

In: KSC-BC-2020-06/IA036
KSC-BC-2020-06/IA037
KSC-BC-2020-06/IA038
KSC-BC-2020-06/IA040
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: A Panel of the Court of Appeals Chamber
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

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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**Joint Defence Consolidated Appeal Against Decisions
F03201, F03202, F03203, F03211, F03213**

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I. INTRODUCTION

1. Pursuant to Article 45(2) of Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office ("Law")¹ and Rule 77 of the Rules of Procedure and Evidence ("Rules"),² the Defence for Messrs. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi ("Defence") hereby files this appeal against five Decisions rendered by Trial Panel II.
2. Trial Panel II granted the Defence leave to appeal on five similar issues, arising from different decisions, but all concerning Rule 149. The Defence appeals on the following grounds:
 - a. The Panel erred in its interpretation of the definition of an expert report within the meaning of Rule 149 ("**First Issue**").³
 - b. 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 ("**Second Issue**").⁴
 - c. The Panel erred in law and fact in finding that autopsies are not expert reports and that pathologists are not experts ("**Third Issue**").⁵

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 F03299, *Decision on Joint Defence Request for Leave to Appeal Decision on Prosecution Motion for Admission of Documents concerning Murder Victims and Related Request*, 1 July 2025, public, para 28(a).

⁴ F03312, *Decision on Joint Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of International Reports*, 7 July 2025, public, para 52(a).

⁵ F03298, *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)*, 1 July 2025, public, para 48(a).

- d. The Panel erred in finding that DNA profiling and sequencing reports from the International Commission on Missing Persons (“ICMP”) setting out (i) their scientific findings from DNA bone analysis on recovered degraded skeletal remains; and (ii) conclusions on the probability of relatedness, are not expert reports (“**Fourth Issue**”);⁶
 - e. As a result of the error in the Third Issue, the Panel erred in law by failing to apply Rule 149 to the source material to W04875’s expert reports (“**Fifth Issue**”);⁷
3. This Appeal deals with all five certified issues together as they are inherently interconnected. Each issue concerns the Panel’s interpretation and application of Rule 149, which governs the admissibility of expert evidence.⁸ It is submitted that the Panel in each Impugned Decision misinterpreted and misapplied Rule 149, by taking an improper approach to the scope of the Rule, which renders wholly ineffective the procedural protections of Rule 149.
4. It is worth stating at the outset that these issues have arisen as a result of the highly unorthodox approach the SPO has taken in relation to the expert evidence in their case. Instead of the traditional approach of calling the experts who conducted the relevant analysis to give testimony on their findings and conclusions, the SPO has sought to rely upon DNA and pathology experts – W04874 and W04875 – both of whom conducted none of the underlying analysis upon which they provide comment, and use them as trojan horses through which to tender numerous expert reports authored by expert

⁶ F03297, *Decision on Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875*, 1 July 2025, public, para 49(a).

⁷ *Ibid.*

⁸ Rules, Rule 149.

witnesses the SPO have chosen not to call. They have also sought to admit large swathes of expert evidence in writing via the bar table in circumvention of Rule 149. In doing so, they have deprived the Defence of the protections afforded to expert evidence.

II. PROCEDURAL HISTORY

5. The issues that are the subject of this appeal have been the forefront of extensive litigation between the Parties during the last few months of the SPO case.

A. Expert Witnesses

6. On 13 January 2025, SPO expert witness W04875 testified,⁹ and the SPO tendered his proposed evidence for admission.¹⁰ On 17 January 2025, the Defence filed supplemental submissions on the admissibility of W04875's Proposed Evidence.¹¹ On 20 January 2025, the SPO replied.¹²
7. On 22 and 23 January 2025, W04874 testified¹³ and the SPO tendered his proposed evidence for admission.¹⁴ On 29 January 2025, the Defence filed supplemental submissions on the admissibility of W04874's Proposed Evidence.¹⁵ On 31 January 2025, the SPO replied.¹⁶

⁹ Transcript, 13 January 2025, T.23546-23686.

¹⁰ *Ibid.*, T.23686.17-20; 124392-124406.

¹¹ F02836, *Joint Defence Response to Prosecution Request for Admission of the Expert Report and Source Material of W04875*, 17 January 2025, public.

¹² F02840, *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.

¹³ Transcript, 22 January 2025, T.24220-24328; Transcript, 23 January 2025, T.24357-24449.

¹⁴ Transcript, 23 January 2025, T.24450.4-8; 124449-124455.

¹⁵ F02871/COR, *Corrected Version of Joint Defence Response to Prosecution Request for Admission of the Expert Report and Source Material of W04874*, 29 January 2025, confidential (a public redacted version was filed on 6 June 2025, F02871/COR/RED).

¹⁶ F02884, *Prosecution Reply to 'Corrected Version of Joint Defence Response to Prosecution Request for Admission of the Expert Report and Source Material of W04874' (F02871/COR)*, 31 January 2025, public.

