



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06

**The 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: Fidelma Donlon

Date: 16 December 2024

Language: English

Classification: Public

**Public Redacted Version of Decision on Prosecution Motion for Admission of
Evidence of Witnesses W04826, W04874, and W04875 pursuant to Rules 138, 149,
and 154 and Related Request**

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Articles 21, 37 and 40 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 118(2), 137-138, 141(1), 149 and 154 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 7 October 2024, the Specialist Prosecutor’s Office (“SPO”) filed the information required by paragraphs 73 and 74 of the Order on the Conduct of Proceedings¹ in relation to the upcoming testimony of proposed three expert witnesses.²
2. On 9 October 2024, the Defence informed the SPO that it: (i) does not challenge the qualifications of the Experts; (ii) does not agree with the reports of the Experts, or the reports underlining the Experts’ conclusions; and (iii) wishes to cross-examine the Experts.³
3. On 11 October 2024, the SPO filed a motion for the admission of evidence of expert witnesses W04826, W04874 and W04875 (“Motion”) and related request to amend its list of exhibits (“Exhibit List”).⁴

¹ F01226/A01, Panel, *Order on the Conduct of Proceedings* (“Order on the Conduct of Proceedings”), 25 January 2023.

² F02620/A01, Specialist Prosecutor, *Annex 1 to Prosecution submission of list of witnesses for 18 November 2024 to 30 January 2024* (“Prosecution Submission of List of Witnesses”), 7 October 2024, confidential, pp. 66-80, 90-100-154.

³ F02633, Specialist Prosecutor, *Prosecution Motion for Admission of Evidence of Witnesses W04826, W04874, and W04875 pursuant to Rules 138, 149, and 154 and related request* (“Motion”), 11 October 2024, confidential, with Annexes 1-3, confidential, para. 17 (a public redacted version was filed on the same day, F02633/RED).

⁴ Motion; F02511, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List*, 27 August 2024, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential.

4. On 8 November 2024, upon authorisation by the Panel,⁵ the Defence teams for Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi (collectively, “Defence” and “Accused”) jointly responded to the Motion (“Response”).⁶
5. On 18 November 2024, the SPO replied to the Response (“Reply”).⁷
6. On 20 November 2024, the Defence jointly requested leave for a sur-reply to the SPO’s reply (“Sur-Reply Request”).⁸
7. On 21 November 2024, the SPO responded to the Sur-Reply Request.⁹
8. On 3 December 2024, the Panel issued an oral order rejecting the Defence’s request for a sur-reply.¹⁰

II. SUBMISSIONS

9. The SPO requests the admission of the reports (“Expert Reports”) and associated source material (“Associated Source Material”) of expert witnesses W04826, W04874 and W04875 (“Expert Witnesses”) pursuant to Rules 138 and 149.¹¹ The SPO also requests the admission pursuant to Rule 154 of the transcripts of testimony (“Statements”) and associated exhibits (“Associated Exhibits”) of W04826 in [REDACTED] and in [REDACTED], and of W04875 in [REDACTED].¹²

⁵ F02648, Panel, *Decision on Joint Defence Request for an Extension of Time to Respond to F02620, F02625 and F02633*, 14 October 2024, para. 13(b)(ii).

⁶ F02703, Specialist Counsel, *Joint Defence Consolidated Response to F02620 and F02633*, 8 November 2024, confidential, with Annexes 1-4, confidential.

⁷ F02732, Specialist Prosecutor, *Prosecution Reply Relating to Request to Admit Expert Witness Evidence (F02633)*, 18 November 2024.

⁸ F02737, Specialist Counsel, *Joint Defence Request for Leave to Sur-Reply to “Prosecution Reply Relating to Request to Admit Expert Witness Evidence (F02633)”*, 20 November 2024, public.

⁹ F02741, Specialist Prosecutor, *Prosecution Response to Joint Defence Request for Leave to Sur-reply (F02737)*, 21 November 2024, public.

¹⁰ Transcript of Hearing, 3 December 2024, p. 23240, lines 6-22.

¹¹ Motion, paras 1, 42.

