



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**In:** KSC-BC-2023-12/IA009

**Before:** A Panel of the Court of Appeals Chamber  
Judge Michèle Picard  
Judge Emilio Gatti  
Judge Nina Jørgensen

**Registrar:** Fidelma Donlon

**Date:** 30 June 2026

**Original language:** English

**Classification:** Public

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**Public Redacted Version of Decision on Specialist Prosecutor's Appeal Against  
Decision on Admission of Expert Evidence of Witness 8**

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**THE PANEL OF THE COURT OF APPEALS CHAMBER** of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),<sup>1</sup> acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”), is seised of an appeal filed by the Specialist Prosecutor’s Office (“SPO”) on 11 May 2026 (“Appeal”)<sup>2</sup> against the “Decision on the Admission of Expert Evidence of Witness 8” (“Impugned Decision”).<sup>3</sup> The Defence for Hashim Thaçi, the Defence for Bashkim Smakaj and the Defence for Isni Kilaj (collectively, “Defence” or “Accused”) jointly responded on 21 May 2026 that the Appeal should be rejected (“Defence Response”).<sup>4</sup> The SPO replied on 1 June 2026 (“Reply”).<sup>5</sup>

## I. BACKGROUND

1. On 15 December 2025, the SPO filed a request seeking the admission of the final expert report of Witness 8 and associated materials pursuant to Rule 138 and Rule 149 of the Rules (“Request for Admission”).<sup>6</sup>
2. On 26 January 2026, noting the Defence’s notification pursuant to Rule 149(2) of the Rules that it challenged the qualifications of Witness 8 as an expert and the relevance of his expert report, and wished to cross-examine him,<sup>7</sup> the Single Trial

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<sup>1</sup> IA009/F00001, Decision Assigning a Court of Appeals Panel, 1 May 2026 (confidential, reclassified as public on 3 June 2026) (“Assignment Decision”).

<sup>2</sup> IA009/F00002, Prosecution appeal against the ‘Decision on the Admission of Expert Evidence of Witness 8’ (F00825), 11 May 2026 (confidential) (“Appeal”).

<sup>3</sup> F00825/RED, Public Redacted Version of Decision on the Admission of Expert Evidence of Witness 8, 1 May 2026 (confidential version filed on 27 March 2026) (“Impugned Decision”).

<sup>4</sup> IA009/F00003, Joint Defence Response to “Prosecution Appeal against the ‘Decision on the Admission of Expert Evidence of Witness 8’”, 21 May 2026 (confidential) (“Defence Response”).

<sup>5</sup> IA009/F00004, Prosecution reply to the joint Defence response IA009/F00003, 1 June 2026 (confidential) (“Reply”).

<sup>6</sup> F00620/RED, Public redacted version of ‘Prosecution response to Filing F00586 and motion for admission of evidence of Witness 8’, 7 January 2026 (confidential version filed on 15 December 2025) (“Request for Admission”).

<sup>7</sup> F00586, Joint Defence Notification pursuant to Rule 149, 1 December 2025.

Judge deferred ruling on Witness 8's qualification as an expert and the admissibility of his expert report and associated materials until after the witness's testimony.<sup>8</sup>

3. On 3 and 4 March 2026, Witness 8 testified before the Single Trial Judge.<sup>9</sup>

4. On 27 March 2026, having received further submissions from the Defence<sup>10</sup> and the SPO,<sup>11</sup> the Single Trial Judge issued the Impugned Decision denying the admission of Witness 8's expert report, associated materials and related testimony.<sup>12</sup>

5. On 9 April 2026, having been granted an extension of time,<sup>13</sup> the SPO filed a request for certification to appeal the Impugned Decision.<sup>14</sup>

6. On 29 April 2026, having received the Defence's response and the SPO's reply to the certification request,<sup>15</sup> the Single Trial Judge granted the SPO leave to appeal the Impugned Decision on the following three issues:<sup>16</sup>

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<sup>8</sup> F00691, Interim Decision on Prosecution Motion for Admission of Evidence of Witness 8, 26 January 2026, paras 10-11, 14(a).

<sup>9</sup> Transcript, 3 March 2026, pp. 494-563, 570-598; Transcript, 4 March 2026, pp. 602-656.

<sup>10</sup> F00784/COR/RED, Public Redacted Version of Corrected Version of Taçi Defence Submissions Relating to Witness 8, 16 March 2026 (corrected confidential version filed on 11 March 2026, uncorrected, confidential version filed on 10 March 2026); F00785/RED, Public redacted version of 'Joint Kilaj and Smakaj Defence Supplementary Submissions Relating to Witness 8', 23 April 2026 (confidential version filed on 11 March 2026).

<sup>11</sup> F00796/RED, Public redacted version of 'Prosecution response to Defence submissions F00784 and F00785', 27 March 2026 (confidential version filed on 16 March 2026) ("SPO Submissions on Witness 8 Evidence").

<sup>12</sup> Impugned Decision, paras 55, 62-63, 64(b)-(c). The Panel notes that the Single Trial Judge did not make an explicit finding on Witness 8's qualifications but rather assessed the subject of his proposed expertise and concluded that comparative microdot analysis is not a recognised or accepted expertise. See Impugned Decision, para. 62. This finding was one basis upon which the Single Trial Judge found Witness 8's evidence to be inadmissible. See Impugned Decision, para. 63.

<sup>13</sup> F00834, Decision on the Specialist Prosecutor's Request for Extension of Time, 31 March 2026.

<sup>14</sup> F00851/RED, Public Redacted Version of Prosecution request for leave to appeal Decision F00825, 4 May 2026 (confidential version filed on 9 April 2026).

<sup>15</sup> F00867/RED, Public Redacted Version of Joint Defence Response to Prosecution Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness 8, 5 May 2026 (confidential version filed on 20 April 2026); F00885/RED, Public Redacted Version of 'Prosecution reply to the joint Defence response F00867', 4 May 2026 (confidential version filed on 28 April 2026).

<sup>16</sup> F00888/RED, Public Redacted Version of Decision on Prosecution Request for Leave to Appeal Decision F00825, 6 May 2026 (confidential version filed on 29 April 2026) ("Certification Decision").

- a. Whether the Panel erred and/or abused its discretion in its evaluation of expertise for the purpose of Rule 149;
- b. Whether the Panel erred in concluding that the methods applied in the Report are not sufficiently transparent to permit a meaningful assessment of its probative value; and
- c. Whether the Panel (i) erred in law in finding Rule 107 authorisation to have been required, and/or (ii) abused its discretion in finding that Witness 8's refusal to answer questions in the absence of advance Rule 107 authorisation prejudiced the Defence or violated the right of the Accused to examine witnesses against them.

7. On 11 May 2026, the SPO filed an appeal against the Impugned Decision, asserting that the Single Trial Judge erred in law and abused his discretion in his interpretation and application of relevant legal provisions, which resulted in the improper exclusion of Witness 8's evidence.<sup>17</sup> The SPO raises three grounds of appeal, which it contends are "interdependent" as each "bore on considerations integral to [the Single Trial Judge's] reasoning" and, therefore, an error with respect to any of them would have independently led to the improper exclusion of Witness 8's evidence.<sup>18</sup> The SPO requests that the Court of Appeals Panel reverse the Impugned Decision and order the admission of Witness 8's evidence or, in the alternative, remand the matter to the Single Trial Judge for a new determination on the admissibility of Witness 8's evidence.<sup>19</sup>

8. On 21 May 2026, the Defence responded to the Appeal, requesting that the Appeals Panel deny the Appeal and affirm the Impugned Decision.<sup>20</sup> The Defence

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<sup>17</sup> Appeal, paras 1-3, 36.

<sup>18</sup> Appeal, para. 36; Reply, para. 10.

<sup>19</sup> Appeal, paras 3, 37.

<sup>20</sup> Defence Response, para. 43.

submits that the Impugned Decision rests on three independent grounds, each of which is sufficient on its own to justify the exclusion of Witness 8's evidence, and that none of the alleged errors would therefore have materially affected the Impugned Decision.<sup>21</sup>

## II. STANDARD OF REVIEW

9. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.<sup>22</sup>

10. The Appeals Panel recalls that decisions related to the admission of evidence are generally treated as discretionary, and that appellate intervention in that respect is warranted only in very limited circumstances.<sup>23</sup> This includes a panel's decisions with respect to the evaluation of expert evidence received pursuant to Rule 149 of the Rules.<sup>24</sup> The Panel notes that the Impugned Decision concerns the Single Trial Judge's assessment of the admissibility of expert evidence pursuant to Rules 138 and 149 of the Rules and is, therefore, discretionary in nature. In this regard, the Panel further recalls that, when challenging a discretionary decision, a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based

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<sup>21</sup> Defence Response, para. 41.

<sup>22</sup> KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati Appeal Decision on Arrest and Detention*"), paras 4-14. See also IA001/F00005, Decision on Isni Kilaj's Appeal Against Decision on Continued Detention, 28 January 2025, paras 15-16.

<sup>23</sup> KSC-BC-2020-06, IA030/F00009, Decision on Krasniqi and Selimi Appeals against "Decision on Prosecution Motion for Admission of Accused's Statements", 31 May 2024 ("*Krasniqi and Selimi Appeal Decision*"), para. 6; KSC-BC-2020-04, IA006/F00007, Decision on Shala's Appeal Against Decision Concerning Prior Statements, 5 May 2023 ("*Shala Appeal Decision*"), para. 8. See also KSC-BC-2020-07, IA006/F00006, Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 7 January 2022 ("*Haradinaj Appeal Decision on Defence Witnesses*"), para. 14 and jurisprudence cited therein.

<sup>24</sup> KSC-BC-2020-06, IA036/F00011, IA037/F00011, IA038/F00011, IA040/F00011, Decision on Joint Defence Consolidated Appeal Against Decisions F03201, F03202, F03203, F03211 and F03213, 8 October 2025 ("*Case 06 Expert Evidence Appeal Decision*"), para. 15. See also ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement, 29 November 2017, para. 286; ICTY, *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, para. 58; ICTR, *Prosecutor v. Renzaho*, ICTR-97-31-A, Judgement, 1 April 2011, para. 289.

on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.<sup>25</sup> The Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.<sup>26</sup>

### III. PUBLIC FILINGS

11. The Appeals Panel notes that the Impugned Decision was initially filed confidentially. As a result, all submissions on appeal were also filed confidentially.<sup>27</sup> However, the Panel notes that, following the issuance of the Certification Decision, a public redacted version of the Impugned Decision was issued, public redacted versions of the Parties' submissions on certification were filed, and the Assignment Decision was reclassified as public.

12. The Appeals Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel.<sup>28</sup> The Panel, therefore, orders the Parties to file public redacted versions of their respective filings on appeal, namely Appeal (F00002), Defence Response (F00003) and Reply (F00004),<sup>29</sup> or indicate, through a filing, whether they

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<sup>25</sup> *Krasniqi and Selimi* Appeal Decision, para. 6; *Shala* Appeal Decision, para. 8. See also *Haradinaj* Appeal Decision on Defence Witnesses, para. 14 and jurisprudence cited therein; KSC-CA-2023-02, F00038/RED, Public Redacted Version of Appeal Judgment, 14 December 2023 (confidential version filed on 14 December 2023), para. 36.

<sup>26</sup> *Gucati* Appeal Decision on Arrest and Detention, para. 14 and jurisprudence cited therein.

<sup>27</sup> See Appeal, para. 35; Defence Response, para. 42; Reply, para. 11.

<sup>28</sup> See e.g. IA008/F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), paras 8-9. See also KSC-CA-2022-01, F00103, Decision on Gucati Application for Reclassification or Public Redacted Versions of Court of Appeals Panel Decisions, 9 January 2023, para. 2.

<sup>29</sup> The Panel notes the SPO's indication that a public version of the Appeal and the Reply will be filed. See Appeal, para. 35; Reply, para. 11.

can be reclassified as public within ten days of receiving notification of the present Decision.

#### IV. DISCUSSION

##### A. ALLEGED ERRORS REGARDING THE SINGLE TRIAL JUDGE'S EVALUATION OF WITNESS 8'S EXPERTISE FOR THE PURPOSE OF RULE 149 OF THE RULES (GROUND 1)

###### 1. Submissions of the Parties

13. The SPO submits that the Single Trial Judge erred in his assessment of Witness 8's expertise under Rule 149 of the Rules by applying an "unduly restrictive standard", requiring the SPO to demonstrate that comparative microdot analysis was an accepted expertise.<sup>30</sup> In particular, the SPO avers that, having found Witness 8 to be a qualified expert in the field of striations, impressions and shape analysis ("SISA"),<sup>31</sup> the Single Trial Judge should have proceeded to determine whether Witness 8's expert opinion fell within the scope of his accepted expertise.<sup>32</sup> Instead, the SPO submits that the Single Trial Judge disqualified Witness 8 as an expert not due to a lack of specialised knowledge, but rather based on a perceived absence of "external markers of reliability validating his methodology".<sup>33</sup> In the SPO's view, the Single Trial Judge conflated the threshold question of Witness 8's qualification as an expert with the assessment of the evidentiary weight to be assigned to his expert evidence.<sup>34</sup> The SPO submits that the Single Trial Judge's failure to correctly distinguish between Witness 8's expertise and the probative value of his evidence resulted in the improper

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<sup>30</sup> Appeal, paras 2, 12-15.

<sup>31</sup> In this respect, the SPO adds that Witness 8 identified himself as an expert in the field of SISA, which encompasses comparative microdot analysis. In the SPO's view, the Single Trial Judge mis-assessed Witness 8's evidence and the SPO's position on his expertise, which directly affected the conclusion in the Impugned Decision that the SPO had not established that comparative microdot analysis was accepted as an expertise. See Appeal, para. 12 and fn. 24.

<sup>32</sup> Appeal, paras 12-13.

<sup>33</sup> Appeal, para. 14.

