



In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Trial Panel II
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 18 November 2024

Language: English

Classification: Public

Prosecution reply relating to request to admit expert witness evidence (F02633)

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Luka Mišetić

Counsel for Kadri Veseli

Rodney Dixon

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Response¹ misrepresents the framework governing expert evidence and ignores established admissibility standards. The SPO correctly tendered and, in the interest of fairness and expeditiousness, sought an advance ruling on the admissibility of the expert reports of W04826, W04874, and W04875 (collectively, 'Experts') and source material pursuant to Rules 138 and 149 of the Rules,² and the prior testimony and associated exhibits of W04826 and W04875 under Rule 154.³

II. SUBMISSIONS

2. The Response is detached from legal and practical realities. For example, autopsy and DNA documents are not reports within the meaning of Rule 149,⁴ and calling the authors of every autopsy and DNA report in a case of this size and scope, or commissioning a 'second autopsy' on the relevant victims,⁵ is unnecessary, entirely unrealistic, and contrary to the legal framework and past practice.⁶ As long as sufficient notice has been provided of the expert's credentials and anticipated evidence, which is within their field of expertise, there can be no prejudice, considering, in particular, the opportunity for Defence submissions under Rule 149(2) and cross-examination.

¹ Joint Defence Consolidated Response to F02620 and F02633, KSC-BC-2020-06/F02703, 8 November 2024, Confidential ('Response').

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule' or 'Rules' are to the Rules.

³ Prosecution motion for admission of evidence of Witnesses W04826, W04874, and W04875 pursuant to Rules 138, 149, and 154 and related request, KSC-BC-2020-06/F02633, 11 October 2024, Confidential ('Request').

⁴ *Contra* Response, KSC-BC-2020-06/F02703, paras.20-23,57-58.

⁵ Response, KSC-BC-2020-06/F02703, para.58.

⁶ *Contra* Response, KSC-BC-2020-06/F02703, paras.19-23,27,56-60,63-65.

A. THE TENDERED ITEMS ARE ADMISSIBLE

3. Rule 149 is the *lex specialis* admissibility provision only in relation to the specific documents it regulates – '[t]he final report of any expert witness'.⁷ Nothing in this or any other provision of the Law or Rules prohibits the admission of other material related to experts through other Rules, including Rule 154.⁸ Further, the Panel has the authority to issue a preliminary ruling on the admissibility of the tendered materials before the Experts testify.⁹ The Panel routinely does so in relation to Rule 154 witnesses. There is no reason to depart from this practice in relation to the Experts, as concerns items properly tendered pursuant to Rules 138, 149, and 154.¹⁰

4. Much of the Response focuses on the source material, wrongly claiming that such material and in turn, the Experts' related reports are not admissible. The source material tendered (namely, autopsy, DNA, and other forensics documents) is admissible¹¹ and similar documents have been admitted – at the request of the SPO, Defence, and Victims' Counsel – through the bar table, Rules 153-155, and/or witnesses in this case.¹²

⁷ *Contra* Response, KSC-BC-2020-06/F02703, paras.6,12.

⁸ ICTY, *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, para.40. *See also* Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Conduct of Proceedings Order'), para.123.

⁹ *Contra* Response, KSC-BC-2020-06/F02703, paras.11-18.

¹⁰ *See e.g.* ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on Expert Reports by Richard Butler, 4 March 2009, para.38; ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on Prosecution's Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, 5 December 2016, paras.29-30. *See also Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, KSC-BC-2020-07/F00470, 3 December 2021 ('*Gucati and Haradinaj* Decision'), paras.62-66,98-99,127(d).

¹¹ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.123.

¹² By way of non-exhaustive example, for forensics and medical items admitted: (i) through the bar table, *see e.g.* KSC-BC-2020-06/F01983, paras.42-79; KSC-BC-2020-06/F01409, paras.41-50; (ii) as associated exhibits to Rule 153, 154, and 155 statements, *see e.g.* KSC-BC-2020-06/F02421, para.81; KSC-BC-2020-06/F01380, paras.98-106, fn.171; KSC-BC-2020-06/F01595, para.38; KSC-BC-2020-06/F01901, paras.75-76; KSC-BC-2020-06/F02245, paras.82-83; and (iii) during witness testimony, *see e.g.* P00759, P01678, P00196, P00201, 1D00022, 1D00129, V00005, V00006.