¹² Motion, paras 1, 42. *See also* Annexes 1-3 to the Motion.

10. The SPO submits that the Expert Reports and Associated Source Material (“Expert Evidence”), and the Statements and Associated Exhibits (“Rule 154 Evidence”) of the Expert Witnesses (“Proposed Evidence”) meet the requirements of the Rules for admission.¹³ The SPO also submits that, during the preparation sessions with the Expert Witnesses, it may ask for opinions concerning documents not currently addressed in the Proposed Evidence.¹⁴ Finally, the SPO requests to amend the Exhibit List to include an item relating to W04826.¹⁵

11. The Defence responds that the SPO has erred in its application of the relevant principles and proposed approach to the admission of the Proposed Evidence.¹⁶ The Defence opposes the Motion on the basis that: (i) Rule 149 is the *lex specialis* governing the admissibility of the Proposed Evidence, which cannot be admitted via Rules 138 or 153-155 but can only be admitted pursuant to Rule 149 following the live testimony of the Experts;¹⁷ (ii) there is no provision within the Rules or in the Order on the Conduct of Proceedings permitting the reports of third-party expert witnesses, who are not on the SPO witness list, to be tendered through another expert witness;¹⁸ (iii) third-party witness statements must be admitted through the *lex specialis* Rules 153-155 and cannot be admitted pursuant to Rule 138 or through experts pursuant to Rule 149;¹⁹ (iv) the SPO intends to elicit opinion evidence from the Expert Witnesses beyond their field of expertise, and this is impermissible;²⁰ (v) there is no provision in the Rules or in the Order on the Conduct of Proceedings permitting the admission of a supplementary statement or report from experts in advance of their evidence or to call fresh evidence beyond

¹³ Motion, para. 2.

¹⁴ Motion, para. 18.

¹⁵ Motion, paras 32.

¹⁶ Response, para. 10.

¹⁷ Response, paras 11-18.

¹⁸ Response, para. 19. *See also* Response, paras 20-27, 56-67.

¹⁹ Response, paras 28-30. *See also* Response, paras 31-34, 66-67.

²⁰ Response, paras 35-37. *See also* Response, para. 38, 66-67.

that which is contained in their reports live at trial;²¹ and (vi) there is no provision in Rule 149 or in the Order on the Conduct of Proceedings permitting or providing for the use of preparatory sessions with expert witnesses.²²

12. The SPO replies that the Motion should be granted insofar as: (i) the Response misrepresents the framework governing expert evidence and ignores established admissibility standards;²³ (ii) the Proposed Evidence is admissible and relates to the specific expertise of the Expert Witnesses;²⁴ and (iii) the SPO can conduct witness preparation with the Expert Witnesses and lead evidence beyond that contained in the Expert Reports.²⁵

III. APPLICABLE LAW

13. In relation to the proposed Expert Evidence, Rule 149(2) provides that within (7) days of disclosure of the report of an expert witness, or as directed by the Panel, the opposing Party shall file a notice indicating whether:

- (a) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the expert witness report and, if so, which parts;
- (b) it accepts the expert witness report or parts thereof; or
- (c) it wishes to cross-examine the expert witness.

14. Rule 149(3) provides that if the opposing Party accepts the expert witness report or parts thereof, the latter may be admitted into evidence by the Panel without calling the expert witness to testify in person.

²¹ Response, para. 43. *See also* Response, paras 39-42, 44, 46, 66-67.

²² Response, para. 45. *See also* Response, paras 66-67.

²³ Reply, paras 1-2, 16.

²⁴ Reply, paras 3-11, 16.

²⁵ Reply, paras 12-16.

15. Rule 149(4) provides that if a Party exercised its rights under paragraph (2)(b) or (c), the Panel shall decide on the admissibility of the expert witness report following the testimony and questioning of the expert.

