

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 Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
Specialist Counsel for Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

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**Public Redacted Version of Joint Defence Request for Leave to Appeal Decision
on the Admission of Expert Evidence of Witness W04875 (F03202)**

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law¹ and Rule 77(2) of the Rules,² the Defence requests leave to appeal the Panel's Decision on the Admission of Expert Evidence of Witness W04875 ("Impugned Decision").³
2. The SPO called Dr Goodwin (W04875) as their only DNA expert. However, he conducted none of the DNA analysis, or probability of relatedness calculations, relied upon to identify alleged murder victims. Goodwin was instructed to simply comment upon narrow aspects of the findings of other experts. He did not, could not, and was not instructed to, conduct the underlying analysis or come to independent conclusions.
3. The Impugned Decision sanctions the use of Goodwin's expert report as a trojan horse for the admission of 22 DNA reports completed by third-party experts, primarily the International Commission on Missing Person ("ICMP"), which do not satisfy Rule 149 admissibility requirements. The Panel wrongly found that they are not expert reports and the scientists who conducted them are not experts.⁴ These findings are irrational, inconsistent, and wrong in law.
4. The evidential significance of Goodwin's report lies in the findings and conclusions in the source material. The SPO relies, not on Goodwin's report, but on the conclusions of others. This is unlawful. Goodwin did not adopt the conclusions in the "source material" as his own and has provided no independent conclusions. The Panel, in sanctioning this approach, misinterpreted and misapplied the law, and made incorrect findings of fact which, if left

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("Law").

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ("Rules").

³ F03202, Panel, *Decision on the Admission of Expert Evidence of Witness W04875*, 27 May 2025, public ("Impugned Decision").

⁴ *Ibid*, para. 40.

unchecked, could create dangerous and incorrect precedent, and cause serious prejudice. Timely appellate intervention is required to rectify these errors.

5. The Defence submits **Five Issues** for certification:
- i. **Issue One:** The Panel erred in finding that DNA profiling and sequencing reports from the “ICMP” setting out (a) their scientific findings from DNA bone analysis on recovered degraded skeletal remains, and (b) conclusions on the probability of relatedness, are not expert reports.
 - ii. **Issue Two:** As a result of the error in **Issue One**, the Panel erred in law by failing to apply Rule 149 to the “source material.”
 - iii. **Issue Three:** The Panel applied the incorrect legal test for admission of “source material” with expert statements under Rule 149.
 - iv. **Issue Four:** The Panel erred in finding that the irregularities identified in the source material were not relevant to admissibility under Rule 138.
 - v. **Issue Five:** The Panel erred in its assessment of the prejudice caused to the Defence by the admission of the “source material.”

II. PROCEDURAL HISTORY

6. On 13 January 2025, W04875 testified⁵ and the SPO tendered his proposed evidence for admission.⁶ On 17 January 2025, the Defence filed supplemental submissions on the admissibility of W04875's Proposed Evidence.⁷ On 20 January 2025, the SPO replied.⁸ On 27 May 2025, the Panel issued its Decision.⁹

⁵ Transcript, 13 January 2025, T.23546-23686.

⁶ 124392-124406, Annex 1.

⁷ F02836, Specialist Counsel, *Joint Defence Response to Prosecution Request for Admission of the Expert Report and Source Material of W04875*, public, 17 January 2025.

⁸ F02840, Specialist Prosecutor, *Prosecution Reply to 'Joint Defence Response to Prosecution Request for Admission of the Expert Report and Source Material of W04875' (F02836)*, 20 January 2025, public.

⁹ Impugned Decision.

III. APPLICABLE LAW

7. The relevant laws governing application for certification to appeal are set out in Article 45(2) of the Law and Rule 77(2).

