



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA 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: 1 July 2025

Language: English

Classification: Public

**Decision on Joint Defence Consolidated Request for Leave to Appeal Decisions
on the Admission of Expert Evidence of Witnesses W04826 and W04874
(F03201 and F03203)**

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TRIAL PANEL II ("Panel"), pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 27 May 2025, the Panel issued two decisions admitting certain items tendered by the SPO in relation to expert witnesses W04826 and W04874 ("F03201" and "F03203", respectively; collectively "Impugned Decisions").¹
2. On 3 June 2025, the Defence jointly filed a request for certification to appeal the Impugned Decisions ("Request").²
3. On 13 June 2025, the SPO responded to the Request ("Response").³
4. On 23 June 2025, the Defence replied ("Reply").⁴

II. SUBMISSIONS

5. The Defence requests leave to appeal the Impugned Decisions in relation to the following five issues (collectively, "Issues"):

1. The Panel erred in law and fact in finding that autopsies are not expert reports and that pathologists are not experts ("First Issue");

¹ F03201, Trial Panel, *Decision on the Admission of Expert Evidence of W04826* ("F03201"), 27 May 2025 (a corrected version was issued on 16 June 2025, F03201/COR); F03203, Trial Panel, *Decision on the Admission of Expert Evidence of W04874* ("F03203"), 27 May 2025.

² F03223, Specialist Counsel, *Joint Defence Consolidated Request for Leave to Appeal Decisions on the Admission of Expert Evidence of Witnesses W04826 and W04874 (F03201 and F03203)*, confidential, 3 June 2025 (a public redacted version was filed on 30 June 2025, F03223/RED).

³ F03259, Specialist Prosecutor, *Prosecution Response to 'Joint Defence Consolidated Request for Leave to Appeal Decisions on the Admission of Expert Evidence of Witnesses W04826 and W04874 (F03201 and F03203)'*, 13 June 2025, confidential.

⁴ F03286, Specialist Counsel, *Joint Defence Reply to Prosecution Response to 'Joint Defence Consolidated Request for Leave to Appeal Decisions on the Admission of Expert Evidence of Witnesses W04826 and W04874 (F03201 and F03203)'*, 23 June 2025, confidential.

2. The Panel applied the incorrect legal test for admission of “source material” with expert statements under Rule 149 (“Second Issue”);
 3. The Panel erred in failing to deal with the Defence objection to the SPO tendering wholly contradictory evidence and not requiring the SPO to state which stream of evidence it intends to rely upon (“Third Issue”);
 4. The Panel erred in its assessment of the prejudice caused to the Defence by the admission of the “source material” (“Fourth Issue”); and
 5. The Panel erred in admitting document SPOE00111910-SPOE00111913, as it was not referred to in W04874’s report (“Fifth Issue”).⁵
6. The Defence submits that the Issues satisfy the requirements for leave to appeal as: (i) they are appealable; (ii) they significantly impact the fair and expeditious conduct of the proceedings; and (iii) their immediate resolution by the Court of Appeals Panel will materially advance the proceedings.⁶
7. The SPO responds that the Request should be dismissed because it fails to meet the requirements set out in the Law and Rules.⁷ In particular, the SPO avers that: (i) the Panel is afforded considerable discretion in deciding whether to admit evidence; (ii) the Defence merely disagrees with, and misrepresents, the Impugned Decisions; and (iii) the Defence fails to identify an error in the Panel’s exercise of its discretion, let alone one warranting exceptional relief.⁸
8. The Defence replies in relation to the First,⁹ Second¹⁰ and Third Issues¹¹ are summarised below.

⁵ Request, paras 5, 31.

⁶ Request, paras 8-30.

⁷ Response, para. 1. *See also* Response, para. 25.

⁸ Response, para. 1.

⁹ *See below* para. 15.

¹⁰ *See below* para. 23.

¹¹ *See below* para.32.