<sup>34</sup> Appeal, para. 14.

exclusion of relevant expert evidence which satisfies the requirements of Rule 149 of the Rules.<sup>35</sup>

14. Regardless, the SPO submits that, even accepting that a field of expertise ought to amount to a reliable body of knowledge or experience, the Single Trial Judge wrongly assessed the reliability of Witness 8's expertise based solely on prior judicial acceptance and academic validation.<sup>36</sup> In the SPO's view, such an approach is "excessively rigid" and contrary to the accepted definition of expert evidence before other courts, which have repeatedly recognised specialised forensic knowledge and skills as a legitimate area of expertise by simple reference to the witness's "professional track-record in the relevant field".<sup>37</sup> In this regard, the SPO avers that commonly accepted indicia of expert knowledge clearly establish Witness 8's expertise in comparative microdot analysis, including his professional certifications and experience, prior assistance in judicial proceedings, past training of other forensic experts, as well as validation by an internationally accredited forensic institution through peer-review.<sup>38</sup>

15. The SPO further submits that the qualification of an expert must be evaluated independently from whether their opinion can be validated or tested due to confidentiality restrictions.<sup>39</sup> In this respect, the SPO asserts that whether specific forensic techniques applied by an expert require [REDACTED] "does not strip the technique of its forensic utility, much less disqualify the expert using it".<sup>40</sup> In the SPO's view, any questions as to the accuracy of Witness 8's opinion or the methods applied in his analysis more appropriately go to the weight to be assigned to his evidence at

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<sup>35</sup> Appeal, para. 18.

<sup>36</sup> Appeal, para. 15.

<sup>37</sup> Appeal, para. 15.

<sup>38</sup> Appeal, para. 15.

<sup>39</sup> Appeal, para. 16.

<sup>40</sup> Appeal, para. 16.

the end of trial, and not to the threshold question of whether he possesses specialised knowledge, skill or training to qualify as an expert.<sup>41</sup>

16. Finally, the SPO submits that the Single Trial Judge's erroneous assessment of Witness 8's expertise is heightened by "asymmetric and erroneous" findings of fact regarding judicial recognition of comparative microdot analysis.<sup>42</sup> Specifically, the SPO challenges the Single Trial Judge's finding that Witness 8's testimony regarding his prior casework on microdot analysis was insufficient to demonstrate judicial recognition on the basis that no decisions or other materials from such proceedings were provided to validate his evidence.<sup>43</sup> The SPO avers that, in addition to imposing an "excessive and legally unsupported expectation of proof", this finding is directly contradicted by records cited in the Impugned Decision.<sup>44</sup> In particular, the SPO refers to (i) [REDACTED];<sup>45</sup> and (ii) [REDACTED] that were identified and relied upon by the Single Trial Judge in the context of evaluating the credibility of Witness 8's assertion of confidentiality, but ignored when evaluating his proffered expertise.<sup>46</sup>

17. The Defence responds that the Single Trial Judge did not err or abuse his discretion in his evaluation of Witness 8's expertise under Rule 149 of the Rules.<sup>47</sup> The Defence first argues that the definition of an expert "presupposes a recognised field of 'expertise' forming the basis of the witness's 'knowledge, skills, experience, training or education'" that qualifies such witness to testify as an expert under Rule 149 of the Rules.<sup>48</sup> Therefore, according to the Defence, the Single Trial Judge correctly required proof that Witness 8's proposed field of expertise be sufficiently organised or recognised as a reliable body of knowledge or experience, a standard which it avers is

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<sup>41</sup> Appeal, para. 16. See also Reply, para. 3.

<sup>42</sup> Appeal, para. 17.

<sup>43</sup> Appeal, para. 17, referring to Impugned Decision, para. 41.

<sup>44</sup> Appeal, para. 17.

<sup>45</sup> See Appeal, fn. 36, referring to SPOE00410048-00410058 (confidential), para. 9. The Panel notes that [REDACTED]. See SPOE00410048-00410058 (confidential), fn. 8.

<sup>46</sup> Appeal, para. 17.

<sup>47</sup> Defence Response, paras 4, 11.

<sup>48</sup> Defence Response, para. 6.

also supported by the jurisprudence of national jurisdictions.<sup>49</sup> The Defence claims that, contrary to the SPO's assertion, the "absence of external markers of reliability validating [a witness's] methodology" is not a matter of weight, but forms part of the preliminary determination regarding a witness's qualifications to give an expert opinion.<sup>50</sup> In the Defence's view, any contrary interpretation "would render the qualification requirement of Rule 149 a nullity" and result in the admission of expert evidence "whose foundations a Panel has no means of assessing".<sup>51</sup>

18. The Defence further argues that the Single Trial Judge did not assess Witness 8's expertise solely on the basis of prior judicial acceptance and academic validation, as claimed by the SPO, but rather found that "the SPO produced *no* material — academic, judicial, or otherwise" to establish comparative microdot analysis as an accepted expertise.<sup>52</sup> In the Defence's view, unlike other fields which are the subject of the cases cited by the SPO, comparative microdot analysis has not been [REDACTED], and can only [REDACTED].<sup>53</sup>

19. Moreover, the Defence avers that the SPO's argument that the expertise can be ascertained through Witness 8's certifications and professional experience in comparative microdot analysis, training of other forensic experts, prior assistance in judicial proceedings on microdot analysis, and the validation provided by the Netherlands Forensic Institute ("NFI") conflates Witness 8's personal qualifications with the question of whether the body of knowledge he applied is a recognised expertise.<sup>54</sup> In this regard, the Defence further claims that, having found comparative microdot analysis not to be a recognised expertise, the Single Trial Judge did not have to address Witness 8's personal qualifications.<sup>55</sup> Regardless, the Defence submits that

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<sup>49</sup> Defence Response, paras 6-7.

<sup>50</sup> Defence Response, para. 7.

<sup>51</sup> Defence Response, para. 7.

<sup>52</sup> Defence Response, para. 8 (emphasis in original).

<sup>53</sup> Defence Response, para. 8.

<sup>54</sup> Defence Response, para. 9.

<sup>55</sup> Defence Response, para. 9.

the SPO's claim regarding Witness 8's prior experience providing expert reports on microdot analysis in Dutch criminal proceedings are misleading, as the witness could not recall appearing before an investigative judge or to what extent his reports were used or relied upon.<sup>56</sup>

20. Finally, the Defence argues that the inability to test or validate the methodology applied by Witness 8 is not irrelevant to the recognition of comparative microdot analysis as an expertise.<sup>57</sup> In the Defence's view, "[a] discipline that cannot *in principle* [REDACTED] is by definition not a recognised expertise".<sup>58</sup>

21. The SPO replies that the Defence fails to explain how its assertions concerning the probative value of comparative microdot analysis relate to any "'presuppose[d]' criteria for *qualifying*" an expertise under Rule 149 of the Rules.<sup>59</sup> The SPO submits that the Defence's reliance on national standards for the admission of expert evidence is inapposite and of limited relevance before the Specialist Chambers, where the fact-finders are professional judges and not lay juries, who are "capable of weighing evidence in its proper context".<sup>60</sup> In this respect, the SPO further submits that, contrary to the Defence's assertion, professional certifications and institutional accreditation are not only relevant markers of a witness's qualifications but can also demonstrate the existence of an organised field.<sup>61</sup> In the present case, the SPO avers that it is illogical to suggest that "recognition by a state-run, internationally renowned forensic institution is immaterial to whether a forensic technique qualifies as a 'recognised' expertise".<sup>62</sup>

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<sup>56</sup> Defence Response, para. 10.

<sup>57</sup> Defence Response, para. 11.

<sup>58</sup> Defence Response, para. 11 (emphasis in original).

<sup>59</sup> Reply, para. 2 (emphasis in original).

<sup>60</sup> Reply, para. 2.

<sup>61</sup> Reply, para. 3.

<sup>62</sup> Reply, para. 3.

22. Lastly, the SPO replies that the Defence's claim that the SPO has not presented anything to rebut the Single Trial Judge's findings regarding the judicial recognition of comparative microdot analysis is evidently incorrect, as it ignores the specific examples laid out in the Appeal.<sup>63</sup>

## 2. Assessment of the Court of Appeals Panel

23. In the Impugned Decision, the Single Trial Judge found that the SPO had not established that comparative microdot analysis is a recognised or accepted expertise and, on this basis, concluded that the subject of Witness 8's expert report (i.e. comparative microdot analysis) does not constitute an expertise for the purpose of Rule 149 of the Rules.<sup>64</sup> The Single Trial Judge further found that this conclusion "is an independent and sufficient basis to find that the Report lacks probative value".<sup>65</sup>

24. The SPO challenges the Single Trial Judge's assessment of Witness 8's "expertise", asserting that: (i) by requiring the SPO to demonstrate that comparative microdot analysis was an accepted expertise, the Single Trial Judge conflated the threshold question of Witness 8's qualification as an expert with the assessment of the evidentiary weight to be assigned to his expert evidence; and (ii) the Single Trial Judge wrongly assessed the reliability of Witness 8's expertise based solely on prior judicial acceptance and academic validation and that his findings of fact in this respect were not supported by evidence in the record.

25. The Panel recalls that expert evidence is deemed admissible if: (i) the proposed witness can be regarded as an expert within the meaning of Rule 149 of the Rules; (ii) the expert statement or report meets the requirements of Rule 138(1) of the Rules, including in respect of minimum standards of reliability, relevance and probative value; and (iii) the content of the expert statement or report falls within and is confined

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<sup>63</sup> Reply, para. 4, referring to Appeal, para. 17.

<sup>64</sup> See Impugned Decision, paras 61-63. See also above, fn. 12.

<sup>65</sup> Impugned Decision, para. 63. The Panel notes that Witness 8's qualifications as an expert are not put into question. See Impugned Decision, para. 56.

to the accepted expertise of the expert witness and does not offer an opinion upon matters within the knowledge or exclusive competence of the panel.<sup>66</sup>

26. An “expert” within the meaning of Rule 149 of the Rules is defined 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”.<sup>67</sup> In evaluating whether a proposed witness qualifies as an expert, a panel must be satisfied that the witness possesses “relevant, specialized knowledge acquired through education, expertise, or training in his proposed field of expertise”.<sup>68</sup> This assessment “is based solely on the credentials of a specific individual”.<sup>69</sup> For this purpose, the witness’s former and present positions and professional experience are of importance.<sup>70</sup> A panel may also be guided by the witness’s *curriculum vitae*, as well as any scholarly articles

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<sup>66</sup> KSC-BC-2020-07, F00470, Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 3 December 2021 (“Case 07 Admissibility Decision”), para. 63; KSC-BC-2020-06, F03202, Decision on the Admission of Expert Evidence of Witness W04875, 27 May 2025 (“Case 06 Admissibility Decision”), para. 22. See also ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on Admissibility of Expert Report of Patrick Treanor, 27 November 2008 (“Perišić Decision”), para. 8; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008 (“Popović Appeal Decision”), para. 21; ICTY, *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Decision on Defence Expert Witnesses, 21 August 2007 (“D. Milošević Defence Expert Decision”), paras 6-10, and references cited therein.

<sup>67</sup> Case 06 Expert Evidence Appeal Decision, para. 35. See also F00875/RED, Public Redacted Version of Decision on Request for Admission of Report Prepared by Thaçi Defence Witness DHT-02, 1 May 2026 (confidential version filed on 22 April 2026), para. 11; ICTY, *Prosecutor v. Galić*, IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002 (“Galić Decision on Prosecution Expert Witnesses”), p. 2; ICTY, *Prosecutor v. Martić*, IT-95-11-T, 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; ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007 (“Nahimana et al. Appeal Judgement”), para. 198.

<sup>68</sup> ICTR, *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Decision on the Prosecution’s Objections to Expert Witnesses Lugan and Strizek, 23 October 2008 (“Ndindiliyimana Decision”), para. 9. See also ICTY, *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007 (“D. Milošević Expert Evidence Decision”), para. 7; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee, 25 October 2007, para. 16; ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Transcript, 4 September 2002 (Oral Decision on Defence Motions Challenging the Qualification of Expert Witness Dr. Alison Des Forges), p. 6.

<sup>69</sup> *Ndindiliyimana Decision*, para. 9.

<sup>70</sup> *D. Milošević Expert Evidence Decision*, para. 7.

or other publications written by the witness, or other information that may assist in establishing the qualifications and expertise of the witness.<sup>71</sup>

27. The Panel will first address the SPO's claim that, by requiring the SPO to demonstrate that comparative microdot analysis was an accepted expertise, the Single Trial Judge conflated the assessment of Witness 8's qualifications with the weight to be assigned to his evidence at the end of trial.

28. At the outset, the Panel considers that whether a witness is qualified to testify as an "expert" logically presupposes the existence of a field of "expertise".<sup>72</sup> However, for the purpose of assessing whether a proposed witness may be regarded as an expert,<sup>73</sup> what constitutes an "expertise" is determined on the basis of the witness's specific knowledge, skills and experience in the proposed field of expertise.<sup>74</sup> If the witness is found to be qualified as an expert, his or her expertise is deemed "accepted" (i.e. he or she has the necessary specialised knowledge and skills to give an opinion in the proposed field of expertise)<sup>75</sup> and the first part of the test is satisfied.

29. The Panel agrees with the SPO that whether comparative microdot analysis has been accepted as an expertise by other courts and/or been the subject of academic publication or validation is not relevant to the threshold question of a witness's *qualifications* as an expert, which is evaluated solely based on the credentials of the

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<sup>71</sup> *D. Milošević* Expert Evidence Decision, para. 7; ICTY, *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Admissibility of Expert Report of Kosta Čavoški, 1 March 2006, pp. 2-3; ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on Defence Motions to Exclude the Expert Reports of Mr. Patrick J. Treanor, 27 October 2008, para. 11; ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 12 February 2008, para. 28.

<sup>72</sup> See Defence Response, para. 6.

<sup>73</sup> See above, para. 25.

<sup>74</sup> ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Defence Rule 94 bis Notice Regarding Prosecution Expert Witness Richard Butler, 19 September 2007, para. 26 ("The determination to be made at this initial stage is whether the witness has sufficient expertise in a relevant subject area such that the Trial Chamber may benefit from hearing his or her opinion.").

<sup>75</sup> See above, para. 25. In this respect, the Panel clarifies that an "accepted expertise" in the context of the test for admissibility does not refer to its acceptance before other courts and in the professional community, but to the recognition of an expertise by the panel on the basis of the witness's qualifications. Contra Defence Response, paras 6-7.

proposed witness.<sup>76</sup> A witness's qualifications should be assessed independently from the question of the admissibility of his or her evidence.<sup>77</sup> However, the Panel considers that prior judicial acceptance<sup>78</sup> and academic or professional validation of an expertise may nonetheless become a relevant consideration<sup>79</sup> when assessing the probative value of the proposed evidence<sup>80</sup> under the second part of the test,<sup>81</sup> and in particular, the reliability of the applied methodology.<sup>82</sup> In this respect, the Panel notes that, while an expert report must possess minimum indicia of reliability at the admissibility stage

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<sup>76</sup> See above para. 26.

