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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2023-12**
	The Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi
Before:	**Single Trial Judge**
	Judge Christopher Gosnell
Registrar:	Fidelma Donlon
Date:	27 March 2026
Language:	English
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Public Redacted Version of Decision on the Admission of Expert Evidence of Witness 8

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THE SINGLE TRIAL JUDGE, pursuant to Rules 137(2), 138 and 149 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers,[1] hereby issues this decision.

I. PROCEDURAL BACKGROUND

1. On 1 December 2025, the Defence for Hashim Thaçi ("Mr Thaçi") ("Thaçi Defence"), the Defence for Bashkim Smakaj ("Mr Smakaj") ("Smakaj Defence") and the Defence for Isni Kilaj ("Mr Kilaj") ("Kilaj Defence") (collectively, "the Defence") gave notice pursuant to Rule 149(2) that they challenge Specialist Prosecutor's Office ("SPO") witness Koen Herlaar's ("Mr Herlaar", also referred to as Witness 8 in the proceedings) qualifications as an expert, do not accept his report, and request his cross-examination.[2]

2. On 15 December 2025, the SPO requested the admission of Mr Herlaar's expert report dated 14 December 2023 ("Report")[3] and certain associated materials,[4] pursuant to Rules 138 and 149.[5] It also responded to the Rule 149 Notification.

3. On 5 January 2026, the Defence responded, arguing that the Single Trial Judge should defer his decision on the qualification of Mr Herlaar as an expert and on the admission of his Report until after his examination in court, and requested the

[1] All references to "Article" and "Rule" shall be understood, unless otherwise indicated, as referring to the Law and Rules.
[2] KSC-BC-2023-12, F00586, Thaçi Defence, Smakaj Defence and Kilaj Defence, *Joint Defence Notification Pursuant to Rule 149* ("Rule 149 Notification"), 1 December 2026, public, para. 1(a)-(c).
[3] 118299-118304.
[4] 127822-127830 RED, SPOE00408800-00408801 RED, SPOE00408800-SPOE00408801-ET, SPOE00408802-00408803 RED, SPOE00408802-SPOE00408803-ET, SPOE00408849-00408850 RED, SPOE00408849-SPOE00408850-ET, 119225-119225 RED, 119227-119227 RED and 119228-119228 RED (collectively, "Associated Materials").
[5] KSC-BC-2023-12, F00620, SPO, *Prosecution Response to Filing F00586 and Motion for Admission of Evidence of Witness 8* ("SPO Witness 8 Motion"), 15 December 2025, confidential, with Annex 1, confidential; a public redacted version was filed on 7 January 2026, F00620/RED.

opportunity to make further submissions on the admissibility of Mr Herlaar's evidence after his testimony had been heard.[6]

4. On 26 January 2026, the Single Trial Judge issued his "Interim Decision on Prosecution Motion for Admission of Evidence of Witness 8" ("Interim Decision"), deferring his decision on Mr Herlaar's qualifications as an expert and the admissibility of the Report and Associated Materials until after his testimony.[7] A calendar for post-testimony submissions was also set, with the Defence required to file its submissions two days after the conclusion of Mr Herlaar's testimony, and the SPO within two days thereafter.[8]

5. Mr Herlaar testified from 3 to 4 March 2026.[9]

6. On 4 March 2026, the Single Trial Judge granted an oral request varying the deadline for post-testimony submissions.[10] The Thaçi Defence filed individual submissions[11] and the Smakaj Defence and Kilaj Defence filed joint submissions[12] on 10 March 2026, which were also expressly "adopt[ed] and endorse[d]" by the Thaçi Defence.[13] The SPO responded on 16 March 2026.[14]

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[6] KSC-BC-2023-12, F00648, Thaçi Defence, Smakaj Defence and Kilaj Defence, *Joint Defence Response to Prosecution Motion for Admission of Evidence of Witness 8 (F00620)*, 5 January 2026, public, para. 7.
[7] KSC-BC-2023-12, F00691, Single Trial Judge, *Interim Decision on Prosecution Motion for Admission of Evidence of Witness 8* ("Interim Decision"), 26 January 2026, public, paras 10-11, 14(a).
[8] Interim Decision, paras 11 and 14(b).
[9] Transcript of Hearing, 3 March 2026, p. 490, line 13, to p. 599, line 7 ("3 March Transcript"); Transcript of Hearing, 4 March 2026, p. 602, line 6, to p. 656, line 14 ("4 March Transcript").
[10] 4 March Transcript, p. 660, line 4, to p. 660, line 13.
[11] KSC-BC-2023-12, F00784, Thaçi Defence, *Thaçi Defence Submissions Relating to Witness 8* ("Thaçi Submissions"), 10 March 2026, confidential; a corrected version was filed on 11 March 2026, F00784/COR and a public redacted version was filed on 16 March 2026, F00784/COR/RED.
[12] KSC-BC-2023-12, F00785, Smakaj Defence and Kilaj Defence, *Joint Kilaj and Smakaj Defence Supplementary Submissions Relating to Witness 8* ("Smakaj and Kilaj Submissions"), 10 March 2026, confidential, with Annex A, confidential.
[13] Thaçi Submissions, para. 2.
[14] KSC-BC-2023-12, F00796, Specialist Prosecutor, *Prosecution Response to Defence Submissions F00784 and F00785* ("SPO Submissions"), 16 March 2026, confidential.

7. Also on 16 March 2026, the Kilaj and Smakaj Defence requested a *post facto* extension of the word limit for their submissions by 538 words.[15]

II. SUBMISSIONS

A. SPO'S PRE-TESTIMONY SUBMISSIONS

8. The SPO submitted prior to Mr Herlaar's testimony that he is an expert in the field of "Striations, impressions and shape analysis" ("SISA").[16] His Report is said to be relevant as it claims to establish that two documents, one purportedly seized from Mr Smakaj and the other from Mr Kilaj, had been printed on the only printer available to Mr Thaçi in the Detention Centre.[17] The Report is also said to be "*prima facie* authentic and reliable, bearing sufficient indicia of reliability."[18] The SPO argued that the probative value of the Report is not outweighed by any prejudice, since "Witness 8 will be available for cross-examination" and that the SPO intended to "elicit oral testimony on essential matters, including to supplement, clarify or explain certain aspects" of the Report and "address issues not covered therein for 1.5 hours."[19]

9. The SPO also noted that the Report itself, as well as subsequent communications with Mr Herlaar and his employer, the Netherlands Forensic Institute ("NFI"), indicated that certain "restrictions limit what can be disclosed" concerning microdots, which is the basis for the analysis in the Report.[20] The SPO specifically asserted that:

> [T]he NFI's position is that (i) Witness 8's testimony regarding how he conducted the microdot analysis as set forth in the 14 December Report must occur in private session; and (ii) there are certain matters related to printer microdots more generally – which are

[15] KSC-BC-2023-12, F00793, Smakaj Defence and Kilaj Defence, *Joint Defence Request for Variation of Word Limit Regarding F00785* ("Smakaj and Kilaj Request"), 16 March 2026, confidential.
[16] SPO Witness 8 Motion, para. 3.
[17] SPO Witness 8 Motion, paras 4-5.
[18] SPO Witness 8 Motion, para. 10.
[19] SPO Witness 8 Motion, para. 12.
[20] SPO Witness 8 Motion, para. 14.