8. On 27 January 2025, W04826 testified¹⁷ and the SPO tendered his proposed evidence for admission.¹⁸ On 30 January 2025, the Defence filed supplemental submissions on the admissibility of W04826's Proposed Evidence.¹⁹ On 3 February 2025, the SPO replied.²⁰

B. Murder Victims' Bar Table Motion

9. On 13 December 2024, the SPO filed a motion for admission of murder victims documents and a related request.²¹ On 23 January 2025, the Defence filed a response.²² On 28 January 2025, the SPO replied.²³

C. International Reports Bar Table Motion

10. On 31 March 2025, the SPO filed a motion for admission of reports drafted by international organisations.²⁴ On 24 April 2025, the Defence filed a response.²⁵ On 5 May 2025, the SPO replied.²⁶

¹⁷ Transcript, 27 January 2025, T.24503-24580.

¹⁸ *Ibid*, T.24582.4; 124921-124937.

¹⁹ F02876, *Joint Defence Response to Prosecution Request for Admission of Expert Report and Source Material of W04826*, 30 January 2025, confidential (a public redacted version was filed on 6 June 2025, F02876/RED).

²⁰ F02894, *Prosecution Reply to 'Joint Defence Response to Prosecution Request for Admission of Expert Report and Source Material of W04826' (F02876)*, 3 February 2025, public.

²¹ F02784, *Prosecution motion for admission of documents concerning murder victims and related request with confidential Annexes 1-2*, 13 December 2024, public.

²² F02853, *Joint Defence Response to Prosecution motion for admission of documents concerning murder victims with confidential Annexes 1 and 2*, 23 January 2025, confidential (a public redacted version was filed on 5 June 2025, F02853/RED).

²³ F02867, *Prosecution reply to 'Joint Defence Response to Prosecution motion for admission of documents concerning murder victims' (F02853)*, 28 January 2025, public.

²⁴ F03066, *Prosecution motion for admission of international reports with confidential Annexes 1-2*, 31 March 2025, confidential (a public redacted version was filed on 8 April 2025, F03066/RED).

²⁵ F03144, *Joint Defence Response to the Prosecution Motion for Admission of International Reports with Confidential Annex 1*, 24 April 2025, confidential (a public redacted version was filed on 21 May 2025, F03144/RED).

²⁶ F03165, *Prosecution reply relating to its motion for admission of international reports (F03066)*, 5 May 2025, confidential (a public redacted version was filed on the same day, F03165/RED).

D. Impugned Decisions

11. On 27 May 2025, Trial Panel II rendered a decision admitting into evidence the items tendered in relation to expert witnesses W04826 (**"First Impugned Decision"**);²⁷ W04875 (**"Second Impugned Decision"**);²⁸ and W04874 (**"Third Impugned Decision"**).²⁹
12. On 29 May 2025, Trial Panel II admitted through the bar table items tendered by the SPO concerning murder victims (**"Fourth Impugned Decision"**),³⁰ and international reports (**"Fifth Impugned Decision"**).³¹
13. On 3 June 2025, the Defence jointly filed two requests for certification to appeal the First, Second and Third Impugned Decisions concerning the admission of evidence of the expert witnesses.³²
14. On 5 June 2025, the Defence jointly filed a request for certification to appeal the Fourth Impugned Decision concerning the admission of evidence through the SPO's murder victim bar table motion³³ and the Fifth Impugned Decision concerning the SPO's international reports bar table motion.³⁴

²⁷ F03201, *Decision on the Admission of Expert Evidence of W04826*, 27 May 2025, public.

²⁸ F03202, *Decision on the Admission of Expert Evidence of Witness W04875*, 27 May 2025, public.

²⁹ F03203, *Decision on the Admission of Expert Evidence of W04874*, 27 May 2025, public.

³⁰ F03211, *Decision on Prosecution Motion for Admission of Documents concerning Murder Victims and Related Request*, 29 May 2025, confidential (a public redacted version was filed the same day, F03211/RED).

³¹ F03213, *Decision on Prosecution Motion for Admission of International Reports*, 29 May 2025, public.

³² F03222, *Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875 (F03202)*, 3 June 2025, confidential (a public redacted version was filed on 30 June 2025, F03222/RED); F03223, *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).

³³ F03238, *Joint Defence Request for Leave to Appeal Decision on Prosecution Motion for Admission of Documents concerning Murder Victims and Related Request (F03211)*, 5 June 2025, confidential (a public redacted version was filed on 4 July 2025, F03238/RED).

³⁴ F03237, *Joint Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of International Reports*, 5 June 2025, public.

