SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Kai Ambos
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor's Office
Date:	4 August 2025
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Prosecution response to 'Joint Defence Consolidated Appeal Against Decisions F03201, F03202, F03203, F03211, F03213'

with public Annex 1

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I. INTRODUCTION

1. In the Decisions,[1] Trial Panel II admitted, *inter alia,* DNA and autopsy reports (collectively, 'Items')[2] either as source material or through the bar table. Such admission was consistent with the regulatory framework governing this case, including Articles 37 and 40 of the Law,[3] Rules 138(1) and 149 of the Rules,[4] and paragraphs 60 and 123 of the Order on the Conduct of Proceedings.[5] Prior to admitting the Items, the Trial Panel carefully assessed, *inter alia,* that they were *prima facie* authentic and relevant, had probative value which was not outweighed by any prejudice and, additionally for the source material, that they were referenced in the Expert Reports[6] and/or testimony of W04826, W04874, and W04875.[7]

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[1] Corrected Version of Decision on the Admission of Expert Evidence of W04826, KSC-BC-2020-06/F03201/COR, 27 May 2025 ('W04826 Decision'); Decision on the Admission of Expert Evidence of Witness W04875, KSC-BC-2020-06/F03202, 27 May 2025 ('W04875 Decision'); Decision on the Admission of Expert Evidence of W04874, KSC-BC-2020-06/F03203, 27 May 2025 ('W04874 Decision'); Decision on Prosecution Motion for Admission of Documents concerning Murder Victims and Related Request, KSC-BC-2020-06/F03211, 29 May 2025, Confidential ('Murder Victim Documents Decision'); Decision on Prosecution Motion for Admission of International Reports, KSC-BC-2020-06-F03213, 29 May 2025 ('International Reports Decision', collectively with the W04826 Decision, W04875 Decision, W04874 Decision, and Murder Victim Documents Decision, the 'Decisions'). Annex 1 to this response includes a table of authorities cited.

[2] *See* para.3 below.

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

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

[5] Annex 1 to Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Order on the Conduct of Proceedings').

[6] P01951, Forensic Expert Report compiled by W04875 pursuant to the SPO's Letter of Instruction of 30 July 2021, dated 22 September 2021; P01953, Updated DNA forensic expert report prepared by W04875 on 6 March 2023; P01991, Forensic Expert Report compiled by W04874 pursuant to the SPO's Letter of Instruction of 30 July 2021, dated 15 September 2021; P02003, Forensic Expert Report compiled by W04826 pursuant to the SPO's Letter of Instruction of 30 July 2021, dated 07 October 2021 (P01951, P01953, P01991, and P02003 are referred to collectively as the 'Expert Reports').

[7] *See e.g.* W04826 Decision, KSC-BC-2020-06/F03201/COR, paras 28-36; W04875 Decision, KSC-BC-2020-06/F03202, paras 33-41; W04874 Decision, KSC-BC-2020-06/F03203, paras 28-36; Murder Victim Documents Decision, KSC-BC-2020-06/F03211, paras 20-143; International Reports Decision, KSC-BC-2020-06-F03213, paras 18-29.

2. Rather than demonstrating any error in the Decisions, the five Grounds raised in the Appeal[8] fail to identify with sufficient specificity which admitted evidence the Defence challenges, mischaracterise and/or fail to address the alleged errors, disregard and/or misinterpret the applicable legal framework, rely on hypothetical and speculative arguments, exceed the scope of the certified issues, misconstrue the sparse jurisprudence relied on, and ignore the ample authority that rebuts their position. Such arguments are incapable of satisfying the standard of review. For these reasons and those set out below, the Appeal lacks merit and should be dismissed.[9]

II. SUBMISSIONS

A. PRELIMINARY ISSUES

1. The Appeal fails to sufficiently identify the challenged items

3. While the Appeal contains extensive submissions on autopsy reports and DNA reports generally, it fails to identify such items with sufficient specificity, for example by reference to relevant exhibit numbers, rendering the scope of the Appeal unclear. Accordingly, in this response, the Specialist Prosecutor's Office ('SPO') has defined 'Items' as all DNA and autopsy reports admitted in the Decisions.[10] The Appeal also fleetingly mentions, without additional argument and without citing specific examples, 'anthropological reports (re. exhumations); ballistics and fingerprint

[8] Joint Defence Consolidated Appeal Against Decisions F03201, F03202, F03203, F03211, F03213, KSC-BC-2020-06/IA036/F00005, KSC-BC-2020-06/IA037/F00005, KSC-BC-2020-06/IA038/F00005, KSC-BC-2020-06/IA040/F00005, 17 July 2025 ('Appeal'). The five certified issues identified in paragraph 2 of the Appeal are referred to herein as the 'First Ground', 'Second Ground', 'Third Ground', 'Fourth Ground' and 'Fifth Ground', and collectively, 'Grounds'.

