



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 response to 'Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875 (F03202)'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Request¹ should be dismissed as the Issues² fail to meet the criteria for certification³ under Article 45 of the Law⁴ and Rule 77 of the Rules.⁵ Triers of fact are afforded considerable discretion in deciding whether to admit evidence, and certification to appeal admissibility decisions are the absolute exception.⁶ The Request, riddled with mere disagreements with, and distortions of, the Decision,⁷ fails to identify any error in the Panel's exercise of its discretion, let alone one warranting exceptional relief.

II. SUBMISSIONS

A. THE ISSUES ARE NOT APPEALABLE

2. The Issues are not specific, discrete, or identifiable; the Request presents no appealable issues. Instead, the Defence seeks to relitigate the admission of the Source Material⁸ by repeating previous objections, misrepresenting the Panel's findings, and expressing mere disagreement with the Decision. Rather than clearly articulating why the Decision was allegedly in error,⁹ the Defence impermissibly¹⁰ argues the merits.¹¹

¹ Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875 (F03202), KSC-BC-2020-06/F03222, 3 June 2025, Confidential ('Request').

² See Request, KSC-BC-2020-06/F03222, para.5, defining the issues.

³ The applicable law has been set out in prior decisions. See e.g. Decision on the Thaçi Defence Application for leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, Confidential, paras 9-17.

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein are to the Law.

⁵ Rules of Procedure and Evidence before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules.

⁶ See e.g. Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960, KSC-BC-2020-06/F02157, 29 February 2024, para.11; *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, paras 34-35.

⁷ Decision on the Admission of Expert Evidence of Witness W04875, KSC-BC-2020-06/F03202, 27 May 2025 ('Decision').

⁸ See Decision, KSC-BC-2020-06/F03202, fn.15 defining the 'Source Material'.

⁹ See, similarly, Decision on Joint Defence 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.

¹⁰ See Decision on Veseli Defence Request for Certification to Appeal the Decision to Admit P1064 and P1065, KSC-BC-2020-06/F02259, 23 April 2024 ('23 April 2024 Decision'), paras 10-11.

¹¹ See e.g. Request, KSC-BC-2020-06/F03222, paras 8-9, 21-25.

(i) *First Issue*

3. The First Issue misrepresents the Panel's findings and constitutes a mere disagreement with them and with other similar decisions issued by the Panel.¹² The Source Material (DNA reports), do not constitute 'expert witness report[s]' within the meaning of Rule 149.¹³ Plainly, they are not '[t]he final report of any expert witness to be called by a Party'.¹⁴ The Oxford English Dictionary definition of a 'report'¹⁵ is irrelevant in this regard.

4. The Request repeatedly conflates scientific skill with what constitutes an expert witness and an expert witness report under the regulatory framework governing this case,¹⁶ merely repeating submissions that the Defence has already made and that the Panel has already rejected. In particular, the Defence has already argued that DNA reports constitute expert reports under Rule 149, that those who prepare DNA reports are experts for the purposes Rule 149, and that DNA reports prepared by persons other than the experts called to testify are not admissible.¹⁷ The Decision rightly dismissed these arguments and the Request fails to identify any error therein.

5. The Defence asserts that the Panel's findings in this regard are 'contrary to decades of legal precedent', yet fails to provide a single ruling in support of the unfounded, illogical Defence theory that every DNA report of the type contained in

¹² See e.g. Decision on the Admission of Expert Evidence of Witness W04874, KSC-BC-2020-06/F03203, 27 May 2025, para.30; Decision on Prosecution Motion for Admission of Documents concerning Murder Victims and Related Request, KSC-BC-2020-06/F03211, 29 May 2025, Confidential ('Decision on Documents concerning Murder Victims'), paras 17-18; Decision on Prosecution Motion for Admission of International Reports, KSC-BC-2020-06/F03213, 29 May 2025 ('International Reports Decision'), para.14.

¹³ *Contra* Request, KSC-BC-2020-06/F03222, paras 5(i), 8-14.