16. In relation to the Rule 154 Evidence, the Panel incorporates by reference the applicable law as set out in the Panel's first decision regarding the admission of evidence under Rule 154.²⁶

IV. DISCUSSION

A. PRELIMINARY ISSUE

17. The SPO submits that, during the preparation sessions with the Expert Witnesses, it may ask for opinions concerning a limited number of documents related to certain victims not currently addressed in the Proposed Evidence.²⁷

18. The Defence argues that there is no provision in Rule 149 or the Order on the Conduct of Proceedings permitting or providing for the use of preparatory sessions with expert witnesses.²⁸ The Defence submits that any preparatory session with the Expert Witnesses would inevitably result in the production of fresh evidence, which is impermissible, and further argues professional witnesses do not have the same potential vulnerabilities as lay witnesses, and therefore fall outside of the preparatory session regime.²⁹

19. The SPO replies that the Defence fails to identify a cogent reason why the SPO would be prohibited from conducting witness preparation with the Expert

²⁶ F01380, Panel, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154*, 16 March 2023, confidential (a public redacted version was filed on 7 November 2023, F01380/RED), paras 11-35.

²⁷ Motion, para. 18.

²⁸ Response, para. 45.

²⁹ Response, para. 45.

Witnesses or from eliciting, during testimony, expert evidence beyond that contained in the Expert Reports.³⁰

20. The Panel observes that, in line with relevant practice and jurisprudence, nothing in the Specialist Chambers' ("SC") legal framework or in the Order on the Conduct of Proceedings prohibits preparation sessions with expert witnesses,³¹ or prevents the calling Party from eliciting expert opinion from expert witnesses on documents not commented in an expert report.³² As with other witnesses, the purpose of preparation sessions is help prepare the witness for testimony and evaluate his or her capacity to provide relevant and credible evidence in respect of facts or circumstances relevant to the case.³³ The Panel also notes that: (i) the Defence was given notice since at least 11 October 2024 of the limited additional items to be discussed with the Expert Witnesses; and (ii) such items appear to be similar in nature to the tendered Associated Source Material underlying the Expert Reports. No prejudice therefore arises from the suggested course. The Defence's arguments are therefore dismissed.

B. REQUEST TO AMEND THE EXHIBIT LIST

21. The SPO seeks authorisation to amend the Exhibit List by adding a death certificate signed by W04826 ("Death Certificate").³⁴ The SPO submits that there is good cause for the requested amendment and no prejudice to the Defence.³⁵ The

³⁰ Reply, para. 12.

³¹ See KSC-BC-2020-05, F00150, Trial Panel I, *Decision on witness familiarisation*, 9 July 2021 para. 20; KSC-BC-2020-04, F00435, Trial Panel I, *Decision on witness familiarisation*, 24 February 2023 para. 19; KSC-BC-2023-10, F00595, Trial Panel I, *Decision on witness familiarisation*, 13 November 2024, para. 32.

³² See ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Trial Chamber I, [Decision on the Prosecution Submissions on the Expert Statement of Prosecution Witness Teufika Ibrahimfendić Pursuant to Rule 94bis](#), 14 September 2012, paras 6-7.

³³ Order on the Conduct of Proceedings, para. 86. See also F02563, Panel, *Decision on Selimi Defence Request Concerning W04846's Preparation Session and Selimi Defence Request to Caution the SPO and for Additional Relief*, 12 September 2024, para. 18.

³⁴ Motion, para. 32 referring to [REDACTED].

³⁵ Motion, para. 32.

SPO argues that the Death Certificate was only identified as an exhibit in the course of preparing for W04826's testimony.³⁶

22. The Defence responds that the SPO has not established the requirements for such an amendment.³⁷ The Defence submits that the person named in the death certificate, [REDACTED], is not a victim named in the indictment and therefore the Death Certificate is not *prima facie* relevant and of sufficient importance to justify its late addition to the Exhibit List.³⁸ The Defence further submits that this document has been in possession of the SPO since 8 December 2022 and no good cause has been shown for its late addition to the Exhibit List.³⁹

23. Pursuant to Rule 118(2), the Panel may permit the amendment of the exhibit list upon timely notice and a showing of good cause. In this regard, the Panel recalls that, as proceedings advance, any further requests to amend the exhibit list will be subject to greater scrutiny.⁴⁰ As previously stated,⁴¹ the Panel has already permitted the SPO to add items to the exhibit list and the Exhibit List is already, by any standards, voluminous. With this in mind, the Panel will assess whether, at the current stage of proceedings, the SPO has provided timely notice and shown good cause for the amendment of its Exhibit List, and that no undue prejudice is caused to the Defence as a result.⁴²

³⁶ Motion, para. 32.