[9] This response is filed pursuant to Rule 170(2) and the Decision on Joint Request for Extension of Words to File Consolidated Appeal Against Decisions on Admission of Evidence, KSC-BC-2020-06/IA036/F00004, KSC-BC-2020-06/IA037/F00004, KSC-BC-2020-06/IA038/F00004, KSC-BC-2020-06/IA040/F00004, 10 July 2025, para.11 of which ordered the SPO to file a consolidated response to the Appeal not exceeding 12,000 words, within 17 days from the date of the notification of the Appeal.

[10] *See* para.1 above.

evidence […] scene of crime reports, medical examinations'.[11] To the extent the Appeal may be construed as asserting that admitted evidence of this nature also falls within the parameters of Rule 149, the SPO relies on the same argument set out in relation to the Items.

2. The Appeal fails to identify the correct standards of review

4. The Appeal merely asserts an error of law,[12] ignoring that the Decisions concern the admission of evidence and are therefore discretionary, warranting appellate intervention only in 'very limited circumstances'.[13] Accordingly, for the Appeal to succeed, the Defence must demonstrate that the Trial Panel committed a discernible error in that the Decisions are: (i) based on an incorrect interpretation of the governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Panel's considerable discretion.[14] The Appeal fails to meet the applicable standard.

5. Further, while, as certified, Ground Three alleges the Trial Panel 'erred in law and fact',[15] the Appeal fails to articulate, let alone address or establish, that any alleged error of fact occasioned a miscarriage of justice and that no reasonable trier of fact could have made the impugned finding.[16]

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[11] Appeal, paras 39-40.
[12] *See e.g.* Appeal, paras 19-20.
[13] *Specialist Prosecutor v. Mustafa*, KSC-CA-2023-02/F00038/RED, Public Redacted Version of Appeal Judgment, 14 December 2023, ('*Mustafa* Appeal Judgment'), paras 37, 99; Decision on Krasniqi and Selimi Appeals against "Decision on Prosecution Motion for Admission of Accused's Statements", KSC-BC-2020-06/IA030/F00009, 31 May 2024 (31 May 2024 Decision), paras 6, 53; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, KSC-BC-2020-07/IA006/F00006, 7 January 2022 ('7 January 2022 Decision'), para.14.
[14] *Mustafa* Appeal Judgment, para.36; 31 May 2024 Decision, KSC-BC-2020-06/IA030/F00009, para.6; 7 January 2022 Decision, para.14.
[15] *See* Appeal, para.2(c).
[16] *See* Appeal, paras 41-47; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, para.13; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Appeals Against Decision

B. THE TRIAL PANEL CORRECTLY INTERPRETED AND APPLIED RULE 149 (FIRST AND SECOND GROUNDS)

6. In the First and Second Grounds, the Defence merely disagrees with the Panel's logical interpretation of the unambiguous language in Rule 149, failing to demonstrate how the Decisions were in error.

1. Rule 149 is limited in scope

7. As the heading to Rule 149 unambiguously indicates, this rule deals with 'Evidence of Expert Witnesses'. This is mirrored in the opening clause of Rule 149(1), which refers to '[t]he final report of any expert witness to be called by a Party'. Faced with the clear language of Rule 149, an investigation into the intention of the drafters of the Rules is speculative and unnecessary, and no precedent need be cited in support of the Rule's logical interpretation.[17] In any event, the jurisprudence of other courts supports such interpretation.[18]

8. As concerns the SPO's case, the procedures set out in Rule 149 only apply to the admissibility of the final reports of expert witnesses W04826, W04874, and W04875,[19] *i.e.* to the Expert Reports. There is nothing narrow or novel about this.[20] The Trial Panel ensured full compliance with the requirements of Rule 149, admitting the Expert Reports pursuant thereto only after the conclusion of the relevant testimony.[21]

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on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021 ('23 June 2021 Decision'), paras 14-15.

[17] *Contra* Appeal, paras 21, 30-32, 56.

[18] *See* paras 19-20, 22-24, 40-42 below. In addition, other provisions in the Law and Rules are also consistent with the interpretation adopted in the Decisions. For example, the Defence's proposed interpretation of Rule 149 is inconsistent with Article 37(3)(d). The Rules should be interpreted in a manner consonant with the Law.

[19] *Contra* Appeal, paras 3-4, 20, 24, 27-28, 32, 42-45, 55.

[20] *Contra* Appeal, para.31.

[21] *See* W04826 Decision, KSC-BC-2020-06/F03201/COR; W04875 Decision, KSC-BC-2020-06/F03202; W04874 Decision, KSC-BC-2020-06/F03203.

9. The self-serving, overbroad, unfounded, and unqualified assertions littering the Appeal, including that Rule 149 'governs the admissibility of expert evidence',[22] and the description of DNA and autopsy reports admitted as source material or through the bar table as 'expert reports authored by expert witnesses',[23] wholly ignores the clear language of Rule 149. The assertion that the Decisions are 'fundamentally contrary to the intention behind, and the wording of, the Rule itself'[24] is entirely disconnected from reality.

