



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** KSC-BC-2020-06

**The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli,  
Rexhep Selimi, and Jakup Krasniqi**

**Before:** Trial Panel II

Judge Charles L. Smith III, Presiding Judge

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 18 July 2024

**Language:** English

**Classification:** Public

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**Decision on SPO Request for Leave to Appeal the Decision on Selimi Defence  
Motion to Exclude Evidence of W04846**

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

## I. PROCEDURAL BACKGROUND

1. On 19 June 2024, the Panel issued its Decision on Selimi Defence Motion to Exclude Evidence of W04846 (“Impugned Decision”).<sup>1</sup>
2. On 26 June 2024, W04846 testified in the present proceedings.<sup>2</sup>
3. On 26 June 2024, the Specialist Prosecutor’s Office (“SPO”) filed a request for leave to appeal the Impugned Decision (“Request”).<sup>3</sup>
4. On 8 July 2024, the Defence for Rexhep Selimi (“Mr Selimi” and “Selimi Defence” respectively) filed a response to the Request (“Response”).<sup>4</sup>
5. On 15 July 2024, the SPO filed a reply to the Response (“Reply”).<sup>5</sup>

## II. SUBMISSIONS

6. The SPO requests leave to appeal the Impugned Decision regarding the following four issues (collectively, “Issues”):

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<sup>1</sup> F02393, Panel, *Decision on Selimi Defence Motion to Exclude Evidence of W04846*, 19 June 2024, confidential (a public redacted version was issued on the same day, F02393/RED).

<sup>2</sup> Transcript of Hearing, 26 June 2024, confidential, pp. 17256-17324.

<sup>3</sup> F02410, Specialist Prosecutor, *Prosecution Request for Leave to Appeal Decision F02393*, 26 June 2024, confidential (a public redacted version was filed on 27 June 2024, F02410/RED).

<sup>4</sup> F02436, Specialist Counsel, *Selimi Defence Response to Prosecution Request for Leave to Appeal Decision F02393*, 8 July 2024, confidential (a public redacted version was filed on 15 July 2024, F02436/RED, F02436/RED).

<sup>5</sup> F02443, Specialist Prosecutor, *Prosecution Reply to ‘Selimi Defence Response to Prosecution Request for Leave to Appeal Decision F02393’*, 15 July 2024, confidential (a public redacted version was filed on the same day, F02443/RED).

1. Whether the Panel gave undue weight to purported inconsistencies and speculation in, and lack of corroboration of, the witness's evidence concerning the Second Allegation ("First Issue");
2. Whether the Panel gave undue weight to the timing and nature of the Second Allegation ("Second Issue");
3. Whether the Panel failed to take into account relevant factors and/or afford them sufficient weight, in particular, that the witness would be available for cross-examination and that the trial is being conducted by professional Judges ("Third Issue"); and
4. Whether the Panel failed to provide adequate reasoning to support its findings on reliability, probative value, and/or prejudice ("Fourth Issue").<sup>6</sup>

7. The SPO submits that the Issues satisfy the test for certification as: (i) they arise from the Impugned Decision, and are discrete and identifiable;<sup>7</sup> (ii) they significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial;<sup>8</sup> and (iii) their immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>9</sup>

8. The Selimi Defence responds that the Request should be rejected.<sup>10</sup> The Selimi Defence argues that the Impugned Decision concerns admission of evidence, which is generally treated as discretionary and where appellate intervention is warranted only in limited circumstances.<sup>11</sup> The Selimi Defence contends that the SPO has failed to identify any discernible errors that would warrant such intervention and that the Request is rife with unsubstantiated criticism, distortions and unsupported reinterpretations of Rule 138.<sup>12</sup> The Selimi Defence further argues that the SPO has failed to demonstrate that the Issues significantly affect

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<sup>6</sup> Request, paras 1, 27.

<sup>7</sup> Request, paras 4-20.

<sup>8</sup> Request, paras 4, 21-24.

<sup>9</sup> Request, paras 4, 25.

<sup>10</sup> Response, paras 1, 27.

<sup>11</sup> Response, para. 1.