> irrelevant to the analysis he conducted in this case and which are not discussed in the 14 December Report – which Witness 8 would be [REDACTED] from providing information on pursuant to Article 58 and Rule 107. The SPO will, in its questioning of Witness 8, limit the scope of its questioning solely to the information relevant to the 14 December Report and Witness 8's conclusions therein, and thus will not seek to illicit [sic] from Witness 8 any facts regarding microdots which he is prohibited from answering in any forum.[21]

B. THE DEFENCE'S POST-TESTIMONY SUBMISSIONS

10. The Defence argues that the description in the Report of the methodology applied by Mr Herlaar is deficient and "amounts to little more than a bare conclusion, being entirely unsupported by any methodology or basis."[22] The "[REDACTED] comparison process followed by Witness 8 is entirely opaque" and "no [REDACTED] was ever produced, preventing the Parties and the [Single Trial Judge] from verifying the accuracy of the corresponding [REDACTED]",[23] as the Report cites no accessible or public source for the predicate assertion that [REDACTED].[24] The Defence concludes that the "techniques are not sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience to be admitted in a court of law."[25]

11. According to the Defence, these deficiencies were not remedied during Mr Herlaar's testimony, which merely "confirmed his conclusions", "without expanding further on the methodology."[26] In fact, he refused to answer numerous questions put to him by the Defence, including concerning the "origin and definition of microdot analysis"; "the methodology of [REDACTED]"; the "existence and nature of [REDACTED]"; the "distinction between [REDACTED]"; and the nature and scope of the [REDACTED]

[21] SPO Witness 8 Motion, para. 15.
[22] Kilaj and Smakaj Submission, para. 31.
[23] Kilaj and Smakaj Submissions, para. 50.
[24] Kilaj and Smakaj Submissions, para. 51; Thaçi Submissions, para. 35 ("[REDACTED].")
[25] Kilaj and Smakaj Submissions, para. 52.
[26] Kilaj and Smakaj Submissions, para. 32.

purportedly prohibiting Mr Herlaar from answering these questions.[27] These were said to be "matters of great relevance to the assessment of the Witness's evidence, qualification and knowledge".[28]

12. The Defence argues that these refusals violated fundamental fair trial rights, including the right to confront and cross-examine incriminating witnesses.[29] The "extraordinary nature, degree, and scope of the confidentiality claimed by the witness […] represented a wholly disproportionate interference with the Defence's right to cross-examine".[30] Mr Herlaar refused to provide "any clarification of the scope" of the [REDACTED], allowing him "to control the boundaries of his own examination and cross-examination by determining which questions fell within the scope of the relevant confidentiality arrangements" as he understood them.[31]

13. The Defence adds that the SPO also failed to provide the necessary legal justification for Mr Herlaar's refusals to answer questions, whether by making an application pursuant to Rule 107 or, alternatively, advising the NFI to make an application pursuant to Rule 211.[32] Either way, such an application was a necessary pre-condition for Mr Herlaar to refuse to answer questions.[33]

C. THE SPO'S POST-TESTIMONY SUBMISSIONS

14. The SPO reiterates that Mr Herlaar is qualified as an expert within the field of SISA, which it submits encompasses "microdot comparison performed in this case."[34] Mr Herlaar's reports on microdot analysis have been accepted in Dutch

[27] Kilaj and Smakaj Submissions, para. 33; Thaçi Submissions, para. 31 ("The Witness further asserted that the very scope and extent of this confidentiality is itself confidential.")
[28] Thaçi Submissions, para. 33.
[29] Kilaj and Smakaj Submissions, paras 13-21.
[30] Thaçi Submissions, para. 33.
[31] Thaçi Submissions, para. 24.
[32] Thaci Submissions, paras 37-38.
[33] Thaçi Submissions, paras 21-25, 28-30.
[34] SPO Submissions, paras 4-5, 7.

judicial proceedings "with the same confidentiality restrictions which arose during his testimony in this case."[35] The conclusion in the Report is based on "publicly available [REDACTED]" and was "separately validated through an independent peer-review by a fellow SISA expert at the NFI, who conducted the review without access to Witness 8's own conclusions."[36] Mr Herlaar, according to the SPO, "provided detailed explanations of his methodology".[37] The [REDACTED] on which Mr Herlaar performed his analysis have been disclosed to the Defence, which "had, and still have, every opportunity to procure their own microdot comparative examination."[38] The SPO claims that Mr Herlaar confirmed during his testimony that "a document examiner with the relevant expertise would be in a position to verify the results in the report".[39]

15. According to the SPO, Mr Herlaar's "forthcoming responses" to the Defence's questions "left no doubt as to his expertise, the reliability of his conclusions, or the admissibility of his evidence."[40] The cross-examination was conducted "in conformity with a ruling governing the conditions and manner of examination" and that "the Defence neither sought leave to appeal that ruling, nor at any point thereafter made any concrete request for the witness to be compelled to answer any specific question."[41] Any unanswered questions "primarily pertain to matters outside of the scope of [the Report] and are immaterial to the forensic examination" he performed.[42] In particular, the SPO asserts that most of the unanswered questions concerned: (i) the nature and scope of the [REDACTED] purportedly constraining Mr Herlaar's ability to answer questions; and (ii) "the possibility of [REDACTED]" – which is an

[35] SPO Submissions, para. 5.
[36] SPO Submissions, para. 7.
[37] SPO Submissions, para. 17.
[38] SPO Submissions para. 18.
[39] SPO Submissions, para. 18.
[40] SPO Submissions, para. 1.
[41] SPO Submissions, para. 2.
[42] SPO Submissions, para. 11.

"alternative means of conducting microdot analysis, through [REDACTED], that was not used in this case."[43] The SPO asserts that these matters are not a bar to the admission of Mr Herlaar's evidence "[g]iven their clear irrelevance to the expert work conducted in this case",[44] and that neither of these subjects impair an independent expert validation of the Report.[45]

16. The SPO claims that the Defence is seeking to "relitigate" the issue of whether Rule 107 or Rule 211 applications should have been made.[46] Such applications would, in any event, not "have improved neither the extent to which" Mr Herlaar could have discussed the matters, "nor judicial scrutiny of the reasons therefore" because, even if invoked, "Rule 107(3)-(4) provides that the Panel may neither compel the witness to answer questions relating to the information or its origin if the witness declines to answer on the grounds of confidentiality."[47] Furthermore, past Rule 107 litigation before the Court is not based on "more specific information about the scope or grounds of confidentiality."[48]

III. APPLICABLE LAW

17. Rule 149(4) provides that if a Party has challenged an opposing expert pursuant to Rule 149(2)(b) or (c), then a "Panel shall decide on the admissibility of the expert witness report following the testimony and questioning of the expert".