³⁷ Response, para. 50.

³⁸ Response, para. 50.

³⁹ Response, para. 50.

⁴⁰ See F02167, Panel, *Decision on Prosecution Requests to Amend the Exhibit List (F02099)* ("7 March 2024 Decision"), 7 March 2024, confidential, para. 10 (a public redacted version was filed on the same day, F02167/RED). See also Transcript of Hearing, 15 February 2023, pp. 2017-2018.

⁴¹ 7 March 2024 Decision, para. 10; F01995, Panel, *Decision on Prosecution Request to Amend the Exhibit List (F01844)* ("8 December 2023 Decision"), 8 December 2023, confidential, para. 9 (a public redacted version was issued on the same day, F01995/RED); F01902, Panel, *Decision on Prosecution Request to Amend the Exhibit List (F01858)* ("3 November 2023 Decision"), 3 November 2023, para. 7; F01785, Panel, *Decision on Prosecution Requests to Amend the Exhibit List (F01689 and F01747)* ("12 September 2023 Decision"), 12 September 2023, confidential, para. 16 (a public redacted version was issued on 10 November 2023, F01785/RED).

⁴² 7 March 2024 Decision, para. 10; 8 December 2023 Decision, para. 9; 3 November 2023 Decision, para. 7; 12 September 2023 Decision, para. 16.

24. As regards the timeliness of notice, the Panel notes the SPO's submission that the Death Certificate was not previously added to the Exhibit List because the SPO only identified it as an exhibit in the course of preparing for W04826's testimony.⁴³ While the request to add the Death Certificate to the Exhibit List could have been made earlier, the Panel notes that the Death Certificate was disclosed to the Defence under Rule 102(3) on 8 December 2022.⁴⁴ The Panel further notes that W04826 will testify in January 2025,⁴⁵ and considers that the Defence has been on notice of the SPO's intent to use the Death Certificate since 11 October 2024. Bearing in mind that a certain degree of flexibility must be maintained in the context of a complex multi-accused trial,⁴⁶ and considering the very limited size of the Death Certificate and narrow focus, the Panel therefore finds the notice provided by the SPO in respect of the Death Certificate to be timely.

25. As regards good cause and the question of the relevance and importance of the Death Certificate, the Panel is not satisfied that inadvertent omission, on its own and at this stage of the proceedings, constitutes good cause.⁴⁷ However, while a Party's late realisation of an item's importance alone is insufficient to demonstrate good cause, the Panel acknowledges that the relevance and importance of certain items may become more apparent to a Party as the trial proceeds.⁴⁸ The Panel notes that the Death Certificate relates to, *inter alia*, (i) the death of [REDACTED]; (ii) the circumstances of his alleged detention; and (iii) a pattern of conduct at a relevant detention location. The Panel is of the view that, even if [REDACTED] is not a charged murder victim, such issues are material to

⁴³ Motion, para. 32.

⁴⁴ See Disclosure Package 615.

⁴⁵ Prosecution Submission of List of Witnesses, p. 101.

⁴⁶ See e.g. 12 September 2023 Decision, paras 32, 38, 65, 71, 77, 88, referring to IA019/F00006, Court of Appeals Panel, *Decision on Thaçi's Appeal against Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures*, 12 July 2022, para. 21.

⁴⁷ F01352, Panel, *Decision on Prosecution Request to Amend the Exhibit List and Related Matters*, 8 March 2023, confidential, para. 30.

⁴⁸ 12 September 2023 Decision, paras 27, 72.

this case insofar as it might be relevant to establishing certain patterns regarding the treatment of KLA detainees and cause of death of some of those detainees. The Panel is therefore satisfied that, contrary to the Defence's arguments,⁴⁹ the Death Certificate is *prima facie* relevant and of sufficient importance and that there is good cause for its late addition to the Exhibit List.