III. APPLICABLE LAW

9. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth therein has been met. Rule 77(2) provides that:

The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

10. The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.¹²

IV. DISCUSSION

11. In Decision F03201, the Panel found that the expert report of W04826 ("W04826's Expert Report") was admissible pursuant to Rules 138(1) and 149.¹³ Furthermore, the Panel found that, with the exception of selected items, which were rejected by the Panel or addressed in Decision F03203 and Decision F03211,¹⁴ the remaining associated exhibits and source material to W04826's Expert Report, were admissible pursuant to Rule 138.¹⁵

12. In Decision F03203, the Panel found that the expert report of W04874 ("W04874's Expert Report") was admissible pursuant to Rules 138(1) and 149.¹⁶

¹² See F01237, Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; KSC-BC-2020-07, F00423, Panel, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, Panel, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, Panel, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14. See also F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

¹³ F03201, para. 27.

¹⁴ F03211, Panel, *Decision on Prosecution Motion for Admission of Documents concerning Murder Victims and Related Request* ("F03211"), 29 May 2025, confidential (a public redacted version was issued on the same day, F03211/RED).

¹⁵ F03201, para. 41.

¹⁶ F03203, para. 21.

Furthermore, the Panel found that, with the exception of documents with ERN SITF00405633-SITF00405638-ET and SPOE00111801-00111808, the remaining associated exhibits and source material to W04874's Expert Report were admissible pursuant to Rule 138.¹⁷

A. FIRST ISSUE

13. The Defence submits that the Panel erred in law and fact in finding that autopsies are not expert reports and that pathologists are not experts,¹⁸ as: (i) the Panel provides no reasoning as to why it does not deem an autopsy to be an expert report;¹⁹ (ii) the Panel fails to define "source material" or "autopsy document" and does not explain how it differentiates them from autopsies or expert reports;²⁰ (iii) there can be no sensible dispute that forensic pathology is a recognised field of expertise;²¹ (iv) the Panel's findings that W04826 and W04874 are experts but not those who conducted the underlying autopsies is irrational;²² (v) an autopsy is work that can only be conducted by an expert medical doctor, it is not something that can be done by a lay person and is far outside the knowledge of the Panel and Parties, and it is therefore an expert report;²³ and (vi) the notion that an autopsy is an expert report is wholly uncontroversial in criminal law, and the Panel provided no reasoning for departing from well-settled law.²⁴

14. The SPO responds that the First Issue misconstrues the Panel's findings, constituting mere disagreement with them and with other similar decisions issued by the Panel.²⁵ In particular, the SPO submits that: (i) the Panel did not find that

¹⁷ F03203, paras 27, 33, 36.

¹⁸ Request, paras 8-9.

¹⁹ Request, para. 10.

²⁰ Request, para. 10.

²¹ Request, para. 11.

²² Request, para. 11.

²³ Request, para. 12.

²⁴ Request, para. 13.

²⁵ Response, para. 3.

forensic pathologists other than W04826 and W04874 are not experts in the lay sense of the term, rather, only W04826 and W04874 can be classified as SPO expert witnesses for the purposes of Rule 149 since only they, thus far, have been ‘called by a Party’ as required by this rule;²⁶ (ii) autopsy reports constituting source material are not ‘expert witness report[s]’ within the meaning of Rule 149, as they are not ‘[t]he final report of any expert witness to be called by a Party’;²⁷ (iii) the Panel is under no obligation to define self-explanatory terms such as autopsy document, and the Defence fails to provide any basis for such an assertion;²⁸ (iv) “source material” was defined by the Panel in the Impugned Decisions, and the Panel also explained the term ‘expert report’ for the purposes of Rule 149(1) and provided clear reasons as to why it does not deem an autopsy report to constitute an expert report for the purposes of this rule;²⁹ (v) the Defence has already argued that autopsy reports constitute expert reports under Rule 149, that those who prepare autopsy reports are experts for the purposes Rule 149, and that autopsy reports prepared by persons other than the experts called to testify are not admissible;³⁰ (vi) the Defence provides no examples to illustrate the alleged “well-settled law” the Impugned Decisions are said to have “departed significantly from”;³¹ and (vii) other courts have admitted forensics documents through general admissibility provisions similar to Rule 138(1), and the admission of autopsy reports as source material is fully in line with the applicable legal framework, including paragraph 123 of the Order on the Conduct of Proceedings.³²

²⁶ Response, para. 4.

²⁷ Response, para. 5.

²⁸ Response, para. 6.

²⁹ Response, para. 7.

³⁰ Response, para. 8.