10. The protections enshrined in Rule 149, including the disclosure to the opposing Party of the final report of any expert witness to be called by a Party, the ability of the opposing Party to challenge the qualifications of such expert witness and to assert its wish to cross-examine him or her, and for admission of such report to be decided on only after the relevant testimony,[25] are indeed more than those applicable to material admissible through Rule 138.[26] Such heightened protection is logical considering, *inter alia,* that such an expert is being called to testify by a Party following the receipt of instructions and the compilation of a report pursuant to such instructions and for the specific purposes of a case.

11. Accordingly, the Trial Panel's interpretation of Rule 149 does not depart from its plain and ordinary meaning and is consistent with the object and purpose thereof.[27] The Appeal fails to establish how or why the specific protections in Rule 149 should

[22] Appeal, paras 3, 20.
[23] Appeal, para.4.
[24] Appeal, paras 21, 30, 32.
[25] Rule 149 (1)(2) and (4).
[26] Appeal, para.30.
[27] *See* Public Redacted Version of Decision on Veseli and Krasniqi Appeal against Second Decision on Specialist Prosecutor's Bar Table Motion, KSC-BC-2020-06/IA029/F00005/RED, 23 August 2023, para.36; *Specialist Prosecutor v. Thaçi, Smakaj, et al.,* Public Redacted Version of Decision on the Specialist Prosecutor's Office's Appeal Against the Decision on the Confirmation of the Indictment, KSC-BC-2023-12/IA002/F00012/RED, 3 April 2025, para.20; Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on SC and SPO, KSC-CC-PR-2017-01/F00004, 26 April 2017, para.14.

be applicable to anything other than the final report of any expert witness to be called by a Party. Indeed, the Defence's definition of an expert report as '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', which is wholly detached from the applicable regulatory framework governing this case, cites to nothing.[28]

12. The Appeal also misrepresents the 3 July 2025 Decision, which does not lend any credence to the Defence's distorted interpretation of Rule 149.[29] That decision dealt exclusively with reports that, unlike the Items, were specifically prepared for this case or other cases before the Kosovo Specialist Chambers ('KSC').[30] Consistent with the Decisions, the Panel highlighted the clear language of the Rule, noting that 'Rule 149(1) refers to the "report of any expert witness *to be called by a Party*"'.[31] Accordingly, when the Panel, in the 3 July 2025 Decision, subsequently noted that 'Rule 149 is *lex specialis* for the admission of expert reports',[32] it was clearly referring to the Rule being *lex specialis* for the admission of the report of expert witnesses called by a Party (or participant)[33] in the case.

13. Indeed, the 3 July 2025 Decision further establishes that a party does not have 'the power to control the applicability of Rule 149' and cannot seek to tender the reports by experts specifically commissioned by a Party or participant other than through Rule 149.[34]

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[28] Appeal, paras 24(b), 51.
[29] *See* Appeal, paras 20, 33-36, 51, fns.49, 60-61, 76 citing to Decision on Victims' Counsel's Submission of Expert Reports and Request to Admit Them into Evidence, KSC-BC-2020-06/F03305, 3 July 2025 ('3 July 2025 Decision').
[30] *See* 3 July 2025 Decision, KSC-BC-2020-06/F03305, para.8.
[31] 3 July 2025 Decision, KSC-BC-2020-06/F03305, para.27 (emphasis in original).
[32] 3 July 2025 Decision, KSC-BC-2020-06/F03305, para.40.
[33] While Victims' Counsel is not a Party, as defined in Rule 2, the Panel reasonably exercised its discretion under Rule 114(4)-(5) and applied Rule 149 to expert reports tendered by him.
[34] *Contra* Appeal, paras 20, 29-30; *see* 3 July 2025 Decision, KSC-BC-2020-06/F03305, paras 31, 40, 45(e)(f).

2. The Decisions are consistent with relevant practice

14. At the outset, it is unclear how or why the description of certain Items, such as, for example, P03376, pages SPOE0068512-4, which on its front page reads: 'AUTOPSY REPORT',[35] as an autopsy document or document concerning the death of a victim can be considered '[u]nprecedented' as claimed in the Appeal.[36] Regardless, the Defence fails to even articulate any argument which could establish any error occasioned by the use of such language.

15. Similarly, it is unclear why the assertion that such documents require or express some kind of expertise would be controversial.[37] In this regard, the Appeal exceeds the scope of the certified issues, containing argument based on language contained not in the Decisions, but in decisions certifying leave to appeal.[38] Accordingly, such submissions, in particular the odd claim that such language is part of a 'fresh attempt to incorrectly demean the nature and quality' of the Items,[39] should be summarily dismissed.[40]

16. There is nothing 'unorthodox' about the tendering and admission of DNA and autopsy reports as source material or through the bar table.[41] Such practice does not circumvent the requirements of Rule 149 since this Rule is inapplicable to anything beyond the 'final report of any expert witness to be called by a Party'.[42] Panels at this and other courts have consistently found that there is no requirement that items be authenticated through witnesses for the purposes of admission.[43] In the same vein, the