<sup>77</sup> See ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003 ("*Brđanin* Decision"), p. 4 ("[T]he Trial Chamber first has to decide whether the Witness is qualified as an expert, before determining whether his evidence is admissible as expert evidence"); ICTR, *Prosecutor v. Ntahobali et al.*, ICTR-98-42-T, Decision on Ntahobali and Nyiramasuhuko's Extremely Urgent Motions to Limit the Extent and Nature of the Report and Testimony of Filip Reyntjens, 18 September 2007, para. 14 ("It is the practice of the Chamber to assess the qualification of an expert witness prior to making a determination on the admissibility of the expert's evidence"). See also Appeal, fn. 34.

<sup>78</sup> In this respect, the Panel emphasises that, while a relevant consideration, acceptance of a witness's expertise by other courts is not dispositive. As several chambers have rightly commented, recognition of a witness's expertise is highly dependent on the contribution of his or her testimony in the particular case. See *Ndindiliyimana* Decision, para. 14 ("In assessing the utility of an expert, [...] the Chamber must focus on the ability of the expert witness to contribute to the particular case at hand. Therefore, it is not relevant whether an individual has been recognized as an expert in other trials, and 'the same person might be qualified as an expert in one case and not in another.'"); ICTR, *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, 7 July 2006, para. 32 ("A witness's qualification as an expert turns on the contribution he or she can make to a Trial Chamber's analysis of a particular case. Thus, the same person might be qualified as an expert in one case and not in another.").

<sup>79</sup> In this regard, the Panel emphasises that the reliability of an expert report is not a distinct requirement for admissibility but is an underlying consideration in the assessment of relevance and probative value. See ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009 ("*Prlić* Appeal Decision"), para. 33.

<sup>80</sup> See e.g. ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Decision on Prosecution Motions Concerning the Testimony of Davor Strinović, 7 November 2008, para. 22 ("The Chamber notes that the Witness has already given expert evidence for the Prosecution before the Tribunal"); ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on the Defence Motion to Exclude the Expert Reports of Robert Donia, 27 October 2008, para. 12 ("[T]he Trial Chamber notes that Dr. Donia has already testified as an expert witness in numerous cases before the Tribunal.").

<sup>81</sup> See above, para. 25.

<sup>82</sup> See ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Defence Notice Under Rule 94bis, 5 March 2009 ("*Đorđević* Decision on Defence Notice"), para. 11 ("Further, the report appears to have been reviewed by specialists in the field, which lends support to the view that the methodology used by [the witness] is an accepted research tool.").

in order to be probative,<sup>83</sup> deficiencies which may affect the credibility of the witness's opinion or accuracy of his or her applied methodology<sup>84</sup> are generally matters of the weight to be assigned to the evidence.<sup>85</sup> Therefore, while much depends on the nature of the concerned field of expertise, the Panel considers that recognition of an expertise by other courts and its acceptance in the relevant professional community may be relevant indicators of reliability at the admissibility stage.<sup>86</sup>

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<sup>83</sup> See ICTY, *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of Deceased Witness, 21 July 2000, para. 24 (“[T]he reliability of a statement is relevant to its admissibility, and not just to its weight. A piece of evidence may be so lacking in terms of the indicia of reliability that is not ‘probative’ and is therefore inadmissible.”); *Dorđević* Decision on Defence Notice, para. 8 (“The expert statement or report must therefore meet the minimum standards of reliability”); *D. Milošević* Defence Expert Decision, para. 7 (“[T]he expert statement or report must meet the minimum standards of reliability”).

<sup>84</sup> In the Panel's view, this may include a consideration of the impact of any confidentiality restrictions on the witness's evidence.

<sup>85</sup> *Perišić* Decision, para. 14 (“[Q]uestionable methodology used in drafting an expert report is a matter that may go to the weight given to the evidence, rather than its admissibility”); ICTY, *Prosecutor v. Delić*, IT-04-83-T, Decision on Paul Cornish's Status as an Expert, 20 March 2008 (“*Delić* Decision”), para. 14 (“Absence of such clear references or accessible sources might have its impact on the weight given to the report”); ICTY, *Prosecutor v. Galić*, IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 February 2003 (“*Galić* Reconsideration Decision”), para. 11 (“[W]hile a minimum degree of transparency and reliability in sources is required at the stage of admission, it mostly plays a role when the Trial Chamber appreciates the weight to be given to the expert report at the end of trial, and in light of all the evidence adduced”); *Popović* Appeal Decision, para. 22 (noting that determination on authenticity and credibility are “matters to be assessed by the Trial Chamber at a later stage in the course of determining the weight to be attached to the evidence”); ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003 (“*Rutaganda* Appeal Judgement”), fn. 63 (noting that admission of an expert report is not a “binding determination as to [its] authenticity or trustworthiness”, but “[t]hese are matters to be assessed by the Trial Chamber at a later stage in the course of determining the weight to be attached to the evidence”);

<sup>86</sup> External recognition and validation do not, however, operate as a strict, technical requirement barring the admissibility of evidence. Rather, these are merely factors that may be considered when assessing the reliability of expert evidence. In this regard, the Panel notes that international criminal tribunals generally follow a flexible approach to the assessment of evidence, favouring admissibility and broad discretion, and are not constrained by strict technical rules predominant in domestic systems. Unlike in domestic systems where trials are conducted before a jury and judges exercise a gatekeeping role in order to shield the fact-finder from unreliable evidence, panels before the Specialist Chambers are made up of professional judges who are qualified to assess the credibility and probative value of expert evidence, consider it in its proper context, and accord it appropriate weight, if any. See KSC-BC-2020-06, IA028/F00011/RED, Public Redacted Version of Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning, 4 July 2023 (confidential version filed on 4 July 2023) (“Case 06 Judicial Questioning Decision”), para. 53; *Popović* Appeal Decision, para. 31. See also Ambos, K., *Treatise on International Criminal Law: Volume III: International Criminal Procedure* (Second Edition), Oxford University Press 2025, pp. 447-448.

30. For the above reasons, the Panel finds that, while the Single Trial Judge's assessment did not distinctly follow the logical sequence of the three-part test set out in the Impugned Decision<sup>87</sup> and followed by other panels,<sup>88</sup> and further endorsed by the Court of Appeals Panel in the present Decision, his consideration of prior judicial acceptance and academic publication or validation does not constitute an error *per se*. The Panel will further examine the Single Trial Judge's reliance on these indicators of reliability in paragraphs 32-36 below.

31. Relatedly, the SPO argues that, having found Witness 8 to be qualified in SISA, the Single Trial Judge should have proceeded to examine whether comparative microdot analysis fell within his accepted expertise. In this regard, the Panel notes that while the elements of the three-part test outlined in paragraph 25 above are cumulative, the non-fulfilment of one condition is sufficient to find evidence inadmissible. Therefore, should the Single Trial Judge find that one of the requirements under Rule 138(1) of the Rules had not been established, as the Panel understands to have been the case, he was not strictly required to examine whether the contents of the report fell within Witness 8's accepted expertise (i.e. SISA), although the Panel considers that it would have been logical for him to do so. Accordingly, the Panel finds no error on this basis and dismisses the SPO's submissions in this regard.

32. The Panel next turns to the SPO's claim that the Single Trial Judge erred in relying solely on prior judicial acceptance and academic validation while ignoring the presence of other commonly accepted indicators of reliability which it avers were sufficient to validate Witness 8's methodology to a *prima facie* standard.

33. The Panel observes that, in the context of assessing the "expertise of Witness 8", the Single Trial Judge considered that: (i) there was no evidence that comparative

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<sup>87</sup> See Impugned Decision, para. 19.

<sup>88</sup> Case 06 Admissibility Decision, para. 22; Case 07 Admissibility Decision, para. 63.

microdot analysis has been recognised as an expertise by other courts on the basis that no decisions or materials were provided by the SPO to substantiate Witness 8's testimony that he previously provided an expert opinion on microdot analysis in Dutch criminal proceedings;<sup>89</sup> and (ii) comparative microdot analysis does not appear to have been the object of significant academic publication or validation, and that no publications were provided by the SPO in this regard.<sup>90</sup>

34. The Panel notes that, while relevant indicators of reliability, prior judicial recognition and academic or professional validation are neither prerequisites for nor dispositive of reliability and, consequently, admissibility.<sup>91</sup> Moreover, such markers may not be relevant in every case but will depend on the nature of the expertise and of the expert opinion. The Panel observes that the Single Trial Judge relied almost exclusively on the absence of prior judicial recognition and academic validation when assessing the reliability of Witness 8's proposed evidence.<sup>92</sup> The Panel further observes that a panel may consider a range of factors within the exercise of its discretion when evaluating the reliability of expert evidence, including several indicators that are plainly apparent in the present case, but were not considered by the Single Trial Judge in his assessment. This includes, but is not limited to, adherence to industry standards and internal protocols, quality control through peer review, accreditation by a reputable institution (in this case, the NFI), the offering of academic courses and trainings on the applied methods, and the use of the applied methods by [REDACTED].<sup>93</sup> In the Panel's view, these factors are sufficient to establish reliability

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<sup>89</sup> In this regard, the Panel notes the SPO's argument that Witness 8's testimony regarding his prior casework and testimony on microdot analysis was sufficient to demonstrate judicial recognition to a *prima facie* standard. See Appeal, para. 17; Reply, para. 4.

<sup>90</sup> See Impugned Decision, paras 60-61.

<sup>91</sup> See *Popović* Appeal Decision, para. 22 and fn. 88 (finding that a determination on reliability has to be made on a case-by-case basis and rejecting the prosecution's argument that the fact the expert witness previously testified before the tribunal in other cases automatically renders his testimony reliable). See also above, para. 29 and fn. 86.

<sup>92</sup> In this regard, the Panel notes that the Single Trial Judge separately considered the transparency of sources and methodology in Witness 8's expert report when assessing its reliability and probative value. See Impugned Decision, paras 25-32.

<sup>93</sup> See also Appeal, para. 15; Reply, para. 3.

to a *prima facie* standard. Accordingly, the Panel finds that the Single Trial Judge failed to give any weight or sufficient weight to relevant considerations in reaching his decision.

35. Moreover, the Panel notes that definite proof of reliability is not required at the stage of admissibility.<sup>94</sup> Expert evidence is not subject to a more stringent standard than other evidence<sup>95</sup> and it is therefore sufficient that, on its face, the evidence possesses some indicia of reliability establishing a baseline of trustworthiness.<sup>96</sup> The Panel considers that, by requiring the submission of decisions or other materials to substantiate the testimony of Witness 8 regarding his prior expert testimony and the submission of academic or professional publications substantiating the recognition of comparative microdot analysis as an expertise, the Single Trial Judge applied a higher standard than required at the stage of admissibility.<sup>97</sup>

36. On the basis of the above, the Appeals Panel finds that the Single Trial Judge committed a discernible error by failing to give weight to relevant considerations in reaching his decision and by applying a higher standard than required at the stage of admissibility. Having found that the Single Trial Judge committed a discernible error in the standard applied in his assessment, the Panel finds it unnecessary to consider

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<sup>94</sup> *Popović* Appeal Decision, para. 22. See also *Prlić* Appeal Decision, para. 33 (“[D]efinitive proof of reliability is not required at the admissibility stage. Rather, it is an issue to be assessed at a later stage in the course of determining the weight to be attached to the evidence after its admission”); *Rutaganda* Appeal Judgement, paras 33, 266 (“[P]rovisional proof of reliability on the basis of sufficient indicia is enough at the admissibility stage”).

<sup>95</sup> ICTY, *Prosecutor v. Stanišić & Simatović*, IT-03-69-PT, Decision on Prosecution’s Submission of the Expert Report of Nena Tromp and Christian Nielsen Pursuant to Rule 94 *bis*, 18 March 2008, para. 11; *Brđanin* Decision, p. 4. See also *D. Milošević* Defence Expert Decision, para. 10.

<sup>96</sup> See ICTR, *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Casimir Bizimungu’s Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe (Rule 89(C)), 2 September 2005 (“*Bizimungu* Decision”), para. 14 (“This is a low threshold to satisfy, and the Appeals Chamber has determined that ‘only the beginning of proof that evidence is reliable’ is required.”); ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence, 4 October 2004 (“*Nyiramasuhuko* Appeal Decision”), para. 7.

<sup>97</sup> See above, para. 33.

the SPO's argument regarding the Single Trial Judge's factual findings on the basis of said standard.<sup>98</sup>

37. In light of the Appeals Panel's findings in paragraphs 34-36 above, the Panel grants, in part, Ground 1 of the Appeal.

B. ALLEGED ERRORS REGARDING THE SINGLE TRIAL JUDGE'S ASSESSMENT OF WITNESS 8'S EVIDENCE (GROUND 2)

**1. Submissions of the Parties**

38. The SPO submits that the Single Trial Judge erred in concluding that a lack of transparency concerning the sources and methods underlying Witness 8's expert opinion rendered his evidence inadmissible.<sup>99</sup> In reaching such conclusion, the SPO avers that the Single Trial Judge fundamentally misapplied the *prima facie* standard of reliability applicable at the admissibility stage by requiring full transparency as to the sources and methods.<sup>100</sup> In particular, the SPO asserts that, while acknowledging that Witness 8 had provided the [REDACTED] and explained his general methodology, the Single Trial Judge nonetheless excluded his evidence on the basis that the specific steps and [REDACTED] work-product underlying Witness 8's conclusions had not been disclosed due to asserted confidentiality restrictions.<sup>101</sup>

39. In the SPO's view, the threshold for admission requires only a "minimum standard of reliability", which is a low threshold to satisfy and only requires that there is sufficient information to allow the basis of the expert's conclusions to be tested and challenged.<sup>102</sup> Having satisfied this minimum standard, any alleged deficiencies in the transparency of Witness 8's expert opinion, including any undisclosed aspects thereof,

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<sup>98</sup> Namely, that the Single Trial Judge's findings of fact were directly contradicted by other evidence in the record. See Appeal, para. 17.

<sup>99</sup> Appeal, para. 19.

<sup>100</sup> Appeal, paras 19-20.

<sup>101</sup> Appeal, para. 19.

