

In: KSC-BC-2023-12

Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi

Before: Single Trial Judge
Judge Christopher Gosnell

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi, Bashkim Smakaj, Isni Kilaj

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**Public Redacted Version of Joint Defence Response to Prosecution Request
for Leave to Appeal Decision on the Admission of Expert Evidence of Witness**
8

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I. INTRODUCTION

1. The Defence for Messrs Hashim Thaçi, Bashkim Smakaj and Isni Kilaj (“Defence”) hereby responds to the Specialist Prosecutor’s Office (“SPO”) Request¹ for leave to appeal the Decision on the Admission of Expert Evidence of Witness 8 (“Impugned Decision”).² The SPO requests the Single Trial Judge (“STJ”) to certify the following issues for appeal:

- (i) Whether the Panel erred in considering material that is not admitted or offered for admission, or noticed to the Parties, as relevant to the admissibility of tendered evidence (“First Issue”);
- (ii) Whether the Panel erred and/or abused its discretion in its evaluation of expertise for the purpose of Rule 149 (“Second Issue”);
- (iii) Whether the Panel erred in concluding that the methods applied in the Report are not sufficiently transparent to permit a meaningful assessment of its probative value (“Third Issue”); and
- (iv) Whether the Panel erred in law in finding Rule 107 authorisation to have been required, and/or abused its discretion in finding that Witness 8’s refusal to answer questions in the absence of advance Rule 107 authorisation prejudiced the Defence or violated the right of the Accused to examine witnesses against them (“Fourth Issue”; collectively, “Issues”).³

¹ KSC-BC-2023-12/F00851, Prosecution request for leave to appeal Decision F00825, 9 April 2026, confidential (“Request”).

² KSC-BC-2023-12/F00825, Decision on the Admission of Expert Evidence of Witness 8, 27 March 2026, confidential (“Impugned Decision”).

³ SPO Request, pp. 1, 4, 7, 9.

2. The Defence opposes the Request. The Issues merely disagree with and/or misrepresent the Impugned Decision's findings and reasoning. In any case, the SPO fails to establish that any of the Issues meet the requirements of Rule 77(2).⁴

II. APPLICABLE LAW

3. Pursuant to Article 45(2) of the Law⁵ and Rule 77(2), a Panel may grant certification to appeal if (i) the matter raised by the party is an "appealable issue"; (ii) the issue would significantly affect either (a) the fair and expeditious conduct of the proceedings, or (b) the outcome of the trial; and (iii) immediate resolution by the Court of Appeals Panel ("Appeals Panel") may materially advance the proceedings ("Certification Test").⁶
4. The applicable law concerning the Certification Test has been laid out in a prior decision of the Pre-Trial Judge.⁷
5. Even where the Certification Test is satisfied, certification is not automatic but remains at the discretion of the Panel.⁸

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

⁵ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("Law").

⁶ KSC-BC-2023-12/F00149, [Decision on Specialist Prosecutor's Request for Leave to Appeal the "Decision on the Confirmation of the Indictment"](#), 30 January 2025, public ("Decision F00149"), para.16; KSC-BC-2020-07/F00423, [Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect](#), 8 November 2021 ("Case 07 Decision F00423"), paras 11-12.

⁷ [Decision F00149](#), paras 17-22. See also [Case 07 Decision F00423](#), paras 13-21.

⁸ ICTY, *Prosecutor v. Strugar*, IT-01-42-T, [Decision on Defence Motion for Certification](#), 17 June 2004, para.2; *Prosecutor v. Karadžić*, IT-95-5/18-PT, [Decision on Accused's Application for Certification to Appeal Decision on Adequate Facilities](#), 13 February 2009, para.6, and references cited therein; ICTR, *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, [Decision on Defence Extremely Urgent Motion for Reconsideration or Certification of the 'Decision on Defence Urgent Motion to Hear Testimony of Dr. Susan Thomson via Videolink' of 9 March 2011](#), 30 March 2011 ("Nzabonimana Decision"), paras 29, 40.