IV. SUBMISSIONS

A. The Issues Arise from the Impugned Decision

8. The **First Issue** arises directly from the Impugned Decision. Twenty of the twenty-two DNA reports in this case are DNA profiling and relatedness reports from the ICMP setting out (a) DNA profiling and sequencing on DNA extracted from samples of degraded skeletal remains, and (b) their conclusions as to relatedness of those remains. The scientific analysis involved in this work is unquestionably within the exclusive ambit of experts. Extracting DNA from degraded bone samples, sequencing that DNA, creating a profile, analysing and comparing it to other DNA samples and providing conclusions as to probability of relatedness is, incontrovertibly, work that only an expert with relevant training and expertise could conduct. See, for example, the conclusions related to [REDACTED]:

[REDACTED].¹⁰

9. Consistent with the definition of an expert previously adopted by the Panel,¹¹ there can be no rational question that these reports are the product of persons who require specialised knowledge, skill or training in areas of genetic science, who can assist the trier of fact to understand or determine an issue in dispute, namely DNA identification. This evidence clearly takes the form of a report – an account of a situation, event, etc., brought by one person to another,

¹⁰ [REDACTED].

¹¹ F02787/RED, *Decision on Prosecution Motion for Admission of Evidence of Witnesses W04826, W04874, and W04875 pursuant to Rules 138, 149, and 154 and Related Request*, 16 December 2024, public, para 28.

especially as the result of an investigation.¹² As such they are ‘expert reports’ within the meaning of Rule 149 that reflect the conclusions of experts, as defined by the Panel.

10. However, the Impugned Decision held that;

The Panel does not consider that these documents are themselves “expert witness reports” within the meaning of Rule 149. Nor does the Panel consider their authors to be “third party experts”, as submitted by the Defence.¹³

11. This unreasoned decision is irrational and incorrect. The Panel did not explain or justify the finding that the ICMP scientists are not experts and their work not within the ambit of expert reports. DNA profiling, sequencing and conclusions on relatedness has uniformly been considered by domestic and international courts to be expert evidence. The Panel does not define what the underlying reports are, or even could be, if not expert reports. Re-categorising them as “source material” is inadequate. This unreasoned finding, fundamentally contrary to decades of legal precedent, must be the subject of appellate review.

12. Moreover, the Decision is inconsistent with the conclusion that Goodwin himself is an expert under Rule 149, and that Goodwin’s report constitutes an expert report, when it merely comments upon the same subject matter. Either reports from scientists dealing with DNA extraction, profiling and analysis are expert, or they are not; the same logic must be applied to Goodwin and the underlying reports. Goodwin himself confirmed the ICMP reports were expert reports and this was not challenged by the SPO or the Panel.¹⁴

13. A finding that ICMP DNA scientists are not experts and that DNA profiling and identification reports produced by the ICMP (and others) are not expert

¹² As defined by the [Oxford English Dictionary](https://www.oed.com/dictionary/report_n?tab=meaning_and_use#25843505); https://www.oed.com/dictionary/report_n?tab=meaning_and_use#25843505

¹³ Impugned Decision, para. 40.

¹⁴ Transcript, 13 January 2025, T. 23627, lines 3-5.

reports will have broader repercussions; the ICMP work in numerous post-conflict situations and to find that their reports are not expert reports is likely to impact many future ICL cases.

14. The above submissions apply equally to the two reports not conducted by the ICMP but by other scientists.
15. The **Second Issue** is interconnected with the First. As the Panel erred in finding that the source material were not expert reports, the Panel also failed to apply Rule 149. Rule 149 puts in place strict requirements for the admission of expert evidence, which protect the Defence. The Panel deprived the Defence of the protections in Rule 149, in particular Rule 149(4).¹⁵
16. The **Third Issue** arises directly from the decision as the Panel applied the incorrect legal test for admission of “source material.”
17. The Order on the Conduct of Proceedings provides that “[s]ource material will be admitted upon request, when justified.”¹⁶ The Impugned Decision held that,

[T]he admission of source material to the reports of expert witnesses is justified when such material is necessary to understand the reports as well as the expert witness’s testimony.¹⁷
18. In asserting this to be the exclusive consideration for admission of source material, the Panel relies on a decision in *Šešelj*,¹⁸ which does not find the above to be the definitive test for admission or what “justified” means in law. The paragraph cited deals with the admission of a database referred to in an expert report and found “the Database is crucial for understanding the Report and the Experts’ testimony.”¹⁹ While the database was admitted, the decision also

¹⁵ Rules, Rule 149(4).

¹⁶ F01226/A01, Annex 1 to Order on the Conduct of Proceedings, 25 January 2023, public, para 123.

¹⁷ Impugned Decision, para. 33.