[43] SPO Submissions, paras 11-12.
[44] SPO Submissions, para. 14. *See also* SPO Submissions, para. 16 ("In making claims of prejudice, it is incumbent on the Defence to substantiate its position and explain how the Confidential Matters are relevant to, and directly impact upon, Witness 8's methodology and comparison conclusions. The Defence has failed to do so.")
[45] SPO Submissions, para. 18.
[46] SPO Submissions, para 20.
[47] SPO Submissions, para. 21.
[48] SPO Submissions, para. 22.

18. Rule 149 is *lex specialis* for the admission of expert reports,[49] but does not provide more detailed criteria of admissibility than those in Rule 138(1) itself, which requires that "[u]nless challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect."

19. Past jurisprudence has elaborated that the admission of an expert report requires that:

> (i) [T]he proposed witness is regarded as an expert; (ii) the expert statement or report meets the minimum standards of reliability, relevance and probative value, in accordance with Rule 138(1); and (iii) the content of the expert statement or report falls within the accepted expertise of the expert witness and is permissible.[50]

20. An expert within the meaning of Rule 149 has been defined as:

> "[A] person who by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute". The purpose of expert testimony is to supply specialised knowledge that might assist the trier of fact in understanding the evidence before it; an expert witness offers a view based on specialised knowledge regarding a technical, scientific or otherwise discrete set of ideas or concepts that is expected to fall outside the law person's ken.[51]

21. An expert witness "is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon *and of the*

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[49] KSC-BC-2020-06, F03305, Trial Panel II, *Decision on Victims' Counsel's Submissions of Expert Reports and Request to Admit Them into Evidence* ("Case 06 Decision on Expert Reports"), 3 July 2025, public, para. 40.

[50] KSC-BC-2020-07, F00470, Trial Panel II, *Decision on Prosecution Requests in Relation to Proposed Defence Witnesses*, 3 December 2021, public, para. 63; KSC-BC-2020-06, F03201, Trial Panel II, *Decision on the Admission of Expert Evidence of W04826* ("Case 06 Decision on W04826"), 27 May 2025, public, para. 23.

[51] Case 06 Decision on Expert Reports, para. 22. *See also* KSC-BC-2020-06, IA040/F00011, Court of Appeals Panel, *Decision on Joint Defence Consolidated Appeal against Decisions F03201, F03202, F03203, F03211 and F03213*, 8 October 2025, public, para. 35 ("[t]he Panel notes, however, that the definition of an expert witness has been uniformly recognised in the jurisprudence of international courts and tribunals as a person who is qualified by knowledge, skill, experience, training or education to provide a scientific, technical, or other specialised opinion about the evidence or a fact at issue, in order to assist the court in understanding the evidence before it.")

methods used when applying his or her knowledge, experience or skills to form his or her expert opinion".[52] This means that the:

> [S]ources *and methodology* used in support of any proposed expert opinion must be clearly indicated and accessible. If such transparency is lacking, this will seriously affect the parties' and the Chamber's possibility to test or challenge the factual basis and the methodology on which the expert witness reached his or her conclusions, and thereby affect the possibility to assess the probative value of the proposed expert report. The result might be non-admission or that only limited weight can be attached to the expert report.[53]

22. Whether deficiencies as to the transparency of sources or methodology so seriously impair the assessment of probative value as to lead to non-admission, or merely diminishes the weight of an expert opinion, is a matter of degree.[54] The threshold for admission is that the transparency as to sources and methods is sufficient "to allow the other party and/or the Trial Chamber to test or challenge the basis on which the expert witness reached his conclusions."[55] An important consideration in this regard is the degree to which any specific or overall conclusion

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[52] International Criminal Tribunal for the Former Yugoslavia ("ICTY"), *Prosecutor v. Milan Martić*, IT-95-11-T, Trial Chamber I, *Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 Bis (D) and of Expert Reports Pursuant to Rule 94 Bis*, 13 January 2006, para. 37 (emphasis added). *See also* ICTY, *Prosecutor v. Stanislav Galić*, IT-98-29-T, Trial Chamber, *Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps* ("*Galić* Decision"), 3 July 2002, p. 2 ("an expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon and of the methods used when applying his or her knowledge, experience or skills to form his or her expert opinion").

[53] ICTY, *Prosecutor v. Ante Gotovina et al*, IT-06-90-T, Trial Chamber I, *Decision on Disclosure of Expert Materials*, 27 August 2009, para. 10 (emphasis added); ICTY, *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-T, Trial Chamber II, *Decision on Admission of Expert Report of Ratko Škrbić* ("*Tolimir* Decision"), 22 March 2012, para. 37 (denying admission of an expert report based on, *inter alia*, "insufficient sources", and also apparent bias).

[54] ICTY, *Prosecutor v. Stanislav Galić*, IT-98-29-T, Trial Chamber, *Decision on the Expert Witness Statements Submitted by the Defence*, 27 January 2003, p. 5 (in determining the admissibility of an expert report prior to hearing the witness's testimony, holding that "while the sources and methodology used in these three expert witness statements may not be fully transparent yet, the Chamber considers that they meet the degree of transparency that is required at the stage of admission"); *Tolimir* Decision, para. 37 (denying admission of an expert report based on, *inter alia*, "insufficient sources", and also apparent bias).

[55] ICTY, *Prosecutor v. Rasim Delić*, IT-04-83-T, Trial Chamber I, *Decision on Paul Cornish's Status as An Expert* ("*Delić* Decision"), 20 March 2008, para. 14.

is based on unidentified sources, and whether it is also supported by other sources that are revealed. A motion to exclude selected portions of the expert testimony of Dr Alison Des Forges ("Dr Des Forges") before the International Criminal Tribunal for Rwanda ("ICTR") was refused, despite her refusal to identify certain human sources relied upon in her report without their consent, as her expert report and testimony were based on a "multitude of sources".[56] Even in respect of the topics where she had refused to identify a source, the Trial Chamber noted that her opinion was "not based solely on the unnamed sources".[57]

23. Deficiencies in an expert report "can be remedied when the witness appears to testify".[58] Indeed, Rule 149(4) of the Rules codifies the usual practice before the ICTY that the admissibility of an expert report should be determined only after having heard the witness's testimony in full.[59]

IV. DISCUSSION

A. EXTENSION OF WORD LIMIT

24. The Kilaj and Smakaj Defence request for an increase in the applicable word limit by 528 words is granted. The SPO apparently does not oppose the request, and the Smakaj and Kilaj Request is within the total applicable word limit if each Defence team had filed separately, as they were entitled to do.[60] Accordingly, the

[56] ICTR, *Prosecutor v. Casimir Bizimungu et al*, ICTR-99-50-T, Trial Chamber II, *Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges* ("*Bizimungu* Decision"), 2 September 2005, paras 2-3, 25.
[57] *Bizimungu* Decision, para. 24.
[58] Delić Decision, para. 14; ICTY, *Prosecutor v. Momčilo Perišić*, IT-04-81-T, Trial Chamber I, *Decision on Defence Motions to Exclude the Expert Reports of Mr. Patrick J. Treanor* ("*Perišić* Decision"), 27 October 2008, para. 23 (may be "cured by calling [the purported expert] for questioning by the Defence and, possibly, the Trial Chamber").
[59] *Perišić* Decision, para. 30 ("DEFERS the decision on the admissibility of the First Report until the conclusion of Mr. Treanor's testimony"); *Prosecutor v. Momčilo Perišić*, IT-04-81-T, Trial Chamber I, *Decision on Defence Motion to Exclude the Expert Report of Morten Torkildsen*, 30 October 2008, para. 19 ("DEFERS the decision on the admissibility of the Report until the conclusion of Mr. Torkildsen's testimony").
[60] Joint Request, para. 6.

