



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: 7 July 2025

Language: English

Classification: Public

**Decision on Joint Defence Request for Certification to Appeal the Decision on
Prosecution Motion for Admission of International Reports**

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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 29 May 2025, the Panel issued its "Decision on Prosecution Motion for Admission of International Reports" ("Impugned Decision").¹
2. On 5 June 2025, the Defence filed a request for leave to appeal the Impugned Decision ("Request").²
3. On 19 June 2025, the Specialist Prosecutor's Office ("SPO") responded ("Response").³
4. On 27 June 2025, the Defence replied ("Reply").⁴

II. SUBMISSIONS

5. The Defence requests leave to appeal the Impugned Decision in relation to the following seven issues (collectively, "Issues"):
 1. Whether the Trial Panel erred in law and fact, or otherwise abused its discretion, in failing to appreciate the prejudice inherent to the admission of items of crucial importance to the Accused's potential criminal responsibility that the Defence is in no position to effectively challenge ("First Issue");

¹ F03213, Panel, *Decision on Prosecution Motion for Admission of International Reports*, 29 May 2025.

² F03237, Specialist Counsel, *Joint Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of International Reports*, 5 June 2025.

³ F03276, Specialist Prosecutor, *Prosecution Response to 'Joint Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of International Reports'*, 19 June 2025.

⁴ F03292, Specialist Counsel, *Joint Defence Reply to Prosecution Response to 'Joint Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of International Reports'*, 27 June 2025.

2. Whether the Trial Panel erred in law by dispensing with its previous ruling that the SPO must call live evidence that the Defence is able to challenge should it wish to pursue a case concerning the responsibility of the Accused in post-June 1999 ("Second Issue");
 3. Whether the Trial Panel erred in law by dispensing with its previous ruling requiring that reports emanating from international or non-governmental organizations specify the sources upon which their contents are based in order to be admissible ("Third Issue");
 4. Whether the Trial Panel erred in law in finding that fair notice of a party's intention to rely on certain allegations in support of its case can be provided by disclosure ("Fourth Issue");
 5. Whether the Trial Panel erred in law in finding that Rule 149 constitutes *lex specialis* for the admission of expert evidence only where such evidence originates from an expert witness featuring as such on the calling party's list of witnesses ("Fifth Issue");
 6. Whether the Trial Panel erred in law by conflating the propriety of redactions applied pursuant to Rule 107 with the requirements of admission pursuant to Rule 138 ("Sixth Issue"); and
 7. Whether the Trial Panel erred in fact, or otherwise abused its discretion, by admitting into evidence material on the grounds that it is relevant to a given context or a pattern of conduct, yet without specifying what that context or pattern of conduct is ("Seventh Issue").⁵
6. The Defence submits that the Issues satisfy the requirements for leave to appeal as: (i) the Issues are appealable;⁶ (ii) they significantly impact the fair and expeditious conduct of the proceedings or the outcome of trial;⁷ and (iii) their immediate resolution by the Court of Appeals Panel will materially advance the proceedings.⁸
7. The SPO responds that the Request should be dismissed because it fails to meet the requirements set out in the Law and Rules.⁹ In particular, the SPO avers that: (i) the Panel is afforded considerable discretion in deciding whether to admit

⁵ Request, paras 2, 3-21, 26.

⁶ Request, paras 3-21.

⁷ Request, paras 22-24.

⁸ Request, para. 25.

⁹ Response, para. 1.

evidence; (ii) the Defence merely disagrees with, and misrepresents, the Impugned Decision; and (iii) the Defence fails to demonstrate an impact justifying certification.¹⁰

8. The Defence replies that the Response repeatedly mischaracterises the issues put forth for certification in the Request and is replete with superficial criticisms that blatantly ignore the submissions.¹¹

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

¹⁰ Response, para. 1.

¹¹ Reply, para. 1.

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.