¹⁴ Rule 149(1); See Decision on Documents concerning Murder Victims, KSC-BC-2020-06/F03211, paras 17-18; International Reports Decision, KSC-BC-2020-06/F03213, para.14.

¹⁵ See Request, KSC-BC-2020-06/F03222, para.9, fn.12.

¹⁶ See Request, KSC-BC-2020-06/F03222, paras 8-9, 11-14.

¹⁷ Request, KSC-BC-2020-06/F03222, paras 3-4, 8-15; See Joint Defence Consolidated Response to F02620 and F02633 with confidential Annexes 1-4, KSC-BC-2020-06/F02703, 8 November 2024, Confidential ('8 November 2024 Response'), paras 19-23, 27, 64-66; 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 ('17 January 2025 Response'), paras 11, 22, 25.

the Source Material constitutes an expert witness report and that the author of every such DNA report constitutes an expert witness under the regulatory framework governing this case.¹⁸ The Request also misrepresents the Decision – the Panel dismissed these unfounded Defence theories with clear reasoning, assessing the DNA reports as source material upon which the expert, W04875, based his reports.¹⁹

6. As previously noted, other courts have admitted forensics documents through general admissibility provisions similar to Rule 138(1).²⁰ Moreover, the admission of the DNA reports as source material is fully in line with the applicable legal framework.²¹ Further, at least one other DNA report of the same kind as those referred to in the Request was previously admitted in this case with no Defence objection thereto.²² The Defence itself has also tendered DNA evidence. It did not do so through the author thereof, but in the regular course of cross-examination.²³

7. W04875 did not ‘confirm the ICMP reports were expert reports’,²⁴ another mere repetition of previous Defence argument.²⁵ In the excerpt cited by the Defence in support of this assertion,²⁶ Defence Counsel describes such reports as ‘expert reports’ without any qualification or explanation of the term, and W04875 does not specifically remark on that aspect of the question put to him. Regardless, the determination as to

¹⁸ See Request, KSC-BC-2020-06/F03222, para.11.

¹⁹ *Contra* Request, KSC-BC-2020-06/F03222, paras 11-12; Decision, KSC-BC-2020-06/F03202, paras 33-40.

²⁰ See Prosecution reply to ‘Joint Defence Response to Prosecution motion for admission of documents concerning murder victims’ (F02853), KSC-BC-2020-06/F02867, 28 January 2025, Confidential, para.9, fn.33. See also 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 (‘*Martić* Decision’), para.47.

²¹ See e.g. Annex 1 to Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 (‘Order on the Conduct of Proceedings’), para.123.

²² See P00201, p.SPOE00056170, admitted through W03811 (Transcript, 20 June 2023, pp.5131-5).

²³ See 1D00022, p.SITF0182644 admitted through W04337 (Transcript, 11 July 2023, pp.5432-7, 5454).

²⁴ *Contra* Request, KSC-BC-2020-06/F03222, para.12.

²⁵ See 17 January 2025 Response, KSC-BC-2020-06/F02836, para.22, fn.31.

²⁶ See Request, KSC-BC-2020-06/F03222, para.12, fn.14 citing Transcript, 13 January 2025, p.23627, lns.3-5.

whether the source material amounts to an ‘expert report’ within the specific meaning of Rule 149 is a legal one properly made by the Panel, not W04875 or Defence Counsel.

8. Accordingly, the First Issue amounts to unsubstantiated assertions merely amounting to an expression of dissatisfaction with the Decision.

(ii) *Second Issue*

9. The Defence’s five-line argument²⁷ in relation to the Second Issue²⁸ contains no explanation, support, or example as to how the Panel committed the alleged error, and fails to provide any elaboration on what specific protections the Defence has allegedly been deprived of. The Defence’s failure to articulate clearly and unambiguously how or on what basis, it says, the Panel allegedly erred makes it impossible for this issue to meet the Rule 77 threshold.²⁹

10. The Panel properly considered, and admitted, the DNA reports as source material in line with Rules 138(1), 149 and paragraph 123 of the Order on the Conduct of Proceedings, after having considered that they were discussed in W04875’s expert reports and testimony, *prima facie* authentic and relevant, and had probative value which was not outweighed by any prejudice.³⁰ Further, the Panel provided the Defence multiple opportunities to challenge the admission of W04875’s expert reports and the Source Material,³¹ only issuing the Decision after receiving extensive submissions by the Parties and the conclusion of W04875’s testimony, which included a lengthy cross-examination.