³¹ Response, para. 9, *referring to* Request, paras 4, 13.

³² Response, para. 10, *referring to* F01226/A01, Panel, *Order on the Conduct of Proceedings* (“Order on the Conduct of Proceedings”), 25 January 2023, para. 123.

15. The Defence replies that the Panel erred in finding that autopsies are not expert reports and third-party experts are not experts within the meaning of Rule 149, considering that: (i) the Panel is wrongly narrowing the scope of the meaning of the term expert under that rule to only those called by a Party to give live evidence;³³ (ii) this is not a mere disagreement with the Impugned Decisions, but a fundamental question as to the correct interpretation of Rule 149 which has yet to be the subject of appellate review;³⁴ and (iii) the Defence cannot, and bears no burden to, define “autopsy document” as submitted by the SPO.³⁵

16. The Panel recalls that, in the Impugned Decisions, it found that the source material to W04826’s and W04874’s Expert Reports did not constitute “expert witness reports” within the meaning of Rule 149, and that the admission of this material should be determined based on Rule 138(1).³⁶

17. The Panel is satisfied that the question of whether documents requiring or expressing some kind of expertise must be considered as expert reports and whether, as such, they can only be admitted in accordance with the procedure set out in Rule 149, constitute discrete topics arising from the Impugned Decisions. The Panel also notes that there appears to be no established jurisprudence in this jurisdiction on this point. Therefore, the Panel is of the view that the First Issue is an appealable issue arising from the Impugned Decisions.

18. The Panel further finds that resolution of this question may impact the procedural rights of the Parties with regard to the admission of expert evidence under Rule 149, and thus the fairness of the proceedings. It could also affect the way in which the Panel should approach this evidence when assessing its weight

³³ Reply, para. 2.

³⁴ Reply, para. 2.

³⁵ Reply, para. 4.

³⁶ F03201, para. 30; F03203, para. 30.

and probative value. The Defence has therefore demonstrated that the First Issue would significantly affect the fair conduct of the proceedings.

19. The Panel also considers it beneficial for the conduct of the proceedings and the rights of the Accused that any dispute regarding the application and interpretation of Rule 149 be addressed by the Court of Appeals Panel, as resolution of the First Issue might affect the scope of the SPO's case, the ability of the Parties and participants to make informed submissions in respect of such evidence, and the Defence's presentation of their cases, if any. The Panel therefore finds that immediate resolution of the First Issue by the Court of Appeals Panel will materially advance the proceedings.

20. In light of the above, the Panel finds that the requirements of the certification test arising from Article 45(2) and Rule 77(2) have been met and accordingly grants certification to appeal the First Issue.

B. SECOND ISSUE

21. The Defence adopts the same arguments as set out in its Request F03222.³⁷ Therein, the Defence submits that the Second Issue arises directly from the Impugned Decisions, as the Panel applied the incorrect legal test for admission of source material.³⁸ More specifically, the Defence avers that the Panel erred in finding that: (i) whether the source material was necessary to understand an expert report is the only relevant consideration for admission thereof;³⁹ and (ii) the source material can be relied upon for the truth of its content.⁴⁰ In doing so, the Defence submits, the Panel erred in law, and misapplied and disregarded established jurisprudence.⁴¹

³⁷ Request, para. 15.

³⁸ Request F03222, para. 16.

³⁹ Request F03222, paras 17-20, 26.

⁴⁰ Request F03222, paras 24-26.

⁴¹ Request F03222, paras 18, 21-23.

22. The SPO also adopts the same arguments as set out in its response to Request F03222.⁴² Therein, the SPO responds that the issue raised by the Defence is not appealable,⁴³ as the Defence mischaracterises the Panel's findings,⁴⁴ or repeats arguments already raised before and considered by the Panel.⁴⁵ In addition, the SPO contests that the jurisprudence referred to in the Request lends support to the Defence's arguments,⁴⁶ and, further, avers that the Impugned Decision is consistent with the regulatory framework governing the present proceedings.⁴⁷

23. The Defence replies that because the Panel found that the third-party reports were not expert reports, it did not subject them to the full requirements of Rule 149 and admitted them in circumvention of the protections provided for in that rule.⁴⁸ The Defence further submits that in failing to apply the provisions of Rule 149 to these reports, the Panel erred in law.⁴⁹

24. At the outset, the Panel recalls that, in the Impugned Decision, it found that the admission of source material to the reports of expert witnesses is justified when such material is necessary to understand the reports of an expert witness, as well as the expert witness's testimony.⁵⁰

25. While, in making this determination, the Panel did consider several of the arguments brought forward in the Request,⁵¹ the Panel is of the view that the

⁴² Response, para. 12.