III. SUBMISSIONS

A. FIRST ISSUE

6. The First Issue misrepresents the Impugned Decision's use [REDACTED]⁹ and the basis of the STJ's findings on the alleged confidentiality constraints. It therefore does not emanate from the Impugned Decision and is not an appealable issue.¹⁰
7. The SPO submits [REDACTED].¹¹ This is a misrepresentation of the Impugned Decision that selectively and erroneously treats an individual preliminary strand of the STJ's reasoning as the sole underpinning of his overall conclusion and exaggerates the legal significance of the STJ's references to [REDACTED].¹²
8. The STJ referred to [REDACTED] not as a "baseline" but as initial indicia of doubt about the extraordinarily broad and undefined confidentiality Witness 8 asserted. The STJ did not consider that [REDACTED].
9. [REDACTED].¹³ The Impugned Decision [REDACTED].¹⁴ The SPO itself placed this matter at issue by asking the STJ to accept the Witness's refusals to answer at face value.¹⁵

⁹ Impugned Decision, [REDACTED].

¹⁰ KSC-BC-2020-07/F00546/COR, [Corrected Version of Decision on Request for Certification or Reconsideration of F00541](#), 1 February 2022 ("Case 07 Decision F00546"), paras 20-21; KSC-BC-2020-06/F03312, [Decision on Joint Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of International Reports](#), 7 July 2025 ("Case 06 Decision F03312"), para.27.

¹¹ Request, para.3.

¹² Cf. ICC, *Prosecutor v. Said*, ICC-01/14-01/21-435, [Decision on Defence Request for Leave to Appeal](#), 27 July 2022 ("Said Decision"), para.7; *Prosecutor v. Mokom*, ICC-01/14-01/22-357, [Decision on Mr Mokom's Request for Leave to Appeal the 'Decision on Mr Mokom's Request for Compensation'](#), 14 March 2025 ("Mokom Decision"), para.27.

¹³ Cf. ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3273, [Decision on "Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'"](#), 24 July 2015 ("Bemba Decision"), paras 22-23.

¹⁴ Impugned Decision, paras 35, 36.

¹⁵ Transcript of 3 March 2026 ("3 March Transcript"), p.566, line 1 to p.567, line 22; KSC-BC-2023-12/F00796, Prosecution Response to Defence Submissions F00784 and F00785, 16 March 2026, confidential ("SPO Submissions F00796"), paras 11, 14, 16.

10. The actual basis of the STJ's conclusion on the scope of the alleged confidentiality was [REDACTED],¹⁶ the SPO submissions of 15 December 2025,¹⁷ [REDACTED],¹⁸ and Witness 8's 4 March 2026 oral testimony,¹⁹ which together "do not reflect a clear and consistent understanding of the scope of the matters that Mr Herlaar would refuse to answer in court, even in private session".²⁰ The STJ was clear that his "doubts about the scope of the asserted confidentiality" were based on "[t]hese inconsistencies ... combined with the lack of any written or authoritative basis for the asserted confidentiality", not on [REDACTED].²¹ The First Issue, therefore, does not emanate from the Impugned Decision.²²

B. SECOND ISSUE

11. The Second Issue misrepresents and merely disagrees with the Impugned Decision's findings as to whether "comparative microdot analysis" constitutes an expertise for the purpose of Rule 149 and the STJ's weighing of factors in making this finding. It is therefore not an appealable issue.²³

12. The Impugned Decision found that the SPO failed to establish that "comparative microdot analysis" "is sufficiently organized or recognized as a reliable body of knowledge or experience with which the Witness could potentially provide assistance to the Chamber".²⁴ This conclusion was based on the absence of

¹⁶ Impugned Decision, para.38.

¹⁷ Impugned Decision, paras 39-40.

¹⁸ Impugned Decision, para.41.

¹⁹ Impugned Decision, para.42.

²⁰ Impugned Decision, para.37.

²¹ Impugned Decision, para.42.

²² [Case 07 Decision F00546](#), paras 20-21; [Bemba Decision](#), paras 22-24; [Said Decision](#), para.7; [Mokom Decision](#), para.27.