<sup>12</sup> Response, paras 1-2.

the fair and expeditious conduct of the proceedings, or the outcome of the trial, and/or that appellate intervention would significantly advance the proceedings.<sup>13</sup>

9. The SPO replies that the Request is clearly limited to discrete aspects of the Impugned Decision, which it accurately represents and which fairly sets out the requirements for leave to appeal.<sup>14</sup> Specifically, the SPO emphasises that: (i) other panels have granted leave to appeal in similar circumstances;<sup>15</sup> (ii) evidence should only be excluded in extreme circumstances and if there is an unfairness unconnected to the evidential value of the evidence, which was not the case for the Second Allegation;<sup>16</sup> and (iii) granting the Request would ensure that fairness is preserved by allowing the SPO a genuine opportunity to present its case.<sup>17</sup>

### III. APPLICABLE LAW

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

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

11. The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.<sup>18</sup>

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<sup>13</sup> Response, paras 22-25.

<sup>14</sup> Reply, para. 1.

<sup>15</sup> Reply, para. 2.

<sup>16</sup> Reply, para. 4.

<sup>17</sup> Reply, para. 5.

<sup>18</sup> See F01237, Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; KSC-BC-2020-07, F00423, Panel, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect* (“Decision on SPO Request for Leave to Appeal F00413”), 8 November 2021, paras 13-21; F00372, Panel, *Decision on Haradinaj Defence’s Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, Panel, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14. See also F00172, Pre-Trial Judge, *Decision on the Thaçi Defence*

#### IV. DISCUSSION

12. In the Impugned Decision, the Panel excluded evidence that W04846 was expected to give in relation to two matters allegedly related to Mr Selimi, and ordered the SPO not to elicit evidence relating to those to matters. The two matters were: (i) the alleged killing of an individual (“First Allegation”); and (ii) the alleged beating and killing of another individual (“Second Allegation”) (collectively the “Allegations”).<sup>19</sup> The Panel found that, as accepted by the SPO,<sup>20</sup> the SPO had not charged the Allegations in the Indictment, nor had the SPO made reference to those in the Pre-Trial Brief.<sup>21</sup> The Panel noted that, while evidence of uncharged “acts and conduct of the Accused” may be inadmissible for the purpose of determining guilt for the crimes charged, such evidence may be admissible for other valid purposes.<sup>22</sup> Nonetheless, in the specific circumstances before it, the Panel exercised its discretion to exclude the Allegations due to the limited *prima facie* probative value and potential substantial prejudice of the Allegations.<sup>23</sup>

##### A. FIRST AND SECOND ISSUES

13. The SPO submits that the First and Second Issues are discrete, identifiable and arise from the Impugned Decision as the Panel’s one paragraph reasoning to exclude the Second Allegation: (i) cannot be reconciled with the Panel’s finding that the Second Allegation is “*prima facie* relevant and sufficiently connected to

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*Application for Leave to Appeal* (“Decision on the Thaçi Defence Application for Leave to Appeal”), 11 January 2021, paras 6-7, 9-17.

<sup>19</sup> Impugned Decision, paras 9, 21, 25.

<sup>20</sup> Impugned Decision, fn. 27; *See also* F02187, Specialist Prosecutor, *Prosecution Response to Selimi Defence Motion for the Exclusion of Evidence of W04846* (“Prosecution Response to Selimi Defence Motion for the Exclusion of Evidence of W04846”), 18 March 2024, confidential, para. 18 (a public redacted version was filed on the same day, F02187/RED).

<sup>21</sup> Impugned Decision, para. 16.

<sup>22</sup> Impugned Decision, paras 16-18.

<sup>23</sup> Impugned Decision, paras 22-24, 26-29, 31.

material facts in the Indictment”;<sup>24</sup> (ii) failed to fully account for the fact that the witness was to testify live;<sup>25</sup> and (iii) represents a significant departure from the Panel’s prior decisions.<sup>26</sup> In respect of the First Issue, the SPO adds that the witness’s prior statements were generally consistent and that any inconsistencies could have been addressed in cross-examination or by assignment of weight at the end of the trial.<sup>27</sup> In respect of the Second Issue, the SPO adds that the Panel failed to acknowledge the Second Allegation’s close temporal connection to the Indictment period and close connection to material facts in the Indictment.<sup>28</sup>

14. The SPO argues that the First and Second Issues individually and/or the Issues collectively affect the fair and expeditious conduct of the proceedings as the Impugned Decision deprived the SPO of the opportunity to elicit and rely on evidence probative of, *inter alia*, the charged joint criminal enterprise and the Accused’s state of mind, and undermines the Panel’s ability to assess W04846’s evidence.<sup>29</sup> Lastly, the SPO contends that appellate resolution of the First and Second Issues will materially advance the proceedings as it will clarify the permissible scope of W04846’s evidence and similarly situated witnesses.<sup>30</sup>

15. The Selimi Defence responds that the SPO has failed to identify that the First and Second Issues are discrete and appealable issues arising from the Impugned Decision.<sup>31</sup> Instead, the Selimi Defence contends that the SPO: (i) challenges the entire procedure of exclusion of evidence developed by the Panel, which has not been challenged previously;<sup>32</sup> (ii) artificially fragments the Panel’s assessment of

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<sup>24</sup> Request, paras 5, 8.