15. On 13 June 2025, the SPO responded to the Defence's certification requests concerning the admission of evidence of the expert witnesses;³⁵ and to the Defence's certification request concerning the admission of evidence through the SPO's murder victim bar table motion.³⁶ On 19 June 2025, the SPO responded to the Defence's certification request concerning the admission of evidence through the SPO's international bar table motion.³⁷
16. On 23 June 2025, the Defence replied to the SPO's responses of 13 June 2025.³⁸ On 27 June 2025, the Defence replied to the SPO's response of 19 June 2025.³⁹
17. On 1 and 7 July 2025, Trial Panel II rendered its decisions. The Trial Panel granted the Defence's requests for certification to appeal the First and Second Issues concerning Impugned Decision 1;⁴⁰ the First Issue concerning Impugned Decisions 2 and 3;⁴¹ the First Issue concerning Impugned Decision 4;⁴² and the Fifth Issue concerning Impugned Decision 5.⁴³ In doing so, Trial Panel II noted

³⁵ F03260, *Prosecution Response to "Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875 (F03202)"*, 13 June 2025, confidential; F03259, *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, public.

³⁶ F03261, *Prosecution Response to 'Joint Defence Request for Leave to Appeal Decision on Prosecution Motion for Admission of Documents concerning Murder Victims and Related Request (F03211)'*, 13 June 2025, public.

³⁷ F03276, *Prosecution Response to 'Joint Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of International Reports'*, 19 June 2025, public.

³⁸ F03285, *Joint Defence Reply to Prosecution Response to "Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875 (F03202)"*, 23 June 2025, confidential; F03286, *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 (a public redacted version was filed on 4 July 2025, F03286/RED); F03284, *Joint Defence Reply to Prosecution Response to 'Joint Defence Request for Leave to Appeal Decision on Prosecution Motion for Admission of Documents concerning Murder Victims and Related Request (F03211)'*, 23 June 2025, confidential.

³⁹ F03292, *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, public.

⁴⁰ F03297.

⁴¹ F03298.

⁴² F03299.

⁴³ F03312.

that the question of whether documents requiring or expressing some kind of expertise must be considered expert reports, and whether as such, they can only be admitted under Rule 149 is a question whose resolution may impact the procedural rights of the Parties with regard to the admission of expert evidence under Rule 149, and the way in which the Panel should approach this evidence when assessing its weight and probative value.⁴⁴ The Panel further noted that it was beneficial for the conduct of proceedings and 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 Issue may affect the scope of the SPO's case, the ability of the Parties to make informed submissions in respect of such evidence, and the Defence's presentation of their cases, if any.⁴⁵

III. STANDARD OF REVIEW

18. The standard of review applicable to interlocutory appeals is the standard provided for appeals against judgments, as specified in the Law.⁴⁶ In relation to an error of law, a party "must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision".⁴⁷ In relation to a discretionary decision, a party must demonstrate that the lower level panel has committed a discernible error, in that the exercise of discretion is based on an erroneous interpretation of the law; it is exercised on a patently

⁴⁴ F03297, paras. 23-24; F03298, paras. 17-18; F03299, paras. 15-16; F03312, paras. 39-43.

⁴⁵ F03297, para. 25; F03298, para. 19; F03299, para. 17; F03312, para. 44.

⁴⁶ KSC-BC-2020-07/IA001/F00005, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, para. 10.

⁴⁷ KSC-BC-2020-07/IA001/F00005, para. 12.

incorrect conclusion of fact; or where the decision is so unfair and unreasonable as to constitute an abuse of discretion.⁴⁸

IV. SUBMISSIONS

19. It is submitted that in each of the five impugned decisions, the Panel misinterpreted and misapplied Rule 149. In making these discernible errors, the Panel has erred in law.
20. Rule 149 is the sole provision in the Rules governing the admissibility of expert evidence. It is unarguably the *lex specialis* for the admission of expert evidence, which the Panel acknowledged as recently as 3 July 2025.⁴⁹ The Panel erred by finding that not all expert reports relied on by a Party need to be tendered via Rule 149, but only reports of those experts that a Party chooses to call live or who appear on a witness list. The effect of this decision is that a Party may circumvent the totality of the protections of Rule 149 simply by electing to admit all of its expert evidence in writing. Following the Panel's interpretation, Rule 149 does not apply to any expert report by an expert a Party chooses not to call live, but nonetheless seeks to admit into evidence and rely upon, on equal footing, in writing. This decision is wrong in law.
21. It is also clearly without basis or precedent and fundamentally contrary to the intention behind, and the wording of, the Rule itself, which is in place to provide additional protections and safeguards for Parties when it comes to expert evidence considering the unique qualities of this type of evidence. Experts are entitled to give opinion evidence on matters outside the ordinary

⁴⁸ *Ibid.*, para. 14.

⁴⁹ F03305, *Decision on Victims' Counsel's Submission of Expert Reports and Request to Admit Them into Evidence*, 3 July 2025, public, para. 40.

understanding of the Parties. Therefore, in order to be able to properly challenge and confront such evidence, the opposing party requires considerable notice of such evidence and the ability to seek expert opinion of its own in order to adequately challenge the expertise and content of such evidence.