<sup>102</sup> Appeal, para. 20.

should be assessed when assigning weight to the evidence, and do not constitute a ground for its summary exclusion.<sup>103</sup>

40. Furthermore, the SPO submits that recent Specialist Chambers jurisprudence affirms that alleged deficiencies in the information underlying an expert's source material do not warrant the exclusion of the expert's evidence, but rather go to its ultimate weight against the totality of the record.<sup>104</sup> Moreover, the SPO avers that other courts have similarly accepted forensic expert evidence in circumstances where the full set of underlying data could not be disclosed for reasons of privacy or protection of public interest.<sup>105</sup> In the SPO's view, "the very recognition of expertise depends on a witness possessing specialised knowledge beyond the court's own ken", and such status allows an expert to comment on evidence and address factors and inferences beyond those that are readily apparent, in order to make complex technical data available for judicial assessment.<sup>106</sup>

41. Finally, the SPO submits that, in assessing the requisite degree of transparency for admission of Witness 8's evidence, the Single Trial Judge erroneously required "a degree of methodological disclosure approaching replication".<sup>107</sup> In the SPO's view, the evidence remained challengeable through Witness 8's report, his testimony, his qualifications, the disclosed materials, NFI standards, peer review and the possibility for testing by an independent expert.<sup>108</sup> Under these circumstances, the "wholesale exclusion" of Witness 8's evidence constituted an abuse of discretion.<sup>109</sup> Should the Single Trial Judge have considered that parts of Witness 8's report remained insufficiently explained, the SPO asserts that the "only proportionate response" should have been a targeted one, for example by seeking clarification from the Dutch

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<sup>103</sup> Appeal, para. 20.

<sup>104</sup> Appeal, para. 21.

<sup>105</sup> Appeal, para. 21.

<sup>106</sup> Appeal, para. 22.

<sup>107</sup> Appeal, para. 23.

<sup>108</sup> Appeal, para. 23.

<sup>109</sup> Appeal, para. 23.

authorities, the NFI, or Witness 8, requiring corroboration, or assigning reduced weight to the evidence.<sup>110</sup>

42. The Defence responds that, in asserting that the Single Trial Judge's assessment regarding the transparency of Witness 8's methodology was erroneous, the SPO alleges no error of law or fact, but only an abuse of discretion.<sup>111</sup> In the Defence's view, the Single Trial Judge's careful analysis and detailed reasoning cannot conceivably be characterised as "so unfair or unreasonable as to constitute an abuse of the [Single Trial Judge]'s discretion".<sup>112</sup>

43. In support, the Defence first argues that limitations on cross-examination must be proportionate and subject to judicial scrutiny.<sup>113</sup> However, given the SPO's failure to seek authorisation and Witness 8's refusal to explain the basis and scope of the confidentiality restrictions, the Defence avers that such judicial scrutiny was "impossible".<sup>114</sup> Consequently, in the Defence's view, admission of his "incomplete evidence" under those circumstances would have constituted an error of law infringing on the right to a fair trial.<sup>115</sup>

44. The Defence further argues that the SPO's reliance on the ICTY Trial Chamber's decision in *Galić* in support of its assertion that full transparency is not required at the admissibility stage is misplaced.<sup>116</sup> In the Defence's view, the distinct facts and context upon which the *Galić* decision was reached is of significance.<sup>117</sup> The Defence avers that the Single Trial Judge considered and relied upon the *Galić* decision to support the principle that a lack of transparency can impact admissibility or weight, and that the

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<sup>110</sup> Appeal, para. 23.

<sup>111</sup> Defence Response, para. 12.

<sup>112</sup> Defence Response, para. 12. See also Defence Response, para. 21.

<sup>113</sup> Defence Response, para. 18.

<sup>114</sup> Defence Response, paras 17-18.

<sup>115</sup> Defence Response, para. 18.

<sup>116</sup> Defence Response, para. 19, referring to ICTY, *Prosecutor v. Galić*, IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003 ("*Galić* Decision on Defence Expert Witnesses"), p. 3.

<sup>117</sup> Defence Response, para. 19.

distinction is a “question of degree”.<sup>118</sup> However, applying this same principle, the Single Trial Judge ultimately determined that the lack of transparency in Witness 8’s evidence failed to meet the requisite minimum standard.<sup>119</sup> The Defence argues that, unlike in *Galić*, there was “no realistic prospect” that Witness 8’s evidence would become “more transparent” or “fully transparent” with the introduction of additional evidence.<sup>120</sup>

45. Finally, the Defence responds that none of alternative courses of action which the SPO suggests the Single Trial Judge should have taken are sufficient to demonstrate an abuse of discretion.<sup>121</sup> In particular, the Defence asserts that the SPO’s suggestion that the Single Trial Judge could have required corroboration or sought clarification ignores the principle that the presentation of evidence is primarily the responsibility of the parties.<sup>122</sup> In the Defence’s view, if any clarification could have been provided, the responsibility rested on the SPO to provide it, which it failed to do.<sup>123</sup>

46. The SPO replies that the Defence’s arguments demonstrate a fundamental misunderstanding of the *prima facie* reliability standard.<sup>124</sup> In the SPO’s view, a witness’s refusal to answer questions is neither “fatal to reliability” nor renders their evidence “unchallengeable”, in particular as in the present case, where the apparent deficiencies relate to specific intermediate steps and work-product and only concerned a fraction of the questions put to the witness on cross-examination, thereby leaving the overall methodological framework testable.<sup>125</sup> In this respect, the SPO further submits that the Defence ignores the ICTY Trial Chamber’s subsequent

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<sup>118</sup> Defence Response, paras 19-20.

<sup>119</sup> Defence Response, para. 19.

<sup>120</sup> Defence Response, para. 19.

<sup>121</sup> Defence Response, para. 20.

<sup>122</sup> Defence Response, para. 20.

<sup>123</sup> Defence Response, para. 20.

<sup>124</sup> Reply, para. 5.

<sup>125</sup> Reply, para. 5.

decision in *Galić*, which found expert evidence admissible even though not all source material was provided, noting that transparency in sources “mostly plays a role when the Trial Chamber appreciates the weight to be given to the expert report at the end of the trial”.<sup>126</sup> In the SPO’s view, the standard of *prima facie* reliability is a low threshold which favours the admission of evidence and “insisting on full transparency would render the ‘question of degree’ between admissibility and weight entirely illusory.”<sup>127</sup>

## 2. Assessment of the Court of Appeals Panel

47. In the Impugned Decision, the Single Trial Judge found that the omission from Witness 8’s expert report of (i) [REDACTED] during his examination, (ii) [REDACTED], and (iii) a description of the [REDACTED], constituted serious deficiencies in the transparency of Witness 8’s applied methodology.<sup>128</sup> The Single Trial Judge also found that Witness 8 had provided “no source at all” for the proposition applied in his analysis that “[REDACTED]”.<sup>129</sup> On this basis, the Single Trial Judge concluded that the lack of transparency concerning the methodology applied by Witness 8 and the sources relied upon in his report did not permit a meaningful assessment of its probative value, and as a result, found Witness 8’s evidence inadmissible.<sup>130</sup>

48. The SPO challenges the Single Trial Judge’s exclusion of Witness 8’s evidence, asserting that the Single Trial Judge misapplied the standard of *prima facie* reliability applicable at the admissibility stage by requiring the disclosure of the specific steps

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<sup>126</sup> Reply, para. 6, quoting *Galić* Reconsideration Decision, paras 11-12.

<sup>127</sup> Reply, para. 6.

<sup>128</sup> Impugned Decision, paras 28-29.

<sup>129</sup> Impugned Decision, paras 25, 29.

<sup>130</sup> Impugned Decision, paras 55, 63. The Panel observes that, during his testimony, Witness 8 declined to answer several questions on grounds of confidentiality. See e.g. Impugned Decision, para. 34. However, these refusals did not form the basis for the Single Trial Judge’s finding of a lack of transparency.

and work product underlying Witness 8's conclusions,<sup>131</sup> and that, applying the correct standard, Witness 8's evidence was sufficiently transparent to be admissible.<sup>132</sup>

49. The Panel recalls that, at the admissibility stage, expert evidence must meet a minimum standard of reliability to allow a panel to assess its probative value.<sup>133</sup> This standard (*prima facie* reliability) is a low threshold to satisfy<sup>134</sup> and only requires that the evidence possess "sufficient indicia of reliability".<sup>135</sup> Evidence may be "so lacking in terms of the indicia of reliability" that it is "devoid of any probative value" and therefore inadmissible.<sup>136</sup> However, the Panel recalls that definite proof of reliability need not be demonstrated for evidence to be admissible.<sup>137</sup>

50. When evaluating the *prima facie* reliability of an expert report, a panel considers, *inter alia*, whether it contains "sufficient information as to the sources used in support of its conclusions",<sup>138</sup> including "any established or assumed facts on which the expert relied"<sup>139</sup> and regarding the "methods used when applying his or her knowledge, experience or skills to form his or her expert opinion".<sup>140</sup> A panel must be "satisfied

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<sup>131</sup> Appeal, paras 19-20, 23; Reply, para. 5.

<sup>132</sup> Appeal, paras 21-23; Reply, para. 5.

<sup>133</sup> See *Popović* Appeal Decision, para. 22; *Galić* Reconsideration Decision, para. 9. See also *Prlić* Appeal Decision, para. 33. The Panel notes that this assessment falls under the second part of the test set out in paragraph 25 above.

<sup>134</sup> *Bizimungu* Decision, para. 14; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Limit the Scope of Testimony of Expert Witnesses Alison Des Forges and Andre Guichaoua, 21 August 2007 ("*Karemera* Decision"), para. 5.

<sup>135</sup> *Nyiramasuhuko* Appeal Decision, para. 7 ("Thus, at the stage of admissibility, only the beginning of proof that evidence is reliable, namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible."); *Popović* Appeal Decision, para. 22; *Bizimungu* Decision, para. 14; *Karemera* Decision, para. 5.

<sup>136</sup> *Rutaganda* Appeal Judgement, paras 33, 266. See also *Nyiramasuhuko* Appeal Decision, para. 7; *Bizimungu* Decision, para. 14; *Dorđević* Decision on Defence Notice, para. 8; *Popović* Appeal Decision, para. 22.

<sup>137</sup> See above, para. 35.

<sup>138</sup> ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion to Exclude the Expert Report of Kosta Čavoški, 5 April 2023, para. 22.

<sup>139</sup> ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Admissibility of Narratives of Expert Witness Richard Butler, 27 March 2008 ("*Popović* Admissibility Decision"), para. 13.

<sup>140</sup> *Galić* Decision on Prosecution Expert Witnesses, p. 2; *Galić* Decision on Defence Expert Witnesses, p. 3.

globally on the basis of the evidence of the expert and the expert report itself, as to a minimum standard of reliability in terms of transparency in sources and methods".<sup>141</sup> In particular, the sources and methods must be "clearly indicated and accessible" to allow the court to understand how the expert reached his or her conclusions and the opposing party to challenge the basis of those conclusions.<sup>142</sup>

51. However, while an expert should outline generally the methods and sources used, deficiencies in the completeness or clarity of sources and methods do not automatically lead to the exclusion of the evidence. Unless these defects render the evidence "*so lacking* in terms of the indicia of reliability, such that it is not probative,"<sup>143</sup> deficiencies in the sources and methodology relied upon in a witness's report are matters generally relevant to the weight attached to the evidence rather than its admissibility.<sup>144</sup>

52. At the outset, the Panel notes that, in the Impugned Decision, the Single Trial Judge does not explicitly refer to "*prima facie* reliability". However, the Panel

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<sup>141</sup> *Popović* Admissibility Decision, para. 14 (noting, however, that "[w]hile it is necessary for the expert to outline *generally* the methods as well as sources used, it is equally clear that this need not involve detailed references for each and every statement") (emphasis added).

<sup>142</sup> *Delić* Decision, para. 14; *D. Milošević* Defence Expert Decision, para. 7; ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 August 2009, para. 10; *Galić* Reconsideration Decision, para. 9. See also STL, In the Case Against Al Jadeed [Co.] S.A.L./New T.V. S.A. L. (N.T.V) and Al Khayat, STL-14-05/T/CJ, Decision on Witness Ran Sabbah, 8 May 2015, para. 20 (for the chamber to "reasonably determine the statement's reliability and probative value, there should be *some discernible explanation* related to [the proposed expert's] conclusions as to the sources or methods she used") (emphasis added).

<sup>143</sup> See *Popović* Admissibility Decision, para. 14 (emphasis added); *Bizimungu* Decision, para. 14.

<sup>144</sup> See e.g. *Perišić* Decision, para. 14 ("[A] questionable methodology used in drafting an expert report is a matter that may go to the weight to be attached to the evidence rather than its admissibility."); ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on Expert Report by Richard Philipps, 10 March 2009, para. 18 (noting that concerns regarding the sources relied upon by the proposed expert "do not affect the admissibility of [his] Report, but may affect the weight to be given to the [expert]'s evidence"); *Delić* Decision, para. 14 (finding that the "[a]bsence of [...] clear references or accessible sources might have [an] impact on the weight given to the report"); *Popović* Admissibility Decision, para. 16 (noting that "incomplete, obsolete, or insufficient sources" are "all matters which will ultimately go to the weight to be given to this evidence at the end of trial, not to its admissibility"); *Karemera* Decision, para. 5.

understands that this is the standard applied in his assessment, based on the jurisprudence cited in support.<sup>145</sup>

53. The Panel acknowledges that the non-disclosure of these matters<sup>146</sup> may have impacted the transparency of Witness 8's evidence, as they touched upon some aspects of the analysis he performed. That said, the Panel observes that, during his testimony, Witness 8 described at least generally the procedures he followed in performing his analysis, including the [REDACTED],<sup>147</sup> the methods of interpretation he applied in his analysis,<sup>148</sup> his [REDACTED] and how these supported his conclusion,<sup>149</sup> as well as the applied quality control measures by means of an independent peer review by another SISA expert at the NFI, who validated his conclusion.<sup>150</sup> Similarly, although less detailed than what would be expected of an expert report owing to [REDACTED],<sup>151</sup> Witness 8's report nevertheless details the facts or assumptions he relied upon,<sup>152</sup> the relevant standards he followed,<sup>153</sup> the general steps of his analysis and his conclusion.<sup>154</sup> Additionally, the [REDACTED]

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<sup>145</sup> See Impugned Decision, paras 21-22 and fns 52-54.

