



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-04**
The Prosecutor v. Pjetër Shala

Before: **Pre-Trial Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 29 November 2021

Language: English

Classification: **Public**

**Decision on Application for Leave to Appeal “Decision on Motion Challenging
the Establishment and Jurisdiction of the Specialist Chambers”**

Specialist Prosecutor

Jack Smith

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 12 July 2021, the Defence for Pjetër Shala ("Mr Shala" and "Defence") filed a preliminary motion challenging the jurisdiction of the Specialist Chambers ("SC" and "Preliminary Motion").² The Specialist Prosecutor's Office ("SPO") responded to the Preliminary Motion on 6 September 2021.³ The Defence replied to the SPO's response on 24 September 2021 ("Preliminary Motion Reply").⁴

2. On 18 October 2021, the Pre-Trial Judge issued the "Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers" ("Impugned Decision").⁵ The Pre-Trial Judge found, *inter alia*, that, to the extent that it challenges the establishment of the SC and/or alleges that Mr Shala's constitutional rights have been violated, the Preliminary Motion does not raise questions of jurisdiction under Rule 97(1)(a) of the Rules, and instead addressed these submissions pursuant to his power under Article 39(1) of the Law.⁶

¹ KSC-BC-2020-04, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-04, F00054, Specialist Counsel, *Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC*, 12 July 2021, public.

³ KSC-BC-2020-04, F00071, Specialist Prosecutor, *Prosecution Response to Shala Defence Preliminary Motion Challenging the Jurisdiction of the KSC*, 6 September 2021, public.

⁴ KSC-BC-2020-04, F00084, Specialist Counsel, *Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC*, 24 September 2021, public.

⁵ KSC-BC-2020-04, F00088, Pre-Trial Judge, *Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers*, 18 October 2021, public.

⁶ Impugned Decision, para. 71.

3. On 26 October 2021, the Defence submitted an application seeking certification to appeal certain issues not amounting to jurisdictional challenges in connection with the Impugned Decision (“Application”).⁷
4. On 5 November 2021, the Pre-Trial Judge varied, *proprio motu*, the time limits of the briefing schedule and further determined that his decision would be issued by no later than Monday, 29 November 2021.⁸
5. On 10 November 2021, the SPO responded to the Application (“Response”).⁹
6. On 17 November 2021, the Defence replied to the Response (“Reply”).¹⁰

II. SUBMISSIONS

7. The Defence seeks leave to appeal the Impugned Decision in respect of the following four issues (collectively “Four Issues”):

- (i) Whether the Impugned Decision erred by failing to consider whether the Law and procedure applicable to the SC offer weaker procedural guarantees for the rights of an accused in breach of Articles 6 and 7 of the ECHR and the equivalent provisions of the Kosovo Constitution (“First Issue”);
- (ii) Whether the Impugned Decision erred by failing to consider whether the SC has been established in accordance with the law as an impartial and independent tribunal as required by Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution (“Second Issue”);
- (iii) Whether the Impugned Decision erred by failing to consider whether the purported primacy granted by the Law to Customary International Law violates Article 7 of the ECHR and the equivalent provisions of the Kosovo Constitution (“Third Issue”); and

⁷ KSC-BC-2020-04, F00095, Specialist Counsel, *Defence Application for Leave to Appeal the Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers*, 26 October 2021, public.

⁸ KSC-BC-2020-04, F00101, Pre-Trial Judge, *Order Varying Time Limits for Certification Requests and Setting the Date for the Fourth Status Conference and for Submissions*, 5 November 2021, public, paras 14, 19(a)-(b).

⁹ KSC-BC-2020-04, F00104, Specialist Prosecutor, *Prosecution Response to the Defence Application for Leave to Appeal the Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers*, 10 November 2021, public.

¹⁰ KSC-BC-2020-04, F00109, Specialist Counsel, *Defence Reply to Prosecution Response in Filing F00104*, 17 November 2021, public.

(iv) Whether the Impugned Decision erred by failing to consider that the charges against the Accused (a) for the crime of arbitrary detention and (b) that rely on the doctrine of Joint Criminal Enterprise violate Article 7 of the ECHR and the equivalent guarantees of the Kosovo Constitution (“Fourth Issue”).¹¹

8. The SPO responds that the Application should be rejected because it fails to meet the requirements for leave to appeal and the Defence has not carried the burden to show that any of the Four Issues merit appeal at this stage of the litigation.¹²

9. The Defence replies by inviting the Pre-Trial Judge to certify the Four Issues.¹³

III. APPLICABLE LAW

10. Pursuant to Article 45(2) of the Law, interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that it involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

11. Rule 77(2) of the Rules further provides that the Pre-Trial Judge or Trial 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 a Court of Appeals Panel may materially advance the proceedings.