22. All evidence must meet the requirements of Rule 138.⁵⁰ Rule 138 applies regardless of whether the evidence in question must *also* meet additional admissibility requirements of a *lex specialis*. For instance, witness statements tendered through Rules 153/155 must meet the requirements of Rule 138.⁵¹ All evidence tendered via Rule 149 must therefore *also* meet the requirements of Rule 138. Expert evidence cannot be tendered solely through the bar table and Rule 138, in circumvention of Rule 149.
23. There has been an ongoing attempt by both the SPO and the Panel to disingenuously redefine an expert witness and expert reports in both law and fact. Unprecedented language has been used in the pursuit of doing so, for example, by describing expert witness reports as, “autopsy documents”,⁵² “documents concerning the deaths of victims”⁵³ and “documents requiring or expressing *some kind of expertise*”.⁵⁴ The question as to what constitutes an expert report has up to now been uncontroversial and, in light of these recent

⁵⁰ Rules, Rule 138.

⁵¹ F01603, *Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155*, 14 June 2023, confidential, para.12 (a public redacted version was filed on 8 September 2023, F01603/RED); F01904, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153*, 3 November 2023, confidential, para. 7 (a public redacted version was filed on 27 November 2023) referring to F01409, *Decision on Specialist Prosecutor’s Bar Table Motion*, 31 March 2025, confidential, paras. 8-9.

⁵² F03223, para. 10; F03201, para. 30.

⁵³ F03201, para. 30.

⁵⁴ F03297, para. 23; F03298, para. 17; F03299, para. 16.

developments, warrants reiteration by the Court of Appeals Panel, as does the definition of an expert.

24. The Defence submits that:

- a. An expert has been repeatedly defined in international criminal jurisprudence as “[a] person who by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”.⁵⁵
- b. An expert report is an account of a situation, event, etc., brought by one person to another, especially as the result of an investigation, written by a person who meets the definition of an expert; and
- c. Rule 149 applies to all expert reports. Therefore, all reports tendered by a Party that meet the definition of expert reports must meet the requirement of the *lex specialis* of Rule 149 and the overarching requirements of Rule 138, regardless of whether not the tendering Party intends to call the author of the report live.

⁵⁵ F03305, para. 22; F02787, *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, confidential, para. 28 (A public redacted version was filed on 16 December 2024, F02787/RED). See also ICTY, *Prosecutor v. Perišić*, No. IT-04-81-T, Trial Chamber, [Decision on Expert Reports by Richard Butler](#), 4 March 2009, para. 9; ICTY, *Prosecutor v. Stanišić & Simatović*, IT-03-69-PT, Trial Chamber, [Decision on Prosecution’s Submission of the Expert Report of Nena Tromp and Christian Nielsen Pursuant to Rule 94 bis](#), 18 March 2008, para. 8; ICTY, *Prosecutor v. Popović et al*, IT-05-88-T, Trial Chamber, [Second Decision Regarding the Evidence of General Rupert Smith](#), 11 October 2007, p. 3; ICTY, *Prosecutor v. Milošević*, IT-98/29-1-T, Trial Chamber, [Decision on Admission of Expert Report of Robert Donia](#), 15 February 2007, para. 7; ICTY, *Prosecutor v. Martić*, IT-95-11-T, Trial Chamber, [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, para. 22.

A. The First and Second Issue

25. The First and Second Issues are dealt with together as they raise the same question, namely the correct definition of an expert report within the meaning of Rule 149. The **Fourth Impugned Decision** (F03211), which admitted numerous expert reports via the SPO's murder victims bar table motion, held that:

The Panel is of the view that evidence may qualify as an "expert report" if it falls within the scope of application of Rule 149, and is tendered through an "expert witness to be called by a Party". The Panel notes that the Proposed Exhibits are not expert reports of any expert witness to be called by any Party. Rather, they have been tendered by the SPO under Rule 138, and therefore are not being offered nor qualify for the purpose of these proceedings as expert evidence as understood under Rule 149.⁵⁶

26. The **Fifth Impugned Decision** (F03213), which admitted numerous expert reports via the SPO's international reports bar table, held that:

Evidence may qualify as an expert report if it meets the requirements of Rules 149 and 138(1), and is therefore tendered through an expert witness called by a Party in that capacity. The Panel is satisfied that the Proposed Exhibits have been tendered by the SPO under Rule 138, and not through an expert witness under Rule 149, and therefore are not expert reports within the meaning of Rule 149 as demonstrated in previous decisions of the Panel.⁵⁷

27. Firstly, the finding that Rule 149 only applies to expert witnesses to be "called by a Party" is inconsistent with the express provisions of Rule 149 itself. A thorough and proper reading of Rule 149 demonstrates that, on its face, it clearly does not only apply to experts on a Party's witness list. To the contrary, Rule 149 sets out when expert evidence *must* be called live and when their report *may* be admitted on in writing. Rule 149(3) provides that:

⁵⁶ F03211, para. 18.