⁴³ F03260, Specialist Prosecutor, *Prosecution Response to "Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875 (F03202)"* ("Reponse F03260"), 13 June 2025, confidential, para. 11.

⁴⁴ Reponse F03260, para. 12.

⁴⁵ Reponse F03260, paras 13-14.

⁴⁶ Reponse F03260, paras 15, 17-18.

⁴⁷ Reponse F03260, paras 16, 18-19.

⁴⁸ Reply, para. 5.

⁴⁹ Reply, para. 5.

⁵⁰ F03201, para. 29; F03203, para. 28, referring to F01226/A01, Panel, *Order on the Conduct of Proceedings*, 25 January 2023, para. 123; ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Trial Chamber III, [Decision on the Admission of Evidence Presented During the Testimony of Andras Riedlmayer](#), 14 April 2010, para. 19.

⁵¹ Request, paras 8-14; F02871/COR, Specialist Counsel, *Corrected Version of Joint Defence Response to Prosecution Request for Admission of the Expert Report and Source Material of W04874* ("W04874's Supplemental Response"), 29 January 2025, para. 22 (date original: 29 January 2025), confidential (a

identification of the correct legal test for the admission of source material to an expert report constitutes a discrete topic emanating from the Impugned Decisions. Therefore, the Panel is of the view that the Second Issue is an appealable issue arising from the Impugned Decisions.

26. The Panel further finds that, similarly to the First Issue, resolution of this question may impact the procedural rights of the Parties, and thus the fairness of the proceedings. The Defence has therefore demonstrated that Second Issue would significantly affect the fair conduct of the proceedings.

27. As to whether immediate resolution of the Second Issue would materially advance proceedings, the Panel is of the view that the Defence failed to convincingly articulate why appropriate remedy could not be effectively sought after the end of trial. The Panel considers the Defence's arguments as to the necessity of immediate appellate intervention for the upcoming stages of the case to be unsubstantiated in relation to the Second Issue.⁵² The Panel has granted certification to appeal the Impugned Decision on the First Issue and is not persuaded that immediate resolution of the Second Issue would assist the Defence in the preparation of its case, if any. The Defence provides no explanation as to how it would be impacted and how immediate resolution of the Second Issue would, in practice, materially advance the proceedings and thus warrant the exceptional remedy of an interlocutory appeal.

28. The Panel recalls it has considerable discretion in deciding whether to admit evidence, and certification to appeal admissibility decisions should be granted

public redacted version was filed on 6 June 2025, F02871/COR/RED); F02876, Specialist Counsel, *Joint Defence Response to Prosecution Request for Admission of Expert Report and Source Material of W04826*, 30 January 2025, para. 13, confidential (a public redacted version was filed on 6 June 2025, F02876/RED); F02703, Specialist Counsel, *Joint Defence Consolidated Response to F02620 and F02633* ("F02703"), 8 November 2024, confidential, paras 19-27 (a further public redacted version was filed on 2 January 2025, F02703/RED2).

⁵² Request, para. 30.

only on an exceptional basis.⁵³ Any relief that could potentially be obtained through the exceptional remedy of an interlocutory appeal would, in the view of the Panel, have no substantial effect on the proceedings.

29. Accordingly, the Panel concludes that the Defence has not demonstrated that the Second Issue satisfies the criteria set out in Article 45(2) and Rule 77(2). The request for certification to appeal the Second Issue is, thus, rejected.