IV. DISCUSSION

A. FIRST ISSUE

11. The Defence submits that: (i) the Panel ignores the prejudice inherent to the admission of exhibits absent cross-examination where such exhibits are critical to a determination of the Accused's criminal responsibility;¹³ and (ii) the Panel has repeatedly stated that the bar table procedure should not become an alternative to presenting the most important exhibits through witnesses.¹⁴

12. The SPO responds that the First and Second Issues are interrelated and therefore addresses them together.¹⁵ The SPO responds that the allegation that the SPO has failed to produce witnesses to testify on issues discussed in the proposed evidence, is unfounded, considering that: (i) the Defence fails to relate this allegation to any specific evidence;¹⁶ (ii) the Defence cites solely to paragraphs that dealt exclusively with two Ministry of Public Order police identification cards;¹⁷ (iii) the Defence allegation appears to be that the SPO failed to produce witnesses regarding the 'continued existence and functioning of the military police' from June to September 1999, this is a misrepresentation of the record;¹⁸ (iv) there is no inherent prejudice in the admission through the bar table of exhibits that relate to core issues in these proceedings, as the right to confrontation does not translate into a right for every exhibit to be tendered through a witness;¹⁹ and (v) it is for the SPO to determine the most important exhibits to its case and tender them accordingly, in full knowledge that, if items are tendered through the bar table

¹³ Request, para. 4.

¹⁴ Request, para. 4.

¹⁵ Response, para. 3.

¹⁶ Response, para. 3.

¹⁷ Response, para. 3.

¹⁸ Response, para. 4.

¹⁹ Response, para. 5.

without sufficient contextualisation, this could negatively impact the weight afforded to them.²⁰

13. The Defence replies that: (i) the SPO ignores the clear differences between the First and Second Issue;²¹ (ii) the Defence challenged the assessment of prejudice in admitting items relevant to several issues of paramount importance to the Accused's responsibility, rather than the prejudice inherent solely to the admission of items related to the functioning of the military police in the summer of 1999;²² and (iii) the SPO overlooks the specific references to individual exhibits, cited in the Request.²³

14. The Panel observes that, in the Impugned Decision, it found that there is no bar to the admission through the bar table of proposed exhibits on account of their alleged central importance to the Prosecution case.²⁴ The Panel then evaluated whether the probative value of the tendered documents was outweighed by any prejudicial effect, and for the majority of items ultimately found that it was not. In coming to that view, the Panel noted in particular that the Defence would be able to make submissions in respect of the weight and probative value of these items and could, if it so chooses, challenge the content of any of these items through the presentation of evidence, although it bears no onus to do so.²⁵

15. The Panel therefore finds that the First Issue misrepresents and merely disagrees with the outcome of the Panel's assessment, and attempts to re-litigate the issue of prejudice by reiterating the same objections made prior to the Impugned Decision.²⁶ Moreover, the Panel recalls that triers of fact are afforded

²⁰ Response, para. 5.

²¹ Reply, para. 2.

²² Reply, para. 3.

²³ Reply, para. 3.

²⁴ Impugned Decision, para. 8.

²⁵ Impugned Decision, para. 29.

²⁶ F03144, Specialist Counsel, *Joint Defence Response to the Prosecution Motion for Admission of International Reports* ("Defence Response of 24 April 2025"), 24 April 2025, confidential, paras 3, 6, 8-9, 23, with Annex 1, confidential (a public redacted version was filed on 21 May 2025, F03144/RED).

considerable discretion in deciding whether to admit evidence, and certification to appeal admissibility decisions should be granted only on an exceptional basis.²⁷ Such principles are reflected in the Court of Appeals Panel's holding that "appellate intervention in decisions relating to the admission of evidence is warranted only in very limited circumstances."²⁸ In light of the above, the Panel finds that the Defence has failed to establish that the First Issue constitutes a discrete topic emanating from the Impugned Decision.

16. 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 First Issue. The request for certification to appeal the First Issue is therefore rejected.