⁵⁷ F03213, para. 14.

If the opposing Party accepts the expert witness report or parts thereof, the latter may be admitted into evidence by the Panel without calling the expert witness to testify in person.⁵⁸

28. As such, the Rule expressly regulates the circumstances in which expert reports relied upon by a Party can be admitted in writing, i.e. by agreement pursuant to Rule 149(3), not via Rule 138 or the bar table. Rule 149(4) also articulates that, in cases where an expert must be called live under Rule 149(2), “the Panel shall decide on the admissibility of the expert witness report following the testimony and questioning of the expert”.⁵⁹ The Rule clearly cannot be said to only apply to experts that a Party *intends* to call live.
29. If the Panel’s interpretation were correct, and if an opposing Party objected to a proposed expert under Rule 149(2), the tendering Party could simply change course, remove the witness from their witness list and instead seek to admit their report via the bar table, wholly circumventing the opposing Party’s objection and denying them the opportunity to challenge that evidence as entitled under Rule 149. It would also be open to a Party to choose to tender the entirety of its expert evidence via the bar table at trial, denying the opposing Party notice of the reports in advance of them being tendered (Rule 149(1)) or any right to challenge the expertise of those witnesses or cross-examine those experts as to the substantive content of the report (Rule 149(4)), thereby rendering Rule 149 completely nugatory. This cannot be a correct interpretation of the Law.
30. Secondly, the Panel’s interpretation cannot have been the intention of the drafters of the Rules. The drafters cannot have intended to place the power to control the applicability of Rule 149 in the hands of a tendering Party, allowing

⁵⁸ Rules, Rule 149(3).

⁵⁹ *Ibid.*, Rule 149(4).

them, at their whim, to deny the opposing Party the benefit of the protections it affords. By virtue of Rule 149, Parties are entitled to *more* protections in law when it comes to the admission of expert evidence. Expert evidence is treated differently in domestic and international jurisdictions alike for good reason; that is why there is a *lex specialis*. Expert evidence is no less expert evidence when tendered in writing versus when heard live. The drafters of the Rules could not have intended that the tendering Party could simply choose to tender expert evidence unchallenged through the bar table, or shoehorn it in as “source material” if and when it pleases, instead of via the provisions of Rule 149. This is fundamentally inconsistent with the interests of justice. Expert evidence concerns matters outside the ordinary knowledge and expertise of the Panel and Parties and as such the opposing Party is entitled to adequate notice to enable it to seek its own expert opinion if needed. Further, as experts are entitled to give opinion evidence that lay witnesses are not, it is imperative that the opposing Party has the opportunity to challenge the expertise of a witness and the substance of their evidence. These rights and safeguards are acknowledged and enshrined in Rule 149 and must be protected, not undermined by the Panel who have an obligation to enforce the provisions of the Rule. If the Panel’s interpretation is allowed to stand, however, these protections become meaningless.

31. Thirdly, the **Fourth and Fifth Impugned Decisions** do not cite any international or domestic precedent to support its narrow and novel interpretation of the Rule. This interpretation is without legal basis or precedent. Significantly, the wording of Rule 149(a) is similar to that of ICTY Rule 94bis, which provides at (a) that “[t]he full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit

prescribed by the Trial Chamber or by the pre-trial Judge." Were the Panel's interpretation of Rule 149 correct, it would equally be correct to read the same narrow limitation into Rule 94bis. The fact that at no stage in its long history did the ICTY do so seriously undermines the Panel's finding that this is the correct interpretation of the Rule.

32. Rule 149(1) reads "any expert witness to be called by a Party" because it is clear from the wording of the Rule as whole that the drafters intended that all expert evidence would be called live, unless agreed by the opposing Party, in which case it can be admitted in writing under Rule 149(3). These provisions are therefore phrased with the presumption that all expert evidence sought to be relied on will, by default, be called live. The Rule plainly does not exist only to regulate admissibility of a special sub-category of expert evidence, namely expert witnesses a Party may choose to call live at their discretion for presentational purposes. The Rule is entitled "Evidence of Expert Witnesses", and applies to all expert witnesses. The determination of what amounts to an expert report within the Rule is not contingent upon the manner in which it is being offered by a Party.
33. Inexplicably, in its recent decision on the admissibility of expert evidence tendered by Victims Counsel ("VC"), the Panel applied Rule 149 correctly, in finding the following in relation to VC's application to admit the expert report of Dr Lerz in writing:

The Panel notes that Rule 149 is *lex specialis* for the admission of expert reports. The Panel also reiterates the fact that admission of a report pursuant to Rule 149(1) is conditioned on the author of the report being called to testify, subject to a waiver. The Panel therefore considers that, in the present circumstances, should Victims' Counsel wish to seek admission of Dr Lerz's Reports pursuant to Rule 149 in order to assist the Panel in its determination of the impact of the crimes and harm suffered by

the VPPs, he should do so by calling Dr Lerz to testify in court and allow for cross-examination by the Defence, as envisioned by Rule 149(4).⁶⁰ [*Emphasis added*]

34. The Panel further found in relation to the admissibility of the iMMO Case 05 Reports, which the iMMO witnesses called live (Ms Duhne-Prinsen and Dr Black) did not co-author, that the report was not admissible where the experts who authored the report were not called to give evidence:

Rule 149(1) refers to the “report of any expert witness to be called by a Party”. Rule 149(1) thus conditions admission of an expert report to its author being called to testify and does not foresee the possibility of tendering an expert report written by an individual who is not to be called as a witness. Rule 149(3) permits the admission of an expert report “without calling the expert witness to testify in person” only if the opposing Party accepts the expert witness report or parts thereof. This suggests that the opposing Party must be given an opportunity to cross-examine the expert witness whose report the Party or the participant concerned wishes to tender pursuant to Rule 149.⁶¹

35. The approach taken by the Panel to these reports was correct; expert reports sought to be relied upon, that are not agreed by the Parties, cannot be admitted in writing in circumvention of the *lex specialis* and the tendering Party must call the witness live in order to tender the report, unless the report can be admitted by agreement.
36. VC never proposed calling Dr Lerz, or the authors of the second Case 05 report live, yet the provisions of Rule 149 was correctly applied to these reports. It is irrelevant whether or not the authors of expert reports are on a calling Party’s witness list. The authors qualify as experts, and the reports as expert reports, and thus Rule 149 applies. The Panel has not provided any justification for distinguishing the written expert reports tendered by the SPO from that of VC

⁶⁰ F03305, para 40.

⁶¹ *Ibid*, para 27.

and permitting the SPO to tender challenged expert reports in writing in circumvention of the requirements of the *lex specialis*.

37. The Accused and the Parties require legal certainty. The net result of the Panel's differing approach to the same legal matter based, it appears, on who the calling party is, has created uncertainty and confusion. It cannot be correct as a matter of law that the relevant standards applicable to the admission of expert evidence depend on who the calling Party is, especially when Rule 149 itself makes no such distinction. The Panel has contradicted itself creating divergent legal standards and legal uncertainty for all in this case.
38. The Panel's interpretation in the Impugned Decisions also cannot be right in law because expert reports are also witness statements, albeit a special class of witness statement. Experts are witnesses who possess expertise and whose statement consists of the written articulation of their expert findings and conclusions. Witness statements equally cannot be admitted via the bar table. Expert evidence therefore cannot be admitted via the bar table and Rule 138 alone.
39. In its decision granting leave to appeal, the **First Issue** the Panel refers to "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".⁶² This appears to be an effort by the Panel to create some sort of sub-category of expert report. Either a report is an expert report, or it is not. The definitions of experts and expert reports are outlined above. If these definitions are met the report is an expert report. The reports tendered in the SPO's murder victims bar table

⁶² F03299, para. 15.

motion were unarguably expert reports and consisted of over 30 autopsies; 20 DNA identification reports; 11 anthropological reports (re. exhumations); ballistics and fingerprint evidence.⁶³

40. Similarly, the reports tendered in the SPO's international reports bar table motion consisted of three case files containing, *inter alia*, scene of crime reports, medical examinations and DNA analyses.⁶⁴ These are all clearly areas of expertise within the ambit of expert authors who possess far more than "some kind of expertise" and whom fall squarely within the definition of experts. Therefore, the reports are clearly expert reports within the meaning of Rule 149.

B. The Third Issue

41. In the **First and Third Impugned Decisions** (F03201 and F03203), the Panel stated:

The evidence produced by third parties at issue here are autopsy documents and other documents concerning the death of victims. **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. Rather, **these documents are source material** which W04826, a forensic pathologist who qualifies as an expert within the meaning of Rule 149, was entitled to consult and assess in preparing his Expert Report.⁶⁵

42. It is submitted that the reports in question are expert reports within the meaning of Rule 149, which are subject to the admissibility provisions contained therein. The fact that the reports were commented upon in another expert's report and could therefore also be labelled as "source material" does not mean they can circumvent the admissibility requirements of Rule 149. The Panel's

⁶³ F03238, para. 3.

⁶⁴ F03144/A01, *Annex 1 to Joint Defence Response to the Prosecution Motion for Admission of International Reports with Confidential Annex 1*, 24 April 2025, items 57, 66 and 128.