5. The Request does not seek the admission of expert reports or witness statements of third parties.¹³ Defence submissions in this regard are based on a mischaracterisation of the tendered items and the definition of a ‘statement’.¹⁴ The source material for W04874’s report identified in the Response as third party expert reports are autopsy documents.¹⁵ Similarly, the alleged third party expert reports relied on in W04875’s report consist of a DNA document.¹⁶

6. The Defence also claims that W04826’s report relies on SITF00200638-00200657 RED, describing it as a third-party expert report.¹⁷ This item was provided to W04826 along with the letter of instruction¹⁸ and, in his report, W04826 merely notes it was provided to him.¹⁹ W04826 was not asked any specific questions about this item, nor does he provide any opinion on it.²⁰ The item, as is the case with several others, was included in the October Notification²¹ solely because it was provided to W04826 for context purposes. It is not tendered in the Request,²² nor will the SPO be seeking its admission through W04826.

7. The expert opinion of W04874 and W04875 on the source material they did not author enhances the reliability and probative value thereof. The issues raised in the Response go to weight, not admissibility,²³ and the Defence will have every

¹³ *Contra* Response, KSC-BC-2020-06/F02703, paras.15,19-23,27-30.

¹⁴ Response, KSC-BC-2020-06/F02703, paras.28-30; Decision on Joint Request for Certification to Appeal the Reasons for Admission of W03780’s Statements and Related Order (F02580), KSC-BC-2020-06/F02639, 11 October 2024, para.16.

¹⁵ *Contra* Response, KSC-BC-2020-06/F02703, paras.20,22, fns.22-23, referring to SITF00414169-SITF00414223-ET (fn.22, seemingly erroneously refers to this item as ‘SITF00414143-SITF00414223 ET’).

¹⁶ Response, KSC-BC-2020-06/F02703, para.20, fn.22.

¹⁷ Response, KSC-BC-2020-06/F02703, para.20, fn.22.

¹⁸ 102443-102471, p.102449.

¹⁹ 103427-103470, pp.103448-103449.

²⁰ 102443-102471, p.102450; 103427-103470, p.103449 (containing W04826’s opinion in relation to the specific question asked concerning SPOE00068589-00068605).

²¹ KSC-BC-2020-06/F02620/A01 (‘October Notification’), p.118.

²² KSC-BC-2020-06/F02633/A02.

²³ Response, KSC-BC-2020-06/F02703, paras.26-27,56-65.

opportunity to cross-examine the Experts, seek to admit other relevant evidence, and call their own experts to testify.²⁴

8. Finally, the SPO's tender is no way 'indiscriminate'.²⁵ The Request specifies, for each item, the excerpts from the respective reports which address such items. The letters of instruction and expert reports clearly set out the parameters and methodology adopted by the experts.

B. THE PROPOSED EXPERT EVIDENCE RELATES TO EACH EXPERT'S SPECIFIC EXPERTISE

9. Expert witnesses are ordinarily afforded wide latitude to offer opinions within their expertise; their views need not be based upon first-hand knowledge or experience.²⁶

10. The SPO has not asked, and will not be asking, for expert opinion outside of the Experts' fields of expertise.²⁷ The scope of the Experts' opinions is clearly set out in their reports. Where an Expert provided opinion on a certain excerpt from an item, the SPO, on occasion, indicated it seeks to tender the entirety of such item into evidence given that it relates to the same victim/s and meets the criteria for admissibility.²⁸ As indicated in the Request, the admission of the excerpts not opined on by the Experts is sought pursuant to Rule 138, not Rule 149.

11. Finally, any further evidence to be elicited from the Experts will be akin to that contained in their reports, which solely relate to their fields of expertise. In particular,

²⁴ See *Gucati and Haradinaj* Decision, para.100; ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on Defence request to disqualify Richard Butler as an expert and bar the Prosecution from presenting his reports, 19 October 2012 ('*Mladić* Decision'), para.13.

²⁵ *Contra* Response, KSC-BC-2020-06/F02703, para.34.

²⁶ 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, para.27; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1159, Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016, para.9.

²⁷ *Contra* Response, KSC-BC-2020-06/F02703, paras.24-25,35-38.