Single Trial Judge finds good cause to recognise the Smakaj and Kilaj Request as validly filed pursuant to Article 36(3) of the Registry Practice Direction on Files and Filings.

B. THE ADMISSIBILITY OF MR HERLAAR'S REPORT AND TESTIMONY

1. The Impact of Matters Not Disclosed on the Ability to Assess the Probative Value of the Expert Opinion

25. Mr Herlaar's Report offers a single conclusion, namely, that [REDACTED] printed sheets were printed by the same printer.[61] This single conclusion is based on two propositions: (i) [REDACTED] microdot patterns;[62] and (ii) [REDACTED].[63]

26. The Report explains that Mr Herlaar [REDACTED].[64] As clarified through subsequent disclosure and testimony,[65] Mr Herlaar used [REDACTED], which he then analysed and examined using [REDACTED].[66] Under "Results", the Report states: "[REDACTED]."[67]

27. During his testimony, Mr Herlaar explained that "[REDACTED]"[68] Mr Herlaar did not describe systematically in his Report or his direct examination what these "[REDACTED]" were, but did offer descriptions of aspects of his analysis, namely that "[REDACTED].[69] Some further information concerning the nature of the [REDACTED] emerged during cross-examination, including that he

[61] Report, p. 6 ("[REDACTED].")
[62] Report, p. 4.
[63] Report, p. 4.
[64] Report, p. 4.
[65] SPOE00410059; 3 March Transcript, p. 529, line 1, to p. 535, line 14.
[66] Report, p. 4 ("[REDACTED]"); 3 March Transcript, p. 531, lines 21-22 ("[REDACTED].")
[67] Report, p. 4.
[68] 3 March Transcript, p. 535, lines 5-12. *See also* 4 March Transcript, p. 635, lines 12-20 ("[REDACTED].")
[69] 3 March Transcript, p. 533, lines 11-14. *See also* 4 March Transcript, p. 642, lines 6-12.

[REDACTED] ;[70] that [REDACTED];[71] that [REDACTED],[72] [REDACTED];[73] and that [REDACTED].[74]

28. None of the [REDACTED] by Mr Herlaar were reproduced in his Report or otherwise disclosed. Although [REDACTED][75] [REDACTED] have been disclosed to the Defence, the [REDACTED] and was the basis for his conclusion – have not been produced or shown to the Court. Nor was the "[REDACTED]"[76] [REDACTED]. Finally, no description is provided of the "[REDACTED]"[77] [REDACTED].

29. The Single Trial Judge considers these omissions to constitute serious deficiencies in the transparency of Mr Herlaar's methodology. They directly concern the [REDACTED] analysis performed by Mr Herlaar to reach his conclusion. Indeed, the undisclosed items were [REDACTED], and formed an essential part of, the analysis leading to his conclusion. The information omitted, to adopt Mr Herlaar's [REDACTED] analogy,[78] is tantamount to a failure to provide: the [REDACTED]; the [REDACTED]; any meaningful explanation or description of how [REDACTED]; or the nature of [REDACTED]. In fact, no source at all is cited for this last proposition.

30. The Single Trial Judge does not accept the SPO's submission that the only methodological issues on which Mr Herlaar refused to provide information only concern an "alleged alternative means of conducting a microdot analysis" which "was not used in this case".[79] This appears to be a reference to a method of microdot

[70] 4 March Transcript, p. 603, line 25. ("[REDACTED].")
[71] 4 March Transcript, p. 604, line 21.
[72] 3 March Transcript, p. 575, lines 4-7("[REDACTED]"); T. 639, ll. 2-4. ("[REDACTED].")
[73] 4 March Transcript, p. 640, lines 9-11.
[74] 3 March Transcript, p. 560, line 13("[REDACTED].")
[75] 3 March Transcript, p. 535, line 5.
[76] 3 March Transcript, p. 535, line 9.
[77] 3 March Transcript, p. 535, line. 5.
[78] 3 March Transcript, p. 535, line 10.
[79] SPO Submissions, paras 12, 14, 17-18.

analysis known as "[REDACTED]", [REDACTED][80] [REDACTED].[81] The information above that Mr Herlaar failed or refused to provide does not concern "[REDACTED]", but rather the [REDACTED] microdot comparative analysis that he did perform, and that is the basis of the Report.

31. The Single Trial Judge also does not accept the SPO's submission that these deficiencies are remedied by the disclosure of the [REDACTED] used by Mr Herlaar, thus giving the Defence the "opportunity to procure their own expert examination and conduct their own microdot comparative examination".[82] First, the [REDACTED] in no way reveal the [REDACTED]" [REDACTED].[83] Second, the failure to provide [REDACTED] is not remedied by saying that a Defence expert could perform the same procedures and reach the same conclusions. The Defence does not bear the burden of disproving (or for that matter, confirming) an expert opinion that is facially deficient in its exposition of its sources or methods. Third, even if the Defence were to engage another expert with access to the same confidential information as Mr Herlaar, then he or she would presumably be subject to the same confidentiality restrictions as Mr Herlaar and, therefore, would be unable to be any more transparent than he was as to the methodology of analysing the [REDACTED]. If, on the other hand, the SPO's submission is to be interpreted as meaning that the Defence could engage a private sector analyst who had "developed" his expertise independently of confidential information,[84] then this merely underscores that the SPO could have done so itself, thus presenting to the

[80] 3 March Transcript, p. 558, lines 3-8 ("[REDACTED]"); 3 March Transcript, p. 559, lines 15-21 ("[REDACTED]"); 3 March Transcript, p. 580, lines 3-4 ("[REDACTED]"); ("[REDACTED]").
[81] 3 March Transcript, p. 558, line 15 ("[REDACTED].")
[82] SPO Submissions, para. 18.
[83] 3 March Transcript, p. 529, lines 3-4 ("[REDACTED]"); 3 March Transcript, p. 535, lines 3-6 ("[REDACTED].")
[84] SPO Submissions, para. 18 ("as Witness 8 explained, a document examiner with the relevant expertise would be in a position to verify the results in the report, and the probability analysis can also be confirmed, by someone who has, *or develops*, the relevant expertise") (emphasis added). Mr Herlaar suggest that the relevant expertise could be "developed" by someone "[REDACTED]." (4 March Transcript, p. 652, lines 13-15).

Court an expert opinion that was more transparent than could be provided by Mr Herlaar. In any event, Mr Herlaar seemed to acknowledge that [REDACTED].[85] For these reasons, the Single Trial Judge does not accept that the potential of the Defence procuring its own expert report remedies the deficiencies identified.