⁶⁵ F03201, para 30; *similarly*, in F03203, para. 30.

restrictive approach to the applicability of Rule 149 is incorrect, for the reasons outlined above.⁶⁶

43. Forensic pathologists are experts. Autopsies are unquestionably expert reports. The conclusions in these reports deal with the cause of death of alleged murder victims on this indictment. There can therefore be no rational argument that the reports in question and the conclusions contained therein are not the work and conclusions of persons who require specialised knowledge, skill or training in areas of science, who can assist the trier of fact to understand or determine an issue in dispute, namely cause of death. The Panel improperly described the expert reports in question as “autopsy documents and other documents concerning the death of victims,”⁶⁷ in what appears to be an effort to erroneously dilute their status as expert reports. There can be no sensible dispute that the forensic pathologists who wrote these reports are not witnesses in this case; they saw and examined the bodies of the alleged victims in this case, recorded their findings, applied their expertise and provided their resultant conclusions. These reports are expert reports within the meaning of Rule 149 and, as outlined above, all expert reports relied upon by a Party must subject to the provisions of the *lex specialis*, Rule 149.

44. The mere fact an expert report has been commented upon by another expert witness, rendering it liable to be labelled as “source material” does not mean it can be admitted into evidence independently, and in circumvention of the *lex specialis* of Rule 149. “Source material” is material which an expert witness refers to, relies on or comments upon in their report. “Source material” is not its own category of evidence; it is a means by which to describe a specific

⁶⁶ See, paras. 27-35.

⁶⁷ F03201, para. 30.

collection of evidence, which may belong to different categories. If an expert report is commented upon or referred to in another expert's report, it does not lose its inherent evidential characteristics as an expert report, nor does it become automatically admissible by virtue of the fact that another expert has commented upon it. For example, were an expert to refer in their report to a witness statement, that document would equally be inadmissible because witness statements must be tendered via the *lex specialis* of Rules 153-155. It cannot be admitted, notwithstanding its inherent status as a witness statement, on the basis that it is "source material."

45. There is no dispute as to whether an expert witness called live by a Party is entitled to refer to reports of third parties in the preparation of their expert report. The question that arises in this Appeal concerns the independent admissibility requirements for those underlying or "third party" expert reports. A document can simultaneously be an expert report and "source material"; these are not mutually exclusive. If a Party wishes to *rely* upon the underlying expert report, however, they must seek to tender it into evidence independently via Rule 149. This is the core of the issue.
46. To find that simply by virtue of their parallel status as "source material" these expert reports may be admitted in circumvention of the *lex specialis*, is also to misunderstand the law governing the admissibility of source material, which clearly mandates that admission of such material is very much the exception, not the rule. Established precedent has held that source material will not be admitted as a matter of course⁶⁸ and that "[e]xpert reports generally should be

⁶⁸ ICTY, *Prosecutor v Karadzic*, IT-95-5/18, Trial Chamber, [Decision on Prosecution's submission on the relevancy of certain documents relating to the testimony of Richard Philipps with Appendix A](#), 9 July 2010 ("*Prosecutor v Karadzic*"), para 5, citing the Order on Procedure for the Conduct of Trial, 8 October 2009, Appendix A, para. P. ("ICTY Order on Procedure").

complete and understandable in themselves, such that there is no need to tender for admission into evidence the source used by the expert”.⁶⁹ The ICTY has determined that when a Party sought admission of the 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”.⁷⁰ It has also 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”.⁷¹ It again bears reiteration, the unequivocal and fundamental principle that “documents that are source material are not admitted for their substantive content”.⁷²

47. It is also significant to bear in mind how and why these expert reports came to be “source material” in this case. These reports are not the type of “source material” that the law ordinarily anticipates arising within an expert report, such as reference to academic articles or textbooks. The SPO provided W04874 with these third-party expert reports and instructed him to comment upon them. They did not ask W04874 to conduct any independent analysis or secondary autopsies.⁷³ It was the SPO that caused these reports to be source material, not W04874. As stated above, the SPO has sought to inappropriately use W04874 as a trojan horse to admit these reports, which he did not author and most importantly, the conclusions in which he queries, disagrees with, and

⁶⁹ *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.

⁷⁰ *Ibid*

⁷¹ *Ibid*.

⁷² *Prosecutor v Karadzic*, para. 10.

⁷³ *See*, 102430-102442 PRV; Transcript, 22 January 2025, T.24249.19-T.24254.10.

cannot adopt as his own.⁷⁴ This strategy of the SPO was adopted in an obvious effort to circumvent Rule 149 and deny the Defence the protections contained therein. W04874 was instructed by the SPO to analyse these reports, thereby ensuring they could be labelled as source material and their admission rubber-stamped. This approach is unjust, wrong in law, and clearly not what precedent envisages when it contemplates rare occasions where source material can and should be properly admitted alongside an expert report. This approach should not be sanctioned by the Appeals Chamber.