B. SECOND ISSUE

17. The Defence submits that: (i) several items tendered and admitted pertain directly to the alleged continued existence and functioning of the military police during the period from June 1999 and September 1999, its involvement in the commission of crimes and to the Accused's alleged authority in that context;²⁹ (ii) the SPO failed to produce witnesses available for cross-examination on this point;³⁰ and (iii) the Panel failed to identify what led to its implicit conclusion that the SPO fulfilled the Panel's previously stated requirement to call live witnesses on this issue.³¹

²⁷ F02241, Panel, *Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P1046*, 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 Decision"), 29 February 2024, para. 11 and footnote 26 (with further references). See also ICTR, *Prosecutor v. Nyiramasuhuko*, ICTR-98-42-AR73.2, Appeals Chamber, [Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence](#), 4 October 2004, para. 5.

²⁸ KSC-CA-2022-01, F00114, Court of Appeals Panel, *Appeal Judgment*, 2 February 2023, para. 35. See also 29 February 2024 Decision, para. 11; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber, [Judgement](#), 20 February 2001, para. 533.

²⁹ Request, para. 5.

³⁰ Request, para. 5.

³¹ Request, para. 6.

18. The SPO responds that: (i) the Defence allegation appears to be that the SPO failed to produce witnesses regarding the ‘continued existence and functioning of the military police’ from June to September 1999, which the SPO submits is a misrepresentation of the record;³² and (ii) the right to confrontation does not translate into a right for every exhibit to be tendered through a witness.³³

19. The Defence replies that: (i) the SPO’s claim that the Request cites solely to items that deal exclusively with two Ministry of Public Order police identification cards, ignores the broader scope of citations to several items which relate to the contested topic in its Request;³⁴ (ii) the SPO’s contention that the Defence misrepresents the record by stating that the SPO has failed to produce witnesses regarding the functioning of the military police in the summer of 1999 simply recites evidence already identified and addressed by the Defence;³⁵ and (iii) the SPO fails to engage with the Defence’s central contention that the narrow scope and lack of specificity inherent to that evidence did not afford the Defence an adequate opportunity to challenge this contested aspect of the SPO’s case.³⁶

20. The Panel notes that, in the Request, the Defence merely repeats arguments it already put forward in its submissions prior to the Impugned Decision. In particular, the Panel observes that the Defence previously submitted that the Panel explicitly stated that “if it is a part of the SPO case to establish the continued existence and functioning of the military police during the period from June 1999 and September 1999 and its involvement in the commission of crimes, it will have to meet the applicable standard of proof” and that “it is therefore to be expected that, if the SPO pursues such a case, it will call evidence that the Defence will be

³² Response, para. 4.

³³ Response, para. 5.

³⁴ Reply para. 4.

³⁵ Reply para. 4.

³⁶ Reply para. 4.

able to challenge on that point”.³⁷ These submissions were considered, addressed, and rejected by the Panel in the Impugned Decision.³⁸ In particular, in addressing such submissions, the Panel found that the right to confrontation is not absolute and does not encompass a right for a Party to have each and every exhibit or document produced through a witness, which the Party is then able to question in respect of its content.³⁹ However, if proposed exhibits are not put to witnesses who are able to contextualise them, this may negatively impact the weight that the Panel might be prepared to give to such an exhibit at the end of trial.⁴⁰

21. For these reasons, the Panel is of the view that the Second Issue misrepresents the Panel’s findings and constitutes a mere disagreement with them. The Panel therefore finds that the Defence has failed to establish that the Second Issue constitutes a discrete topic arising from the Impugned Decision.

22. 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 Second Issue. The request for certification to appeal the Second Issue is therefore rejected.

C. THIRD ISSUE

23. The Defence submits that: (i) the Panel previously denied admission of reports emanating from international or non-international organizations where the findings do not clearly identify the basis on which they were reached, and where they are based on unidentifiable, anonymous sources, or on sources which do not feature on the SPO’s exhibit list;⁴¹ (ii) the Panel denied the admission of Proposed Exhibit 74 in the Impugned Decision, on the basis that, *inter alia*, much

³⁷ Defence Response of 24 April 2025, para. 22, referring to F01603, Panel, *Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155*, 14 June 2023, para. 159.

³⁸ Impugned Decision, para. 9.

³⁹ Impugned Decision, para. 9.

⁴⁰ Impugned Decision, para. 9.