32. Whether these deficiencies should lead to the non-admission of Mr Herlaar's Report and testimony, or merely diminish the weight that it should be accorded, is assessed in Section 3 below, after a consideration of other potentially relevant factors.

2. Whether Prejudice Was Caused by the Witness's Refusal to Answer Questions in the Absence of Prior Authorisation Pursuant to Rule 107

33. The Report indicates that the level of detail provided concerning the method and sources upon which it is based is limited by a purported [REDACTED] "[REDACTED]."[86] During his testimony, Mr Herlaar confirmed that the section of his Report entitled "[REDACTED]" was limited "[REDACTED]."[87] Mr Herlaar also indicated that further information validating the accuracy of the [REDACTED] process had not been provided in this section of the Report because "[REDACTED]."[88]

34. Mr Herlaar also repeatedly refused to answer questions based on these purported confidentiality obligations. Some of these refusals concerned the

[85] 4 March Transcript, p. 652, lines 6-15 ("[REDACTED].")
[86] Report, p. 4.
[87] 4 March Transcript, p. 632, lines 18-21.
[88] 4 March Transcript, p. 639, lines 2-4.

[REDACTED][89] and its "[REDACTED]",[90] while others impacted directly on the [REDACTED] analysis used for his Report.[91] Yet [REDACTED]"[REDACTED]."[92]

35. However, Mr Herlaar was unable or refused to provide information about the origin, nature and scope of these confidentiality obligations.[93] He testified that [REDACTED].[94] His general understanding was that the background of the [REDACTED] was "[REDACTED]" and that, in order to avoid [REDACTED], "[REDACTED]."[95]

36. While the Single Trial Judge does not doubt Mr Herlaar's affirmation that some such [REDACTED], he has no way of ascertaining whether Mr Herlaar has properly interpreted its scope. There are several indications that he has not, which only increases the possibility that he has declined to answer at least some of the questions that he refused to answer without a proper lawful basis. [REDACTED].[96] [REDACTED],[97] [REDACTED].[98]

37. Further doubt concerning the scope of the applicable confidentiality restriction arises from the SPO's communications with Mr Herlaar and the NFI, which do not reflect a clear and consistent understanding of the scope of the matters that Mr Herlaar would refuse to answer in court, even in private session. During a meeting with the SPO on 5 June 2025, Mr Herlaar indicated that an explanation of

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[89] 3 March Transcript, p. 550, line 25 to p. 551, line 1 ("[REDACTED]"); p. 551, line 13 ("[REDACTED]"); p. 555, lines 10-11 ("[REDACTED]"); p. 556, line 23 ("[REDACTED]"); p. 557, lines 7-8 ("[REDACTED]"); p. 558, line 8 ("[REDACTED]"); p. 560, lines 1-2 ("[REDACTED]"); p. 577, lines 6-9; p. 579, lines 16-17 ("[REDACTED]"); 4 March Transcript, p. 646, line 8 ("[REDACTED].")
[90] 3 March Transcript, p. 580, lines 4-5 ("[REDACTED]"); 4 March Transcript, p. 646, line 17 ("[REDACTED]"); p. 649, lines 14-15 ("[REDACTED]").
[91] 3 March Transcript, p. 571, lines 17-18 ("[REDACTED]"); p. 573, lines 20-21 ("[REDACTED]"); p. 575, line 25 to p. 576, line 1 (in respect of a proposition concerning the [REDACTED] at issue in his Report ([REDACTED]): "[REDACTED]"); 4 March Transcript, p. 652, lines 3-4 ("[REDACTED].")
[92] 3 March Transcript, p. 595, lines 7-10.
[93] 4 March Transcript, p. 625, lines 15, 19-20; p. 626, lines 3, 9; p. 627, lines 7-8, 14; p. 645, lines 16-17.
[94] 4 March Transcript, p. 625, line 13, to p. 626, line 9.
[95] 4 March Transcript, p. 626, line 22 to p. 627, line 4.
[96] [REDACTED].
[97] *See* [REDACTED].
[98] [REDACTED].

the scope and basis of his confidentiality obligations would subsequently be provided by the NFI.[99] The NFI did so in a letter, dated 22 July 2025, which explains that:

> [REDACTED].[100]

38. [REDACTED]

39. Nevertheless, the SPO seems to have been aware at least as of 15 December 2025, when it made submissions on the admissibility of the Report, that Mr Herlaar would refuse to answer certain questions, even in private session:

> On the basis of the 14 December Report, the 5 June 2025 meeting and the NFI Notice, the SPO notes that the NFI's position is that (i) Witness 8's testimony regarding the details of how he conducted the microdot analysis as set forth in the 14 December Report must occur in private session; and (ii) there are certain matters related to printer microdots more generally – which are irrelevant to the analysis he conducted in this case and which are not discussed in the 14 December Report – which Witness 8 would be prohibited by [REDACTED] from providing information on pursuant to Article 58 and Rule 107. The SPO will, in its questioning of Witness 8, limit the scope of its questioning solely to the information relevant to the 14 December Report and Witness 8's conclusions therein, and thus will not seek to illicit [sic] from Witness 8 any facts regarding microdots which he is prohibited from answering in any forum.[101]

40. This submission seems to suggest that the confidentiality restriction does not encompass [REDACTED] microdot analysis (which was performed by Mr Herlaar), but does apply to "certain matters related to printer microdots more generally".[102] Although somewhat vague, the submission that these matters "are irrelevant to the analysis […] and […] are not discussed in the 14 December Report", in retrospect, could be understood as a reference to the [REDACTED] ([REDACTED] and, therefore, in the SPO's view, was irrelevant to his Report).[103] Indeed, Mr Herlaar

[99] 128072-128080, para. 19 ("[REDACTED].")
[100] 128444-128444.
[101] SPO Witness 8 Motion, para. 15.
[102] SPO Witness 8 Motion, para. 15.
[103] SPO Witness 8 Motion, para. 15.

himself, during his testimony and despite attempting to avoid even confirming the existence of the [REDACTED], asserted that it was "irrelevant for this report."[104]

41. [REDACTED].[105] [REDACTED]: "[REDACTED."[106]

42. These inconsistencies, when combined with the lack of any written or authoritative basis for the asserted confidentiality, raise doubts about the scope of the asserted confidentiality. Indeed, on cross-examination, when asked why he did not provide his report to the SPO as a confidential document, after indicating that he had written it on the assumption that it would be made public, Mr Herlaar stated: "[REDACTED]."[107] This seems to imply – again, against the backdrop of considerable lack of clarity – that Mr Herlaar would have been prepared to be more forthcoming depending on his understanding of the confidentiality conditions that could have been provided by the Court.