²³ KSC-BC-2020-06/F03297, [Decision on Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875](#), 1 July 2025 ("Case 06 Decision F03297"), paras 39, 46; KSC-BC-2020-06/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 ("Case 06 Decision F03298"), para.39; [Case 06 Decision F03312](#), paras 15, 49.

²⁴ Impugned Decision, para.61.

“significant academic publication” concerning the alleged expertise and the absence of its acceptance in other judicial proceedings.²⁵

13. The Second Issue argues that, in concluding that the basis of Witness 8’s Report does not constitute an expertise, the STJ “applied an unduly restrictive standard to evaluate the relevant expertise, and inverted the tests for the qualification of an expert and the evaluation of their evidence under Rule 149”.²⁶ The SPO accepts that the Impugned Decision correctly laid out the applicable legal standard.²⁷ It contends, however, that the STJ weighed competing indicators of the expertise’s existence “too rigidly”.²⁸ This amounts to a mere disagreement with the STJ’s finding on whether “comparative microdot analysis” constitutes an expertise and the weight the STJ afforded Witness 8’s training, certifications, and NFI affiliation, relative to that he afforded the absence of academic literature or judicial recognition of the alleged expertise.
14. Contrary to the SPO’s characterisation, the STJ did not treat the absence of academic literature or the lack of prior judicial recognition as individually “dispositive”,²⁹ but considered them as factors within a holistic assessment.³⁰ The decisions cited by the SPO³¹ are inapposite as they address whether a witness’s own lack of prior publications or appearances as an expert disqualifies them from serving as an expert in a field whose existence as an expertise is uncontested.³² The STJ found “that the SPO has not established that ‘comparative

²⁵ Impugned Decision, paras 60, 61.

²⁶ Request, para.9.

²⁷ Request, para.10.

²⁸ Request, para.11.

²⁹ Request, para.12.

³⁰ Impugned Decision, paras 60-62.

³¹ Request, para.12, fns 22, 24.

³² ICTY, *Prosecutor v. Milošević*, IT-98-29/1-T, [Decision on Defence Expert Witnesses](#), 21 August 2007, para.6; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC/F2549, [Decision Allowing Mr Gary Platt \(Witness PRH147\) to Give Expert Opinion Evidence](#), 13 April 2016, para.9.

microdot analysis' is a recognised or accepted expertise" in the first place,³³ not that Witness 8 possessed insufficient qualifications in a recognised expertise.

15. The Second Issue also posits that because the STJ did not doubt that Witness 8 was an expert in "Striations, Impressions, and Shape Analysis" ("SISA"), he should have assessed whether Witness 8's Report falls within this expertise.³⁴ This, however, misrepresents the Impugned Decision as the STJ never found that SISA constitutes an expertise in which the Witness could be an expert under Rule 149. The SPO submitted that Witness 8's area of expertise for the purposes of Rule 149 was "comparative microdot analysis", not SISA,³⁵ and the STJ rightly conducted his assessment on that basis.

C. THIRD ISSUE

16. While acknowledging that the Impugned Decision correctly identified the applicable legal standard,³⁶ the Third Issue merely disagrees with the STJ's assessment of the probative value of Witness 8's evidence and repeats previously rejected arguments. It is therefore not an appealable issue.³⁷
17. The Request simply disagrees with several interrelated findings of the STJ and repeats rejected arguments. These include: (i) that "deficiencies in the information regarding a forensic expert's source material do not warrant the exclusion of their evidence";³⁸ (ii) that "[e]ven accepting that confidentiality restrictions limited Witness 8's evidence regarding specific aspects of his analysis, his conclusions were nonetheless testable";³⁹ and (iii) that "the

³³ Impugned Decision, para.61.

³⁴ Request, paras 9-11.

³⁵ Impugned Decision, para. 57, referring to SPO Submissions F00796, para. 7. See also 3 March Transcript, p.535, lines 23-24.

³⁶ Request, para.17.