⁴¹ Request, para. 7.

of the information it contains is unsourced and of unknown origin, and that it is not apparent from the report what safeguards and procedure were used to collect the information and verify it, and by whom;⁴² (iii) the Panel admitted various reports that do not identify the basis upon which the conclusions contained therein are based, or which are otherwise based on anonymous sources or material not disclosed in these proceedings;⁴³ and (iv) the Panel recalled its earlier finding that the fact that evidence is hearsay or unsourced would not necessarily prevent its admission, however, no analysis had been provided to justify the Panel's selective application of its previous ruling only with respect to one single exhibit, to the exclusion of all other exhibits suffering from the same defects.⁴⁴

24. The SPO responds that: (i) the source of information is one of several factors that may be considered when assessing reliability;⁴⁵ (ii) the Panel has the discretion to decide if and when the presence of unsourced information is such as to render a tendered item unsuitable for admission;⁴⁶ (iii) the Request does not cite any authority for the proposition that the Panel is required to provide specific analysis as to why one tendered item meets this threshold *vis-à-vis* another item which does not;⁴⁷ (iv) the Defence makes a bare assertion that certain admitted International Reports contain the same type and degree of unsourced information as another Proposed Exhibit that the Panel declined to admit;⁴⁸ and (v) in attempting to supplant the Panel's assessment with its own, the Defence expresses mere disagreement with the Impugned Decision and thereby fails to articulate an appealable issue.⁴⁹

⁴² Request, para. 8.

⁴³ Request, para. 9.

⁴⁴ Request, para. 9.

⁴⁵ Response, para. 7.

⁴⁶ Response, para. 7.

⁴⁷ Response, para. 8.

⁴⁸ Response, para. 8.

⁴⁹ Response, para. 8.

25. The Defence replies that: (i) the Panel's discretion to admit unsourced material does not empower the Panel to exercise its discretion in an arbitrary manner;⁵⁰ (ii) the Panel may not deny admission of unsourced material in one instance, and admit the same type of material in another, without identifying any distinguishing characteristics between the two;⁵¹ and (iii) the SPO's attempt to equate discretionary assessments with arbitrary decisions so as to legitimize the latter should accordingly be dismissed.⁵²

26. First, the Panel recalls that it has repeatedly ruled that the fact that evidence is hearsay or unsourced does not necessarily prevent its admission.⁵³ Where such a document is admitted, these features would be accounted for when assessing the weight and probative value of the evidence.⁵⁴ Second, the Panel notes that the source of information contained in a proposed exhibit is one factor that may be considered when assessing its reliability and weight. Third, the Panel notes that, when assessing the *prima facie* authenticity of tendered documents under Rule 138(1), it considered the source of the information or lack of indication of origin together with other indicia of authenticity, such as dates, signatures and other details supporting the documents' authenticity.⁵⁵ The Panel found that all the proposed evidence was *prima facie* authentic.⁵⁶

27. Contrary to the Defence's submissions,⁵⁷ the Panel did not decline to admit Proposed Exhibit 74 solely on the basis that much of the information it contains is unsourced and of unknown origin. The Panel also took into consideration the fact that a portion of this proposed exhibit went to acts and conducts of an Accused.⁵⁸

⁵⁰ Reply, para. 5.

⁵¹ Reply, para. 5.

⁵² Reply, para. 5.

⁵³ Impugned Decision, para. 11.

⁵⁴ Impugned Decision, para. 11.

⁵⁵ Impugned Decision, paras 21-22.

⁵⁶ Impugned Decision, para. 23.

⁵⁷ Request, para. 8.

⁵⁸ Impugned Decision, para. 26.

The Panel further found that, considering the late tender of this item and the fact that the Defence will not have an opportunity to cross-examine the authors of this report, nor other witnesses in respect of this part of the report, the probative value of this Proposed Exhibit on that specific point is outweighed by the prejudicial effect that would result from its admission.⁵⁹ The Defence's submissions misrepresent the basis on which the Panel's findings were based.