43. In this context, the absence of an application by the SPO pursuant to Rule 107 is particularly significant. Rule 107(4) provides that a Panel "may not compel that witness to answer any question relating to the information or its origin if the witness declines to answer on grounds of confidentiality". The procedure applies not only to lead information in documentary form on a confidential basis,[108] but also when a State or other entity such as an employer authorises the testimony of a person only subject to certain conditions of confidentiality.[109] Where this is the case, the party

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[104] 3 March Transcript, p. 586, lines 8-9.
[105] SPOE00410048-SPOE00410058, para. 25.
[106] SPOE00410048-SPOE00410058, para. 11 (emphasis added).
[107] 4 March Transcript, p. 632, lines 25 to p. 633, line 2.
[108] *Contra* SPO Submissions, para. 19.
[109] *See* KSC-BC-2020-06, F02004, Trial Panel II, *Decision on the Specialist Prosecutor's Rule 107(2) Request* ("Case 06 Rule 107 Decision F02004"), 13 December 2023, public, paras 1-2, 5 ("W0275 is employed at an international organisation ("Rule 107 Provider")); F01847, Trial Panel II, *Public Redacted Version of Decision on the Prosecution Request for Rule 107 Measures for W04147 and W04868 (F01764)* ("Case 06 Decision Rule 107 Decision F01847"), 10 October 2024, para. 5. *See also* ICTY, *Prosecutor v. Slobodan Milosević*, IT-02-54-AR108*bis* & AR73.3, Appeals Chamber, *Public Version of the Confidential Decision on the Interpretation and Application of Rule 70*, 23 October 2002, para. 23 ("The fact that information is provided in the form of testimony does not exclude it from being 'information' or 'initial

calling the witness must make a request for the application of Rule 107(4) in advance of a witness's testimony and, where possible, set out the grounds and scope of the confidentiality requested.[110] If the request is granted, the Panel is not permitted to compel a witness to answer a question once the Rule 107 application has been granted.[111]

44. A witness's refusal to answer questions on cross-examination in the absence of authorisation pursuant to the mechanism prescribed for that purpose under the Rules is prejudicial to the cross-examining party. The duty of witnesses to answer questions by all parties, under the control of the judge, is:

> a basic principle of this judicial institution, and goes to the heart of the notion of justice. It ensures that the evidence required for the proper administration of justice is available; and therefore this duty is subject to very few exceptions. The decision on whether a proposed witness falls under these exceptions is to be exercised solely by the Chamber, and not by the witness.[112]

45. The SPO, at least as of 15 December 2025, knew that there was a risk that Mr Herlaar would attempt to refuse to answer questions on the ground of confidentiality. It was not entitled to assume that the Single Trial Judge would share

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information' provided under the Rule [….] The Trial Chamber appears to have adopted an overly narrow interpretation of the term 'information.' When a person possessing important knowledge is made available to the Prosecutor on a confidential basis, not only the informant's identity and the general subject of his knowledge constitute 'information' shielded by Rule 70, but also the substance of the information shared by the person – often, as in this case, presented in summary form in a witness statement.")

[110] *See* Case 06 Rule 107 Decision F02004, paras 1-2, 5 ("strictly limited to the period of events when W02475 was not associated with the Rule 107 Provider"); Case 06 Decision Rule 107 Decision F01847, para. 5 ("the Rule 107 Provider authorised the Witnesses to testify subject to […] the scope of their testimonies be[ing] limited to three defined topics").

[111] Rule 107 conditions may also be granted on the basis of a request by a State or an international organization to the President pursuant to Rule 211, who is to refer the request to the competent panel, which may then "where appropriate, apply Rule 107 *mutatis mutandis*." This possibility does not, however, alleviate the primary obligation on the calling party to make such an application once it becomes aware of the need to do so.

[112] ICTY, *Prosecutor v. Dragan Jokić*, IT-05-88-R77.1, Trial Chamber II, *Judgement on Allegations of Contempt*, 27 March 2009, para. 25. Indeed, the witness's refusal to answer questions was facially contrary to the solemn declaration taken at the beginning of his testimony to "state my findings and opinion accurately and completely" (3 March Transcript, p. 494, line 21).

its view that any such questions would be "irrelevant"[113] and, therefore, should have brought a Rule 107 application. The necessity of such an application certainly would have become clear to the SPO [REDACTED] "[REDACTED]."[114]

46. The SPO's assertion that such an application "would not have made a difference to the outcome"[115] is speculative and, in any event, irrelevant to the serious procedural impropriety of a witness refusing to answer questions on grounds of confidentiality without advance permission granted pursuant to Rule 107. Such an application would also have clarified, at least to some extent, the scope of the confidentiality being asserted and its basis. Instead, the contours of the asserted confidentiality had to be ascertained during cross-examination. In any event, the integrity of the proceedings would not have been undermined by a witness refusing to answer questions in court without a proper basis. The SPO, as the party calling the witness, and being informed of the witness's position, was responsible for making the application under Rule 107.

47. The SPO's claim that the Defence did not seek to compel Mr Herlaar to answer questions is incorrect.[116] A clear application was made in this regard by the Thaçi Defence near the beginning of Mr Herlaar's cross-examination.[117] It was not necessary for this motion be brought on the basis of a "specific question"[118] and, in any event, another party did make such an application on the basis of a specific question.[119] The Single Trial Judge took the view that the testimony, having been subject to a Rule 149 challenge by the Defence, was "conditional upon a future decision"[120] and therefore did not compel Mr Herlaar to answer the question.

[113] SPO Witness 8 Motion, para. 15.
[114] SPOE00410048-SPOE00410058, para. 11.
[115] SPO Submissions, para. 21.
[116] SPO Submissions, footnote 55.
[117] 3 March Transcript p. 563, line 22 to p. 565, line 19 (*see*, in particular, p. 565, lines 17-19: "we submit that either the witness should be compelled to answer the questions asked in cross-examination or his evidence should be excluded.")
[118] SPO Submissions, para. 2.
[119] 3 March Transcript, p. 553, line 25 to p. 554, line1 ("[REDACTED].")
[120] 3 March Transcript, p. 568, line 1.

Instead, he indicated that any questions could be asked and then, based on an assessment of the questions that the witness refused to answer, a determination would be made "either at the level of admissibility or in respect of weight" what impact those refusals should have.[121] The SPO did not join in the request that Mr Herlaar should be compelled to answer the questions, but rather supported the approach indicated by the Single Trial Judge.[122]

48. The Single Trial Judge acknowledges that the SPO may not have had full information concerning the scope of the questions that Mr Herlaar would not answer in advance of his testimony.[123] For example, it seems that Mr Herlaar refused to acknowledge [REDACTED] " even to the SPO.[124] He presumably also refused to reveal to the SPO the exact basis of the asserted confidentiality.[125] He may have also prevaricated, as reflected in the communications above, as to the scope of questions he would not answer. Nevertheless, the SPO was duty bound under Rule 107 to bring an application setting out as transparently as it could the scope and grounds on which Mr Herlaar, as an employee of a State agency and being made available to testify by that agency,[126] sought to be relieved of his obligation to answer any and all questions put to him during his testimony, subject to the Court's control.

