



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

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Prosecution reply to 'Joint Defence Response to Prosecution Request for Admission of the Expert Report and Source Material of W04875' (F02836)

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Contrary to the Panel's specific direction,¹ the Supplemental Submissions² extensively repeat arguments set out in the 8 November 2024 Response³ and Annex 3⁴ thereto.⁵ Once again, the Defence misrepresents the framework governing expert evidence and ignores established admissibility standards. Further, the Defence misrepresents W04875's evidence. The Panel should admit the Proposed Evidence,⁶ which consists of W04875's expert reports, letters of instruction, *curriculum vitae*, and source material, pursuant to Rules 138 and 149 of the Rules.⁷

II. SUBMISSIONS

2. W04875 confirmed that his expert reports contain his independent opinion concerning the matters addressed therein, that the information therein is accurate and

¹ Transcript, 13 January 2025, p.23689.

² Joint Defence Response to Prosecution Request for Admission of the Expert Report and Source Material of W04875, KSC-BC-2020-06/F02836, 17 January 2025 ('Supplemental Submissions').

³ Joint Defence Consolidated Response to F02620 and F02633, KSC-BC-2020-06/F02703, 8 November 2024, Confidential ('8 November 2024 Response').

⁴ Annex 3 to Joint Defence Consolidated Response to F02620 and F02633, KSC-BC-2020-06/F02703/A05, 8 November 2024, Confidential ('Annex 3'). *See also* Annex 4 to Joint Defence Consolidated Response to F02620 and F02633, KSC-BC-2020-06/F02703/A07, 8 November 2024, Confidential (providing an explanation of the codes used in Annex 3).

⁵ *Compare, e.g.:* (i) on the admissibility of reports not authored by W04875, 8 November 2024 Response, KSC-BC-2020-06/F02703, paras 19-23, 27, 63-65, 66(c) and items with the codes O.2 and O.3 in Annex 3, KSC-BC-2020-06/F02703/A05; *with* Supplemental Submissions, KSC-BC-2020-06/F02836, paras 11, 22, 25-28; and (ii) on alleged inaccuracies in the Proposed Evidence, 8 November 2024 Response, KSC-BC-2020-06/F02703, paras 26-27 and items with the code O.4 in Annex 3, KSC-BC-2020-06/F02703/A05; *with* Supplemental Submissions, KSC-BC-2020-06/F02836, paras 12-17.

⁶ The SPO initially set out the items to be tendered through W04875 in 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 ('11 October 2024 Request'), and Annex 3 to 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/A03, 11 October 2024, Confidential ('Annex 3 to 11 October 2024 Request'). The SPO subsequently made minor amendments to its tender as reflected in Annex 1 to W04875 Witness preparation Note, 124392-124406, which lists all items tendered for admission through W04875, constituting the 'Proposed Evidence' (*see* KSC-BC-2020-06, Transcript, 13 January 2025, p.23558). *See also* para.9 below.

⁷ 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.

truthful to the best of his knowledge and belief, and that the expert reports accurately reflect what he would say if he were examined about the items addressed therein.⁸

3. The Supplemental Submissions ignore the Decision, which held that Rule 149 is *lex specialis* for the admission of expert reports as defined in Rule 149(1),⁹ not for ‘all expert evidence’, as claimed by the Defence.¹⁰ The fact that W04875 did not author the source material and was not always able to rerun the calculations set out therein does not impact the *prima facie* admissibility of the Proposed Evidence.¹¹ In this respect, W04875’s expert reports and testimony concerning the source material he did not author enhances the reliability and probative value thereof.¹²

4. For example, W04875 described the ICMP, the organisation that prepared the vast majority of the DNA reports tendered, as having ‘pioneered the use of the DNA-led approach to human identification in particular in post-conflict contexts’, noting it is ‘a highly respected organisation’ which ‘established the benchmark for the methodology to be used in this type of work’.¹³ W04875 further testified that ‘in terms of processes, I have no reason to question what they're doing’¹⁴ and that he has no specific knowledge of flaws in their processes.¹⁵ W04875 also noted, *inter alia*, that the potential for contamination¹⁶ was very low,¹⁷ that he would not expect mixing¹⁸ to be

⁸ Transcript, 13 January 2025, pp.23551, 23557.

⁹ See Decision on 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/F02787, 16 December 2024, Confidential (‘Decision’), para.41; Prosecution reply related to request to admit expert witness evidence (F02633), KSC-BC-2020-06/F02732, 18 November 2024, para.3.

¹⁰ Supplemental Submissions, KSC-BC-2020-06/F02836, para.8.

¹¹ *Contra* Supplemental Submissions, KSC-BC-2020-06/F02836, paras 1, 11, 13-14.

¹² *Contra* Supplemental Submissions, KSC-BC-2020-06/F02836, para.12.

¹³ Transcript, 13 January 2025, p.23677.

¹⁴ Transcript, 13 January 2025, p.23677.

¹⁵ Transcript, 13 January 2025, p.23678.

¹⁶ Supplemental Submissions, KSC-BC-2020-06/F02836, para.30.

¹⁷ Transcript, 13 January 2025, p.23584.

