Rule 34) and Rule 38 (formerly Rule 35). In addition, this Rule now regulates in detail the execution of search and seizure both in the presence (para. (1)) and in the absence (para. (2)) of the person concerned. Rule 39 also requires the presence (para. (1)(d)) and describes the role (para. (4)) of an independent observer regardless of whether the person concerned is present or not. Paragraphs (3) to (5) regulate in more detail the execution of search and seizure.

**Findings addressed:** Rule 39 specifically addresses the findings of the Constitutional Court Panel in relation to the applicability of this Rule (paras 91, 93) and the right of the concerned person to be informed of his or her rights (para. 92). Rule 39 also draws upon relevant case-law of the European Court of Human Rights as regards execution of search and seizure.

#### *Sub-Section 4: Other Measures*

#### **Rule 40 (formerly Rule 37)**

##### **Exhumations and Post-Mortem Examinations**

[unchanged]

#### **Rule 41 (formerly Rule 38)**

##### **Collection of Bodily Material for Expert Examinations**

- (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.

#### Rule 41 (formerly Rule 38)

**Focus:** Rule 41 (formerly Rule 38) regulates the collection of bodily material with physical contact or bodily intrusion (to be applied together with Rules 31-33).

**Content:** Rule 41 was amended to indicate its scope, i.e. the collection of bodily material with physical contact or bodily intrusion (para. (1)), to include the categories of persons in respect of whom such measures can be undertaken in the absence of consent (para. (2)) and to put forward a set of factors which the Panel has to take into consideration in its judicial scrutiny before authorizing such measures (para. (3)). Rule 41 also provides safeguards as regards the collection of certain samples (para. (4)) and the use of the collected material (para. (5)). As said above, Rule 33 regarding the destruction or return of collected material also applies in this case.

**Findings addressed:** Rule 41 specifically addresses the findings of the Constitutional Court Panel in relation to the difference between collection of material with and without bodily intrusion (para. 98), the lack of authorization for bodily intrusive collections (para. 99), judicial scrutiny (para. 103) and the duration of the retention of such materials (para 105).

**Rule 57 (formerly Rule 54)**  
**Review and Reconsideration of Detention on Remand**

- (1) [unchanged]
- (2) [unchanged]
- (3) [unchanged]
- (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 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.

<b>Rule 57 (formerly Rule 54)</b>
<p><b><u>Focus and content:</u></b> Paragraph (4) of Rule 57 (formerly Rule 54) was amended to clarify that the release of a detained person is not subject to an agreement of a Third State; such agreement is only necessary for the release of that person on the territory of the State concerned.</p> <p><b><u>Findings addressed:</u></b> Rule 57 specifically addresses the findings of the Constitutional Court Panel in relation to the wording of this paragraph (paras 120-121).</p>

**Rule 137 (formerly Rule 134)**  
**General Provisions**

- (1) [unchanged]
- (2) [unchanged]
- [(3) deleted]

<b>Rule 137 (formerly Rule 134)</b>
<p><b><u>Focus and content:</u></b> paragraph (3) of Rule 137 (formerly Rule 134) was deleted as it was found that in addition to the concern expressed by the Constitutional Court Panel, it did not contribute substantially to the RPE.</p> <p><b><u>Findings addressed:</u></b> the deletion addresses the findings of the Constitutional Court Panel in relation to the clarity of this provision (paras 191-193).</p>

**Rule 161 (formerly Rule 158)****Status of the Acquitted Person**

Where a detained Accused is acquitted, he or she shall immediately be released, unless he or she is lawfully detained or serving a sentence, in relation to crimes other than those for which he or she was acquitted. Release shall take place in accordance with Article 41(11) of the Law.

[(2) deleted]

[(3) deleted]

<b>Rule 161 (formerly Rule 158)</b>
<p><b>Focus and content:</b> Paragraph (1) of Rule 161 (formerly Rule 158) was amended to reflect that an acquitted person shall be released unless he or she is lawfully detained or serving a sentence in another proceeding of the Specialist Chambers or another jurisdiction – a scenario also reflected in para. 201 of the decision of the Constitutional Court Panel (“unless an accused is suspected of or charged with having committed some other offence which was not tried at trial”).</p> <p><b>Findings addressed:</b> paragraph (1) was amended to conform with the Constitutional Court Panel’s findings (para. 201). Paragraphs (2) and (3) of Rule 161 were deleted to address the findings of the Constitutional Court Panel in relation to the legal basis for continued detention of an acquitted person (paras 204-205).</p>