²⁷ Request, KSC-BC-2020-06/F03222, para.15.

²⁸ Request, KSC-BC-2020-06/F03222, para.5(ii).

²⁹ See Decision on Veseli, Selimi, and Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Intercepted Communications, KSC-BC-2020-06/F03183, 19 May 2025, Confidential, para.31.

³⁰ *Contra* Request, KSC-BC-2020-06/F03222, paras 5(ii), 15; See Decision, KSC-BC-2020-06/F03202, paras 33-40, fn.81.

³¹ *Contra* Request, KSC-BC-2020-06/F03222, para.15; See 8 November 2024 Response, KSC-BC-2020-06/F02703; 17 January 2025 Response, KSC-BC-2020-06/F02836.

(iii) *Third Issue*

11. The Third Issue essentially amounts to a request to entirely disregard, *inter alia*, Rule 138(1), 149 and paragraph 123 of the Order on the Conduct of Proceedings. It is not a discrete issue which arises from the Decision.

12. Rather than relying on any one 'exclusive consideration for admission of source material',³² the Panel applied the correct legal test for admission.³³ The Panel did not find that source material would automatically be admitted, or that it could not be excluded for good reason.³⁴ Indeed, the Panel noted the Specialist Prosecutor's Office ('SPO') did not tender pages of items among the source material which the Defence objected to as falling outside of W04875's expertise, and the Panel did not admit such pages.³⁵ The Panel admitted the Source Material after finding it is necessary to understand W04875's expert reports given that it is used with and discussed by W04875 in his expert reports and testimony.³⁶ The Request fails to identify any discrete error in that assessment.

13. As part of the Third Issue, the Defence raises, without elaboration, its previously canvassed and unfounded argument that reports concerning matters related to murder victims amount to witness statements.³⁷ The Panel specifically dismissed such arguments in its 29 May 2025 decision,³⁸ and the Defence fails to explain, let alone establish, any error in this regard.

³² Request, KSC-BC-2020-06/F03222, para.18.

³³ *Contra* Request, KSC-BC-2020-06/F03222, paras 5(iii), 16-26; *See* Decision, KSC-BC-2020-06/F03202, paras 18, 33-41, fns.81-2, and p.1 where the Panel notes it renders the Decision pursuant to Articles 21, 37 and 40 of the Law and Rules 137-138 and 149 of the Rules.

³⁴ *Contra* Request, KSC-BC-2020-06/F03222, paras 18, 20-23.

³⁵ Decision, KSC-BC-2020-06/F03202, para.35.

³⁶ Decision, KSC-BC-2020-06/F03202, para.36.

³⁷ *See* Request, KSC-BC-2020-06/F03222, para.20; 8 November 2024 Response, KSC-BC-2020-06/F02703, paras 28-30; Joint Defence Response to Prosecution motion for admission of documents concerning murder victims with confidential Annexes 1 and 2, KSC-BC-2020-06/F02853, 23 January 2025, Confidential, paras 7, 23-26.

³⁸ Decision on Documents concerning Murder Victims, KSC-BC-2020-06/F03211, para.19.

14. The Defence assertions that the SPO does not rely on W04875's expert reports and that his expert reports contain no independent findings or conclusions³⁹ are unfounded. As previously submitted,⁴⁰ W04875's expert reports and testimony concerning the Source Material enhances the reliability and probative value thereof.

15. Defence attempts to demonstrate error by invoking the *Karadžić* Decision are inapt.⁴¹ That decision concerned a subject-matter entirely distinguishable from DNA analysis,⁴² and, unlike with W04875, the documents at issue were not discussed in the expert's report.⁴³

16. This case is governed by the legal framework of this court and the Order on the Conduct of Proceedings, paragraph 123 of which provides that '[s]ource material will be admitted upon request, when justified.' No mention is made of any limited purpose for the admission of source material. Significantly, the Defence did not challenge this provision when given the opportunity to do so before its adoption⁴⁴ and did not seek leave to appeal in relation thereto once it was adopted.⁴⁵ Neither has the Defence previously argued that source material cannot be admitted for the truth of its content. The latter factor alone means the Defence is barred from raising such arguments at this stage.