26. As regards prejudice, the Panel recalls that W04826 is due to testify in January 2025.⁵⁰ The Panel further considers: (i) the limited size of the Death Certificate (two pages only) and narrow focus on one individual; (ii) that the Death Certificate was disclosed to the Defence on 8 December 2022 under Rule 102(3);⁵¹ and (iii) that the SPO does not intend to tender the Death Certificate under Rules 149 or 154.⁵² The Panel is satisfied that the Defence has sufficient time to adequately prepare before the witness's testimony and that the effectiveness of the rights of the Accused is being preserved. The Panel accordingly finds that no undue prejudice is caused by the addition of the Death Certificate to the Exhibit List.

C. THE QUALIFICATIONS OF THE EXPERT WITNESSES

27. Expert evidence is admissible if: (i) the proposed witness can be regarded as an expert; (ii) the expert evidence 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 statements or reports fall within the accepted expertise of the expert witness and is permissible.⁵³

⁴⁹ Response, para. 50.

⁵⁰ *See above* para. 24.

⁵¹ *See* Disclosure Package 615.

⁵² Motion, para. 34.

⁵³ *Gucati and Haradinaj* 3 December 2021 Decision, para. 63, referring to ICTY, *Prosecutor v. Martić*, IT-95-11-T, Trial Chamber, [Decision on Defence's Submission of the Expert Report of Milisav Sekulić Pursuant to Rule 94bis, and on Prosecution's Motion to Exclude Certain Sections of the Military Expert Report of Milisav Sekulić, and on Prosecution Motion to Reconsider Order of 7 November 2006](#), 13

28. The Panel observes at the outset that neither the Law nor the Rules define what qualifies as an expert witness. Rule 149(2)(a) of the Rules implicitly requires that an expert witness must have the requisite qualifications and that his or her evidence is relevant to the proceedings.⁵⁴ An expert within the meaning of Rule 149 of the Rules may be defined as “[a] person who by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”.⁵⁵

29. The Panel takes note that the Defence informed the SPO that it does not challenge the qualifications of the Expert Witnesses.⁵⁶

November 2006, pp 3-4; *Prosecutor v. Milošević*, IT-98-29/1-T, Trial Chamber, [Decision on Admission of Expert Report of Robert Donia](#), 15 February 2007, para. 8; *Prosecutor v. Martić*, IT-95-11-T, Trial Chamber, [Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 bis](#), 9 November 2006.

⁵⁴ KSC-BC-2020-07, F00470, Trial Panel II, *Decision on Prosecution Requests in Relation to Proposed Defence Witnesses* (“*Gucati and Haradinaj* 3 December 2021 Decision”), 3 December 2021, para. 62.

⁵⁵ *Gucati and Haradinaj* 3 December 2021 Decision, para. 64, referring to ICTY, *Prosecutor v. Galić*, IT-98-29, Trial Chamber, [Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philips](#), 3 July 2002, p. 2; *Prosecutor v. Brđanin*, IT-99-36-Y, [Decision on Prosecution’s Submission of Statement of Expert Witness Ewan Brown](#), 3 June 2003, p. 4; *Prosecutor v. Strugar*, IT-01-42-PT, Trial Chamber, [Decision on the Defence Motions to Oppose Admission of Prosecution Expert Reports Pursuant to Rule 94 bis](#), 1 April 2004, p. 4; *Prosecutor v. Stanišić and Simatović*, IT-03-69-PT, Trial Chamber, [Decision on Prosecution’s Submission of the Expert Report of Nena Tromp and Christiam Nielsen Pursuant to Rule 94 bis](#), 18 March 2008, para. 8; *Prosecutor v. Perišić*, IT-04-81-T, Trial Chamber, [Decision on Expert Reports by Richard Butler](#), 4 March 2009, para. 9; *Prosecutor v. Martić*, IT-95-11-T, Trial Chamber, [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; *Prosecutor v. Milošević*, IT-98-29/1-T, Trial Chamber, [Decision on Defence Expert Witnesses](#), 21 August 2007, para. 6; SCSL, *Prosecutor v. Taylor*, 03-01-T, Trial Chamber, [Decision on Defence Application to Exclude the Evidence of Proposed Prosecution Expert Witness Corinne Dufka or, in the Alternative, to Limit its Scope and on Urgent Prosecution Request for Decision](#), 19 June 2008, paras 7-8; *Prosecutor v. Brima et al.*, 04-16-T-365, Trial Chamber, [Decision on Prosecution Request for Leave to Call an Additional Witness \(Zainab Hawa Bangura\) Pursuant to Rule 73 bis \(E\), and on Joint Defence Notice to Inform the Trial Chamber of Its Position Vis-a-vis the Proposed Expert Witness \(Mrs. Bangura\) Pursuant to Rule 94 bis](#), 5 August 2005, paras 23, 31; *Prosecutor v. Norman et al.*, 04-14-T, Trial Chamber, [Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures](#), 21 June 2005; *Prosecutor v. Sesay et al.*, 04-15-T, Trial Chamber, [Decision on Prosecution Request for Leave to Call an Additional Expert Witness](#), 10 June 2005.