[35] *See* P03376, p.SPOE0068512.
[36] *See* Appeal, paras 23, 43.
[37] *See* Appeal, paras 23, 39-40, 52-53.
[38] *See* Appeal, paras 39, 52-53, fns.62, 77.
[39] Appeal, para.52.
[40] Decision on Thaçi and Selimi Appeals Against Decisions on Special Investigative Measures, KSC-BC-2018-01/IA006/F00010, 4 July 2024, Confidential ('4 July 2024 Decision'), paras 20-22.
[41] *Contra* Appeal, paras 3-4.
[42] *Contra* Appeal, para.22.
[43] *See e.g.* Decision on Prosecution Motion for Admission of Nerodime Zone Documents, KSC-BC-2020-06/F03082, 4 April 2025, para.11, fn.19; *Specialist Prosecutor v. Shala*, Public redacted version of Trial

Trial Panel has also previously ruled, consistent with the findings of other courts, that admission of a proposed exhibit does not require that the witness arguably best-positioned to comment upon it be called to testify, provided the standard admissibility requirements under Rule 138(1) are met.[44]

17. The Appeal fails to substantiate the assertion that the Decisions are 'without basis or precedent' and misconstrues ICTY jurisprudence concerning ICTY Rule *94 bis* and the admission of evidence of the same or similar nature to the Items.[45]

18. In this case, at least two other autopsy reports[46] and at least one other DNA report[47] of the same kind as some of the Items were previously admitted with no Defence objection. The Defence itself has also tendered a death certificate and DNA evidence, doing so in the regular course of cross-examination, not through the author thereof.[48]

19. This is consistent with the practice at other courts. For example, the ICTY Trial Chamber in *Haradinaj et al.* admitted forensic documents concerning a victim's cause of death through the bar table.[49] Another ICTY Trial Chamber in *Mladić* admitted

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Judgment and Sentence, KSC-BC-2020-04/F00847/RED, 16 July 2024, para.89; *Specialist Prosecutor v. Mustafa*, Further redacted version of Corrected version of Public redacted version of Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, 16 December 2022, para.42; ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 29 October 2008, para.34.

[44] Decision on Prosecution Request for Admission of Documents Shown to W04739, KSC-BC-2020-06/F02293, 8 May 2024, Confidential, para.32.

[45] Appeal, paras 21, 31.

[46] *See* P01678, pp.SITF00169000-2, admitted through W04422 (Transcript, 25 September 2024, pp.20212-4); P01147, pp.SPOE00208416-8, admitted through W04371 (Transcript, 30 April 2024, pp.15249-52; the Defence did not object in its written submissions either, *see* Joint Defence Consolidated Response to F02195 and F02196, KSC-BC-2020-06/F02229, 8 April 2024, Confidential, para.35, fn.69).

[47] *See* P00201, p.SPOE00056170, admitted through W03811 (Transcript, 20 June 2023, pp.5131-5).

[48] *See* 1D00022, pp. SITF0182644, SITF0182646-7, admitted through W04337 (Transcript, 11 July 2023, pp.5432-7, 5454).

[49] *See e.g.* ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84*bis*-T, Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its 65*ter* Witness and Exhibit Lists and Admit Evidence Pursuant to Rule 92*ter*, 26 January 2012, paras 36-37, 38(d).

through the bar table, *inter alia,* death certificates, identification reports, autopsy reports, and records of exhumations.[50]

20. ICTY Chambers have also dismissed defence arguments that UN Commission of Experts reports should be tendered through a witness given the alleged inability of the Defence to test the prosecution's subjective interpretation thereof, and admitted such items through the bar table.[51] ICTY and IRMCT jurisprudence establishes that 'a party's decision not to tender a document through an expert witness does not, in and of itself, prevent it from being tendered from the bar table'.[52]

3. The Items are not testimonial in nature

21. The contention that 'expert reports are also witness statements, albeit a special class of witness statement',[53] citing to nothing, is undeveloped. Accordingly, such argument should be summarily dismissed.[54] Regardless, such assertions are unfounded, ignore the important distinction between evidence which is and is not testimonial in nature,[55] and have also been rejected by other courts.

22. In *Ongwen,* an ICC Chamber rejected the Defence contention that reports from a medical examiner seeking to determine how a person died were testimonial in

[50] ICTY, *Prosecutor v. Mladić,* IT-09-92-T, Decision on Prosecution Motion to Admit Evidence from the Bar Table – Proof of Death Documents, 31 January 2014, para.5.
[51] ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Bar Table Motion, 28 November 2013 ('*Hadžić* Decision'), para.182.
[52] IRMCT, *Prosecutor v. Stanišić and Simatović*, MICT-15-96-T, Decision on Prosecution motion for admission of documents underlying expert report of Christian Nielsen, 5 March 2018 ('*Stanišić and Simatović* Decision'), para.9; *See also Hadžić* Decision, para.8.
[53] Appeal, para.38.
[54] 23 June 2021 Decision, para.15; *Specialist Prosecutor v. Gucati and Haradinaj,* KSC-BC-2020-07/IA005/F00008/RED, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021, para.16.
[55] *See Specialist Prosecutor v. Mustafa*, Decision on the submission and the admissibility of evidence, KSC-BC-2020-05/F00169, 25 August 2021, para.29.