49. Mr Herlaar's refusal to answer questions, in the absence of a duly approved Rule 107 application, was prejudicial to the Defence. The refusals were not limited to unimportant or clearly irrelevant matters. Mr Herlaar refused to answer questions, or confirmed that he had not provided information in the Report, on a wide range of topics, on the basis of confidentiality including: that he had

[121] 3 March Transcript, p. 554, line 18.
[122] *See* 3 March Transcript, p. 566, line 1 to p. 568, line 5.
[123] *See* 3 March Transcript, p. 566, line 24 to p. 567, line 4.
[124] 3 March Transcript, p. 553, lines 13-16 ("[REDACTED].")
[125] 3 March Transcript, p. 566, line 24 to p. 567, line 4 ("The witness is not in a position to tell anyone – us or the Defence or, frankly, Your Honour, I believe, alone – what it is that he cannot say. We don't know what it is. We don't possess it, have not possessed it, and don't know. And so I believe what the position we'd be in is the position we're in now, where the contours exactly of what he can and cannot say he has to inform when asked.")
[126] 4 March Transcript, p. 648, lines 2-11.

"[REDACTED]" about his methodology on the basis of confidentiality concerns;[127] had not [REDACTED];[128] had not [REDACTED] "[REDACTED]" [REDACTED];[129] could not confirm [REDACTED];[130] or the existence of a [REDACTED].[131]

50. While the SPO has asserted that this last category of information is irrelevant, the Single Trial Judge does not have enough information – based precisely on Mr Herlaar's refusal to answer questions – to determine whether this is the case. *Prima facie*, the failure of an expert to perform another available method of analysis within the same expertise, and which purportedly would have produced more information, is a matter that meets the threshold of relevance.[132] Whether there is a legitimate confidentiality basis for not answering, performing or revealing the results of such an analysis is a different issue. In any event, whether these refusals fell within the scope of the [REDACTED] that Mr Herlaar invoked could not be confirmed because, as with these other topics, he was either unable or refused to answer questions about it.[133]

51. Although the right of cross-examination even within the framework of trial proceedings is not absolute,[134] the fact that Mr Herlaar was formally presented as a witness and declined to answer questions on the basis of confidentiality without any advance authorisation under Rule 107, and not otherwise based on any recognised testimonial privilege, violated the right of the accused pursuant to

[127] 4 March Transcript, p. 639, lines 2-3.
[128] 4 March Transcript, p. 650, line 14.
[129] 3 March Transcript, p. 535, line 9; 4 March Transcript, p. 650, lines 15-19.
[130] 4 March Transcript, p. 652, line 3.
[131] *See* 3 March Transcript, p. 560, lines 1-3.
[132] Rule 143(3) ("Cross-examination shall be limited to the subject-matter of the direct examination and matters affecting the credibility of the witness.") The gist of the Defence's line of inquiry was that [REDACTED]. Even though Mr Herlaar insisted that the [REDACTED] analysis was "[REDACTED]," the questions in themselves cannot be considered irrelevant to the reliability of Mr Herlaar's analysis as a whole. *See* 3 March Transcript, p. 559, lines15 to p. 560, line 23; 4 March Transcript, P. 646, l. 3-17.
[133] *See supra* paras 33-34.
[134] KSC-BC-2018-01, IA006/F00010, Court of Appeals Panel, *Public Redacted Version of Decision on Thaçi and Selimi Appeals against Decisions on Special Investigative Measures*, 4 July 2024, public, para. 58.

Article 21(4)(f) to examine witnesses against them. Furthermore, this violation caused significant prejudice to the Defence given the importance of the expert conclusion and relevance of the matters on which he refused, or otherwise indicated his unwillingness, to provide information.

3. Whether the Non-Disclosed Information, Viewed Cumulatively, Seriously Affects the Ability to Assess the Probative Value of the Expert Report and Testimony, and Whether the Prejudicial Effect of Its Admission Would Outweigh Any Probative Value

52. The Single Trial Judge recalls his earlier finding that Mr Herlaar failed to reproduce in his Report or otherwise disclose: (i) [REDACTED]; (ii) the method by which he rendered [REDACTED]; (iii) [REDACTED]; and (iv) the nature and basis of the proposition that [REDACTED].[135]

53. The Single Trial Judge considers that these elements, viewed cumulatively are essential for his ability to assess the probative value[136] of Mr Herlaar's expert opinion.

54. The SPO's suggestion that the assessment of the probative value of Mr Herlaar's opinion with reference to other evidence in the case is misplaced.[137] Unlike a social science or historical expert opinion which involves an inter-dependence of facts to be proven and interpretive opinion, as was the case with Dr Des Forges testimony in the *Bizimungu* case[138] or Mr Maupeu's report in the *Ruto*

[135] *See supra* para. 28. *See also* 4 March Transcript, p. 652, lines 3-6 ("[REDACTED].")
[136] *Supra* para. 22.
[137] SPO Submissions, para. 14.
[138] *Bizimungu* Decision, para. 21 ("the matter which will fall for determination by the Chamber is what weight, if any, it will afford to the witness' opinion about a particular matter. In so doing, it will take into account a number of matters including, but not limited to, the bases upon which the expert opinion formed that opinion as well as the extent to which the expert has been able to provide details about those basis of his or her opinion. Other relevant matters to be taken into account include corroboration, whether by testimony of the witness, or by the testimony of other witnesses during the course of the trial, as well as the extent to which the accused persons have had the opportunity to test the veracity of the assertions made.")

case,[139] Mr Herlaar's conclusion is based purely on a [REDACTED]. He relied on no other evidence in the case. As such, any potential corroboration provided by evidence of other types does not assist the Single Trial Judge in coming to a view as to the probative value that he should assign to the Report and associated testimony as such. This difficulty is enhanced by the fact that unlike an opinion based on social science, the Report involves a single conclusion expressed to a degree of certainty that is almost absolute.[140] This makes it all the more important that the Single Trial Judge is in a position, based on an assessment of methodology and sources, to evaluate the probative value of this absolute claim.

55. In these circumstances, the Single Trial Judge considers that the lack of transparency concerning the methodology and sources relied upon by Mr Herlaar render his Report, Associated Materials, and expert testimony inadmissible.

C. WHETHER THE SPECIFIC ANALYSIS PROVIDED BY MR HERLAAR IS THE PRODUCT OF A RECOGNISED EXPERTISE

56. The Single Trial Judge does not doubt, and the Defence does not challenge, that Mr Herlaar is a qualified expert within a field described as SISA. This field is, according to Mr Herlaar himself, apparently broad, encompassing examination of "traces from footwear and toolmarks. For example, we examine various objects and traces in order to identify what trace relates to what origin, for instance, a footprint left by a piece of footwear. But also we might compare duct tape found at a crime scene to see if it is the same as duct tape which is found in the possession of a

[139] SPO Submissions, para. 14, citing International Criminal Court, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-844, Trial Chamber V(a), *Decision on Sang Defence Application to Exclude Expert Report of Mr Hervé Maupeu*, 7 August 2013, para. 23 ("the subject matter of the Expert Report appears to fall within the expertise of a social and political background expert […] not only is it impossible for the Prosecution to be expected to establish facts before the commencement of trial, but the Chamber will not be in a position to fully determine what facts are established until all the evidence in the case has been presented.")
[140] Report, p. 6, which concludes that it is "[REDACTED]". [REDACTED].