C. THIRD ISSUE

30. The Defence submits that the Panel erred in failing to deal with the Defence objection to the SPO tendering wholly contradictory evidence and not requiring the SPO to state which stream of evidence it intends to rely upon, considering that: (i) the Panel has in the past required the Defence to state its case and has refused to admit documents tendered by the SPO for the truth of their contents in circumstances where the contents of the document tendered contradicted the facts relayed by the relevant live witness;⁵⁴ (ii) the SPO tendered documents through W04874 as “underlying material” that are in contradiction to, and seriously undermined by, W04874’s testimony;⁵⁵ (iii) the SPO must be required to state its case on how alleged victims were killed;⁵⁶ (iv) the Defence cannot be left to operate in the dark until it receives the SPO’s final brief;⁵⁷ and (v) the Panel was unable to properly assess the SPO’s application to admit the relevant material without knowledge of the purpose for which it was being tendered or the nature of the SPO’s case.⁵⁸

⁵³ F02241, Panel, *Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P1046* (“15 April Decision 2024”), 15 April 2024, para. 10; F02157, Panel, *Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960*, 29 February 2024, para. 11 and footnote 26 (with further references). See also ICTR, *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73.2, Appeals Chamber, [Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence](#), 4 October 2004, para. 5.

⁵⁴ Request, para. 17.

⁵⁵ Request, para. 18.

⁵⁶ Request, para. 18.

⁵⁷ Request, para. 18.

⁵⁸ Request, para. 19.

31. The SPO responds that the Third Issue does not arise from Decision F03203.⁵⁹ In particular, the SPO submits that: (i) following the completion of W04874's testimony, the Veseli Defence asked that the SPO state its case in relation to unspecified evidence, and the Panel made no such order;⁶⁰ (ii) the Defence's failure to specify what concrete alleged inconsistencies it purportedly required clarity on meant that the Panel could not have issued a specific ruling;⁶¹ (iii) in Decision F03203, the Panel noted the Defence's oral and written submissions concerning the alleged need for the SPO to state its case, and the fact that W04874's evidence was admitted despite such submissions necessarily means that the Panel determined that no specific ruling in relation thereto was required for the purposes of determining the admissibility of any of W04874's evidence;⁶² (iv) the rejection of admission of an item because the witness it was tendered through provided full and complete testimony is distinguishable from the situation with W04874's evidence;⁶³ (v) previous requests for the SPO to state its case in relation to certain evidence before the conclusion of trial have rightly been dismissed;⁶⁴ (vi) the Accused are unequivocally charged with the murders of the victims addressed in W04874's Expert Report;⁶⁵ and (vii) the Defence assertion that the SPO cannot rely on source material for the truth of its content is unsupported, and no argument in relation thereto is outlined in the Request or in any submissions predating the Impugned Decisions.⁶⁶

32. The Defence replies that it did not fail to specify the alleged inconsistencies it required clarity on, considering that: (i) the alleged inconsistencies are obvious to

⁵⁹ Response, para. 13.

⁶⁰ Response, para. 13.

⁶¹ Response, para. 14.

⁶² Response, para. 15.

⁶³ Response, para. 16.

⁶⁴ Response, para. 16.

⁶⁵ Response, para. 16.

⁶⁶ Response, para. 17.

the Parties and the Panel as they were drawn out in cross-examination of W04874;⁶⁷ and (ii) examples of two such inconsistencies were highlighted in the Request.⁶⁸ The Defence takes issue with the fact that the Panel failed to engage with the submissions in any way and failed to rule upon it, which is an appealable issue.⁶⁹ The Defence further submits that suggesting that the SPO's case is clear in circumstances where the SPO called and sought to rely upon an expert pathologist who disagreed with many of the findings of autopsies which the SPO simultaneously tendered and seeks to rely upon is disingenuous.⁷⁰ Finally, the Defence submits that the law in relation to a Party's ability to rely on source material for truth is clear, and the Defence did no more than bring the law to the attention of the SPO and the Panel, as it appeared to have been overlooked and is relevant to the issues at hand.⁷¹

33. The Panel recalls that, in Decision F03203, it noted the Defence's oral and written objections concerning the need for the SPO to state its case.⁷² Thereafter, the Panel held that the issue of the autopsy reports whose findings W04874 was not able to adopt goes primarily to weight rather than to admissibility.⁷³ While the Panel, in making this determination, did consider several of the Defence's arguments, which were already before it,⁷⁴ the Panel did not expressly address the Defence's argument regarding the SPO's failure to state its case. Therefore, the Panel is of the view that the Third Issue is an appealable issue arising from F03203.