<sup>146</sup> See above, para. 47.

<sup>147</sup> See e.g. Transcript, 3 March 2026, p. 529, lines 3-7 (private session), p. 533, line 8 - p. 534, line 2 (private session), p. 535, lines 3-12 (private session); Transcript, 4 March 2026, p. 635, line 7 - p. 637, line 5 (private session). See also Impugned Decision, para. 26.

<sup>148</sup> See e.g. Transcript, 3 March 2026, p. 536, lines 4-25 (private session); Transcript, 4 March 2026, p. 627, line 21 - p. 630, line 15 (private session), p. 643, line 19 - p. 644, line 25 (private session).

<sup>149</sup> See e.g. Transcript, 3 March 2026, p. 528, line 17 - p. 529, line 14 (private session), p. 532, line 18 - p. 534, line 5 (private session), p. 535-537 (private session); Transcript, 4 March 2026, p. 639, line 5 - p. 643, line 16 (private session).

<sup>150</sup> See e.g. Transcript, 3 March 2026, p. 504, lines 6-23, p. 516, line 13 - p. 517, line 10 (private session), p. 538, lines 1-10 (private session); Transcript, 4 March 2026, p. 634, lines 15-23 (private session), p. 638, lines 17-22 (private session), p. 654, lines 3-9 (private session). The Panel notes that Witness 8's testimony and expert report are supplemented by [REDACTED]. See 128072-128080 (confidential) (Disclosure 54, 11 July 2025); SPOE00410048-00410058 (confidential) (Disclosure 17, 16 February 2026).

<sup>151</sup> See Transcript, 4 March 2026, p. 632, lines 13-21 (private session).

<sup>152</sup> See 118299-118304 (Report) (confidential), p. 3 (118301).

<sup>153</sup> See 118299-118304 (Report) (confidential), pp. 4-6 (118302-118304).

<sup>154</sup> See 118299-118304 (Report) (confidential), pp. 4-6 (118302-118304).

examined by Witness 8 were disclosed to the Defence in advance of his testimony,<sup>155</sup> along with a printout detailing the [REDACTED] he examined.<sup>156</sup>

54. Moreover, the Panel notes that, while Witness 8 could not, owing to confidentiality, disclose an “official source” for the proposition applied in his analysis [REDACTED],<sup>157</sup> Witness 8 also testified that this assertion was based on [REDACTED].<sup>158</sup> In this respect, the Panel notes that, by its inherent nature, expert evidence involves the offering of an opinion based not only on specific facts and sources, but also the application of the expert’s general knowledge gained through the development of his or her expertise.<sup>159</sup> For this reason, the Panel considers that satisfying the minimum degree of transparency for the purpose of admissibility does not require Witness 8 to provide a specific authoritative source for the specialised knowledge he has developed by virtue of his training and years of experience in his field of expertise.

55. The Panel considers, having regard to the information provided in Witness 8’s report and his testimony as a whole, that the sources relied upon and methods applied by Witness 8 in performing his analysis were sufficiently transparent to allow the Single Trial Judge and the Defence to understand his evidence.<sup>160</sup>

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<sup>155</sup> See 129531-129531 (confidential) (Disclosure 81, 24 October 2025). See also 128072-128080 (confidential), para. 27 (128080); SPO Submissions on Witness 8 Evidence, fn. 41.

<sup>156</sup> See SPOE00410059-SPOE00410065RED (confidential) (Disclosure 109, 19 February 2026).

<sup>157</sup> See Transcript, 4 March 2026, p. 652, lines 3-4 (private session) (“[REDACTED].”).

<sup>158</sup> See Transcript, 3 March 2026, p. 551, lines 19-24 (private session) (“[REDACTED].”). Contra Impugned Decision, para. 29 (“In fact, no source at all is cited for this last proposition.”).

<sup>159</sup> See *Popović* Admissibility Decision, para. 14.

<sup>160</sup> Contra ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, Decision on Admission of Expert Report of Ratko Škrbić with Separate Opinion of Judge Mindua and Dissenting Opinion of Judge Nyambe, 22 March 2012 (finding the methodology not sufficiently transparent where the expert, *inter alia*, disregarded relevant facts and materials upon which the case was premised (para. 28), did not clearly connect the hypothesis and the conclusion reached in the analysis (para. 26), and where the report lacked clear structure and did not include a summary of the findings (para. 33) and was based on insufficient sources (para. 33)).

56. The Panel notes the Defence's argument that there was "no realistic prospect" that Witness 8's evidence would become "more transparent" or "fully transparent" with the introduction of additional evidence and therefore, his evidence was properly excluded.<sup>161</sup> In this regard, the Panel stresses that the Single Trial Judge's assessment must be based on whether the evidence is, at this stage, sufficiently transparent to be admissible, regardless of what may (or may not) be established in the future. The question before the Single Trial Judge was whether Witness 8's evidence was sufficiently transparent, to a *prima facie* standard, to have some probative value. As noted above, the appropriate weight to be assigned to his evidence, in light of any deficiencies, is to be assessed by the Single Trial Judge at a later stage.<sup>162</sup>

57. For this reason, the Appeals Panel finds that by requiring the disclosure of specific [REDACTED] to support Witness 8's [REDACTED], and a specific authoritative source for the proposition applied in his analysis, the Single Trial Judge committed a discernible error in his application of the *prima facie* standard of reliability by imposing an unduly high threshold to meet the minimum degree of transparency required at the stage of admissibility.

58. The SPO next argues that these alleged deficiencies in the transparency of Witness 8's methodology did not justify the exclusion of his evidence, as it remained challengeable.

59. The Panel recalls that, for purposes of admissibility, expert evidence must be sufficiently transparent to allow the panel and the parties to understand how the expert reached his or her conclusions and the opposing party to challenge the basis of that conclusion.<sup>163</sup> The Panel takes note of the Defence's argument that Witness 8 refused to answer questions on his methodology and that these refusals, which were

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<sup>161</sup> See Defence Response, para. 19.

<sup>162</sup> See above, para. 51.

<sup>163</sup> See above, para. 50.

the result of confidentiality restrictions, impacted the Defence's cross-examination.<sup>164</sup> However, the Panel is not persuaded, having regard to the observations outlined above,<sup>165</sup> that these refusals impacted the transparency of Witness 8's evidence to such a degree as to prevent the Defence from challenging his analysis and conclusions. To the contrary, the Panel notes that the Defence had the opportunity to challenge Witness 8's evidence and did in fact question Witness 8 on his qualifications,<sup>166</sup> applied methods,<sup>167</sup> observations and conclusions,<sup>168</sup> as well as the credibility of his analysis.<sup>169</sup>

60. In conclusion, the Panel considers that Witness 8's evidence was sufficiently transparent to permit an assessment of its probative value at the admissibility stage.<sup>170</sup> To the extent that any deficiencies impacted the credibility or accuracy of his evidence, they are to be considered in the course of determining the appropriate weight to be

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<sup>164</sup> See Defence Response, paras 14, 17-18.

<sup>165</sup> See above, paras 53-54.

<sup>166</sup> See e.g. Transcript, 4 March 2026, p. 618, line 5 - p. 624, line 7.

<sup>167</sup> See e.g. Transcript, 3 March 2026, p. 585, line 3 - p. 586, line 9 (private session); Transcript, 4 March 2026, p. 635, line 7 - p. 639, line 4 (private session), p. 643, line 19 - p. 644, line 25 (private session).

<sup>168</sup> See e.g. Transcript, 3 March 2026, p. 582, line 11 - p. 588, line 19; (private session) Transcript, 4 March 2026, p. 602, line 23 - p. 603, line 3, p. 603, line 16 - p. 616, line 10 (private session), p. 627, line 21 - p. 632, line 2 (private session), p. 639, line 6 - p. 643, line 16 (private session). Contra ECtHR, *Vidgen v. the Netherlands*, no. 29353/06, Judgment, 10 July 2012 ("*Vidgen Judgment*"), paras 47-48 (wherein the European Court of Human Rights ("ECtHR") found a violation of Articles 6(1) and (3)(d) of the European Convention on Human Rights ("ECHR") in circumstances where the witness refused to answer any questions [by the defence] and questioning was futile); ECtHR, *Cabral v. the Netherlands*, no. 37617/10, Judgment, 28 August 2018 ("*Cabral Judgment*"), paras 21, 37-38 (wherein the ECtHR found a violation of Article 6(1) and (3)(d) of the ECHR in circumstances where a witness refused to give evidence under cross-examination by the defendant, making questioning futile, and there was no other possibility to challenge the credibility of the witness's statement); ECtHR, *Keskin v. the Netherlands*, no. 2205/16, Judgment, 19 January 2021 ("*Keskin Judgment*"), paras 68-70 (wherein the ECtHR found a violation of Article 6(1) and (3)(d) of the ECHR in circumstances where the defendant was denied the possibility to cross-examine prosecution witnesses).

<sup>169</sup> See e.g. Transcript, 3 March 2026, p. 558, line 10 - p. 560, line 3 (private session), p. 596, line 10 - p. 597, line 17 (private session); Transcript, 4 March 2026, p. 653, line 23 - p. 654, line 17 (private session). Contra ECtHR, *Pichugin v. Russia*, no. 38623/03, Judgment, 23 October 2012 ("*Pichugin Judgment*"), paras 211, 213 (wherein the ECtHR found a violation of Article 6(1) and (3)(d) of the ECHR in circumstances where the defendant was not permitted to cross-examine a witness on factors that might undermine the credibility of the witness's testimony); *Cabral Judgment*, paras 21, 37-38 (wherein the ECtHR found a violation of Article 6(1) and (3)(d) of the ECHR in circumstances where a witness refused to give evidence under cross-examination by the defendant and there was no other possibility to challenge the credibility of the witness's statement).

<sup>170</sup> See above, para. 55.

assigned to his evidence at the end of trial and in light of all evidence adduced before the Single Trial Judge.<sup>171</sup> For this reason, the Appeals Panel finds that the Single Trial Judge committed a discernible error by excluding Witness 8's evidence on the basis that it lacked transparency.

61. In light of the Appeals Panel's findings in paragraphs 53-60 above, the Panel grants Ground 2 of the Appeal.

C. ALLEGED ERRORS REGARDING THE SINGLE TRIAL JUDGE'S INTERPRETATION AND APPLICATION OF RULE 107 OF THE RULES (GROUND 3)

**1. Submissions of the Parties**

62. The SPO submits that the Single Trial Judge erred in finding that advance authorisation pursuant to Rule 107 of the Rules was required<sup>172</sup> and abused his discretion in finding that Witness 8's refusal to answer questions in the absence of a formal request and authorisation prejudiced the Defence and violated the right of the Accused to examine witnesses against them.<sup>173</sup>

63. First, the SPO asserts that authorisation under Rule 107 of the Rules was not mandatory under the circumstances, as a "predicate step" where a provider actually gives information on conditions of confidentiality never occurred in the present case.<sup>174</sup> In the SPO's view, where protected information is subject to disclosure, Rule 107 of the Rules does require the SPO to apply to the relevant panel in order to be relieved of its disclosure obligations.<sup>175</sup> However, the SPO avers that it never possessed the confidential information underlying Witness 8's refusals to answer, and the confidential matters were neither included in Witness 8's report nor the subject of

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<sup>171</sup> See above, paras 51, 56.

<sup>172</sup> Appeal, paras 24-31.

<sup>173</sup> Appeal, paras 32-34.

<sup>174</sup> Appeal, paras 26-27.

<sup>175</sup> Appeal, para. 25.

intended examination.<sup>176</sup> Consequently, a request pursuant to Rule 107 of the Rules was not strictly required.<sup>177</sup>

64. In this regard, the SPO further asserts that not every refusal to answer on grounds of confidentiality triggers the application of Rule 107 of the Rules,<sup>178</sup> and similarly, not every refusal to answer must be covered by Rule 107 protection or a recognised testimonial privilege in order for the witness's testimony to be admissible.<sup>179</sup> Regardless, in the SPO's view, even in the absence of a Rule 107 application, it fell within both the power and responsibility of the Single Trial Judge to regulate and oversee the conduct of Witness 8's testimony and to request any further information that he deemed necessary in order to clarify the scope, basis or applicability of any confidentiality restrictions.<sup>180</sup>

65. While acknowledging that an advance application pursuant to Rule 107 of the Rules may have been preferred by the Single Trial Judge, and accepting responsibility for not having made such an application, the SPO avers that the Single Trial Judge erred by treating advance Rule 107 authorisation as a requirement for the admission of Witness 8's testimony.<sup>181</sup>

66. Second, the SPO asserts that the absence of an advance Rule 107 authorisation did not result in prejudice to the Defence.<sup>182</sup> According to the SPO, the right to examine witnesses does not equate a right to "compel every desired answer irrespective of legitimate confidentiality claims" and, moreover, the admission of a witness statement without the possibility of effective cross-examination does not automatically render

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<sup>176</sup> Appeal, para. 27.

<sup>177</sup> Appeal, para. 27. In this regard, the SPO adds that it nevertheless notified the Defence and the Single Trial Judge that the witness may assert confidentiality protections with respect to certain topics that lay beyond the scope of the SPO's tendered evidence. See Appeal, para. 28.

<sup>178</sup> Appeal, para. 29.

<sup>179</sup> Appeal, para. 30.

<sup>180</sup> Appeal, para. 29.

<sup>181</sup> Appeal, para. 31.

<sup>182</sup> Appeal, paras 32-34.

proceedings unfair.<sup>183</sup> To the contrary, the SPO avers that the exclusion of evidence is a remedy falling at the extreme end of a range of measures available to the Single Trial Judge in addressing any alleged prejudice.<sup>184</sup>

67. Moreover, the SPO submits that, should the Single Trial Judge have considered that Witness 8's refusal to answer questions in the absence of an advance Rule 107 authorisation would result in serious procedural impropriety or undermine the integrity of the proceedings, appropriate rulings should have been made prior to Witness 8's testimony or at the time the issue arose.<sup>185</sup> Instead, while having foreseen in advance the possibility that Witness 8 might refuse to answer questions on grounds of confidentiality and having given thought to the matter, the Single Trial Judge allowed Witness 8's testimony to proceed and permitted the witness to assert confidentiality.<sup>186</sup> The SPO asserts that, for the Single Trial Judge to subsequently find prejudice arising from the very circumstances that he oversaw, constitutes an abuse of discretion.<sup>187</sup>

68. The Defence responds that a Rule 107 authorisation was mandatory and that the SPO's submission to the contrary reflects a misunderstanding of the scope and operation of Rule 107 of the Rules.<sup>188</sup> In this regard, the Defence first asserts that, when information is provided in the form of testimony, the application of Rule 107 is not limited to information conveyed to the calling Party in written form, but extends to the substance of the witness's knowledge.<sup>189</sup> In support, the Defence argues that Rule 107 of the Rules and its equivalent rule at the ICTY have commonly been invoked to set a "positive limit" on the scope of cross-examination by defining what subjects

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<sup>183</sup> Appeal, para. 32.