¹¹ Application, para. 2.

¹² Response, paras 1, 26.

¹³ Reply, paras 3, 22.

IV. DISCUSSION

12. A right to appeal arises only if the Pre-Trial Judge is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.¹⁴ The Pre-Trial Judge sets forth key aspects of the interpretation of the law relevant to this decision below, and incorporates by reference findings on the interpretation of these provisions as previously set out in detail.¹⁵

13. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

- (i) Whether the matter is an “appealable issue”;
- (ii) Whether the issue at hand would significantly affect:
 - (a) The fair and expeditious conduct of the proceedings, or
 - (b) The outcome of the trial; and
- (iii) Whether, in the opinion of the Panel, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁶

14. An “issue” has been described as an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion.¹⁷ Hypothetical or abstract questions or the argument that the Pre-Trial Judge’s entire reasoning is erroneous equally do not meet the test.¹⁸ The first prong of the certification test, as set out in (ii), contains two alternatives: the issue must have significant repercussions on either (a) “the fair and expeditious conduct of

¹⁴ See also KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal (“Thaçi Decision on Leave to Appeal”)*, 11 January 2021, public, para. 9. Similarly ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, para. 20.

¹⁵ See *Thaçi Decision on Leave to Appeal*, paras 9-17.

¹⁶ See *Thaçi Decision on Leave to Appeal*, para. 10.

¹⁷ See *Thaçi Decision on Leave to Appeal*, para. 11.

¹⁸ See *Thaçi Decision on Leave to Appeal*, para. 11.

proceedings” or (b) “the outcome of the trial”.¹⁹ The second prong of the test for certification, as set out in (iii), requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the “judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial” thereby moving the proceedings forward along the right course.²⁰ Failure to establish the first prong, exempts the Pre-Trial Judge from assessing the second prong.²¹ Lastly, where necessary, the Pre-Trial Judge will provide clarifications if it is clear that a misrepresentation of the decision so warrants.²²

A. FIRST ISSUE

15. The Defence argues that, whereas the Pre-Trial Judge rejected the Defence’s submission for having been raised for the first time in the Preliminary Motion Reply, it had duly raised it in its Preliminary Motion, in which it argued that the Law deviates from the Kosovo Constitution and the Kosovo Code of Criminal Procedure and breaches the principle of legality.²³ The Defence adds that it provided an example in support of this submission in the Preliminary Motion Reply.²⁴ The Defence is further of the view that: (i) this issue significantly affects the fair conduct of the proceedings as well as the outcome of the trial as it goes to the core of the guarantees of fair trial; and (ii) an immediate resolution by the Court of Appeals will materially advance the proceedings as it would provide certainty on whether the proceedings are continuing in compliance with fundamental guarantees of fairness and legality.²⁵

16. The SPO responds that the First Issue is not sufficiently precise or specific as it expresses concerns about the Law and procedure applicable to the SC without

¹⁹ See *Thaçi* Decision on Leave to Appeal, para. 12.

²⁰ See *Thaçi* Decision on Leave to Appeal, para. 16.

²¹ See *Thaçi* Decision on Leave to Appeal, para. 15.

²² See *Thaçi* Decision on Leave to Appeal, para. 17.

²³ Application, para. 6.

²⁴ Application, para. 7.

²⁵ Application, paras 12-13.

identifying the specific provisions it challenges, and it complains of weaker procedural guarantees without specifying compared to what they are purportedly weaker.²⁶ It adds that the Defence's arguments misrepresent the procedural history as it quotes selectively from the Preliminary Motion and the full quote makes clear that the original issue did not address procedural guarantees but rather the establishment of the SC and its primacy over other courts in Kosovo.²⁷ Lastly, according to the SPO, it is patently insufficient to generally argue that any challenge arising under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") or the Kosovo Constitution would satisfy the remaining criteria arising from Rule 77(2) of the Rules.²⁸

17. The Defence replies that the SPO impermissibly seeks to interpret the First Issue in a vacuum.²⁹ It adds that the Response is contradictory: on the one hand it purports to argue that the Defence submissions complain of weaker procedural guarantees without specifying what they are purportedly weaker than, but on the other argues that the Accused's challenge was framed entirely around how such guarantees purportedly fell short of the protections in the Kosovo Code of Criminal Procedure, rather than the ECHR or Kosovo Constitution.³⁰ The Defence also contends that the SPO misconstrues the Defence submission; the Defence is not suggesting that the applicable framework is weaker than the ECHR or Kosovo Constitution but that the weaker procedural guarantees available to Mr Shala under the SC procedure breach Articles 6 and 7 of the ECHR and the equivalent guarantees of the Kosovo Constitution that require *inter alia* that in the event of possible application of different frameworks the one most favourable to the accused is the one that ought to be applied.³¹ According to the Defence, the SPO's selected reading of the Defence

²⁶ Response, para. 14.