²⁸ See e.g. KSC-BC-2020-06/F02633/A02, items 22-27,30-31,33-57.

logically, the SPO will not seek to elicit expert opinion concerning DNA from W04826 or W04874.²⁹ Defence submissions in this regard appear to be premised on a confusion concerning which of the experts are forensic pathologists (W04826 and W04874) and which is a forensic geneticist (W04875).³⁰

C. THE SPO CAN CONDUCT WITNESS PREPARATION WITH THE EXPERTS AND LEAD EVIDENCE BEYOND THAT CONTAINED IN THE EXPERT REPORTS

12. The Response fails to identify cogent reason as to why the SPO would be prohibited from conducting witness preparation with the Experts or from eliciting, during testimony, expert evidence beyond that contained in the reports.³¹

13. The primary purposes of expert reports is two-fold: (i) to provide notice and enable opposing Party submissions under Rule 149(2) and effective preparation; and (ii) to expedite proceedings through admission of such report in lieu of an expert's oral testimony.³² Thus, so long as adequate notice is provided, nothing in the legal framework prohibits the calling Party from eliciting expert opinion, *inter alia*, on documents not commented on in an expert report,³³ considering also that: (i) after a report is filed and in the course of the trial, additional evidence may be elicited and admitted that concerns matters falling within an expert's expertise; (ii) an expert may testify entirely *viva voce*; and (iii) a Party may choose not to tender a report, and in any

²⁹ *Contra* Response, KSC-BC-2020-06/F02703, para.36.

³⁰ *See* Response, KSC-BC-2020-06/F02703, para.36, fn.38 (in support of its assertion that the 'SPO also appear to wish to elicit fresh evidence from pathologists relating to anthropological and DNA reports', citing KSC-BC-2020-06/F02620/A01, p.66, containing the issues, facts, and circumstances in relation to which W04875, the forensic geneticist, will be examined).

³¹ *Contra* Response, KSC-BC-2020-06/F02703, paras.39-46.

³² ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, Order on Defence Submissions Regarding Various Experts' Reports Disclosed by the Prosecution Pursuant to Rule 94bis, 2 February 2007, paras.3-4.

³³ ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on the Prosecution Submissions on the Expert Statement of Prosecution Witness Teufika Ibrahimfendić Pursuant to Rule 94bis, 14 September 2012, paras.6-7; ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Second Decision on the Prosecution Submissions on the Expert Statement of Prosecution Witness Teufika Ibrahimfendić Pursuant to Rule 92bis, 12 February 2013, para.10.

event, the Panel does not decide on the report's admissibility under Rule 149(4) until after the testimony is concluded.

14. The Defence has been on notice since, at least, 11 October 2024 that the SPO may ask the Experts for their opinions about a limited number of additional items, with the full scope of such items being notified along with submissions as to their relevance.³⁴ These limited, additional items – seven of which have been already admitted and one of which was admitted in part³⁵ – are similar in nature to the tendered source documents already commented on in the respective reports, fall within the expertise of the relevant Experts, and for W04826, concern documents he authored or has first-hand knowledge of. To the extent the Defence has any specific issues it would like to raise in relation to these documents and their use with the Experts, it is free to raise such matters *inter partes*.

15. In the circumstances, requiring letters of instruction and updated reports before the Experts' preparation sessions or testimony would undermine the very purposes that Rule 149 is intended to serve and threaten to delay proceedings. On the other hand, any use of such items during preparation, serves the purposes of such sessions under the Conduct of Proceedings Order,³⁶ provides advance notice to the Defence, and ultimately expedites proceedings. There is no legal basis warranting a different approach to expert witnesses in terms of preparation.

³⁴ Request, KSC-BC-2020-06/F02633, para.18, fn.29; KSC-BC-2020-06/F02620/A01, pp.66-80,90-154.

³⁵ KSC-BC-2020-06/F02620/A01, pp.97 (item 29), 98 (items 33,35), 118 (item 69), 120 (item 74), 141 (item 150), 151-152 (items 194,196). Other than these already admitted items, the SPO intends to use seven additional items with W04826 and one additional item with W04874 (all on the exhibit list). See KSC-BC-2020-06/F02620/A01, pp.98, (item 34), 119, 150-152 (items 71, 191-193, 197, 189-190). Any change in the items the SPO intends to use will be notified at the earliest opportunity.

³⁶ See Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.86. Even in *Shala*, where witness preparation was generally not permitted, the Panel allowed the equivalent for expert witnesses. See *Specialist Prosecutor v. Shala*, Decision on witness familiarisation, KSC-BC-2020-04/F00435, 24 February 2023, para.19; *Specialist Prosecutor v. Shala*, Transcript, 26 June 2023, p.2043.

III. RELIEF REQUESTED

16. For the foregoing reasons and those previously given, the Request should be granted.

Word Count: 1,994



Kimberly P. West

Specialist Prosecutor

Monday, 18 November 2024

At The Hague, the Netherlands.