nature and should be tendered through a witness in court. It found there was no bar to the admissibility of such items through the bar table, noting that it was:[56]

> satisfied that these items are documentary evidence and are not testimonial in nature. The reports primarily seek to determine how a person died. They are not the result of a formal dialogue similar to an interrogation or questioning, and the medical examiner cannot be considered as having been 'questioned in the capacity as a witness' when providing his reports. Rather, the post-mortem reports are records memorialising objective data made in the ordinary course of business of a medical examiner. Further, the information contained within the reports is routine, descriptive and non-analytical, in short, not testimonial in nature.

The logic and reasoning applied in this decision are entirely applicable to the Items.

23. The same ICC Chamber rejected prosecution submissions that reports prepared by a psychiatrist after an in-court examination of certain prosecution witnesses could only be admitted pursuant to Rule 68 of the ICC Rules,[57] finding they did not constitute prior recorded statements and could be submitted as documentary evidence.[58] In particular, the Chamber noted that the fact such items were at least in part analytical in nature does not make them automatically fall under Rule 68 of the ICC Rules and that there was no apparent indication that the relevant doctor provided his opinions as a witness or prospective witness, meaning that '[t]he connection to the legal proceedings is too attenuated to justify a consideration of the reports as a prior recorded statement.'[59] Again, this logic and reasoning is wholly applicable to the Items.

24. ICTY jurisprudence mirrors the Decisions and the ICC decisions referred to above, similarly standing in stark contrast to the Appeal's unqualified assertions and

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[56] ICC, *Prosecutor v Ongwen*, ICC-02/04-01/15-795, Decision on Prosecution's Request to Submit 1006 Items of Evidence, 28 March 2017, paras 18, 21. *See also* para.49.
[57] Rule 68(1) of the ICC Rules of Procedure and Evidence refers to 'previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony'.
[58] ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-1670, Decision on Defence Request to Submit 470 Items of Evidence, 14 November 2019 ('2019 *Ongwen* Decision'), paras 16-19. *See also* ICC, *Prosecutor v. Al-Rahman*, ICC-02/05-01/20-885-Red, Decision on the Prosecution's bar table motion, 27 February 2023, para.40.
[59] 2019 *Ongwen* Decision, paras 17-18.

selective reliance on jurisprudence. By way of example, in *Kordić and Čerkez,* an ICTY Trial Chamber dismissed defence objections to the admission of a report concerning exhumations on the basis that it constitutes expert testimony of persons who are not going to testify in the case and who are not available for cross-examination, finding that it constituted 'purely documentary evidence of fact about what happened as part of the judicial investigative process undertaken' and admitting it under ICTY Rule 89(C),[60] the general admissibility provision akin to Rule 138.

25. Finally, even assuming, *arguendo*, that the Items contain 'opinion evidence' as argued by the Defence,[61] there is no principle or Rule requiring exclusion thereof on this basis alone.[62]

4. The Decisions do not prejudice the Defence

26. The Appeal fails to establish that the Items' admission adversely impacts the fairness or expeditiousness of the proceedings[63] or to demonstrate that actual prejudice has been suffered from the Items' admission, raising only a speculative or hypothetical risk of prejudice, which does not suffice.[64] The Decisions do not prejudice the Defence and ensure full compliance with the applicable legal framework and the interests of justice.[65]

[60] ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, 29 July 1999, paras 29-32.
[61] *See* Appeal, paras 21, 30.
[62] *See e.g.* Decision on Prosecution Sixth Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F03012, 13 March 2025, Confidential, para.58
[63] *See Specialist Prosecutor v. Mustafa,* Public redacted version of Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material, KSC-BC-2020-05/F00281, 13 December 2021, para.14.
[64] Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning, KSC-BC-2020-06/IA028/F00011, 4 July 2023, Confidential, para.51; Decision on Appeal Against Oral Order of 5 December 2024, KSC-BC-2020-06/IA031/F00005, 11 April 2025, Confidential, para.33.
[65] *Contra* Appeal, para.30.

27. The Defence was in possession of the Items for months or years. Arguments of a lack of considerable notice cannot succeed in this context.[66] The right to cross-examination is not absolute,[67] and the admission of the Items is not *per se* prejudicial merely because the opposing Party cannot cross-examine the author or others involved in their preparation.[68]

28. The Defence was given ample opportunity to challenge the admissibility of the Items, both those that were tendered as source material and those tendered through the bar table,[69] through other procedural avenues, including written submissions and cross-examination of witnesses including W04826, W04874, and W04875. Nothing in the Decisions constitutes any bar or hindrance on the Defence's ability to adequately challenge the Items, or to seek expert opinion of its own in order to do so.[70] On the contrary, the Defence remains able to challenge the Items, including through calling witnesses and making closing submissions concerning the Items.