28. For these reasons, the Panel is of the view that the Third Issue misrepresents the Panel's findings, seeks to relitigate matters already raised and decided by the Panel and constitutes a mere disagreement with the Impugned Decision. The Panel therefore finds that the Defence has failed to establish that the Third Issue constitutes a discrete topic arising from the Impugned Decision.

29. 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 Third Issue. The request for certification to appeal the Third Issue is therefore rejected.

D. FOURTH ISSUE & SEVENTH ISSUE

30. The Panel preliminarily considers that the Fourth and Seventh Issue are predicated substantially on the same underlying findings in the Impugned Decision and will, therefore, be addressed jointly.

31. In relation to the Fourth Issue, the Defence submits that: (i) the Panel held that the Indictment is the sole accusatory instrument and it is only by virtue of the facts pleaded therein that the Accused may be put on notice of the case they have to respond to;⁶⁰ (ii) other tribunals have consistently emphasised that the mere service of witness statements or potential exhibits pursuant to disclosure

⁵⁹ Impugned Decision, para. 26.

⁶⁰ Request, para. 12.

obligations will not suffice to inform an Accused of the case against them;⁶¹ and (iii) if the Defence were instead expected to carry out its cross-examinations on the basis that every item on the SPO's exhibit list would be tendered, regardless of whether they bear any connection with the facts and circumstances pleaded in the charging instruments, then this would shift the burden to the Defence to respond to a case that is purely hypothetical.⁶² In relation to the Seventh Issue, the Defence submits that: (i) the Impugned Decision is silent on what context, or what specific pattern of conduct these incidents are alleged to be relevant to;⁶³ and (ii) the Accused's right to mount an effective defence necessarily entails that the Accused is aware of the factual allegations that they have to respond to.⁶⁴

32. The SPO responds that the Fourth and Seventh Issue are interrelated and therefore addresses them together.⁶⁵ The SPO responds that: (i) the Request attempts to artificially divorce the Panel's comments regarding the notice the Defence had of the relevant proposed evidence from the purpose for which they were tendered and admitted;⁶⁶ (ii) the Panel has repeatedly confirmed that, while evidence of uncharged acts cannot result in a finding of guilt in respect of any of the accused, such evidence can be admitted for other valid purposes, including to clarify a given context or to demonstrate a deliberate pattern of conduct;⁶⁷ (iii) the Defence misrepresents the record by asserting that the context and pattern of conduct for which the proposed evidence was tendered and admitted was unspecified;⁶⁸ (iv) the SPO specified that the proposed evidence was tendered in order to demonstrate the existence of a widespread and/or systematic attack

⁶¹ Request, para. 12.

⁶² Request, para. 13.

⁶³ Request, para. 19.

⁶⁴ Request, para. 20.

⁶⁵ Response, para. 9.

⁶⁶ Response, para. 9.

⁶⁷ Response, para. 10.

⁶⁸ Response, para. 10.

against civilians;⁶⁹ (v) this is a key contextual element of all crimes against humanity with which the Accused are charged, and was validly pleaded in the Indictment;⁷⁰ (vi) the jurisprudence cited by the Defence, which relates to curing defective indictments, is irrelevant;⁷¹ (vii) the Impugned Decision does not suggest that the Defence ought to have cross-examined witnesses in respect of uncharged incidents included in all items on the SPO exhibit list, rather, the Panel observed that the Defence was on notice of the SPO's intention to tender the proposed evidence;⁷² and (viii) the Panel did not engage in a burden-shifting exercise, and the Defence submissions to the contrary distort the Impugned Decision and fail to identify an appealable issue.⁷³

33. The Defence replies that: (i) the SPO's submissions relating to context and pattern of conduct are outright misrepresentations, as the Panel did not declare that the context and pattern of conduct it considered the contested items to be relevant to is the same context and pattern of conduct professed by the SPO;⁷⁴ (ii) the SPO did not argue that the tendered items were relevant to clarifying a given context;⁷⁵ and (iii) the SPO further conflates the Panel's finding that certain items are relevant to establishing the contextual elements of crimes against humanity with its finding in relation to the relevance of items in clarifying a given context.⁷⁶

34. At the outset, the Panel recalls that this Panel and the Court of Appeals Panel have repeatedly ruled that evidence of uncharged acts may be admissible for other

⁶⁹ Response, para. 10.