34. As to whether the Third Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, the Panel is of the view that the Defence has failed to convincingly articulate how, in its view,

⁶⁷ Reply, para. 6.

⁶⁸ Reply, para. 6.

⁶⁹ Reply, para. 7.

⁷⁰ Reply, para. 8.

⁷¹ Reply, para. 9.

⁷² F03203, para. 12, footnote 24.

⁷³ F03203, para. 31.

⁷⁴ See F03203, para. 12.

this requirement is met in the present circumstances. As mentioned above, in rendering Decision F03203, the Panel held that the issue of the autopsy reports whose findings W04874 was not able to adopt fully goes primarily to weight rather than to admissibility.⁷⁵ In this regard, the Panel recalls the considerable discretion it enjoys in deciding whether to admit evidence and the exceptionality of the remedy of certification to appeal admissibility decisions.⁷⁶ The Panel further notes that any circumstance affecting the weight to be assigned to the admitted source material will be assessed by the Panel at the end of the proceedings, in light of the totality of the evidence.⁷⁷ The Defence's request to have the SPO state its case did not identify the basis on which such an order could be made, nor did it explain how such a request had a bearing upon the question of the admissibility of this material and/or would affect the Panel's discretion. For these reasons, the Panel finds that the Defence has failed to establish that the Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

35. For similar reasons, the Panel finds that the Defence has also failed to establish that an immediate resolution of the Third Issue by a Court of Appeals Panel would materially advance the proceedings. Any relief that could potentially be obtained through the exceptional remedy of an interlocutory appeal would, in the view of the Panel, have no substantial effect on the proceedings.

⁷⁵ F03203, para. 31.

⁷⁶ 15 April Decision 2024, para. 10; F02157, Panel, *Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960*, 29 February 2024, para. 11 and footnote 26 (with further references).

⁷⁷ Transcript, 6 November 2024, p. 22065, lines 16-22; *See also* F02580, Panel, *Reasons for Admission of W03780's Statements and Related Order*, 17 September 2024, confidential, para. 14 (a public redacted version was issued on the same day, F02580/RED), *referring to* F02130, Panel, *Decision on the Thaçi Defence's Submissions Concerning Use of Prior Inconsistent Statements Pursuant to Rule 143(2)*, 15 February 2024, para. 21; F01821, Panel, *Decision on Prosecution Request for Admission of W03827's Witness Statements Pursuant to Rule 143(2) and Defence Request for Reconsideration*, 28 September 2023, para. 50.

36. Accordingly, the Panel concludes that the Defence has not demonstrated that the Third Issue satisfies the criteria set out in Article 45(2) and Rule 77(2). The request for certification to appeal the Third Issue is, thus, rejected.

D. FOURTH ISSUE

37. The Defence submits that the Panel erred in its assessment of the prejudice caused to the Defence by the admission of the source material, considering that: (i) the source material comprised numerous autopsies conducted by third party forensic pathologists, and W04874 did not adopt the underlying conclusions as his own;⁷⁸ and (ii) the fact that the Defence had the ability to cross-examine W04874 does not make up for the prejudice caused to the Defence by not being able to challenge the authors of the underlying reports.⁷⁹

38. The SPO responds that the Panel properly assessed the potential prejudice caused to the Defence by the admission of W04874's source material.⁸⁰ In particular, the SPO submits that: (i) the Panel found that the Defence's ability to cross-examine W04874 meant that admission of the source material was not outweighed by its prejudicial effect;⁸¹ and (ii) the Defence can call witnesses, experts, seek to tender evidence in relation to W04874's source material, and/or make closing submissions thereon.⁸²

39. In F03203, the Panel held that the probative value of the admitted source material was not outweighed by any prejudice to the Accused, considering in particular that the Defence was able to cross-examine W04874 extensively on these documents.⁸³ Moreover, as mentioned above, the Panel held that the issue of the

⁷⁸ Request, para. 22.

⁷⁹ Request, para. 23.

⁸⁰ Response, para. 18.

⁸¹ Response, para. 18.

⁸² Response, para. 18.