¹⁸ *Ibid*, referring to ICTY, *Šešelj* Decision, para. 19.

¹⁹ *Ibid*.

found that the report commented on areas outside the author's expertise and therefore the Chamber refused to admit certain parts of the database as "source material."²⁰ Clearly, even where the source material is necessary in order to understand the report it can nonetheless be excluded for good reason. *Šešelj* does not establish a one-criteria test for the admission of source material to the exclusion of all other relevant considerations; rather, the subsequent passages make it clear that other factors may be relevant to the admissibility of source material.

19. The ICTY has held that;

[D]ocuments accompanying the written statements or transcripts which "form an inseparable and indispensable part of the testimony" can also be admitted pursuant to Rule 92 bis. Not every document referred to in a witness's written statement and/or transcript from a prior proceeding automatically forms an "inseparable and indispensable part" of the witness's testimony. Rather, a document falls into this category if the witness discusses the document in his or her written statement or transcript, and if that written statement or transcript would become incomprehensible or have lesser probative value without the admission of the document.²¹

20. Whilst a Party *can* tender for admission documents which meet these criteria, documents which amount to expert reports and/or witness statements must nonetheless be excluded as they are subject to separate *lex specialis* requirements of Rules 149 and 153-155.

21. The Panel's decision disregards the well-established body of ICTY precedent on this issue²² including that "[t]he sources used by an expert in compiling his or her report will not be admitted as a matter of course"²³ and that "[e]xpert

²⁰ *Ibid*, para. 20.

²¹ *Prosecutor v Karadzic*, Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 bis (Witnesses for Sarajevo Municipality), 15 October 2009, para. 11.

²² F02703/RED2, Specialist Counsel, *Further Public Redacted Joint Defence Consolidated Response to F02620 and F02633*, 8 November 2024, confidential, with Annexes 1-4, public, paras. 31-34.

²³ *Prosecutor v Karadzic*, Decision on Prosecution's submission on the relevancy of certain documents relating to the testimony of Richard Philipps with Appendix A (9 July 2010), para 5 ("Prosecutor v Karadzic"), citing the Order on Procedure for the Conduct of Trial, 8 October 2009, Appendix A, para. P. ("ICTY Order on Procedure").

reports generally should be complete and understandable in themselves, such that there is no need to tender for admission into evidence the source used by the expert.”²⁴ Where a party sought the admission of sources, it “should be very selective in the source that it tenders for admission and provide clear reasons as to why these sources should be admitted in addition to the expert report itself.”²⁵ The ICTY established that, “the purpose of admitting source material is to enable the Chamber to verify, if necessary, the basis upon which the expert reached his or her conclusions, as well as how the relevant analysis was conducted.” Goodwin does not come to his own conclusions and therefore there are no conclusions the Panel need to verify. Regardless of the fact it constitutes expert evidence, the source material is inadmissible as it does not meet the test for admission.

22. These legal principles underline the inappropriateness of the SPO’s approach. Expert reports should be self-contained, complete and understandable in themselves. Instead, the SPO have commissioned a DNA report which does the opposite – it contains no independent findings and is entirely reliant on the source material for its relevance.
23. The Impugned Decision misapplied a finding in one ICTY decision to the unwarranted exclusion of the central line of precedent on this issue, wrongly converting the admission of source material into the rule rather than the exception. This approach is wrong in law. The ICTY made clear that **“documents that are source material are not admitted for their substantive content.”**²⁶ This fundamental principle is fatal to the SPO’s tender and was ignored by the Panel.

²⁴ *Ibid*, citing the Order on Prosecution Request for Clarification and Proposal Concerning Guidelines for Conduct of Trial issued on 20 October 2009, (“ICTY Order on Clarification”) also at para. 5

²⁵ *Ibid*.

²⁶ *Prosecutor v Karadzic*, para. 10.