³⁷ [Case 06 Decision F03297](#), para.46; [Case 06 Decision F03298](#), para.39; [Case 06 Decision F03312](#), paras 15, 20, 28, 49.

³⁸ Request, para.18. See Impugned Decision, paras 53-55.

³⁹ Request, para.19. See Impugned Decision, para.31. Cf. SPO Submissions F00796, para.18.

availability of independent proof of the same alleged facts remains fundamentally relevant to mitigating any potential prejudice arising from any perceived deficiencies in the witness's evidence".⁴⁰

18. Moreover, the Third Issue does not contest the STJ's detailed factual findings as to serious deficiencies in the transparency of Witness 8's methodology.⁴¹ Rather, it suggests that the Defence could have engaged its own expert⁴²—repeating a submission the STJ explicitly considered and rejected in the Impugned Decision for detailed reasons which the SPO does not engage with.⁴³ The Third Issue is thus a mere disagreement.

D. FOURTH ISSUE

19. The Fourth Issue merely disagrees with and misrepresents the Impugned Decision's finding that the SPO was under an obligation to bring a Rule 107 application in relation to Witness 8 and that serious prejudice was occasioned by its failure to do so, reiterating prior rejected arguments in this regard. It is therefore not an appealable issue.⁴⁴
20. Regarding the SPO's obligations in relation to Rule 107 and Witness 8, the STJ held that:

The SPO, as the party calling the witness, and being informed of the witness's position, was responsible for making the application under Rule 107 ... The SPO was duty bound under Rule 107 to bring an application setting out as transparently as it could the scope and grounds on which Mr Herlaar, as an employee of a State agency and being made available to testify by that agency, sought to be relieved of his obligation to answer any and all questions put to him during his testimony, subject to the Court's control.⁴⁵

⁴⁰ Request, para.19. *See* Impugned Decision, para.54. *Cf.* SPO Submissions F00796, para.14.

⁴¹ Impugned Decision, paras 26-29.

⁴² Request, para.19.

⁴³ Impugned Decision, para.31.

⁴⁴ [Case 06 Decision F03297](#), para.46; [Case 06 Decision F03298](#), para.39; [Case 06 Decision F03312](#), paras 15, 20, 28, 49.

⁴⁵ Impugned Decision, paras 46, 48.

21. The STJ further found that “Mr Herlaar’s refusal to answer questions, in the absence of a duly approved Rule 107 application, was prejudicial to the Defence”, providing detailed reasoning in this regard.⁴⁶
22. The Fourth Issue challenges “findings that Rule 107 authorisation was mandatory in the circumstances, and that its absence resulted in prejudice to the Defence”.⁴⁷ Far from “accept[ing] responsibility for not having made [a Rule 107] application”,⁴⁸ the SPO suggests that its failure to file a Rule 107 request is the result of it not having been called upon to do so by the STJ.⁴⁹ It submits that “[h]ad any further information been required to clarify the scope, basis, or applicability of [confidentiality restrictions on Witness 8’s testimony], it could have been requested at any time” and that “[c]ertainly, to the extent it was considered necessary to effectively oversee the testimony, appropriate rulings should have been made.”⁵⁰ It adds that it was incumbent upon the STJ to “order briefing on Rule 107” if he considered that Witness 8’s refusal to answer questions absent the SPO having sought Rule 107 measures would result in serious procedural impropriety or undermine the integrity of the proceedings.⁵¹ In arguing as such, the Fourth Issue thus merely ignores and disagrees with the STJ’s findings that Rule 107 required the SPO to bring a Rule 107 application with respect to Witness 8.
23. The SPO further suggests that, “in the absence of a Rule 107 application”, it was the STJ’s responsibility to use his powers under the Law and Rules to “regulate and oversee the conduct of [Witness 8’s] testimony”.⁵² This is the first time the SPO has raised such an issue; until now it has consistently supported the STJ’s

⁴⁶ Impugned Decision, paras 49-51, quote at para.49.

⁴⁷ Request, para.22.