<sup>184</sup> Appeal, para. 32. In this regard, the SPO adds that, in and of itself, an advance Rule 107 application would not have further clarified either the scope or basis of the confidentiality restrictions. See Appeal, para. 33.

<sup>185</sup> Appeal, para. 34.

<sup>186</sup> Appeal, para. 34.

<sup>187</sup> Appeal, para. 34.

<sup>188</sup> Defence Response, para. 22.

<sup>189</sup> Defence Response, paras 23-24.

are open for questioning (rather than what is foreclosed), thereby protecting confidential information during questioning.<sup>190</sup> From this perspective, Rule 107 of the Rules can reasonably be applied to information not “possessed” by the calling Party.<sup>191</sup> In the Defence’s view, when a witness is made available on a confidential basis, the substance of that witness’s knowledge is under the “custody or control” of the calling Party within the meaning of Rule 107 of the Rules.<sup>192</sup> Accordingly, the Defence reasons that, because Witness 8 was made available by the NFI subject to confidentiality conditions, the SPO was under an obligation to bring a Rule 107 application.<sup>193</sup> The Defence avers that the SPO’s narrow interpretation of Rule 107 of the Rules is incoherent in light of the Rule’s purpose to “ensure the orderly management of confidentiality at trial”, as it would allow a party to easily evade its obligation to bring an application by ensuring that the confidential information is not reduced to a document in its possession.<sup>194</sup>

69. Secondly, the Defence asserts that the “single paragraph” in the SPO’s Request for Admission<sup>195</sup> did not discharge the SPO of its obligation under Rule 107 of the Rules, as it was not an application but merely a “unilateral assertion” identifying a vague alleged confidentiality, which ultimately did not accurately reflect the scope of the confidentiality invoked by Witness 8.<sup>196</sup> In the Defence’s view, the burden lies on

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<sup>190</sup> Defence Response, para. 25.

<sup>191</sup> Defence Response, para. 25.

<sup>192</sup> Defence Response, para. 25.

<sup>193</sup> Defence Response, para. 26.

<sup>194</sup> Defence Response, para. 26.

<sup>195</sup> In this respect, the Defence adds that the SPO misrepresents its prior submissions by claiming that it “notified the other parties and Panel that the witness may assert confidentiality protections for certain other topics beyond the scope of the SPO’s tender”, while it had in fact submitted that “Witness 8 would be prohibited by [REDACTED] from providing information on certain matters related to [REDACTED] microdots more generally which are irrelevant to the analysis he conducted in this case”. See Defence Response, para. 28, referring to Appeal, para. 28 and Request for Admission, para. 15.

<sup>196</sup> Defence Response, para. 27.

the SPO to bring an application and not on the Single Trial Judge to direct that one be filed.<sup>197</sup>

70. The Defence further responds that the SPO mischaracterises the Impugned Decision by claiming that the Single Trial Judge’s finding of prejudice was predicated on the “bare absence of a Rule 107 application”.<sup>198</sup> The Defence argues that, to the contrary, it was “Witness 8’s refusal to answer questions” that was prejudicial to the Defence, in the absence of a Rule 107 application, considered together with the importance of the expert conclusion and the relevance of the matters on which he refused or was unwilling to provide information.<sup>199</sup> In this regard, the Defence submits that the SPO’s generalised statements fail to engage with the Single Trial Judge’s actual finding that, given the nature of the information withheld, Witness 8’s specific refusals rendered his testimony more prejudicial than probative.<sup>200</sup> The Defence further argues that, while the right to cross-examination may not be absolute, it should not be “illusory”.<sup>201</sup> In the Defence’s view, witnesses are under a duty to testify, and because this obligation is essential for the proper administration of justice, it is subject to very few exceptions.<sup>202</sup> Relatedly, the Defence asserts that a party’s right to cross-examination may only be interfered with “by law” and “subject to the control of the Panel.”<sup>203</sup> Therefore, whether a witness may permissibly refuse to answer can only be decided by a Panel, and not by the witness himself.<sup>204</sup> Without such authorisation, the Defence avers that its right to cross-examine Witness 8 was limited in a manner that was neither prescribed by law nor subject to the control of the Single Trial Judge.<sup>205</sup>

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<sup>197</sup> Defence Response, para. 27.

<sup>198</sup> Defence Response, paras 29, 32.

<sup>199</sup> Defence Response, paras 30 (emphasis in original), 31.

<sup>200</sup> Defence Response, paras 32-33.

<sup>201</sup> Defence Response, para. 33.

<sup>202</sup> Defence Response, para. 33.

<sup>203</sup> Defence Response, para. 34.

<sup>204</sup> Defence Response, para. 34.

<sup>205</sup> Defence Response, para. 35. In this respect, the Defence adds that, even under circumstances where a witness’s refusal to answer is based on a valid testimonial privilege, the resulting limitation on the

71. The Defence next argues that the SPO's submission that an advance Rule 107 authorisation would not have, in and of itself, further clarified the scope or basis of the confidentiality restrictions, was explicitly rejected by the Single Trial Judge and should therefore be summarily dismissed.<sup>206</sup> In any event, the Defence avers that the SPO's suggestion is incorrect, as an advance authorisation would have allowed the NFI to clarify the scope of the confidentiality restrictions on Witness 8's evidence, including through the presence of a representative during his testimony.<sup>207</sup>

72. As regards the SPO's submission that appropriate rulings should have been made by the Single Trial Judge should he have considered that a Rule 107 authorisation was necessary to effectively oversee Witness 8's testimony, the Defence submits that the SPO has waived its right to advance this specific argument as it is raised for the first time on appeal.<sup>208</sup> Regardless, the Defence responds that it is not the Single Trial Judge's responsibility to "rescue" the SPO's case by remedying its failure to comply with the Rules.<sup>209</sup>

73. Moreover, the Defence asserts that the Single Trial Judge's handling of Witness 8's testimony, in view of the Defence's objections regarding the absence of a Rule 107 application, fell well within the considerable discretion afforded to him in managing the conduct of proceedings.<sup>210</sup>

74. Finally, contrary to the SPO's submission, the Defence asserts that the Single Trial Judge's exclusion of Witness 8's evidence was not "automatic" but was based on detailed reasoning regarding the prejudice that resulted from Witness 8's refusals to answer.<sup>211</sup> The Defence adds that, as found by the ICTY Appeals Chamber, exclusion

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defence's ability to cross-examine the witness may still violate the accused's right to examine witnesses against them when the witness's testimony is key evidence. See Defence Response, para. 36.

<sup>206</sup> Defence Response, para. 37.

<sup>207</sup> Defence Response, para. 37.

<sup>208</sup> Defence Response, para. 39.

<sup>209</sup> Defence Response, para. 40.

<sup>210</sup> Defence Response, para. 40.

<sup>211</sup> Defence Response, para. 38.

of a witness's testimony is reasonable in circumstances where confidentiality restrictions "unfairly limit the Defence's ability to challenge [the witness's] credibility and prevent it from obtaining evidence from [the witness] relevant to its case".<sup>212</sup>

75. The SPO replies that the Defence's interpretation unreasonably expands the application of Rule 107 of the Rules as a mandatory procedural requirement for all potential confidentiality issues involving witnesses, irrespective of whether the calling Party possesses the protected information.<sup>213</sup> In the SPO's view, even when applied to witness testimony, Rule 107 protections remain tied to the "substance of the information shared by the person".<sup>214</sup>

76. The SPO further replies that, while the Impugned Decision also considered the relevance of the questions unanswered by Witness 8, the absence of a prior Rule 107 application was itself a "distinct source of substantive prejudice" as the Single Trial Judge's analysis was "expressly contingent upon, and defined by, the procedural status of the witness's refusals".<sup>215</sup> Moreover, the SPO submits that, while the Single Trial Judge is not obliged to "remedy" errors by a party, he is "duty-bound to control the examination of witnesses in a fair and efficient manner".<sup>216</sup> In the SPO's view, having permitted the testimony to proceed and specifically advising Witness 8 that he may assert confidentiality concerns as necessary, the Single Trial Judge's retrospective finding of "heightened prejudice" based on that procedure is neither fair nor reasonable.<sup>217</sup>

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<sup>212</sup> Defence Response, para. 38, citing to ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution From Adding General Wesley Clark to its 65<sup>th</sup> Witness List, 20 April 2007 ("*Milutinović* Appeal Decision"), para. 20.

<sup>213</sup> Reply, para. 7.

<sup>214</sup> Reply, para. 7.

<sup>215</sup> Reply, para. 8.

<sup>216</sup> Reply, para. 9.

<sup>217</sup> Reply, para. 9.

## 2. Assessment of the Court of Appeals Panel

77. In the Impugned Decision, the Single Trial Judge found that: (i) the SPO was “duty-bound” to bring an application pursuant to Rule 107 of the Rules prior to Witness 8’s testimony;<sup>218</sup> and (ii) in the absence of such advance authorisation, Witness 8’s refusal to answer questions on grounds of confidentiality undermined the integrity of the proceedings and caused significant prejudice to the Defence, in light of the relevance of the questions and the importance of the expert conclusion.<sup>219</sup> On this basis, the Single Trial Judge concluded that any probative value of Witness 8’s evidence was outweighed by the prejudice arising from his refusal or inability to answer questions on grounds of confidentiality, a prejudice heightened by the SPO’s failure to have brought a Rule 107 application.<sup>220</sup>

78. The SPO challenges the above findings, asserting that: (i) the Single Trial Judge erred by treating advance Rule 107 authorisation as a requirement; (ii) the absence of a prior Rule 107 authorisation did not result in prejudice to the Defence justifying the exclusion of Witness 8’s evidence; and (iii) the Single Trial Judge’s finding of prejudice arising from the very circumstances that he oversaw constitutes an abuse of discretion.

79. The Appeals Panel will first address the SPO’s claim that the Single Trial Judge erred in finding that an advance authorisation pursuant to Rule 107 of the Rules was required.

80. The Panel notes that the purpose of Rule 107 of the Rules<sup>221</sup> is to encourage cooperation with the Specialist Chambers and to “create an incentive for such

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<sup>218</sup> Impugned Decision, paras 45-46, 48.

<sup>219</sup> Impugned Decision, paras 46, 49, 51.

<sup>220</sup> As acknowledged by the Single Trial Judge, “[t]his consideration was integral to the reasoning and the determination of the inadmissibility of Witness 8’s testimony in the Impugned Decision”. See Certification Decision, para. 31. See also Appeal, para. 36.

<sup>221</sup> The Panel notes that Rule 107 of the Rules is the equivalent of Rule 70 of the Rules of Procedure and Evidence at the ICTY, ICTR and SCSL. For this reason, the Panel considers that the jurisprudence of these tribunals is instructive.

cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected."<sup>222</sup> To this end, Rule 107 of the Rules may be invoked to protect confidential information from disclosure, including by restricting the scope and/or dissemination of a witness's testimony, as a condition for the sharing of such confidential information.<sup>223</sup> When the confidential information is provided in the form of testimony, a witness cannot be compelled to answer questions relating to the information or its origin if the witness declines on grounds of confidentiality.<sup>224</sup> Nevertheless, the Rule expressly provides, as a safeguard, that these confidentiality limitations shall not affect a panel's power to exclude the evidence, in accordance with Rule 138 of the Rules, or to take any measures necessary to ensure the fairness of the proceedings.<sup>225</sup>

81. The Appeals Panel notes that Rule 107 of the Rules explicitly refers to "information which has been provided on a confidential basis" and over which the

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<sup>222</sup> See KSC-BC-2020-06, F01847/RED, Public Redacted Version of Decision on the Prosecution Request for Rule 107 Measures for W04147 and W04868 (F01764), 10 October 2023 (confidential version filed on 10 October 2023) ("Case 06 Rule 107 Decision of 10 October 2023"), para. 14, citing to ICTY, *Prosecutor v. Slobodan Milošević*, IT-02-54-AR108bis&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("*Milošević* Appeal Decision on Rule 70 Interpretation"), para. 19 (interpreting Rule 70 of the ICTY Rules, which is the equivalent to Rule 107 of the Rules). See also ICTR, *Prosecutor v. Bizimungu et al.*, ICTR 99-50-AR73.6, Decision on Interlocutory Appeal Relating to the Testimony of Former United States Ambassador Robert Flaten, 17 July 2007 ("*Bizimungu* Appeal Decision"), para. 17; ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on Urgent Prosecution Motion for Protective Measures and Conditions for Witnesses RM-055, RM-120, RM-163, and RM-176 Pursuant to Rule 70, 30 November 2012 ("*Mladić* Decision on Rule 70 Measures"), para. 8.

<sup>223</sup> See *Bizimungu* Appeal Decision, para. 17; *Milutinović* Appeal Decision, para. 18. See also Case 06 Rule 107 Decision of 10 October 2023, paras 11-17; KSC-BC-2020-06, F02004, Decision on the Specialist Prosecutor's Rule 107(2) Request, 13 December 2023 ("Case 06 Rule 107 Decision of 13 December 2023"), paras 2, 4-7; KSC-BC-2020-06, F03468, Decision on Thaçi Defence Request for Rule 107 Measures for Witnesses 1DW-003, 1DW-004, 1DW-005 and 1DW-006, 12 September 2025 (confidential) ("Case 06 Rule 107 Decision of 12 September 2025"), paras 18-25, 34-36, 41, 43-44.

<sup>224</sup> Rule 107(4) of the Rules. See also Case 06 Rule 107 Decision of 10 October 2023, para. 14; Case 06 Rule 107 Decision of 13 December 2023, para. 5; Case 06 Rule 107 Decision of 12 September 2025, para. 14.

<sup>225</sup> See Rule 107(7) of the Rules. See also *Milutinović* Appeal Decision, para. 18; *Bizimungu* Appeal Decision, paras 17, 26.