C. The Fourth and Fifth Issue

48. In the **Second Impugned Decision** (F03202) the Panel found:

On a separate note, and contrary to the Defence's submissions, the Panel is not persuaded that the documents within the Source Material constitute expert reports themselves and, as such, cannot be admitted through W04875. 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. Rather, these documents are source material which W04875, who qualifies as an expert within the meaning of Rule 149, was entitled to consult and assess in preparing his Expert Reports.⁷⁵

49. The Defence adopts the submissions made above in relation to the Third Issue concerning the applicability of Rule 149 to "source material" at paragraphs 40-45 above.

50. Twenty of the twenty-two DNA reports in question 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.

⁷⁴ Transcript, 23 January 2025, T.24371.10-13; T.24373.6-9; T.24399.16-18.

⁷⁵ F03202, para. 40.

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. Their findings, analysis and conclusions are expert reports.

51. Consistent with the definition of an expert previously adopted by the Panel,⁷⁶ 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 of an account of a situation or event, brought by one person to another, especially as the result of an investigation; as such, they are ‘expert reports.’ DNA profiling, sequencing, and conclusions on relatedness has uniformly been considered by domestic and international courts to be expert evidence.
52. It should also be noted that there appears to be a fresh attempt to incorrectly demean the nature and quality of the DNA expert reports in question. In granting leave on this issue, the Panel noted 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 149.⁷⁷

53. The ICMP reports are not “documents requiring or expressing some kind of expertise”. DNA profiling and sequencing on DNA extracted from samples of degraded skeletal remains and subsequent analysis on familial relatedness is work that requires substantially more than “some kind of expertise”. This work

⁷⁶ F03305, para. 38.

⁷⁷ F03297, para. 23.

has uniformly been considered by domestic and international courts to be expert evidence.⁷⁸

54. It is also impossible to suggest that the expertise required to produce these reports and conduct this analysis is any less than that possessed by the SPO's expert W04875. The subject matter of their expertise is the same – and there is no dispute W04875 is an expert and the documents containing his findings and conclusions are expert reports. W04875 himself confirmed the ICMP reports were expert reports and this was not challenged by the SPO or the Panel.⁷⁹ There is also no legal precedent or foundation for a two-tiered system of expert evidence distinguishing expert reports that express or require “some kind of expertise” and those that require a “lot of expertise” where each would be subjected to different admissibility requirements.
55. The underlying DNA reports are expert reports within the meaning of Rule 149, for the reasons outlined above⁸⁰ and must therefore be subject to its provisions. The fact that these DNA reports were referred to by W04875 did not render them admissibly independent as source material. It should also be recalled and highlighted that W04875 did not and could not adopt any of the conclusions as his own and identified serious inexplicable irregularities with the reports.⁸¹ Further, like in the case of W04874, W04875 was instructed by the

⁷⁸ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/T/TC, Trial Chamber, [Decision on Expert Witness PRH120, Professor Fouad Hussein Ayoub, and Expert Witness PRH508, Dr. Issam Mansour](#), 7 July 2014; ICTY, *Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, [Decision on the Accused's Motion to Exclude DNA Evidence](#), 16 April 2013.

⁷⁹ Transcript, 13 January 2025, T.23627.3-5.

⁸⁰ See, paras 28-38.

⁸¹ F03222, para. 4; Transcript, 13 January 2025, T.23618.3-18; T.23620.13-17; 23622.14-17.

SPO to comment on these reports. Again, the SPO are seeking to use W04875 as a means by which to wrongly circumvent the requirements of Rule 149.

V. CONCLUSION

56. For the reasons outlined above, the Defence requests the Court of Appeals Panel to grant the Appeal, find that Trial Panel II erred in its interpretation and application of Rule 149, reverse the Impugned Decisions, and, as originally requested,⁸² deny the admission of the reports in question. The Panel's interpretation and application of Rule 149 is wrong, contrary to the wording of the provision itself, clearly contrary to the intention of the Rule, demonstrably unjust, leads to illogical results, and has no basis in law or precedent. Intervention by the Court of Appeals Panel is required to clarify the correct interpretation and application of the Rule and ensure that the Parties are afforded the protections of Rule 149, which are in place to ensure a fair trial.

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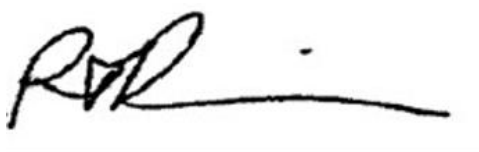
Respectfully submitted on Thursday, 17 July 2025, at The Hague, The Netherlands.



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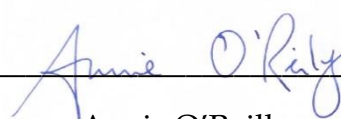
⁸² F02836, para. 43; F02871/COR, para. 50; F02876, para. 27; F02853, para. 37; F03144, para.35



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