⁴⁸ Request, para.22. *Compare* SPO Submissions F00796, para.20.

⁴⁹ Request, paras 24, 26.

⁵⁰ Request, para.24.

⁵¹ Request, para.26.

⁵² Request, para.23.

approach to the management of Witness 8's testimony.⁵³ Notwithstanding that a Panel's duties do not include remedying a party's failure to comply with the Rules in tendering evidence, this is merely a disagreement with the STJ's exercise of his considerable discretion in trial management,⁵⁴ unaccompanied by any arguments as to how this constituted an abuse of discretion.

24. Furthermore, the SPO's claim that "[t]here is no factual basis for the finding in the [Impugned] Decision that an advance Rule 107 application would, in and of itself, have further clarified either the scope or basis of such restrictions"⁵⁵ simply disagrees with an explicit finding of the Impugned Decision⁵⁶ and repeats previously rejected arguments.⁵⁷ A prior Rule 107 application would have allowed the NFI to clarify the scope of Witness 8's 'authorised' evidence in light of the confidential agreements related to microdots, including through the presence of a NFI representative during his testimony.⁵⁸
25. Lastly, the Fourth Issue also misrepresents and merely disagrees with the Impugned Decision by claiming that it established prejudice on the basis of "a question of procedural irregularity" alone.⁵⁹ The STJ specifically set out how Witness 8's refusal to answer questions absent Rule 107 authorisation resulted in concrete and significant prejudice and does not establish such prejudice merely

⁵³ 3 March Transcript, p.566, line 1 to p.568, line 5; SPO Submissions F00796, para.23. *See also* Impugned Decision, para.47.

⁵⁴ KSC-BC-2020-06/IA028/F00011/RED, [Public Redacted Version of Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning](#), 4 July 2023, para.10; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.10, [Decision on Prosecution's Appeal against Trial Chamber's Order on Contact between the Accused and Counsel during an Accused's Testimony pursuant to Rule 85\(C\)](#), 5 September 2008, para.8, and references cited therein.

⁵⁵ Request, para.26.

⁵⁶ Impugned Decision, para.46.

⁵⁷ 3 March Transcript, p.566, line 17 to p.567, line 4; SPO Submissions F00796, para.21.

⁵⁸ *Cf., e.g.*, KSC-BC-2020-06/F01847/RED, [Public Redacted Version of Decision on the Prosecution Request for Rule 107 Measures for W04147 and W04868 \(F01764\)](#), 10 October 2023, paras 11, 18, 34(b); KSC-BC-2020-06, Transcript of 25 March 2024, p.13524, line 7 to p.13525, line 16; KSC-BC-2020-06, Transcript of 15 September 2025, p.26477, line 12 to p.26480, line 22.

⁵⁹ Request, para.27;

on the basis of a procedural irregularity.⁶⁰ The SPO simply disagrees with the STJ's finding of prejudice without setting out how this resulted from an abuse of discretion.⁶¹

E. THE ISSUES DO NOT MEET THE RULE 77(2) REQUIREMENTS

26. Even if the STJ considers that one or more of the Issues are appealable, none of the Issues meet the restrictive requirements of Rule 77(2). Certification would, moreover, significantly impair, rather than facilitate, the fair and expeditious conduct of the proceedings.

27. As the STJ has broad discretion on issues related to the admission of evidence, appellate intervention in decisions on such issues is "warranted only in very limited circumstances".⁶² Certification to appeal decisions falling within such discretion thus must be an "absolute exception".⁶³

i. The Issues Do Not Significantly Affect the Fair and Expeditious Conduct of the Proceedings

28. None of the Issues meet the first test under Rule 77(2).

29. The Impugned Decision rests on three independent and sufficient grounds for the exclusion of Witness 8's evidence: (1) insufficient methodological transparency;⁶⁴ (2) the probative value of the Witness's evidence being outweighed by the prejudicial effect of his refusal to answer questions absent

⁶⁰ Impugned Decision, paras 49-51.

⁶¹ Request, para.27.