<sup>25</sup> Request, paras 5, 7.

<sup>26</sup> Request, para. 5.

<sup>27</sup> Request, paras 8-9; Reply, para. 3.

<sup>28</sup> Request, paras 11-13; Reply, para. 3.

<sup>29</sup> Request, paras 21-24; Reply, para. 2.

<sup>30</sup> Request, para. 25; Reply, paras 1, 2.

<sup>31</sup> Response, paras 6, 13.

<sup>32</sup> Response, paras 3-6.

the evidence;<sup>33</sup> and (iii) argues that the Panel should have ignored factors which diminish the Second Allegation's probative value.<sup>34</sup>

16. At the outset, the Panel notes that the First and Second Issues substantially overlap as both allege that the Panel erred in giving undue weight to factors included in the Impugned Decision and will therefore be addressed jointly.

17. The Panel further notes that the Third and Fourth Issue are intermingled within the reasoning supporting the First and/or Second Issues.<sup>35</sup> As these are separate issues for which certification to appeal is sought, these arguments are addressed below.<sup>36</sup>

18. As concerns the First and Second Issues, the SPO misrepresents the Panel's reasoning in the Impugned Decision. Contrary to the SPO's submissions, the Panel, when setting out its reasons for excluding the Second Allegation, also referred back to preceding paragraphs 16-18, and 23 of the Impugned Decision when outlining the reasons for its decision.<sup>37</sup> Concerning the SPO's argument that the Panel gave undue weight to inconsistencies and speculations in, and lack of corroboration of, the Second Allegation (First Issue) and to the timing and nature of the Second Allegation (Second Issue), the Panel recalls that these are individual factors considered in an overall assessment of the Second Allegation.<sup>38</sup> In conducting its assessment, the Panel also considered the fact that the Second Allegation was not pleaded in the Indictment, that it was not mentioned in the Pre-Trial Brief as a fact or circumstances relevant to the charges, and that the

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<sup>33</sup> Response, paras 7-8.

<sup>34</sup> Response, paras 11-13.

<sup>35</sup> Request, paras 5, 9, where the SPO set out that "the Panel's one paragraph reasoning to exclude it: (i) cannot be reconciled with the Panel's finding that the anticipated evidence on the Second Allegation is '*prima facie* relevant and sufficiently connected to material facts in the Indictment" and that the Defence "could ultimately cross-examine the witness" and "As addressed below under the Third and Fourth Issues, the Panel did not give sufficient weight to, let alone refer to, such opportunities to challenge the evidence or the Panel's ability to assign it appropriate weight."

<sup>36</sup> See *infra*, paras 24-25, 30-34.

<sup>37</sup> Impugned Decision, paras 26, 28; fn. 53.

<sup>38</sup> Impugned Decision, para. 28.



Second Allegation concerned an allegation that Mr Selimi directly participated in the alleged mistreatment and murder of a person not named in the Indictment as an alleged victim of a charged crime, and the potential prejudice of allowing such evidence to be elicited.<sup>39</sup> After weighing all of these factors, the Panel concluded that, in these specific circumstances, the *prima facie* probative value of the Second Allegation was outweighed by its prejudicial effect. The Panel considers that the Impugned Decision applied the same legal principles set out in prior decisions<sup>40</sup> to a different factual matrix and did not depart from its prior decisions on this point. As noted in the Impugned Decision, judges enjoy a degree of discretion in making such assessments and the decision whether or not to exclude evidence largely depends on the circumstances of the particular case.<sup>41</sup>

19. The Panel, therefore, considers that SPO has failed to demonstrate the First and Second Issues amount to more than mere disagreement with the exercise of the Panel's discretion to exclude evidence.<sup>42</sup>

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

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<sup>39</sup> Impugned Decision, paras 16-18, 23, 28, fn. 53.