²⁷ Response, para. 15.

²⁸ Response, para. 11.

²⁹ Reply, para. 5.

³⁰ Reply, para. 8.

³¹ Reply, para. 8.

submission should be rejected as unfair.³² Lastly, the Defence submits that, contrary to the SPO's submissions, certification would not delay the proceedings but rather ensure that the proceedings continue on a correct procedural basis.³³

18. The Pre-Trial Judge recalls that, in the Preliminary Motion, the Defence argued, in general, that the SC is *de facto* an extraordinary court, as opposed to a specialised court, as evidenced by, *inter alia*, the fact that the Law purports to attribute primacy to the SC over all other courts in Kosovo and has been interpreted by the Specialised [sic] Prosecutor and Judicial Panels of the SC in a manner that substantially deviates from the Kosovo Constitution, the Kosovo Code of Criminal Procedure, the Law on Courts, Law No. 03/l-199, and the substantive Kosovo criminal laws.³⁴ The Defence specified its argument by contending that the Law deviates from the Kosovo Constitution and other substantive Kosovo criminal laws on the basis that Articles 3(2)(d) and 12 of the Law are unconstitutional and contrary to the ECHR for granting primacy to customary international law over substantive Kosovo criminal law.³⁵

19. Therefore, the Defence's submissions clearly centred on the primacy of customary international law. Even though the Defence generally referred to the Kosovo Code of Criminal Procedure, it never specifically argued, in the Preliminary Motion, that the procedural guarantees set forth in the Law would fall short of the protections in the Kosovo Code of Criminal Procedure. On this basis, it cannot be said that, as argued by the Defence, the argument that the Law provides weaker procedural guarantees vis-à-vis the Kosovo Code of Criminal Procedure constituted an example of the general reference to the Kosovo Code of Criminal Procedure. This argument clearly exceeds the specific submissions pertaining to the primacy of customary international law and, as a result, it was found to have been raised for the first time in the Preliminary Motion Reply contrary to Rule 76 of the Rules.

³² Reply, para. 9.

³³ Reply, para. 11.

³⁴ Preliminary Motion, para. 7.

³⁵ Preliminary Motion, paras 12-14.

20. In these circumstances, the Defence's submission that, on the basis of the general reference to the Kosovo Code of Criminal Procedure in the Preliminary Motion, the arguments regarding the extent of the procedural guarantees in the Preliminary Motion Reply had been previously raised merely reflects its disagreement with the Impugned Decision. Accordingly, the First Issue does not constitute an appealable issue. As a result, it is not necessary to address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules.

B. SECOND ISSUE

21. The Defence argues that the analysis featured in the Impugned Decision on which the relevant findings are based fails to assess properly the Defence's submissions and provide sufficient reasons in support of the rejection of fundamental issues raised in those submissions.³⁶ The Defence further reiterates its submissions regarding the remaining requirements for certification as set out above.³⁷

22. The SPO responds that the Second Issue misrepresents the Impugned Decision and is, therefore, not appealable.³⁸ According to the SPO, the Pre-Trial Judge expressly considered the Parties' arguments about independence and impartiality.³⁹ The SPO is, furthermore, of the view that these issues are not sufficiently precise as the Defence does not identify any discrete error, any specific arguments not considered, or state concretely whether its claim is that the Pre-Trial Judge did not engage with the arguments sufficiently or that he did not do so at all.⁴⁰ Lastly, the SPO reiterates its submissions regarding the remaining requirements for certification as set out above.⁴¹

³⁶ Application, para. 11.

³⁷ Application, paras 12-13.

³⁸ Response, para. 17.

³⁹ Response, para. 17.

⁴⁰ Response, para. 18.

⁴¹ Response, para. 11.