29. Significantly, the Trial Panel specifically noted that the fact the authors of certain Items had not been called will be considered when determining the weight, if any, to be attributed to them.[71]

30. In striking the proper balance between the Prosecution's duty to present the available evidence to prove its case with the right of the Accused to have adequate time and facilities to prepare a defence and to be tried without undue delay, a certain level of flexibility must be maintained in the context of a complex multi-accused trial involving a considerable amount of evidence.[72] This is not a single murder trial. The

[66] *See* Appeal, paras 21, 29.
[67] 4 July 2024 Decision, para.58.
[68] *See e.g. Specialist Prosecutor v. Shala,* Public redacted version of Decision on the Specialist Prosecutor's Motion for Admission of Documentary Evidence, KSC-BC-2020-04/F00491, 20 April 2023, para.35.
[69] *Contra* Appeal, para.30.
[70] *See* Appeal, paras 21, 29-30.
[71] Murder Victim Documents Decision, KSC-BC-2020-06/F03211, para.18.
[72] *See* Decision on Thaçi's and Selimi's Appeals against Decisions F01057 and F01058, KSC-BC-2020-06/IA025/F00007, 18 April 2023, Confidential, para.41. While this decision was reached in a different

Accused are charged with the murder of over 100 victims, necessitating streamlined, efficient presentation of evidence while ensuring full respect for the Accused's rights. The Decisions are in full compliance with the regulatory framework governing this case and strike the right balance.

31. Further, the Panel is composed of professional Judges, not lay jurors. Professional Judges routinely deal with evidence concerning proof and/or circumstances of death. As the Appeals Panel has noted, 'the assessment of a document's authenticity and reliability is a question falling within the scope of the Trial Panel's responsibilities, and one that does not *require* expert testimony where the Trial Panel, as in this instance, is capable of reaching a determination based on its own knowledge and expertise.'[73]

32. The fact the SPO elected to call a forensic geneticist, W04875, and two forensic pathologists, W04826 and W04874, in order to address certain general and more specific issues in their relevant fields of expertise meant that, should the Defence or Judges have had any concerns or questions about matters of relevance to these fields of expertise, they had every opportunity to ask questions in relation thereto. The SPO's decision to call such experts neither means that it was required to do so nor that the Defence has been prejudiced by the SPO not calling the author of every report falling within such fields of expertise to testify.

C. FOR THE PURPOSES OF RULE 149, NOT ALL AUTOPSY REPORTS ARE EXPERT REPORTS AND NOT ALL PATHOLOGISTS ARE EXPERTS (THIRD GROUND)

33. The Third Ground fails to establish any error for the same reasons set out above in relation to the First and Second Grounds.

procedural context, the principle enunciated is also applicable here, where the Panel has acted within the bounds of the applicable framework and properly exercised its discretion.

[73] *Mustafa* Appeal Judgment, para.103.

34. Defence assertions that '[f]orensic pathologists are experts' and '[a]utopsies are unquestionably expert reports', like other bald assertions throughout the Appeal, cite to nothing and conflate scientific skill with what constitutes an expert witness and what constitutes an expert witness report under the regulatory framework governing this case.[74]

35. The sole fact that, years or decades ago, forensic pathologists examined the bodies of individuals for the purposes of establishing cause of death and those individuals now happen to be victims of charged crimes in this case in no way automatically renders the relevant forensic pathologists 'witnesses in this case'.[75] Such claims defy logic and ignore the process at this[76] and multiple other courts where inclusion on a list of witnesses or similar proactive steps are necessary for someone to be considered a witness in the trial at issue.

36. Moreover, the Items are not witness statements within the meaning of Rules 153-155 according to the definition before this and other courts,[77] and Defence hypotheticals in this regard[78] also fail to demonstrate any error.

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[74] Appeal, para.43.
[75] *Contra* Appeal, para.43.
[76] *See e.g.* Rule 95(4)(5); Order on the Conduct of Proceedings, para.48.
[77] *See* Order on the Conduct of Proceedings, fn.14 providing that the term 'Statement should be understood for the purpose of this Order as defined, *inter alia,* in *Specialist Prosecutor v. Gucati and Haradinaj,* KSC-BC-2020-07/F00334, Decision on the Prosecution Request for Admission of Items Through the Bar Table, 29 September 2021, paras 85-87'. Para.86 of the latter decision provides that 'a written statement under Rules 153-155 of the Rules ought to be taken *in the context of* or *in connection with* legal proceedings to come within the scope of these Rules so as to distinguish such a statement from a statement made and recorded in a context unrelated to such proceedings. In particular, the Panel notes that a key factor in deciding whether an out-of-court statement took place in the context of or in connection with legal proceedings is whether that statement was given to a person or body authorised to collect evidence for use in such proceedings.' *See also Specialist Prosecutor v. Shala*, Public redacted version of corrected version of Decision on Defence request for admission of non-oral evidence and amendment of its exhibit list, KSC-BC-2020-04/F00769/COR, 15 January 2024, para.15 ('A statement is made when a witness is questioned about his or her knowledge of the relevant facts, in the context of or in connection with an investigation or with proceedings'). The above decisions of Trial Panels I and II rely on the definition of witness statement adopted by other courts. *See also* paras 22-23 above.
[78] Appeal, para.44.