⁵⁶ See above para. 2.

1. W04826

30. Having reviewed W04826's *curriculum vitae* ("CV"),⁵⁷ the Panel observes that he obtained a medical degree, a postgraduate specialisation as a forensic medical doctor and Ph.D. in biology and anthropology. W04826 has also worked for many years as a forensic pathologist in Kosovo with [REDACTED]. The Panel is satisfied that, as a forensic pathologist, W04826 qualifies as an expert within the meaning of Rule 149.

2. W04874

31. Having reviewed W04874's CV,⁵⁸ the Panel observes that he obtained a medical degree and postgraduate specialisations in pathology and forensic medical science. W04874 also worked for many years as a forensic pathologist [REDACTED], including in Kosovo, [REDACTED]. Moreover, W04874 was also a senior lecturer in forensic pathology for several years. The Panel is therefore satisfied that, as a forensic pathologist, W04874 qualifies as an expert within the meaning of Rule 149.

3. W04875

32. Having reviewed W04875's CV,⁵⁹ the Panel observes that he obtained a degree in biological sciences and a Ph.D. in molecular biology. W04875 also possesses numerous years of working experience as member of [REDACTED] and as a lecturer in forensic genetics. Moreover, W04875's CV shows that he has experience in conducting DNA analysis and identification of skeletal remains, including in

⁵⁷ 103409-103410. See Annex 2 to the Motion, p. 4.

⁵⁸ 103133-103135. See Annex 1 to the Motion, p. 2.

⁵⁹ 103392-103400. See Annex 3 to the Motion, p. 2.

the context of criminal proceedings. The Panel is therefore satisfied that, as a forensic geneticist, W04875 qualifies as an expert within the meaning of Rule 149.

D. ADMISSIBILITY OF THE EXPERT EVIDENCE

33. The SPO requests the admission of the Expert Reports and Associated Source Material of the Expert Witnesses pursuant to Rules 138 and 149.⁶⁰

34. The Defence submits that the Defence has exercised its rights under Rule 149 (2)(b) and (c) in relation to all three Expert Witnesses and, as such, no evidence can be admitted prior to the conclusion of their live testimony, at which time the Parties are entitled to make submissions as to admissibility.⁶¹ According to the Defence, Rule 149 clearly stipulates that the sole instance in which the evidence of an expert can be admitted in writing without cross-examination is by agreement of the opposing party under Rule 149(3).⁶²

35. The SPO argues that the Panel has the authority to issue a preliminary ruling on admissibility before the Expert Witnesses testify and routinely does so for Rule 154 witnesses.⁶³

36. The Trial Panel considers that the fact that W04826, W04874 and W04875 are called as expert witnesses⁶⁴ does not mean that the admissibility of their Expert Evidence should be assessed by the Panel before they give evidence before the Panel.⁶⁵ As the Defence have not agreed to the admission of the Expert Evidence under Rule 149, and indicated their wish to cross-examine the Expert Witnesses, the Panel is required by Rule 149(4) to “decide on the admissibility of the expert

⁶⁰ Motion, paras 1, 42.