⁶² KSC-BC-2020-07/IA006/F00006, [Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses](#), 7 January 2022, para.14; KSC-CA-2022-01/F00114, [Appeal Judgment](#), 2 February 2023, para.35; KSC-BC-2020-06/IA030/F00009, [Decision on Krasniqi and Selimi Appeals against "Decision on Prosecution Motion for Admission of Accused's Statements"](#), 31 May 2024, para.4.

⁶³ KSC-BC-2020-06/F02157, [Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960](#), 29 February 2024, para.11; ICTR, *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73.2, [Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence](#), 4 October 2004, para.5. See also [Case 06 Decision F03297](#), paras 33, 39, [Case 06 Decision F03298](#), paras 28, 39; [Case 06 Decision F03312](#), paras 15, 49.

⁶⁴ Impugned Decision, paras 25-32, 52-55.

prior Rule 107 authorisation,⁶⁵ and (3) failure to establish that the Witness's opinion is the product of a recognised expertise.⁶⁶ The STJ considered that the first of these grounds was sufficient to render Witness 8's evidence inadmissible⁶⁷ and that the third constituted an "independent and sufficient basis to find" the Witness's Report inadmissible.⁶⁸ The second ground also constituted an independent and sufficient basis for the exclusion of Witness 8's evidence.⁶⁹

30. Accordingly, none of the Issues would individually have "materially affected" the Impugned Decision—the STJ would not have reached a "substantially different" decision but for the alleged error.⁷⁰ Each Issue raises an alleged error which would be "inconsequential and [does] not materially affect the correctness of the overall finding" of the Impugned Decision.⁷¹ Even if the SPO were to succeed on one, two, or even three of the Issues on appeal, the exclusion of Witness 8's evidence would stand on the remaining independent ground(s). Accordingly, the SPO's claim that errors arising from the Second and Third Issues would have "led to the unfair exclusion of Witness 8's evidence" is unfounded as Witness 8's evidence would remain excluded on the basis of the second ground noted above⁷². Conversely, even if the STJ erred with respect to

⁶⁵ Impugned Decision, paras 33-51.

⁶⁶ Impugned Decision, paras 56-62.

⁶⁷ Impugned Decision, para.55.

⁶⁸ Impugned Decision, para.63. The exclusion of the Report on this basis would self-evidently also render the Associated Materials and the Witness's oral testimony inadmissible under Rule 149.

⁶⁹ Impugned Decision, paras 49-51. *See also* KSC-BC-2023-12/F00784/COR, Corrected Version of Thači Defence Submissions Relating to Witness 8, 10 March 2026, confidential, paras 19-20.

⁷⁰ ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-169, [Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"](#), 13 July 2006, para.84.

⁷¹ ICC, *Situation in Uganda*, ICC-02/04-179, [Judgment on the Appeals of the Defence against the Decisions entitled Decision on Victims' Applications for Participation of Pre Trial Chamber II](#), 23 February 2009, para.40.

⁷² Impugned Decision, paras 33-51.

the Fourth Issue, Witness 8's evidence would remain excluded on the basis of the first and third grounds above.⁷³

31. If the SPO were successful on the First Issue, there would be no material effect on the Impugned Decision's findings. As set out above, the [REDACTED] did not form the basis of the STJ's conclusions concerning the alleged confidentiality restrictions.⁷⁴ Even if the STJ erred in referring to [REDACTED], his "doubts about the scope of the asserted confidentiality" would stand on the basis of the inconsistencies in the representations of the NFI, Witness 8, and "the lack of any written or authoritative basis for the asserted confidentiality".⁷⁵ The SPO refers to the First Issue's "manifest implications for the parameters of judicial decision-making".⁷⁶ However, it is well-established that the submission that an issue is of general importance or interest or may arise in future proceedings is insufficient to meet the first test of Rule 77(2).⁷⁷
32. The SPO has repeatedly referred to "corroborating evidence" and described Witness 8's evidence as "corroborative", conceding that the Witness's evidence is not the only evidence it relies on with respect to its allegations concerning Mr Thaçi's alleged printing of documents.⁷⁸ In this respect, where expert evidence is not the only evidence a party has relied upon in support of a given claim, its exclusion has been found not to raise issues which would satisfy the first test under Rule 77(2).⁷⁹

⁷³ Impugned Decision, paras 25-32, 52-62. *Contra* Request, para.31.