37. Defence attempts to demonstrate error by invoking the 9 July 2010 *Karadžić* Decision are equally inapt.[79] That decision concerned a subject-matter entirely distinguishable from DNA analysis or autopsies,[80] and, unlike with W04826, W04874, and W04875, the documents at issue were not discussed in the expert's report.[81]

38. This case is governed by the legal framework of this court and the Order on the Conduct of Proceedings, paragraph 123 of which provides that '[s]ource material will be admitted upon request, when justified.' No mention is made of any limited purpose for the admission of source material.[82] Significantly, the Defence did not challenge this provision when given the opportunity to do so before its adoption[83] and did not seek leave to appeal in relation thereto once it was adopted.[84] The Defence had not argued, prior to its requests for leave to appeal the Decisions, that source material cannot be admitted for the truth of its content, and arguments in this regard clearly exceed the scope of the certified issues. The latter factors alone mean the Defence is barred from raising such arguments at this stage and that such argument should be summarily dismissed.[85]

39. Regardless, even the 9 July 2010 *Karadžić* Decision relied on in the Appeal clearly foresees the possibility of source material being admitted without restrictions as to purpose, noting that 'if, at a later date, a witness discusses the content of a

[79] Appeal, para.46, fn.68 citing ICTY, *Prosecutor v Karadžić*, IT-95-5/18-T, Decision on Prosecution's submission on the relevancy of certain documents relating to the testimony of Richard Philipps with Appendix A, 9 July 2010 ('9 July 2010 *Karadžić* Decision').
[80] *See* 9 July 2010 *Karadžić* Decision, para.4.
[81] *See* 9 July 2010 *Karadžić* Decision, para.7.
[82] *See* Appeal, para.46.
[83] *See* Annex 1 to Order for Submissions on the Draft Order on the Conduct of Proceedings, KSC-BC-2020-06/F01178/A01, 22 December 2022, para.122; Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings (F01178/A01), KSC-BC-2020-06/F01203, 13 January 2023; Further Krasniqi Defence Submissions in Addition to Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings, KSC-BC-2020-06/F01207, 13 January 2023.
[84] *See* Krasniqi Defence Request for Certification to Appeal the "Order on the Conduct of Proceedings", KSC-BC-2020-06/F01246, 1 February 2023, seeking leave to appeal in relation to other matters in the Order on the Conduct of Proceedings.
[85] *See* 23 June 2021 Decision, para.15.

document previously admitted as a source document in such a way that renders that document admissible for its content, its status can be changed to reflect its admission for all purposes.'[86] Even by that measure, considering that the expert reports and/or testimony of W04826, W04874, and W04875 address every item admitted as source material, there would be no justifiable reason to limit the purpose of its admission.

40. Further, in IRMCT jurisprudence more recent than the 9 July 2010 *Karadžić* Decision, a trial chamber 'carefully considered the practice of ICTY trial chambers in relation to the purpose for which documents cited in expert reports may be admitted and observe[d] that there is no uniform approach'.[87] The same chamber then held that 'where admission of material cited in an expert report is sought through a bar table motion, the Trial Chamber will generally assess it for its substantive content',[88] and noted that 'evidence may be admitted from the bar table if it fulfills the requirements of Rule 105(C) of the Rules, specifically that the item proposed for admission has sufficient reliability, relevance, and probative value in respect of issues in the case'[89] mirroring the Rule 138 requirements at the KSC and the approach in the Decisions.

41. Similarly, in *Martić*, an ICTY Trial Chamber held that 'both Rule 92*bis* (E) and Rule 94 *bis* should not be interpreted to the effect to include documents other than "transcripts" and "expert reports" respectively', noting it was more appropriate for the prosecution to separately seek 'the admission of documents supporting the transcripts and the expert reports under examination in court, pursuant to the general

[86] 9 July 2010 *Karadžić* Decision, para.10.
[87] *Stanišić and Simatović* Decision, para.11.
[88] *Stanišić and Simatović* Decision, para.11.
[89] *Stanišić and Simatović* Decision, para.12. Rule 105(C) of the IRMCT Rules of Procedure and Evidence, MICT/Rev.8, 26 February 2024, provides that 'A Chamber may admit any relevant evidence which it deems to have probative value' (the language is identical in the version of the rules applicable at the time of the *Stanišić and Simatović* Decision, *see* MICT/1/Rev.2, 26 September 2016).

principles regulating the admissibility of evidence before this Tribunal.'[90] At the KSC, those principles are enshrined in Rule 138(1), which the Decisions fully considered.