<sup>40</sup> See Transcript of Hearing, 17 April 2023, pp. 2863-2866 (First Oral Order); F01623, Panel, *Decision on Thiçi Defence's Motion to Strike Part of W02652's Testimony*, 23 June 2023, confidential, para. 22 (with further references) (a public redacted version was filed on 24 July 2023, F01623/RED); F01380, Panel, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154* ("16 March 2023 Rule 154 Decision"), 16 March 2023, confidential, para. 113 (a public redacted version was issued on 7 November 2023, F01380/RED); F01700, Panel, *Decision on Prosecution Motion for Admission of Evidence of W03724, W03832, W03880, W04368, W04566, and W04769 Pursuant to Rule 154*, 24 July 2023, confidential, para. 27 (a public redacted version was issued on 7 November 2023, F01700/RED); F02350, Panel, *Decision on Thiçi Defence Request Related to W03170*, 31 May 2024, confidential, paras 23-28 (a public redacted version was filed on the same day, F02350/RED).

<sup>41</sup> Impugned Decision, para. 18.

<sup>42</sup> See for example, International Criminal Tribunal for Rwanda, *Prosecutor v. Théoneste Bagosora et al.*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Appeals Chamber, [Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence](#), 19 December 2003, para. 11.



## B. THIRD ISSUE

21. The SPO submits that the Panel failed to consider relevant factors and/or afford them sufficient weight, namely: (i) that W04846 would be available for cross-examination; and (ii) that the trial is being conducted by professional judges.<sup>43</sup> The SPO argues that the Third Issue is discrete, identifiable and arises from the Impugned Decision, affects the fair and expeditious conduct of the proceedings, and/or the outcome of the trial, and requires immediate appellate resolution for the same reasons as the First and Second Issues.<sup>44</sup>

22. The Selimi Defence responds that the SPO merely disagrees with the Impugned Decision.<sup>45</sup> Specifically, the Selimi Defence argues that the SPO fails to support the contention that the Panel would have somehow lost sight of the fact that the trial is conducted by professional judges. The Selimi Defence adds that the possibility for the Defence to conduct cross-examination does not constitute an absolute safeguard against existence of prejudice; if it did, the safeguards in Rule 138 would become meaningless.<sup>46</sup>

23. To the extent the SPO repeats arguments relating to the First and Second Issues in respect of the Third Issue, the Panel recalls the findings above.<sup>47</sup>

24. In the view of the Panel, the SPO attempts to re-litigate whether the Second Allegation should have been excluded by reiterating the same arguments that it raised before the Panel in the Impugned Decision.<sup>48</sup> Further, the Panel's reliance on Rule 138 factors that tipped the balance in favour of exclusion,<sup>49</sup> does not suggest that Panel lost sight of the fact that professional judges are well placed to

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<sup>43</sup> Request, paras 15-16.

<sup>44</sup> *See supra*, paras 13-14; *See* Request, paras 4-5, 21-25.

<sup>45</sup> Response, para. 16.

<sup>46</sup> Response, paras 14-15.

<sup>47</sup> *See supra*, paras 18-19.

<sup>48</sup> *See* Prosecution Response to Selimi Defence Motion for the Exclusion of Evidence of W04846, paras 2, 10-11, 15-16.

<sup>49</sup> Impugned Decision, para. 28.

conduct a holistic assessment of the evidence at the conclusion of trial in accordance with Rule 139(2). Furthermore, the Panel acknowledged in the Impugned Decision, that: (i) “hearsay evidence is admissible before this jurisdiction”; (ii) “inconsistencies within a witness’s proposed evidence do not make such evidence inadmissible,<sup>50</sup> referring to Panel’s jurisprudence on the Panel’s ability to assess weight at the end of the case and the availability of cross-examination;<sup>51</sup> and (iii) that W04846 would be available for cross-examination.<sup>52</sup> The Impugned Decision must be read holistically in this regard.

25. The Panel, therefore, finds that the SPO has failed to establish that the Third Issue amounts to more than mere disagreement with the Impugned Decision.

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

#### C. FOURTH ISSUE

27. The SPO submits that the Panel failed to: (i) set forth its reasoning with sufficient clarity; (ii) consider the general consistency of W04846’s prior statements; (iii) adequately explain why the nature and timing of the Second Allegation was highly prejudicial; and (iv) balance any purported reliability issues or prejudice with the Accused’s ability to cross-examine the witness and the Panel’s ability.<sup>53</sup> The SPO argues that the Fourth Issue is discrete, identifiable and

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<sup>50</sup> Impugned Decision, para. 22.