24. The Goodwin Expert Report simply comments on the substantive content of the underlying expert reports, which Goodwin cannot and does not verify or adopt as his own. The SPO intend to rely on the conclusions outlined in the source material,²⁷ effectively using Goodwin's report to rubber stamp the admission of third party expert reports masquerading as "source material" whilst shielding the authors of the source material from cross-examination. This is unlawful.
25. Therefore, even if correctly admitted as "source material", the underlying reports cannot be relied upon for the truth of their contents. At no point does the Panel acknowledge the implications of this established principle and its impact on the SPO's approach.
26. Admission of these underlying reports is not permitted by law, as expert reports or as "source material." Appellate intervention is required to ensure the Panel does not fall into error by unlawfully admitting or relying on the substance of this underlying material.
27. The **Fourth Issue** concerns the Panel's error in finding the deficiencies and "unusual" elements in the "source material" were not relevant to admissibility, but weight.²⁸
28. Rule 138(1) requires the Panel to consider four factors at the admissibility stage; evidence undermining any of these, is relevant to the admissibility, not weight alone. The phrasing of Rule 138, "unless challenged" contemplates that in addition to satisfying itself that the documents meet the requirements of admissibility, the Panel must consider challenges brought by the Defence to determine whether the *prima facie* standard remains satisfied. Challenges cannot simply be deferred to an assessment of weight. The finding that issues affecting probative value and prejudice were not relevant to admissibility

²⁷ See: SPO PTB, [REDACTED].

²⁸ Impugned Decision, para 38.

distorts the law. In dismissing arguments unquestionably relevant to admissibility, the Panel renders meaningless the intention and purpose of the Rule, which requires a certain standard to be met. The Panel erred by misapplying the requisite standard.

29. The **Fifth Issue** concerns the Panel's flawed assessment of the prejudice caused to the Defence by the admission of the "source material." The Panel found that "[t]he Defence was able to properly cross-examine the witness on the purported absence of access by the witness to the underlying data, which is sufficient at the stage of admission."²⁹ The Panel failed to consider the true prejudice caused, which is the inability to cross-examine the authors of the underlying reports. The fact the Defence could cross-examine Goodwin does not rectify this prejudice. Further, given the serious unexplained irregularities in the underlying reports, it is highly prejudicial to admit them when their authors cannot be questioned about the reason for these irregularities, which remains unknown. Goodwin, in the absence of the EPGs, could not confirm the veracity of the conclusions reached, nor explain the anomalies or "highly unusual"³⁰ aspects of the reports. Goodwin confirmed the allelic designations in certain reports "would not exist."³¹ Goodwin cannot explain or justify the irregularities. The Defence is also unable to challenge the methodology of the DNA extraction, profiling and relatedness conclusions.

B. The Issues Significantly Affect the Fair and Expeditious Conduct of the Proceedings

30. All **Issues** significantly affect the fair conduct of the proceedings. The issues concern the Panel's erroneous decision to admit third-party expert DNA reports through Goodwin, in contravention of the Rules and contrary to well

²⁹ Impugned Decision, para 39.

³⁰ Transcript, 13 January 2025, T.23622, lines 14-17.

³¹ *Ibid*, T. 23678, line 18.

establish precedent. In doing so, the Panel erred in law and in fact in a number of fundamental respects and deprived the Defence of its procedural rights including to confront the authors of the source material. These errors directly impinge the fair conduct of proceedings.

C. An Immediate Resolution by the Appeals Chambers Will Materially Advance the Proceedings

31. Immediate resolution by the Appeals Chambers is necessary and will materially advance proceedings. The prosecution case has closed. The Defence need to determine whether to call a case and must prepare closing submissions. It is imperative the Defence appreciates the nature and scope of the SPO's case and the evidence upon which it relies.
32. Further, fundamentally important issues as to the interpretation of the law and precedent surrounding expert evidence arise. The SPO seeks to rely on inadmissible evidence in circumvention of the Rules and precedent. The Impugned Decision endorses this approach and so commits profound errors which may have far reaching consequences beyond the scope of this trial. Decisions which erroneously admit large swaths of evidence, in contravention of the Rules and settled international precedent, must be resolved expeditiously to protect the Defence and ensure the Panel applies the law correctly.
33. The issues raised in this application are important, novel and require appellate intervention.

V. CONCLUSION

34. For the reason set out above, the Panel should grant leave to appeal on each of the identified issues.

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Respectfully submitted on Tuesday, 3 June 2025.



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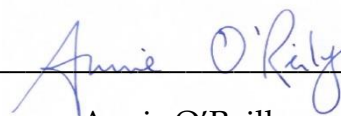
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