³⁹ Request, KSC-BC-2020-06/F03222, paras 4, 21-22, 24.

⁴⁰ See Prosecution reply to 'Joint Defence Response to Prosecution Request for Admission of the Expert Report and Source Material of W04875' (F02836), KSC-BC-2020-06/F02840, 20 January 2025, para.3.

⁴¹ Request, KSC-BC-2020-06/F03222, paras 23-26, fn.26 citing *Prosecutor v Karadžić*, IT-95-5/18-T, Decision on Prosecution's submission on the relevancy of certain documents relating to the testimony of Richard Philipps with Appendix A, 9 July 2010 ('*Karadžić* Decision'), para.10.

⁴² See *Karadžić* Decision, para.4.

⁴³ See *Karadžić* Decision, para.7.

⁴⁴ See Annex 1 to Order for Submissions on the Draft Order on the Conduct of Proceedings, KSC-BC-2020-06/F01178/A01, 22 December 2022, para.122; Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings (F01178/A01), KSC-BC-2020-06/F01203, 13 January 2023; Further Krasniqi Defence Submissions in Addition to Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings, KSC-BC-2020-06/F01207, 13 January 2023.

⁴⁵ See Krasniqi Defence Request for Certification to Appeal the "Order on the Conduct of Proceedings", KSC-BC-2020-06-F01246, 1 February 2023, seeking leave to appeal in relation to other matters in the Order on the Conduct of Proceedings.

17. Further, even the *Karadžić* Decision clearly foresees the possibility of source material being admitted without restrictions as to purpose, noting that ‘if, at a later date, a witness discusses the content of a document previously admitted as a source document in such a way that renders that document admissible for its content, its status can be changed to reflect its admission for all purposes.’⁴⁶ Even by that measure, considering that W04875’s expert reports address every item admitted as source material, there would be no justifiable reason to limit the purpose of its admission.

18. The Defence itself previously cited another ICTY decision where a different chamber articulated a different preference to that in the *Karadžić* Decision – that the prosecution should seek ‘the admission of documents supporting the transcripts and the expert reports under examination in court, pursuant to the general principles regulating the admissibility of evidence before this Tribunal.’⁴⁷ At this court, those principles are enshrined in Rule 138(1), which the Panel fully considered.

19. The Request’s opposition to the regulatory framework governing this case does not constitute an appealable issue.

(iv) *Fourth Issue*

20. The Fourth Issue is not appealable. The Panel properly assessed all applicable requirements of Rule 138(1) in relation to the Source Material.⁴⁸ The Request distorts the Panel’s findings in this regard. The Panel did not defer Defence challenges to the Source Material.⁴⁹ Rather, it considered the Defence challenges as part of its assessment on admissibility and determined that the Source Material is admissible

⁴⁶ *Karadžić* Decision, para.10.

⁴⁷ See 8 November 2024 Response, KSC-BC-2020-06/F02703, para.31, fn.27 citing *Martić* Decision, para.47.

⁴⁸ *Contra* Request, KSC-BC-2020-06/F03222, paras 5(iv), 27-28; *See* Decision, KSC-BC-2020-06/F03202, paras 33-40.

⁴⁹ *Contra* Request, KSC-BC-2020-06/F03222, para.28.

despite the Defence challenges, noting that it would take the challenges into account when assessing ultimate weight.⁵⁰

21. The Panel has previously rejected a similar request for leave to appeal on the grounds that the issue did not arise from the impugned decision.⁵¹ The same applies in this instance.