SPO has “custody or control”.<sup>226</sup> The Panel agrees with the Defence that said “information” may take the form of witness testimony, and is not limited to information provided in written or other documentary form.<sup>227</sup> However, the Panel is not persuaded by the Defence’s argument that the mere fact that a witness with knowledge of confidential information is made available to testify subject to conditions automatically places said confidential information in the “custody or control” of the calling Party within the meaning of Rule 107 of the Rules.<sup>228</sup> In the Panel’s view, the applicability of Rule 107 of the Rules is triggered by the *sharing* of confidential information.<sup>229</sup> Certainly, the protections under Rule 107 of the Rules are not restricted to confidential information known or possessed by the calling Party. Indeed, Rule 107 of the Rules protects not only the initial information, but also its source or origin, which may not always be known to the calling Party.<sup>230</sup> However, the initial information (i.e. evidence to which a witness testifies) must have been provided, *in the first instance*, on a confidential basis.<sup>231</sup>

82. In the present case, the Panel observes that there is no indication that the sensitive information Witness 8 refused to disclose on grounds of confidentiality was provided to the SPO on a confidential basis. To the contrary, the Panel notes that both

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<sup>226</sup> Rule 107(1) of the Rules.

<sup>227</sup> See Rule 107(4) of the Rules; *Milošević* Appeal Decision on Rule 70 Interpretation, para. 23 (“The fact that the information is provided in the form of testimony does not exclude it from being ‘information’ or ‘initial information’ provided under the Rule”). See also Defence Response, paras 23-24.

<sup>228</sup> See Defence Response, para. 25.

<sup>229</sup> See e.g. *Milošević* Appeal Decision on Rule 70 Interpretation, para. 19 (noting that Rule 70 creates an incentive for cooperation by “permitting the *sharing* of information on a confidential basis” (emphasis added)); *Bizimungu* Appeal Decision, para. 26 (referring to the protection of Rule 70 as “ensuring that information *given* in confidence to one of the parties remains confidential” (emphasis added)).

<sup>230</sup> See Rule 107(1), (4) of the Rules. See also SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-AR73, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006 (“*Brima* Appeal Decision”), paras 7-8, 21, 24-25 (finding that the protections of Rule 70 extend to the confidential sources of the information to which the witness testified, although not known by the prosecutor, because the initial information was provided on a confidential basis).

<sup>231</sup> See *Brima* Appeal Decision, paras 21, 24; *Milošević* Appeal Decision on Rule 70 Interpretation, para. 25 (“All that Rule 70 requires is that the information ‘was provided to the Prosecutor on a confidential basis’”); Case 06 Rule 107 Decision of 13 December 2023, para. 6 (noting that “the evidence of W02475 was provided on a confidential basis”). See also Appeal, paras 26-27.

Witness 8's report and his testimony during the proceedings confirm the opposite.<sup>232</sup> Furthermore, there is no evidence suggesting that Witness 8's evidence was provided on the condition that it not be disclosed or that its use at trial required the NFI's prior authorisation.<sup>233</sup> Therefore, the Panel considers that, under the circumstances, an obligation to bring an application pursuant to Rule 107(2) of the Rules did not arise. Accordingly, the Panel finds that the Single Trial Judge committed a discernible error in finding that advance authorisation pursuant to Rule 107 of the Rules was required.

83. Notwithstanding the above, the Panel notes that, pursuant to Article 58 of the Law and Rule 211 of the Rules, the protections afforded under Rule 107 of the Rules may also be applied *mutatis mutandis* by a Panel, when deemed appropriate, at the request of a Third State or international organisation.<sup>234</sup> Rule 211(1) of the Rules specifically provides that Third States and international organisations may take all reasonable steps, in cooperation with a party or participant, to protect confidential or

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<sup>232</sup> See 118299-118304 (Report) (confidential), p. 4 (118302); Transcript, 3 March 2026, p. 553, lines 13-16 (private session) (“[REDACTED].”).

<sup>233</sup> Contra KSC-BC-2020-06, F03424/RED, Public Redacted Version of ‘Thaçi Defence Request for Rule 107 Measures for Witnesses 1DW-003, 1DW-004, 1DW-005 and 1DW-006’, 19 September 2025 (confidential version filed on 27 August 2025), paras 1, 9 (seeking measures for a witness whose evidence was “initially provided to the Thaçi Defence on a confidential basis and ‘for lead and background purposes only’, on the express understanding that Rule 107 applied” and whose statement was later authorised to be disclosed and used at trial by the Rule 107 providers subject to certain conditions); KSC-BC-2020-06, F01764/RED, Public Redacted Version of ‘Prosecution request for Rule 107 measures for W04147 and W04868’, 19 October 2023 (confidential version filed on 4 September 2023), paras 1, 5 (requesting measures for the testimony of two witnesses whose evidence “was initially provided to the SPO on a confidential basis and for lead purposes only, on the express understanding that Rule 107 applied” where “[t]he Rule 107 Provider has since authorised: (i) the disclosure and use of such evidence in proceedings before the Specialist Chambers; and (ii) both Witnesses to testify, subject to [certain] conditions being applied”); KSC-BC-2020-06, F01957/RED, Public Redacted Version of ‘Prosecution request for Rule 107 measures for W02475’, 3 January 2024 (confidential version filed on 24 November 2023), paras 1, 5 (requesting measures for a witness whose evidence was provided on a confidential basis and whose testimony was authorised by Rule 107 provider subject to conditions); KSC-BC-2020-06, F02603/RED, Public Redacted Version of ‘Prosecution request for Rule 107 measures for witnesses [REDACTED]’, 27 September 2024 (confidential version filed on 27 September 2024), paras 1, 3 (requesting measures for witnesses whose testimony is related to evidence “initially provided on a confidential basis and for lead purposes only” and whose testimony and/or admission of their evidence in writing was subsequently authorised by the Rule 107 provider subject to certain conditions).

<sup>234</sup> Rule 211(1) and (3) of the Rules.

sensitive information. The Panel observes that, under Rule 211 of the Rules, there is no condition that the confidential or sensitive information be shared with one of the parties in order to benefit from protection. The Panel further observes that, while a party or participant must cooperate with the information provider, there is no obligation to bring a formal request before the relevant panel.<sup>235</sup>

84. In this regard, the Appeals Panel notes that, following a [REDACTED] meeting with Witness 8 on 5 June 2025 and at the request of the SPO, the NFI provided by letter [REDACTED] (“NFI Letter”).<sup>236</sup> The [REDACTED] and the NFI Letter were disclosed to the Defence and released to the Pre-Trial Judge on 11 July 2025 and 7 August 2025, and formed part of the case file transmitted to the trial panel in accordance with Article 40(1) of the Law and Rule 98 of the Rules.<sup>237</sup> The Panel further observes that, in the Request for Admission submitted on 15 December 2025, the SPO outlined the confidentiality protection asserted by the NFI and relevant statements made by Witness 8 in that regard, and specifically noted that these restrictions [REDACTED].<sup>238</sup>

85. Under the circumstances, the Panel considers that the steps taken by the SPO adequately communicated the information it received from the NFI and fulfilled its responsibility to cooperate with the NFI, in accordance with Rule 211 of the Rules. While the SPO’s submissions could have been more detailed, the Panel considers that they were sufficient to alert the Single Trial Judge to the matter<sup>239</sup> and of the necessity of issuing a ruling, including by requesting further submissions from the Parties, if

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<sup>235</sup> In this respect, the Panel notes that an application pursuant to Rule 211(2) of the Rules is only contemplated if such confidential or sensitive information “is being or is likely to be disclosed”, notwithstanding steps taken under Rule 211(1) of the Rules. This provision is not applicable to the present circumstances.

<sup>236</sup> 128444-128444 (confidential).

<sup>237</sup> See 128072-128080 (confidential) (Disclosure 54, 11 July 2025); 128444-128444 (confidential) (Disclosure 59, 7 August 2025).

<sup>238</sup> See Request for Admission, para. 15.

<sup>239</sup> In this respect, the Panel notes that the Single Trial Judge acknowledged that “[REDACTED]”. See Transcript, 3 March 2026, p. 554, lines 11-13 (private session).

necessary.<sup>240</sup> That said, the Panel finds the SPO's characterisation in the Request for Admission unconvincing, namely that the confidentiality restrictions only touched upon "matters related to [REDACTED] microdots more generally – which are irrelevant to the analysis" conducted by Witness 8.<sup>241</sup> In the Panel's view, at least some of the questions that Witness 8 declined to answer on grounds of confidentiality related to the specific analysis he performed in this case.<sup>242</sup>

86. Nonetheless, the Panel finds some merit in the SPO's contention<sup>243</sup> that, even in the absence of a formal request, a panel may intervene in order to ensure fairness in the proceedings.<sup>244</sup> Indeed, the Appeals Panel recalls that a trial panel has a duty to ensure that a trial is conducted fairly and expeditiously.<sup>245</sup> To this end, a panel has the authority pursuant to Article 40 of the Law and Rule 116 of the Rules to provide for the protection of confidential information<sup>246</sup> and to take all necessary measures to facilitate the fair and expeditious conduct of proceedings.<sup>247</sup> While the assertion of

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<sup>240</sup> Furthermore, the Panel is not persuaded that the submission of a separate, formal request on behalf of the NFI pursuant to Rule 211 of the Rules would have on its own resolved any apparent inconsistencies between the NFI Letter, statements reflected in the [REDACTED] and the SPO's submissions in the Request for Admission. See Impugned Decision, paras 37-41. However, the Panel considers that such a request would have, at the very least, prompted a response by the Defence and timely action by the Single Trial Judge to seek any necessary clarification from the NFI and issue a ruling in advance of Witness 8's testimony.

<sup>241</sup> See Request for Admission, para. 15.

<sup>242</sup> See e.g. Transcript, 3 March 2026, p. 551, line 20 - p. 552, line 2 (private session), p. 571, lines 14-18 (private session), p. 573, lines 20-23 (private session), p. 575, line 25 – p. 576, line 1 (private session); Transcript, 4 March 2026, p. 646, lines 3-8 (private session), p. 651, line 23 - p. 652, line 5 (private session).

<sup>243</sup> See Appeal, para. 34; Reply, para. 9. In this respect, the Panel notes the Defence's argument that the SPO has waived its right to advance this specific argument as it is raised for the first time on appeal. See Defence Response, para. 39. However, the Panel considers that the SPO could not have anticipated before the issuance of the Impugned Decision that the Single Trial Judge would find that the absence of a prior Rule 107 application prejudiced the Defence and, therefore, could not reasonably have raised this argument before the Single Trial Judge. Therefore, the Panel dismisses the Defence's submissions in this regard.

<sup>244</sup> See ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List to Add Wesley Clark, 15 January 2007, paras 13-14.

<sup>245</sup> Article 40(2) of the Law. See also Case 06 Judicial Questioning Decision, para. 45; KSC-BC-2020-06, IA025/F00007/RED, Public Redacted Version of Decision on Thaçi's and Selimi's Appeals against Decisions F01057 and F01058, 18 April 2023 (confidential version filed on 18 April 2023), para. 20.

<sup>246</sup> See Article 40(6)(d) of the Law and Rule 116(4)(b) of the Rules.

<sup>247</sup> See Article 40(2) of the Law and Rule 116(1) of the Rules.

confidentiality is made at the discretion of the information provider,<sup>248</sup> procedures impacting the conduct of proceedings remain at all times under the control of the panel in fulfilling its obligation to ensure that a trial is conducted fairly and expeditiously.<sup>249</sup> Therefore, in the Panel's view, the Single Trial Judge had the authority to intervene and to apply Rule 107 measures *mutatis mutandis* pursuant to Rule 211(3) of the Rules, if appropriate, following the NFI's notification.

87. The Appeals Panel now turns to the SPO's assertion that the Single Trial Judge erred in finding that Witness 8's refusals to answer questions in the absence of a duly approved Rule 107 application prejudiced the Defence, justifying the exclusion of his evidence.

88. The SPO argues that the Single Trial Judge's finding of prejudice was "expressly contingent upon, and defined by, the procedural status of the witness's refusals"<sup>250</sup> and that "[t]he Third Ground accordingly challenges the [Single Trial Judge]'s treatment of the procedural irregularity as a distinct source of substantive prejudice".<sup>251</sup>

89. At the outset, the Panel agrees with the SPO that the Single Trial Judge's finding regarding the prejudice caused to the Defence was in part predicated upon the SPO's failure to make a Rule 107 application in advance of Witness 8's testimony.<sup>252</sup> In this

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<sup>248</sup> See ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-AR108bis.2, Decision on Request of the United States of America for Review, 12 May 2006, para. 35.

<sup>249</sup> *Mladić* Decision on Rule 70 Measures, para. 6; *Milutinović* Appeal Decision, para. 18. In this context, the Appeals Panel notes that where Rule 107 protections are invoked, panels have the authority to conduct a limited inquiry to determine the application of Rule 107 of the Rules in order to prevent its misuse, including by requesting confirmation from the information provider. See *Milošević* Appeal Decision on Rule 70 Interpretation, paras 26, 29. This is of particular significance where the panel has any doubt as to its application. See *Milošević* Appeal Decision on Rule 70 Interpretation, para. 31 ("Where [...] there is any doubt upon the face of the material placed before a Trial Chamber when the protections of Rule 70 are sought, the Trial Chamber should invite the party which provided the information and the Prosecutor to supply evidence upon these issues before ruling upon the application of Rule 70 to the information in question").

<sup>250</sup> Reply, para. 8.

<sup>251</sup> Reply, para. 8.

<sup>252</sup> See Appeal, para. 32; Reply, para. 8. Contra Defence Response, paras 29, 32.

regard, the Panel recalls the Single Trial Judge's conclusion that "the prejudice arising from the questions that [Witness 8] refused to answer or was unable to address because of the confidentiality obligations that he cited [...] is heightened by the SPO's failure to have brought a Rule 107 application".<sup>253</sup> Therefore, while not the sole or primary basis, the Single Trial Judge separately considered and found that the absence of a Rule 107 application increased the degree of prejudice caused to the Defence.<sup>254</sup>

90. Moreover, the Panel observes that, in the context of evaluating the prejudice caused by Witness 8's refusals to answer on grounds of confidentiality, the Single Trial Judge on several occasions qualified the refusals by the absence of a Rule 107 application.<sup>255</sup> In the Panel's view, the absence of a Rule 107 application is therefore also intrinsically tied to the Single Trial Judge's finding of prejudice arising from Witness 8's specific refusals to answer.