⁷⁴ *See supra* paras 7-10.

⁷⁵ Impugned Decision, paras 37-42, quote at para. 42.

⁷⁶ Request, para.30.

⁷⁷ *E.g.*, ICTY, *Prosecutor v. Milošević*, IT-02-54-T, [Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding](#), 20 June 2005, para.5; ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-734, [Decision on Defence Request for Reconsideration and, in the Alternative, Leave to Appeal the 'Decision on Witness Preparation and Familiarisation'](#), 9 April 2020, para.14, and references cited therein.

⁷⁸ Request, paras 19, 31; SPO Submissions F00796, para.14.

⁷⁹ ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, [Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report](#), 30 August 2006, para.13; ICTR, *Prosecutor v. Simba*, ICTR-2001-76-I, [Decision on Prosecutor's Request for Certification to](#)

33. The SPO also refers to the impact of the Issues on “the ability of the SPO to present its case” and the prospect of “reopening of presentation of evidence by the SPO” to address the exclusion of Witness 8’s evidence.⁸⁰ These submissions are misplaced. The SPO closed its case before the resolution of the pending matter of the admission of Witness 8’s evidence, rather than seeking an extension of the deadline for its Rule 129 Notice until a decision on the admission of the Witness, which would have allowed it to call additional evidence in the event of his non-admission. Regardless of the caveat in the SPO Rule 129 Notice,⁸¹ the reopening of the SPO’s case could only be permissible with respect to new evidence which could not have been identified and presented in its case-in-chief with the exercise of reasonable diligence.⁸² A desire to present additional evidence due to an adverse evidentiary decision which was pending prior to the closure of case-in-chief does not meet this standard.
34. Far from advancing the proceedings, certification of any of the Issues would substantially delay them. The SPO case is closed and the STJ has set 5 May 2026 as the target date for the Defence to file notifications of the closure of their respective cases.⁸³ Notwithstanding the outcomes of pending Defence evidentiary motions and without prejudice to Defence submissions responsive to Order F00857, on the current trajectory, closing arguments could realistically be heard in June/July 2026.

[Appeal Decision Dated 14 July 2004 Denying the Admission of Testimony of an Expert Witness](#), 16 August 2004, para.6.

⁸⁰ Request, paras 29, 31.

⁸¹ KSC-BC-2023-12/F00792, [Prosecution Notice pursuant to Rule 129](#), 13 March 2026, public, para.1 (“without prejudice to any appropriate relief” concerning pending evidentiary matters).

⁸² KSC-BC-2020-04/F00813/RED, [Public Redacted Version of Decision on the Defence Request for Leave to Reopen its Case](#), 19 March 2024, para.16; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, [Judgement](#), 20 February 2001, para.283; *Prosecutor v. Kordić and Čerkez*, IT-65-14/2-A, [Judgement](#), 17 December 2004, para.222.

⁸³ KSC-BC-2023-12/F00857, Order for Submissions on the Further Conduct of Proceedings, 16 April 2026, public (“Order F00857”), para.5.