23. The Defence replies that the Impugned Decision summarily dismissed the Defence's submissions and merely repeated the Pre-Trial Judge's findings made in different proceedings, to which the Defence was not a party.⁴² The Defence adds that the Impugned Decision simply did not engage with: (i) the Defence submissions on the basis of Article 14 of the ECHR and, importantly, Protocol No. 12 to the ECHR; (ii) the argument that the application of a different (and less favourable) legal and procedural regime unlawfully brings the SC outside the Kosovo legal framework; and (iii) that the SC *de facto* operates as an extraordinary court.⁴³

24. The Pre-Trial Judge recalls that, whereas there is no obligation to give a detailed answer to every argument raised, it must be clear from the decision that the essential issues of the case have been addressed.⁴⁴ In the Preliminary Motion, the Defence asserted that the exclusion of Kosovo Albanians renders the establishment of the SC in breach of Articles 6 and 14 of the ECHR.⁴⁵ In the Impugned Decision, the Pre-Trial Judge explicitly considered whether the SC is independent and impartial insofar as it was argued that the international staffing of the SC affects these elements of the right to a fair trial.⁴⁶ To the extent that the Defence is claiming that the Impugned Decision referred to findings made in different proceedings, the Pre-Trial Judge notes that, in the Preliminary Motion, the Defence itself explicitly endorsed the arguments raised by the Defence for Mr Selimi.⁴⁷ Therefore, it cannot be maintained that the application of the findings arising from Case KSC-BC-2020-06, which concern legal principles that are generally applicable, is unfair. Furthermore, the supposed extraordinary nature of the SC has been specifically addressed on the basis of the four-pronged argumentation

⁴² Reply, paragraph 13, footnote 12.

⁴³ Reply, para. 13.

⁴⁴ See for example ECtHR, [Case of Van de Hurk v. the Netherlands](#), 16034/90, Judgment, 19 April 1994, para. 61; [Case of Taxquet v Belgium \[GC\]](#), 926/05, Judgment, 16 November 2010, para. 91.

⁴⁵ Preliminary Motion, para. 11.

⁴⁶ Impugned Decision, para. 76.

⁴⁷ Preliminary Motion, para. 10.

presented by the Defence.⁴⁸ In these circumstances, all essential arguments raised by the Defence have been taken into account.

25. Therefore, the Second Issue merely reflects the Defence's disagreement with the Impugned Decision and does not constitute an appealable issue. As a result, it is not necessary to address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules.

C. THIRD ISSUE

26. The Defence argues that the analysis featured in the Impugned Decision on which the relevant findings are based fails to assess properly the Defence's submissions and provide sufficient reasons in support of the rejection of fundamental issues raised in those submissions.⁴⁹ The Defence further reiterates its submissions regarding the remaining requirements for certification as set out above.⁵⁰

27. The SPO responds that the Third Issue misrepresents the Impugned Decision and is, therefore, not appealable.⁵¹ According to the SPO, the Pre-Trial Judge expressly considered the Parties' arguments about customary international law.⁵² It adds that the Third Issue is also not appealable because, for the same reasons given above in relation to the Second Issue, it is not sufficiently precise and represents a mere disagreement with the Impugned Decision.⁵³ The SPO additionally avers that, to certify an appeal on arguments that were not properly raised or briefed before the Pre-Trial Judge, would violate principles of fundamental fairness and judicial

⁴⁸ Preliminary Motion, para. 7; Impugned Decision, paras 75-79.

⁴⁹ Application, para. 11.

⁵⁰ Application, paras 12-13.

⁵¹ Response, para. 20.

⁵² Response, para. 20.

⁵³ Response, para. 21.

economy and unnecessarily delay the proceedings.⁵⁴ Lastly, the SPO reiterates its submissions regarding the remaining requirements for certification as set out above.⁵⁵

28. The Defence replies that the Pre-Trial Judge's finding does not adequately consider the Defence's elaborate submissions as to the violation of Mr Shala's rights under Article 7 of the ECHR and the equivalent constitutional guarantees.⁵⁶

29. The Pre-Trial Judge observes that, both in the Application and the Reply, the Defence merely submits that its arguments were not adequately considered without any supporting argumentation. In this regard, it is of note that the Pre-Trial Judge recalled the corresponding reasoning developed in Case KSC-BC-2020-06, seeing as the Defence's submissions closely followed the equivalent jurisdictional challenge raised in the latter case.⁵⁷ In any event, the relevant determination arising from Case KSC-BC-2020-06 applies to the legal framework of the SC as a whole.