suspect, for instance."[141] Before becoming an expert in SISA, Mr Herlaar was an accredited expert in the field of "questioned documents and printers."[142] The witness explained that there "are some techniques which apply to the two fields, including techniques that I will testify on today."[143] Mr Herlaar signed the Report as a "qualified NFI-expert on Toolmarks."[144]

57. The SPO characterises the expertise applied in Mr Herlaar's report as being "comparative microdot analysis."[145] Mr Herlaar himself appeared to confirm this description, explaining that the propositions set out in his Report reflect "the standard set of hypotheses that we use in this type of examination."[146]

58. A precondition for admitting the opinion evidence of an expert is that the "proposed witness is regarded as an expert" and that "the content of the expert statement or report falls within the accepted expertise of expert witness and is permissible."[147] The notion of "expertise" can be inferred from judicial definitions of an "expert" as being "a person who by virtue of some specialised, skill or training can assist the trier of fact to understand or determine an issue in dispute".[148]

59. The essence of the Defence's challenge to the Report and Mr Herlaar's testimony is that the knowledge and skill he relies upon is not sufficiently established or recognised to constitute an accepted expertise.[149] In particular, the Defence argues that the "'microdot' [REDACTED] are not sufficiently organised or

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[141] 3 March Transcript, p. 496, line 25 to p. 497, lines 1-6.
[142] 3 March Transcript, p. 499, lines 19-24.
[143] 3 March Transcript, p. 500, lines 24-25.
[144] Report, p. 6.
[145] SPO Submissions, para. 7 ("The Expert Report's content manifestly falls within the expertise of Witness 8 – i.e., comparative microdot analysis.")
[146] 3 March Transcript, p. 535, lines 23-24.
[147] Case 06 Decision on W04826, para. 23.
[148] Galić Decision, p. 2; ICTY, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, IT-04-82-T, Trial Chamber II, *Decision on Prosecution's 94bis Notice Re: Expert Witness Slagjana Taševa*, 8 February 2008, para. 6.
[149] Smakaj and Kilaj Submissions, para. 52 ("It is submitted that "microdot" [REDACTED] techniques are not sufficiently organized or recognised to be accepted as a reliable body of knowledge or experience to be admitted in a court of law.")

recognised to be accepted as a reliable body of knowledge or experience to be admitted in a court of law."[150] The technique, according to the Defence, cannot be (and has not been) scientifically tested and validated because of the matters that Mr Herlaar said were confidential due to an [REDACTED].[151] Accordingly, the non-disclosure of confidential information is not only fatal to the admissibility of the Report as such, it is also more broadly fatal to the recognition of the expertise as a whole.

60. The SPO Submissions say little about whether "comparative microdot analysis" has been accepted by any other court as an expertise. No judicial decision recognising "comparative microdot analysis" from any jurisdiction has been cited by the SPO. The SPO cites only Mr Herlaar's own testimony that he had "previously provided expert testimony before Dutch criminal courts on behalf of the NFI, submitting expert reports, including on microdot analysis, in the same format and structure, with a similar level of detail and substantiation as that provided to the court in these proceedings."[152] However, no decisions or other materials from these proceedings have been presented to the Single Trial Judge to validate this assertion. Indeed, Mr Herlaar could not recall that he had "ever appeared before an investigating judge with respect to microdots";[153] was not sure how these reports had been used or treated;[154] and did not know whether they had been relied upon, let alone accepted, as expert opinions in any Dutch proceedings.[155]

61. The Single Trial Judge considers that the SPO has not established that "comparative microdot analysis" is a recognised or accepted expertise. The standard applied by the ICTR for recognising an expertise is whether the field "is sufficiently organized or recognized as a reliable body of knowledge or experience

[150] Smakaj and Kilaj Submissions, paras. 52-53.
[151] Smakaj and Kilaj Submissions, paras. 53-56.
[152] SPO Submissions, para. 6; 3 March Transcript, p. 538, line 11 to p. 540, line 14.
[153] 4 March Transcript, p. 623, lines 10-11.
[154] 4 March Transcript, p. 622, lines 11-12.
[155] 4 March Transcript, p. 622, lines 10-15.

with which the Witness could potentially provide assistance to the Chamber."[156] Unlike other fields that have been recognised as being the basis for an expertise, "comparative microdot analysis" does not appear to have been the object of significant academic publication or validation. If such literature is available, it has not been provided by the SPO, nor was it cited by Mr Herlaar. Indeed, Mr Herlaar's view was that the absence of any such validation was a necessary corollary of the confidentiality that he said limited the scope of his own testimony.[157]

62. For these reasons, the Single Trial Judge is not persuaded that the basis of the Report, even as supplemented by Mr Herlaar's oral testimony, constitutes an expertise for the purpose of Rule 149. In no way is this any reproach to Mr Herlaar's professionalism, but merely reflects that important aspects of his opinion depend on information that is confidential and, therefore, cannot be validated or tested before the court.

D. CONCLUSION

63. The Single Trial Judge finds the Report, the Associated Materials and Mr Herlaar's testimony inadmissible on the basis that the methods applied in the Report are not sufficiently transparent to permit a meaningful assessment of its probative value. Furthermore, any probative value is outweighed by the prejudice

[156] ICTR, *Prosecutor v. Édouard Karemera et al.*, ICTR-98-44-T, Trial Chamber III, *Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka*, 26 September 2007, para. 15. This standard is reflected in various formulations throughout different legal systems of the world including, to cite but two examples, Ireland (*D.P.P v Michael Joseph* Kelly [2008] IECCA 7 (1 February 2008) ("The Court is not satisfied that the technique has a properly established scientific provenance or that it has achieved the requisite degree of expert peer approval [….] the onus of proof has not been discharged in this case to satisfy the Court that it is a science upon which reliance can be placed in this particular case. It may well be that further scientific advances in this area may yield a quite different result and outcome in other cases in future years") and Australia (*Osland v. The Queen* [1998] HCA 75, 197 CLR 316 (10 December 1998) ("Expert evidence is admissible with respect to a relevant matter about which ordinary persons are '[not] able to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience in the area'" and which is the subject "of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience.")

[157] 3 March Transcript, p. 551, lines 2-7; 4 March Transcript, p. 617, line 25 to p. 618, line 1.

arising from the questions that Mr Herlaar refused to answer or was unable to address because of the confidentiality obligations that he cited, a prejudice which is heightened by the SPO's failure to have brought a Rule 107 application. Finally, the Single Trial Judge is not persuaded that the Report itself is a reflection of an expertise in light of the matters that are confidential which is an independent and sufficient basis to find that the Report lacks probative value.

V. DISPOSITION

64. For the above reasons, the Single Trial Judge hereby:

a. **GRANTS** the Joint Request for extension of the word limit;

b. **REJECTS** the SPO Witness 8 Motion to admit the Report and Associated Materials into evidence;

c. **DECLINES** to admit the testimonial evidence of Mr Herlaar; and

d. **ORDERS** the Smakaj Defence and the Kilaj Defence to jointly submit a public redacted version of filings F00785 and F00793 or request their reclassification by **Thursday, 2 April 2026, at 16:00**.

Judge Christopher Gosnell
Single Trial Judge

Dated this Friday, 27 March 2026

At The Hague, the Netherlands.