35. Certification would derail that trajectory. In light of the necessary briefing schedule under Rule 170(1) and need for the Appeals Panel to deliberate, an interlocutory appeal on any of the Issues could not realistically be resolved before June 2026 at the earliest, and in all likelihood would take considerably longer. During that period, the Defence would be unable to close its case. The Defence must know whether or not Witness 8's evidence will be admitted before *inter alia* deciding what, if any, responsive evidence to call, whether to engage its own expert, and how to shape its closing submissions. The Defence cannot be expected to rest while evidentiary matters bearing on the scope of the SPO case it is responding to are outstanding on appeal.⁸⁴
36. Closing arguments would be pushed past the summer recess and into the autumn at the earliest. The judgment would be delayed accordingly. That delay would be incurred in the context of an appeal concerning Issues which, as set out above, could not individually dislodge the Impugned Decision's independent and sufficient grounds for excluding Witness 8's evidence.
37. The SPO submits that its "remedial submissions" addressing the "unfairness" of the Impugned Decision—should it not be subject to appellate review—would adversely affect expeditiousness.⁸⁵ Notwithstanding the uncertain nature and basis of such submissions given the closure of the SPO's case, the certain and substantial delay that certification itself would cause outweighs the speculative delay the SPO invokes to justify it. An interlocutory appeal which effectively pauses a late-stage trial for months to explore Issues which do not individually materially affect the Impugned Decision is antithetical to the expeditious conduct of the proceedings. Moreover, it risks jeopardising the Accused's right to trial within a reasonable time under Article 21(4)(d) of the Law.

⁸⁴ Cf. KSC-BC-2020-07/F00547, [Order Pursuant to Rule 131 of the Rules](#), 1 February 2022, para.5 (ordering the Defence to close their cases as "there are no outstanding evidentiary matters forming part of the Defence case").

⁸⁵ Request, para.30.

ii. Immediate Appellate Resolution Will Not Materially Advance the Proceedings

38. None of the Issues satisfy the second test of Rule 77(2). Because none of the Issues would individually—even if error is established—result in the reversal of the exclusion of Witness 8’s evidence,⁸⁶ any relief that could be obtained through the exceptional remedy of an interlocutory appeal would not materially advance the proceedings.⁸⁷ Thus, even if there is any merit to any of the Issues, they are more appropriately addressed in an appeal from judgment, if any.
39. The above submissions concerning the closure of the SPO case and delays certification would cause provide further reasons why immediate appellate resolution would stall the proceedings rather than advance them.⁸⁸

F. DISCRETION NOT TO CERTIFY

40. Finally, if the STJ finds the Certification Test satisfied as to one or more Issues, he should exercise his discretion in denying certification.⁸⁹ The delay and uncertainty that certification would introduce at this late juncture would jeopardise the Accused’s right to be tried within a reasonable time, as noted above, warranting such an exercise of discretion.⁹⁰ The Appeals Panel is competent to consider whether the non-admission of evidence constituted an abuse of discretion in the context of an appeal from judgment, if any.⁹¹

⁸⁶ See *supra* paras 29-31.

⁸⁷ [Case 06 Decision F03298](#), paras 28, 35.

⁸⁸ See *supra* paras 34-37.

⁸⁹ See *supra* para.5 and authorities cited therein.

⁹⁰ ICTY, *Prosecutor v. Halilović*, IT-01-48-PT, [Separate Opinion of Judge O-Gon Kwon Appended to Trial Chamber Decision Dated 12 January 2005 on Prosecution Request for Certification for Interlocutory Appeal of ‘Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment’](#), 14 January 2005, para.8.

⁹¹ See, e.g., ICTY, *Prosecutor v. Halilović*, IT-01-48-A, [Judgement](#), 16 October 2007, paras 28-41; *Prosecutor v. Šainović et al.*, IT-05-87-A, [Judgement](#), 23 January 2014, paras 161-165; *Prosecutor v. Prlić et al.*, IT-04-74-A, [Judgement](#), 29 November 2017, paras 139-152.

IV. CLASSIFICATION

41. This filing is classified as confidential pursuant to Rule 82(4).

V. CONCLUSION

42. On the basis of the above, the Defence requests that the STJ:

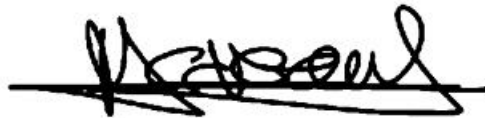
REJECT the Request; and

DENY the SPO certification to appeal the Impugned Decision.

[Word count: 4,983 words]

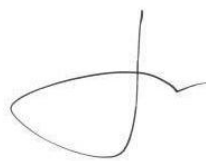
Respectfully submitted,

20 April 2026



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