¹⁸ Supplemental Submissions, KSC-BC-2020-06/F02836, para.31.

a big issue in the reports reviewed,¹⁹ and that he would not necessarily expect EPG profiles²⁰ to typically be included in a report of the nature he addressed.²¹

5. W04875 provided a logical reason as to why certain raw data was not included in the source material, noting he believed this would be for data protection purposes, and that, to his knowledge, it was the ICMP's practice not to include such information in reports such as those included in the Proposed Evidence.²² Significantly, W04875 testified that despite the fact that certain raw data is not included in the source material, the analysis therein would be in line with what would be expected based on the information provided.²³

6. The Defence misstates and misrepresents W04875's evidence. W04875 did not highlight that 'none of the conclusions contain a population substructure adjustment'.²⁴ Rather, W04875 noted that, while he did not believe that correction for population substructure had been included in the DNA reports addressed, he did not know if it was, noting such a correction would not typically be included in such reports.²⁵ Further, W04875 did not specifically accept that the DNA reports he reviewed 'amount to expert reports';²⁶ in the excerpt cited by the Defence in support of this assertion,²⁷ Defence Counsel describes such reports as 'expert reports' without any qualification or explanation of such a term, and W04875 does not specifically remark on that aspect of the question put to him. Regardless, the determination as to

¹⁹ Transcript, 13 January 2025, pp.23588, 23610.

²⁰ Supplemental Submissions, KSC-BC-2020-06/F02836, para.24.

²¹ Transcript, 13 January 2025, p.23609.

²² Transcript, 13 January 2025, pp.23560, 23624, 23680.

²³ *Contra* Supplemental Submissions, KSC-BC-2020-06/F02836, paras 15, 18-21, 23-24, 32, 37-39; *See* Transcript, 13 January 2025, pp.23560-5.

²⁴ *Contra* Supplemental Submissions, KSC-BC-2020-06/F02836, para.20.

²⁵ Transcript, 13 January 2025, pp.23554, 23671.

²⁶ *Contra* Supplemental Submissions, KSC-BC-2020-06/F02836, para.22.

²⁷ *See* Supplemental Submissions, KSC-BC-2020-06/F02836, fn.31, citing Transcript, 13 January 2025, p.23627, lns.1-5.

whether the source material amounts to an 'expert report' within the specific meaning of Rule 149 is a legal one to be made by the Panel, not W04875.

7. The Defence impermissibly²⁸ repeats²⁹ its bald assertion that the SPO seeks to tender expert reports of third-party experts through W04875,³⁰ yet again mischaracterising the nature of the Proposed Evidence. DNA documents are not reports within the meaning of Rule 149.

8. Defence submissions that the SPO is barred from tendering through W04875 any items it did not show to him in court³¹ are unsubstantiated and ignore the clear language of the Conduct of Proceedings Order.³² The SPO's prior written submissions set out the Proposed Evidence alongside information noting where the source material is referred to in W04875's expert reports, and the SPO's submissions on the relevance thereof.³³

9. In relation to the limited Proposed Evidence which the Defence now asserts falls outside W04875's expertise,³⁴ the SPO clarifies that it only tenders, through W04875: (i) pages SPOE00072691-2 from SPOE00072678-00072750 RED2, consisting of a DNA report which W04875 specifically commented on in his expert report³⁵ and testimony;³⁶ and (ii) pages SITF00200239, SITF00200245-6 from SITF00200221-00200249 RED/SITF00200221-SITF00200249-ET RED, a DNA report which W04875

²⁸ See Transcript, 13 January 2025, p.23689.

²⁹ See 8 November 2024 Response, KSC-BC-2020-06/F02703, paras 15, 19-23, 27-30.

³⁰ Supplemental Submissions, KSC-BC-2020-06/F02836, paras 25-27.

³¹ Supplemental Submissions, KSC-BC-2020-06/F02836, para.41.

³² Annex 1 to Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 (Conduct of Proceedings Order), para.123.

³³ See Annex 3 to 11 October 2024 Request, KSC-BC-2020-06/F02633/A03.

³⁴ Supplemental Submissions, KSC-BC-2020-06/F02836, para.42.

³⁵ See 103373-103387, pp.103381-2. The remaining pages in this item are tendered through W04826 (*see* Annex 2 to 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/A02, 11 October 2024, Confidential, item no.70), who authored multiple reports therein, with the remaining information relating to the same victim.

³⁶ Transcript, 13 January 2025, pp.23560-3.

specifically comments on in his expert report³⁷ along with related information specifically concerning DNA.

10. The issues raised in the Supplemental Submissions go to weight, not admissibility. The Defence was given the opportunity to cross-examine W04875 and may seek to admit other relevant evidence, and call their own experts to testify. Accordingly, the admission of the Proposed Evidence would not be prejudicial to the Defence.

III. RELIEF REQUESTED

11. The Proposed Evidence meets the requirements for admissibility since it is relevant, authentic, and reliable, and has probative value, which – considering, in particular, that the Defence extensively cross-examined W04875 thereon – is not outweighed by any prejudice. Admission is therefore in the interests of justice. The Panel should admit the Proposed Evidence.

Word Count: 1504



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Monday, 20 January 2025

At The Hague, the Netherlands.

³⁷ See 103373-103387, pp.103383-4, 103386.