⁷⁰ Response, para. 10.

⁷¹ Response, para. 10.

⁷² Response, para. 11.

⁷³ Response, para. 11.

⁷⁴ Reply, para. 6.

⁷⁵ Reply, para. 7.

⁷⁶ Reply, para. 7.

valid purposes, including to clarify a given context or to demonstrate a deliberate pattern of conduct.⁷⁷

35. The Panel is of the view that the Request mischaracterises and merely disagrees with the Panel's findings. Contrary to the Defence's submissions,⁷⁸ the Panel was not silent on what context, or what specific pattern of conduct these incidents are alleged to be relevant to. The Panel found that the proposed exhibits, *alleging various crimes*, are relevant for the purposes of clarifying a given context and demonstrating a deliberate pattern of conduct.⁷⁹ The Panel further found that the proposed evidence may also be relevant to establishing the existence of an alleged widespread or systematic attack against a civilian population.⁸⁰ The Defence has not sought to demonstrate that the Panel was required to provide any greater specificity for the purpose of deciding admission.

36. Turning to the Defence's submissions that the Impugned Decision suggests that the Defence ought to have cross-examined witnesses in respect of uncharged incidents included in all items on the SPO exhibit list, which would shift the burden to the Defence to respond to a case that is purely hypothetical, the Panel is of the view that the Request mischaracterises and merely disagrees with the Panel's findings. Nothing in the Impugned Decision required the Defence to respond to a case that is purely hypothetical. As noted above, the Panel explicitly underlined the fact that the Defence has been put on notice of the SPO intention to tender proposed evidence that may be relevant to the issues of this case. The suggestion that the Impugned Decision shifted the burden is therefore without foundation and constitutes a misrepresentation of the Impugned Decision

37. In light of the above, the Panel finds that the Defence merely disagrees with the Panel's reasoning and that the Fourth and Seventh Issue do not constitute

⁷⁷ Impugned Decision, para. 27.

⁷⁸ Request, para. 19.

⁷⁹ Impugned Decision, para. 27.

⁸⁰ Impugned Decision, para. 27.

discrete topics emanating from the Impugned Decision. The Panel, therefore, finds that the Fourth and Seventh Issue do not satisfy the first requirement of Rule 77(2).

38. 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 and Seventh Issue. The request for certification to appeal the Fourth and Seventh Issue is, therefore, rejected.

E. FIFTH ISSUE

39. The Defence submits that the Impugned Decision stands for the proposition that a calling Party may avoid the rigour that Rule 149 places on the admissibility of expert evidence by simply tendering such evidence through alternative means;⁸¹ creating a situation where expert evidence can be freely deployed throughout a trial without the need for the calling party to produce a witness that can further contextualise and be cross-examined on such evidence.⁸² The Defence further submits that, if the Panel could substitute the specialised knowledge that expert witnesses are expected to provide, with material tendered from the bar table, then Rule 149 would serve no purpose⁸³ and the heightened protections that Rule 149 attaches to expert evidence, such as the specific deadline for disclosure and the right of the opposing party to request cross-examination would not apply.⁸⁴

40. The SPO responds that: (i) the Fifth Issue rests on the misconceived assertion that some unspecified number of proposed exhibits contain expert evidence within the meaning of Rule 149;⁸⁵ (ii) the Request fundamentally misconstrues the nature of expert evidence and the applicability of Rule 149;⁸⁶ (iii) expert evidence

⁸¹ Request, para. 15.

⁸² Request, para. 15.

⁸³ Request, para. 15.

⁸⁴ Request, para. 15.

⁸⁵ Response, para. 12.