<sup>51</sup> Impugned Decision, fn. 39 referring to 16 March 2023 Rule 154 Decision, para. 21; F02328, Panel, *Decision on Prosecution Motion for Admission of Evidence of Witnesses W01511, W04260, W04305, W04410, W04744, W04752, and W04764 Pursuant to Rule 154 (F02204)*, 22 May 2024, confidential, para. 89 (a public redacted version was issued on the same day, F02328/RED).

<sup>52</sup> Impugned Decision, para. 10.

<sup>53</sup> Request, paras 17-20; Reply, para. 3.

arises from the Impugned Decision, affects the fair and expeditious conduct of the proceedings, and/or the outcome of the trial, and requires immediate appellate resolution for the same reasons as the First and Second Issues.<sup>54</sup>

28. The Selimi Defence responds that the Fourth Issue does not arise from the Impugned Decision as the Defence had alerted the Panel to the speculative and inconsistent nature of the witness's proposed evidence, and the SPO made no, or limited, attempts to contest the accuracy of the factual arguments made by the Defence, and therefore, the SPO's present objections are belated.<sup>55</sup>

29. To the extent the SPO repeats arguments relating to the First, Second and Third Issues in respect of the Fourth Issue, the Panel recalls the findings above.<sup>56</sup>

30. At the outset, the Panel recalls that certification is not concerned with whether the Impugned Decision is correctly reasoned but whether the certification test has been met.<sup>57</sup> The Panel also notes that arguments that are general in nature, or that suggest that the entirety of the Panel's reasoning is erroneous, such as the SPO's argument that the Panel "set forth its reasoning with insufficient clarity", are generally insufficient for the applicant to meet the threshold of Rule 77(2).<sup>58</sup>

31. The SPO also misrepresents the Panel's findings in the Impugned Decision. While the SPO argues that the Panel failed to consider the general consistency of W04846's prior statements, the Panel clearly considered the consistency of the prior statements but reached a different conclusion, namely that "in W04846's prior statements there are statements which are clearly inconsistent or appear speculative."<sup>59</sup>

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<sup>54</sup> See *supra*, paras 13-14; See Request, paras 4-5, 21-25.

<sup>55</sup> Response, paras 17-21.

<sup>56</sup> See *supra*, paras 18-19, 24-25.

<sup>57</sup> See *for example*, Decision on SPO Request for Leave to Appeal F00413, para. 21 (with further references).

<sup>58</sup> See *for example*, Decision on the Thaçi Defence Application for Leave to Appeal, para. 11 (with further references).

<sup>59</sup> Impugned Decision, para. 28.

32. In addition, in the Impugned Decision, the Panel explained that the Second Allegation was prejudicial because: (i) it was an alleged criminal act of Mr Selimi which was not charged in the Indictment, nor referred to in the Pre-Trial Brief; (ii) “the fact that an Accused is said by a witness to have committed a crime on a prior occasion...has a potential of prejudice to the Accused as it could be introduced to suggest the ‘bad character’ of the Accused, or to show that he had a ‘propensity to act a certain way’”; and (iii) the timing and nature of the Second Allegation made it prejudicial.<sup>60</sup> The SPO merely disagrees with these conclusions.

33. Lastly, in respect of the SPO’s argument that the Panel failed to balance any purported reliability issues or prejudice with the Accused’s ability to cross-examine, and the Panel’s ability to assess and assign weight after having heard the witness, the Panel recalls its finding above.<sup>61</sup> Further, as required by the Rules, the Panel assessed the *prima facie* relevance and probative value of the Second Allegation and balanced it against the prejudicial effect of that evidence.<sup>62</sup> Based on such an assessment, the Panel concluded that the *prima facie* probative value of the Second Allegation was sufficiently limited to be outweighed by the prejudicial effect that would have resulted from allowing the SPO to lead the evidence.

34. The Panel, therefore, finds that the SPO has failed to establish that the Fourth Issue amounts to more than a misrepresentation of, or mere disagreement with, the Impugned Decision.

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

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<sup>60</sup> Impugned Decision, paras 16-18, 23, 28, fn. 53.

<sup>61</sup> See *supra*, para. 24.

<sup>62</sup> Impugned Decision, para. 28.

V. DISPOSITION

36. For these reasons, the Panel **REJECTS** the request for certification to appeal the Impugned Decision.



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**Judge Charles L. Smith, III**  
**Presiding Judge**

Dated this Thursday, 18 July 2024

At The Hague, the Netherlands.