⁶¹ Response, para. 12.

⁶² Response, para. 16.

⁶³ Reply, para. 3.

⁶⁴ See above paras 30-32.

⁶⁵ ICTY, *Prosecutor v. Galić*, IT-98-29-T, [Decision on the Expert Witness Statement Submitted by the Defence](#), 27 January 2003, p. 4. See also 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. 31.

witness report *following the testimony and questioning of the expert*". This decision on admissibility of the Expert Evidence will therefore be made by the Panel once the Parties and the Panel have exhausted all questioning of the Expert Witnesses, and based on any arguments advanced in support or against admission by the Parties following their testimony. In the course of direct examination, it will be incumbent upon the Prosecution to demonstrate that the Expert Reports meet the requirements for admission of Rules 138 (1) and 149. The Defence in turn may put questions to the expert witnesses in support of the challenges that they have filed to the admissibility of the Expert Reports through cross-examination. Only then will the Panel be in a position to properly assess whether the Expert Evidence is admissible.

37. In light of the above, the Panel declines to make a preliminary ruling on the admissibility of the Expert Evidence and defers its decision on the admission of such evidence until after the testimony and questioning of each of the Expert Witnesses, pursuant to Rule 149(4).

E. ADMISSIBILITY OF THE RULE 154 EVIDENCE

38. The SPO requests the admission pursuant to Rule 154 of the Statements and Associated Exhibits of W04826 and of W04875.⁶⁶

39. The Defence argues that Rule 154 is not applicable to expert evidence and cannot provide an alternative means to admitting the Statements and Associated Exhibits in advance of live evidence.⁶⁷

⁶⁶ Motion, paras 1, 42. *See also* Annexes 1-3 to the Motion.

⁶⁷ Response, para. 16.

40. The SPO argues that Rule 149 is *lex specialis* for final reports of expert witnesses, but nothing in the Laws or Rules prohibits the admission of other material related to experts through other Rules, including Rule 154.⁶⁸

41. The Panel agrees with the SPO's submissions that Rule 149 is *lex specialis* for the admission of expert reports and that no provision in the Law or Rules prohibits the admission of expert witness statements through Rule 154.⁶⁹ However, as W04826' and W04875's Statements are predicated on their Expert Reports or concern very similar evidence, the Panel exercises its discretion to direct the SPO to elicit live from the Expert any parts of W04826's and W04875's Rule 154 Evidence that the SPO considers to be of particular significance to its case. As indicated, the Panel shall decide on the admissibility of the expert witness reports following the testimony and questioning of the experts.

V. CLASSIFICATION

42. The Panel notes that the Response was filed confidentially. The Panel therefore orders the Defence to submit a public redacted version or request the reclassification of the Response by no later than **Friday, 20 December 2024**.

VI. DISPOSITION

43. For these reasons, the Panel hereby:
- a) **GRANTS** the Motion, in part;
 - b) **GRANTS** the SPO leave to add the Death Certificate to the Exhibit List;
 - c) **ORDERS** the SPO to file its amended Exhibit List by no later than **Friday**,

⁶⁸ Reply, para. 3

⁶⁹ See ICTY, *Prosecutor v. Galić*, IT-98-29-AR73.2, [Decision on Interlocutory Appeal Concerning Rule 92bis\(C\)](#), 7 June 2002, para. 40.

20 December 2024;

- d) **DEFERS** the admission of the Expert Evidence in respect of each Expert Witness until the conclusion of that Expert Witness's testimony;
- e) **DENIES** the part of the Motion concerning W04826's and W04875's Rule 154 Evidence and **DIRECTS** the SPO to elicit live any parts of W04826's and W04875's Rule 154 Evidence that the SPO considers to be of particular significance to its case;
- f) **ORDERS** the Defence to submit a public redacted version or request the reclassification of the Response by no later than **Friday, 20 December 2024**.



Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 16 December 2024

At The Hague, the Netherlands.