⁸⁶ Response, para. 12.

derives its expert status under the Rules by virtue of meeting the relevant requirements and coming from a witness with some specialised knowledge, skill, or training that can assist the trier of fact to understand or determine an issue in dispute;⁸⁷ and (iv) in mischaracterising the applicable law and failing to specify as part of the Fifth Issue which proposed evidence purportedly contain the alleged expert evidence, the Request fails to identify an appealable issue.⁸⁸

41. The Panel recalls that, in the Impugned Decision, it found that the tendered documents did not constitute expert witness reports within the meaning of Rule 149, and could thus be admitted under Rule 138.⁸⁹

42. The Panel is satisfied that the question of whether Rule 149 constitutes *lex specialis* for the admission of expert evidence only where such evidence originates from an expert witness, featuring as such on the calling party's list of witnesses, constitutes a discrete topic arising from the Impugned Decision. Therefore, the Panel is of the view that the Fifth Issue is an appealable issue arising from the Impugned Decision.

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

44. 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 Fifth Issue might affect the scope of the SPO's case, the ability of

⁸⁷ Response, para. 12.

⁸⁸ Response, para. 12.

⁸⁹ Impugned Decision, para. 14.

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 Fifth Issue by the Court of Appeals Panel will materially advance the proceedings.

45. 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 Fifth Issue.

F. SIXTH ISSUE

46. The Defence submits that the Panel implicitly concluded that, because the redactions were properly applied pursuant to Rule 107, then the extent of the redactions becomes a matter of weight rather than admissibility.⁹⁰ The Defence further submits that whether the redactions were applied consistently with Rule 107 is distinct from the question of admissibility, as the Defence is equally prejudiced by its inability to make comprehensive submissions at final brief stage *vis-a-vis* the material as a whole and is also prejudiced by the inability to carry out effective investigations due to the redactions.⁹¹ Finally, the Defence submits that it was prevented from adequately challenging these documents in its assessment of prejudice.⁹²

47. The SPO responds that the Panel explicitly considered that, notwithstanding the redacted content, the Defence was able to make meaningful and effective submissions in respect of all items containing redactions.⁹³ The SPO further submits that the Defence fails to acknowledge that, as these redactions were

⁹⁰ Request, para. 17.

⁹¹ Request, para. 18.

⁹² Request, para. 18.

⁹³ Response, para. 13.

applied by Rule 107 providers, the SPO is in the same position with regard to its ability to make submissions and rely upon these proposed exhibits.⁹⁴

48. The Defence replies that: (i) the SPO fails to explain how its limited ability to make submissions on the redacted exhibits cures the prejudice;⁹⁵ and (ii) the SPO fails to explain how the fact that the SPO itself is equally unaware of the unredacted portions of the contested items demonstrates lack of prejudice, where, as the tendering party, the SPO is not expected to challenge such documents and only seeks to rely upon the unredacted portions of the documents.⁹⁶

49. The Panel recalls that, in the Impugned Decision, it specifically considered the question of prejudice to the Defence. The Panel recalls that it noted, in particular, that the Defence *was* in a position to make meaningful and effective submissions in respect of all items containing redactions.⁹⁷ The Panel is therefore of the view that the Defence merely disagrees with the Panel's findings on prejudice. 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.⁹⁸

50. In light of the above, the Panel finds that the Defence has failed to establish that the Sixth Issue constitutes a discrete topic emanating from the Impugned Decision.

51. 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 Sixth Issue. The request for certification to appeal the Sixth Issue is therefore rejected.

⁹⁴ Response, para. 13.

⁹⁵ Reply, para. 8.

⁹⁶ Reply, para. 8.

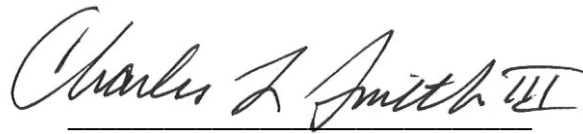
⁹⁷ Impugned Decision, para. 16.

⁹⁸ See above para. 15 and references therein.

V. DISPOSITION

52. For the above-mentioned reasons, the Panel hereby:

- a) **GRANTS** leave to appeal the Fifth Issue; and
- b) **DENIES** leave to appeal the remaining Issues.

A handwritten signature in black ink, reading "Charles L. Smith, III", is positioned above a horizontal line.

Judge Charles L. Smith, III

Presiding Judge

Dated this Monday, 7 July 2025

At The Hague, the Netherlands.