⁸³ F03203, para. 35.

autopsy reports whose findings W04874 was not able to adopt goes primarily to weight rather than to its admissibility.⁸⁴ The Panel is therefore of the view that the Defence merely disagrees with the Panel's findings on prejudice and seeks to relitigate this issue. In this regard, the Panel recalls the considerable discretion it enjoys in deciding whether to admit evidence and the exceptionality of the remedy of certification to appeal admissibility decisions.⁸⁵

40. In light of the above, the Panel finds that the Defence has failed to establish that the Fourth Issue constitutes a discrete topic emanating from F03203.

41. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Fourth Issue. The request for certification to appeal the Fourth Issue is therefore rejected.

E. FIFTH ISSUE

42. The Defence submits that the Panel erred in admitting document with ERN SPOE00111910-SPOE00111913, considering that: (i) W04874 did not provide any commentary on this item in his Expert Report, and therefore it cannot be deemed an indispensable and inseparable part of that report;⁸⁶ (ii) admission of this item is not necessary to understanding W04874's Expert Report, and W04874 did not give evidence to contextualise the item;⁸⁷ and (iii) this item does not concern matters of pathology, but records the description of a crime scene by an investigative judge.⁸⁸

43. The SPO responds that the Fifth Issue repeats previous Defence submissions which the Panel considered and rejected.⁸⁹ In particular, the SPO submits that:

⁸⁴ F03203, para. 31.

⁸⁵ See *above* para. 34 and references therein.

⁸⁶ Request, para. 26.

⁸⁷ Request, para. 26.

⁸⁸ Request, para. 27.

⁸⁹ Response, para. 19.

(i) the content of the document bearing ERN SPOE00111910-SPOE00111913, which was provided to W04874 by the SPO, is referred to in W04874's Expert Report;⁹⁰ and (ii) this item concerns victims whose autopsy reports are addressed at length in W04874's Expert Report and testimony.⁹¹

44. The Panel notes that, in the Request, the Defence merely repeats arguments it already put forward in its submissions prior to the Impugned Decision.⁹² In particular, the Panel observes that the Defence previously submitted, in respect of document with ERN SPOE00111910-SPOE00111913, that W04874 did not refer to this item in his Expert Report and it cannot reasonably be considered a 'source material' essential to understanding W04874's report.⁹³ These submissions were considered and addressed by the Panel in Decision F03203.⁹⁴ In particular, the Panel found that selected source materials, including document with ERN SPOE00111910-SPOE00111913, are referenced in W04874's Expert Report or are directly related to documents which are referred to therein.⁹⁵ The Panel thus found that this source material was admissible under Rule 138.⁹⁶ It is therefore apparent that the Fifth Issue misrepresents and merely disagrees with the Impugned Decision admitting document with ERN SPOE00111910-SPOE00111913.

45. In light of the above, the Panel finds that the Defence has failed to establish that the Fifth Issue constitutes a discrete topic emanating from F03203.

46. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Fifth Issue. The request for certification to appeal the Fifth Issue is therefore rejected.

⁹⁰ Response, para. 19, *referring to* P01991, p. 103111.

⁹¹ Response, para. 19.

⁹² W04874's Supplemental Response, para. 48.

⁹³ W04874's Supplemental Response, para. 48.

⁹⁴ F03203, para. 34, footnote 90.

⁹⁵ F03203, para. 34.

⁹⁶ F03203, para. 36.

V. CLASSIFICATION

1. The Panel notes that the Response and Reply were filed confidentially. The Panel also notes the SPO's submission that the Response can be classified as public.⁹⁷ The Panel therefore: (i) instructs the Registry to reclassify the Response, currently classified as confidential, as public; and (ii) orders the Defence to file public redacted version of the Reply, or request reclassification thereof, by **Tuesday, 8 July 2025**.

VI. DISPOSITION

2. For the above-mentioned reasons, the Panel hereby:
- a) **GRANTS** leave to appeal the First Issue;
 - b) **DENIES** leave to appeal the remaining Issues;
 - c) **INSTRUCTS** the Registry to reclassify the Response, currently classified as confidential, as public; and
 - d) **ORDERS** the Defence to file public redacted version of the Reply, or request reclassification thereof, by **Tuesday, 8 July 2025**.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 1 July 2025

At The Hague, the Netherlands.

⁹⁷ Response, para. 24.