42. In another *Karadžić* decision, the Trial Chamber rejected the Accused's general objection to the admission of documents through the bar table due to the prosecution's failure to use them with expert witnesses, noting it 'does not see any merit to the Accused's general objection that each of the Documents should have been used in connection with the testimony of expert witnesses', and that the testimony of the experts called in that case and the content of their expert reports could not be expected to reflect each document which is relevant to the subject matter covered by their evidence.[91] The same decision established that where a document is clear on its face and does not require further contextualisation by an expert, it can be admitted from the bar table rather than through an expert witness.[92]

43. The Appeal once again resorts to speculation in asserting that the Items 'are not the type of "source material" that the law ordinarily anticipates arising with an expert report',[93] providing no support for this contention and immediately delving into further speculation as to the reasons why the SPO tendered the Items in the manner it did.[94] It seemingly escapes only the Defence that such an approach, other than being fully compliant with the regulatory framework governing this case, is also expeditious and in line with the rights of the Accused, victims and witnesses, there being no legitimate need or reason for 'secondary autopsies'.[95]

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[90] ICTY, *Prosecutor v Martić*, IT-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 *bis*(D) and of Expert Reports Pursuant to Rule 94 *bis*, 13 January 2006, para.47.
[91] ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Motion for the Admission of Documents from the Bar Table (Municipalities), 25 May 2012 ('25 May 2012 *Karadžić* Decision'), paras 13, 22.
[92] 25 May 2012 *Karadžić* Decision, para.22.
[93] Appeal, para.47.
[94] Appeal, para.47.
[95] *See* Appeal, para.47.

44. Finally, Defence comment about the substance of W04874's evidence[96] is both misleading[97] and beyond the scope of the certified issues and should be rejected.

45. Overall, the Defence does not demonstrate any error in the Decision and, in turn, the Third Ground must fail.

D. RULE 149 DOES NOT APPLY TO SOURCE MATERIAL AND, FOR THE PURPOSES OF THIS RULE, NOT ALL DNA REPORTS ARE EXPERT REPORTS AND NOT ALL FORENSIC GENETICISTS ARE EXPERTS (FOURTH AND FIFTH GROUNDS)

46. The Fourth and Fifth Grounds, once again erroneously conflating scientific skill with what constitutes an expert witness and an expert witness report under the regulatory framework governing this case,[98] fail to establish any error for the same reasons set out above in relation to the First, Second, and Third Grounds.

47. In claiming that 'DNA profiling and sequencing […] has uniformly been considered by domestic and international courts to be expert evidence'[99] the Defence does not even attempt to contextualise such claim within the legal framework governing this case. The fact that other courts have deemed certain DNA-related items to be admissible through the expert witnesses who authored them[100] in no way means that similar evidence at such courts, let alone the KSC, is not admissible as source material or through the bar table.

48. Neither the Panel nor the SPO has suggested that the authors of the Items possess less expertise than W04875 or that the subject-matter of their expertise necessarily differs.[101] The distinction is that whereas W04875, like W04826 and W04874, has been instructed as an expert witness by the SPO and produced expert

[96] Appeal, para.47.
[97] *See e.g.* Transcript, 22 January 2025, pp.24233-4, 23 January 2025, pp.24434-5.
[98] Appeal, paras 50-51.
[99] Appeal, para.53.
[100] *See* Appeal, para.53 and the jurisprudence cited in Appeal, fn.78.
[101] *Contra* Appeal, para.54.

reports based on such instruction, the authors of the Items, with the exception of W04826, were not so instructed and instead produced the Items in the ordinary course of their professions. It is this distinction that dictates the applicability of Rule 149, consistent with the plain language of that Rule.

49. W04875 did not confirm the ICMP reports were expert reports.[102] In the excerpt cited by the Defence in support of this assertion,[103] Defence Counsel describes such reports as 'expert reports' without any qualification or explanation of the term, and W04875 does not specifically remark on that aspect of the question put to him. Regardless, the determination as to whether the source material amounts to an 'expert report' within the specific meaning of Rule 149 is a legal one properly made by the Trial Panel and now pending before the Appeals Panel. It is not for W04875 or Defence Counsel to decide.

50. Finally, Defence comment about the substance of W04875's evidence[104] is both misleading[105] and beyond the scope of the certified issues and should be rejected.

51. In light of the above, the Fourth and Fifth Grounds, like the other Grounds, fail to demonstrate any error and should be dismissed accordingly.

III. RELIEF REQUESTED

52. For the foregoing reasons, the Panel should deny the Appeal in its entirety.

[102] *Contra* Appeal, para.54.
[103] *See* Appeal, para.54, fn.79 citing Transcript, 13 January 2025, p.23627, lns.3-5.
[104] Appeal, para.55.
[105] *See e.g.* Transcript, 13 January 2025, pp.23560-5, 23676-8.

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Monday, 4 August 2025

At The Hague, the Netherlands.