(v) Fifth Issue

22. The Panel properly assessed the potential prejudice caused to the Defence by the admission of the Source Material.⁵² The Panel specifically noted the Defence argument that admission of the Source Material without affording the Defence the chance to cross-examine the authors thereof would be highly prejudicial,⁵³ but found that the Defence's ability to cross-examine W04875 meant that admission of the Source Material was not outweighed by any prejudice.⁵⁴ The Request merely disagrees with the Decision in this regard, describing it as 'flawed'⁵⁵ but failing to articulate any error therein.

23. The Request ignores the fact that, not only was the Defence given the opportunity to cross-examine W04875, including in relation to the Source Material, but the Defence will have every opportunity to call witnesses, experts and/or seek to tender evidence in relation thereto.⁵⁶

24. Accordingly, the Fifth Issue is another expression of mere disagreement, not the articulation of an appealable issue.

⁵⁰ Decision, KSC-BC-2020-06/F03202, para.38.

⁵¹ See Decision on Joint Defence Request for Certification to Appeal Decision F01963, KSC-BC-2020-06/F02067, 19 January 2024, paras 12-16.

⁵² *Contra* Request, KSC-BC-2020-06/F03222, paras 5(v), 29.

⁵³ *Contra* Request, KSC-BC-2020-06/F03222, para.29.

⁵⁴ Decision, KSC-BC-2020-06/F03202, paras 13, 39, fn.31.

⁵⁵ Request, KSC-BC-2020-06/F03222, para.29.

⁵⁶ Request, KSC-BC-2020-06/F03222, paras 4, 29.

B. THE ISSUES WOULD HAVE NO IMPACT JUSTIFYING CERTIFICATION

25. The Request asserts, but does not explain or substantiate, that the Issues significantly affect the fair and expeditious conduct of the proceedings, ascribing to the Defence ‘procedural rights including to confront the authors of the source material’ without indicating any basis therefor.⁵⁷ The Issues could have no such impact, in particular considering the Defence’s ability to call a case, continue to challenge, and make final submissions on any evidence it chooses to. Notably, the Defence has not sought leave to appeal from decisions admitting, through the bar table, DNA reports of the same kind as some of those addressed in the Request.⁵⁸

26. The Request also merely alleges, without explaining, that immediate appellate resolution will materially advance the proceedings, invoking speculative, unfounded, allegations that the Decision ‘may have far reaching consequences beyond the scope of this trial’.⁵⁹ The evidentiary record and the Decision are clear. No appellate intervention is necessary for the Defence to be able to ‘determine whether to call a case’ or to appreciate ‘the nature and scope of the SPO’s case and the evidence upon which it relies.’⁶⁰

27. Finally, the Defence provides no reason as to why appropriate remedies could not effectively be granted after the close of the trial. The Panel’s admission of certain Source Material into evidence is without prejudice to its future assessment of the weight, if any, to be assigned. Any consideration of the impact on the proceedings or its outcome caused by the admission is hypothetical, speculative, and premature, and in any event, could be remedied, as necessary and appropriate, on any appeal against a final judgment in the case.⁶¹

⁵⁷ Request, KSC-BC-2020-06/F03222, para.30.

⁵⁸ See e.g. P00854, pp.281, 295 (admitted pursuant to the Sixth Decision, KSC-BC-2020-06/F01983/COR, para.130(b)).

⁵⁹ Request, KSC-BC-2020-06/F03222, paras 13, 31-33.

⁶⁰ *Contra* Request, KSC-BC-2020-06/F03222, para.31.

⁶¹ See 23 April 2024 Decision, KSC-BC-2020-06/F02259, para.13.

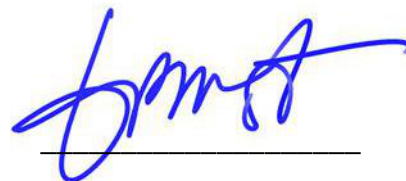
III. CLASSIFICATION

28. This filing is confidential pursuant to Rule 82(4). As it does not contain any confidential information, the SPO requests its reclassification as public.

IV. RELIEF REQUESTED

29. For the foregoing reasons, the Request fails to meet the leave to appeal standard and should be dismissed.

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Friday, 13 June 2025

At The Hague, the Netherlands.