91. Nonetheless, the Panel is not persuaded that these refusals restricted the Defence's right to cross-examination to an extent incompatible with the guarantees provided under Article 31 of the Constitution, read in conjunction with Article 6 of the European Convention on Human Rights. In this regard, the Panel recalls that the right

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<sup>253</sup> Impugned Decision, para. 63.

<sup>254</sup> The Panel further observes that, in evaluating the prejudice caused to the Defence, the Single Trial Judge also noted that Witness 8's refusals to answer on grounds of confidentiality included questions related to the "origin, nature and scope" of the confidentiality obligations. See Impugned Decision, para. 35. Furthermore, while noting "inconsistencies" as to the scope of said confidentiality restrictions between the information provided by the SPO and Witness 8's assertion of confidentiality during his testimony, the Single Trial Judge found that "in the context" of these "inconsistencies", the absence of a Rule 107 application is "particularly significant". See Impugned Decision, paras 42-43. The Panel considers that reliance, even in part, on Witness 8's inability to answer questions related to the source and nature of the confidential information as a basis of prejudice was improper and inconsistent with the protections afforded under Rules 107 and 211 of the Rules, which specify that the source of protected information shall also remain confidential.

<sup>255</sup> See e.g. Impugned Decision, paras 49 ("[Witness 8]'s refusal to answer questions, **in the absence of a duly approved Rule 107 application**, was prejudicial to the Defence"), 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"), 46 (discussing the "serious procedural impropriety of a witness refusing to answer questions on grounds of confidentiality **without advance permission granted pursuant to Rule 107**"), heading before para. 33 ("Whether Prejudice Was Caused by the Witness's Refusal to Answer Questions **in the Absence of Prior Authorisation Pursuant to Rule 107**").

to examine a witness is not absolute and that there may be important competing interests that must be weighed against the rights of the accused, including the protection of national security, witnesses at risk of reprisals or the secrecy of police crime investigative methods.<sup>256</sup> It suffices that an accused has an effective opportunity to challenge the evidence against him and, in particular, be afforded the opportunity to test the truthfulness and reliability of the evidence, and to comment on all evidence adduced or observations filed.<sup>257</sup> Moreover, sufficient procedural safeguards must be in place to counterbalance any limitations,<sup>258</sup> which may involve giving the Defence wider latitude to challenge the witness's evidence through other means,<sup>259</sup> including by calling its own witnesses in rebuttal,<sup>260</sup> and, in principle, not basing a conviction solely or to a decisive extent upon evidence by a witness whom the Defence has not been able to examine.<sup>261</sup>

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<sup>256</sup> KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017 ("Constitutional Court Judgment on Referral of Rules"), para. 178. See also ECtHR, *Al-Khawaja and Tahery v. the United Kingdom*, nos. 26766/05 and 22228/06, Judgment [GC], 15 December 2011 ("*Al-Khawaja* Judgment"), para. 145; ECtHR, *Donohoe v. Ireland*, no. 19165/08, Judgment, 12 December 2013 ("*Donohoe* Judgment"), para. 74.

<sup>257</sup> Case 06 Expert Evidence Appeal Decision, para. 44; *Al-Khawaja* Judgment, para. 127; ECtHR, *Gregačević v. Croatia*, no. 58331/09, Judgment, 10 July 2012, para. 50; ECtHR, *Ruiz-Mateos v. Spain*, no. 12952/87, Judgment, 23 June 1993, para. 63. See also Constitutional Court Judgment on Referral of Rules, para. 189.

<sup>258</sup> *Donohoe* Judgment, paras 76-77; ECtHR, *Rowe and Davis v. the United Kingdom*, no. 28901/95, Judgment, 16 February 2000, paras 54, 61; ECtHR, *Doorson v. the Netherlands*, no. 20524/92, Judgment, 26 March 1996 ("*Doorson* Judgment"), para. 72. See also Constitutional Court Judgment on Referral of Rules, paras 177, 180.

<sup>259</sup> ECtHR, *Pesukic v. Switzerland*, no. 25088/07, Judgment, 6 December 2012, paras 50-52; ECtHR, *Štefančič v. Slovenia*, no. 18027/05, Judgment, 25 October 2012 ("*Štefančič* Judgment"), paras 44-47.

<sup>260</sup> See ECtHR, *Matytsina v. Russia*, no. 58428/10, Judgment, 27 March 2014 ("*Matytsina* Judgment"), paras 169, 173, 182, 185 (recognising that the opportunity to effectively challenge an expert opinion may include introducing or obtaining alternative opinions and reports); ECtHR, *J.M. and Others v. Austria*, nos 61503/14, 61673/14 and 64583/14, Judgment, 1 June 2017 ("*J.M. and Others* Judgment"), para. 128 (recognising that the defence relying on the assistance of its own experts during the proceedings provided sufficient means to effectively challenge the court appointed expert).

<sup>261</sup> *Al-Khawaja* Judgment, paras 119, 147; *Donohoe* Judgment, paras 88-93 (recognising that appropriate safeguards counterbalancing restrictions placed on the cross-examination of an expert witness may include, *inter alia*, not convicting the defendant on the sole basis of the witness's evidence, requiring his or her evidence to be corroborated, and not admitting the evidence as an assertion of fact but as the belief or opinion of an expert); *Štefančič* Judgment, para. 47; *Doorson* Judgment, para. 76.

92. The Panel notes that, while the Defence may have been limited in its questioning on specific matters relevant to the principles applied by Witness 8 in his analysis, the Defence had the opportunity to cross-examine, and did in fact extensively question Witness 8 on his qualifications,<sup>262</sup> applied methods<sup>263</sup> and conclusions,<sup>264</sup> as well as challenge the credibility of his evidence in various respects.<sup>265</sup> Moreover, as rightly pointed out by the SPO,<sup>266</sup> the Defence has the opportunity to present its own expert evidence in rebuttal, a safeguard recognised before international criminal tribunals<sup>267</sup> and by the European Court of Human Rights<sup>268</sup> as appropriate to counterbalance limitations imposed on the cross-examination of a prosecution

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<sup>262</sup> See e.g. Transcript, 4 March 2026, p. 618, line 5 - p. 624, line 7.

<sup>263</sup> See e.g. Transcript, 3 March 2026, p. 585, line 3 - p. 586, line 9 (private session); Transcript, 4 March 2026, p. 635, line 7 - p. 639, line 4 (private session), p. 643, line 19 - p. 644, line 25 (private session).

<sup>264</sup> See e.g. Transcript, 3 March 2026, p. 582, line 11 - p. 588, line 19 (private session); Transcript, 4 March 2026, p. 602, line 23 - p. 603, line 3, p. 603, line 16 - p. 616, line 10 (private session), p. 627, line 21 - p. 632, line 2 (private session), p. 639, line 6 - p. 643, line 16 (private session). Contra *Vidgen* Judgment, paras 47-48 (wherein the ECtHR found a violation of Article 6(1) and (3)(d) of the ECHR in circumstances where the witness refused to answer any questions [by the defence] and questioning was futile); *Cabral* Judgment, paras 21, 37-38 (wherein the ECtHR found a violation of Article 6(1) and (3)(d) of the ECHR in circumstances where a witness refused to give evidence under cross-examination by the defendant, making questioning futile, and there was no other possibility to challenge the credibility of the witness's statement); *Keskin* Judgment, paras 68-70 (wherein the ECtHR found a violation of Article 6(1) and (3)(d) of the ECHR in circumstances where the defendant was denied the possibility to cross-examine prosecution witnesses).

<sup>265</sup> See e.g. Transcript, 3 March 2026, p. 558, line 10 - p. 560, line 3 (private session), p. 596, line 10 - p. 597, line 17 (private session); Transcript, 4 March 2026, p. 653, line 23 - p. 654, line 17 (private session). Contra *Pichugin* Judgment, paras 211-213 (wherein the ECtHR found a violation of Article 6(1) and (3)(d) of the ECHR in circumstances where the defendant was not permitted to cross-examine a witness on factors that might undermine the credibility of the witness's testimony); *Cabral* Judgment, paras 21, 37-38 (wherein the ECtHR found a violation of Article 6(1) and (3)(d) of the ECHR in circumstances where a witness refused to give evidence under cross-examination by the defendant and there was no other possibility to challenge the credibility of the witness's statement). See also above, para. 59.

<sup>266</sup> See Appeal, para. 23; Reply, fn. 19.

<sup>267</sup> See Case 06 Expert Evidence Appeal Decision, para. 44; F00737/RED, Public Redacted Version of Decision on the Specialist Prosecutor's Motion for Admission of Material through the Bar Table, 4 May 2026 (confidential version filed on 12 February 2026), para. 68. See also *Popović* Appeal Decision, para. 21; *Nahimana et al.* Appeal Judgment, para. 199.

<sup>268</sup> See *Matytsina* Judgment, paras 169, 173, 182, 185 (recognising that the opportunity to effectively challenge an expert opinion may include introducing or obtaining alternative opinions and reports); *J.M. and Others* Judgment, para. 128 (recognising that the defence relying on the assistance of its own experts during the proceedings provided sufficient means to effectively challenge the court appointed expert).

witness. Under these circumstances, the Panel considers that the Defence's ability to challenge Witness 8's evidence was not illusory.<sup>269</sup>

93. In this context, and as a corollary of the Panel's finding in paragraph 82 above that the Single Trial Judge erred in finding that the SPO was duty-bound to bring an application pursuant to Rule 107 of the Rules, the Appeals Panel further finds that the SPO's failure to have brought a Rule 107 application could not form the basis of a finding of prejudice. Therefore, the Appeals Panel finds that the Single Trial Judge erred in concluding that the SPO's failure to make an advance application under Rule 107 of the Rules "heightened" any prejudice caused to the Defence.

94. Finally, in relation to the SPO's claim that the Single Trial Judge abused his discretion in concluding that the Defence was prejudiced on the basis of a procedure that he oversaw, the Panel recalls its findings above that: (i) the Single Trial Judge committed a discernible error in finding that an advance authorisation pursuant to Rule 107 of the Rules was required, and (ii) the absence of a Rule 107 application could therefore not form the basis of a finding of prejudice (heightened or otherwise), and accordingly, the Single Trial Judge erred in concluding that the SPO's failure to bring such an application "heightened" any prejudice caused to the Defence.<sup>270</sup> Therefore, the Panel finds it unnecessary to consider this specific argument.

95. In light of the Appeals Panel's findings in paragraphs 79-94 above, the Panel grants, in part, Ground 3 of the Appeal.

## V. CONCLUSION AND INSTRUCTIONS ON REMAND

96. The Appeals Panel recalls that an interlocutory appeal is not a *de novo* review of an impugned decision. Rather, it is a corrective measure, whose scope is determined by the issues certified for appeal. The Panel further recalls that a trial panel's ultimate

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<sup>269</sup> Contra Defence Response, para. 33.

<sup>270</sup> See above, paras 82, 93.

conclusion on the admissibility of expert evidence under Rules 138 and 149 of the Rules involves a factual assessment of the evidence, which falls within the discretionary powers vested with the trial panel pursuant to Article 40(6)(h) of the Law.

97. The Panel observes that the issues certified for appeal concern some, but not all, of the elements to be examined by a trial panel when assessing the admissibility of expert evidence pursuant to Rules 138 and 149 of the Rules. Moreover, the Panel notes that the Single Trial Judge did not fully or explicitly assess each of these elements in the Impugned Decision (i.e. including, for example, the relevance of Witness 8's evidence and whether his report falls within the scope of his expertise).

98. Under these circumstances, and further noting the "importance of the expert conclusion",<sup>271</sup> the Appeals Panel will not substitute its own findings for those of the Single Trial Judge, as he is best placed, as the primary finder of fact, to fully assess the admissibility of Witness 8's evidence pursuant to Rules 138 and 149 of the Rules. For this reason, the Appeals Panel finds it appropriate to remand the matter to the Single Trial Judge, with an order to make a new determination applying the correct legal standards and considering the factors identified as relevant by the Appeals Panel.

99. In view of the above, the Appeals Panel remands the matter to the Single Trial Judge, directing him to:

- a. Re-assess Witness 8's evidence and make a new determination on its reliability, relevance and probative value in accordance with the requirements under Rule 138(1) of the Rules, applying the *prima facie* standard applicable at the stage of admissibility and taking into

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<sup>271</sup> See Impugned Decision, para. 51.

consideration all relevant factors, consistent with the Panel's findings in paragraphs 23-37 (Ground 1) and paragraphs 47-61 (Ground 2) above;

- b. Re-assess and make a new determination on any prejudice caused to the Defence, excluding consideration of the absence of an advance authorisation pursuant to Rule 107 or Rule 211 of the Rules as a source of prejudice, and taking into consideration the low threshold of transparency required at the stage of admissibility, consistent with the Panel's findings in paragraphs 77-95 above (Ground 3); and
- c. A proper balancing of any prejudice caused to the Defence against the probative value of Witness 8's evidence, in accordance with Rule 138(1) of the Rules.

## VI. DISPOSITION

100. For these reasons, the Court of Appeals Panel:

**GRANTS**, in part, Ground 1 of the Appeal;

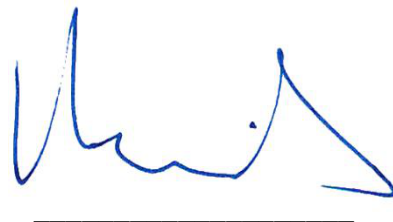
**GRANTS** Ground 2 of the Appeal;

**GRANTS**, in part, Ground 3 of the Appeal;

**REMANDS** the matter to the Single Trial Judge and **DIRECTS** the Single Trial Judge to re-evaluate the admissibility of Witness 8's evidence, in accordance with paragraphs 96-99 of the present Decision;

**ORDERS** the Parties to submit public redacted versions of their appellate filings referenced in paragraph 12 or indicate, through a filing, whether these filings can be reclassified as public, within ten days of receiving notification of the present Decision; and

**INSTRUCTS** the Registry to execute the reclassification as public of the filings referenced in paragraph 12 upon indication by the SPO and the Defence, if any, that they can be reclassified.



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**Judge Michèle Picard,  
Presiding Judge**

Dated this Tuesday, 30 June 2026

At The Hague, the Netherlands