30. In addition, as explicitly indicated in the Impugned Decision,⁵⁸ the submissions under consideration were, in addition to the section pertaining to the establishment of the SC and Mr Shala's constitutional rights, specifically addressed in the section regarding the jurisdictional challenges raised by the Defence.⁵⁹ The reason is that these sets of submissions overlap significantly given that they centred on the purported need for a domestic legal basis to apply customary international law and the resultant fair trial implications arising from Article 7 of the ECHR.⁶⁰ It bears noting that, in

⁵⁴ Response, para. 22.

⁵⁵ Response, para. 11.

⁵⁶ Reply, para. 17.

⁵⁷ KSC-BC-2020-06, F00223, Specialist Counsel, *Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC*, 15 March 2021, public, paras 40-77.

⁵⁸ Impugned Decision, para. 77 ("In connection with the Defence's related assertion that the Law deviates from the Constitution and other substantive criminal laws in that Articles 3(2)(d) and 12 of the Law grant primacy to CIL, the Pre-Trial Judge, *as will be further detailed below*, has previously found that: (i) the legislator, in adopting the Law as the primary instrument governing SC proceedings, merely transposed crimes that were already part of the legal order and that were binding on individuals under international law into written domestic legislation; (ii) the law is not applied retroactively in these circumstances; and (iii) the application of CIL was accessible and foreseeable at the relevant time").

⁵⁹ Impugned Decision, paras 82-87.

⁶⁰ Preliminary Motion, paras 12-14 and paras 16-19.

respect of the determinations on the jurisdictional challenges, the Defence has exercised its right to appeal, which lies as of right, thus allowing it to develop its arguments in connection with the Third Issue before the Court of Appeals.⁶¹

31. For these reasons, the Third Issue misrepresents the Impugned Decision and, therefore, does not constitute an appealable issue. As a result, it is not necessary to address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules.

D. FOURTH ISSUE

32. The Defence argues that the analysis featured in the Impugned Decision on which the relevant findings are based fails to assess properly the Defence's submissions and provide sufficient reasons in support of the rejection of fundamental issues raised in those submissions.⁶² The Defence further reiterates its submissions regarding the remaining requirements for certification as set out above.⁶³

33. The SPO responds that the Fourth Issue misrepresents the Impugned Decision and is, therefore, not appealable.⁶⁴ According to the SPO, the Pre-Trial Judge expressly considered the Parties' arguments about joint criminal enterprise and arbitrary detention.⁶⁵ As with the Second and Third Issue, the SPO adds that the Fourth Issue is also not appealable as it is not sufficiently precise and represents a mere disagreement with the Impugned Decision.⁶⁶ Lastly, the SPO reiterates its submissions regarding the remaining requirements for certification as set out above.⁶⁷

⁶¹ KSC-BC-2020-04, IA002/F00003, Specialist Counsel, *Defence Appeal against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers*, 8 November 2021, public.

⁶² Application, para. 11.

⁶³ Application, paras 12-13.

⁶⁴ Response, para. 24.

⁶⁵ Response, para. 24.

⁶⁶ Response, para. 25.

⁶⁷ Response, para. 11.

34. The Defence replies that the arguments that prosecuting Mr Shala under the mode of liability of a joint criminal enterprise and for the crime of arbitrary detention violates Article 7 of the ECHR and the equivalent guarantees of the Kosovo Constitution were dismissed without adequate reasoning in breach of Article 6 ECHR and the equivalent guarantees under the Kosovo Constitution.⁶⁸

35. The Pre-Trial Judge observes that the Defence does not specify its generic submission that its arguments were not adequately considered either in the Application or the Reply. Furthermore, in contending that it dedicated significant sections of the Preliminary Motion to arguing that the charges against Mr Shala relying on joint criminal enterprise and arbitrary detention violate the principle of legality, the Defence cites to its arguments raising challenges to the jurisdiction of the SC in other sections of the Preliminary Motion.⁶⁹ Therefore, these sets of arguments overlap. As specifically indicated in the Impugned Decision,⁷⁰ the Defence's arguments pertaining to joint criminal enterprise and arbitrary detention were explicitly considered in the section of the Impugned Decision addressing the Defence's challenges to the jurisdiction of the SC.⁷¹ The Defence has exercised its right to appeal these aspects of the Impugned Decision, which lies as of right, thus allowing it to develop its arguments regarding the Fourth Issue before the Court of Appeals.⁷²

36. It follows that the Fourth Issue misrepresents the Impugned Decision and, therefore, does not constitute an appealable issue. As a result, it is not necessary to address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules.

⁶⁸ Reply, para. 20.

⁶⁹ Application, footnote 5.

⁷⁰ Impugned Decision, para. 78 ("In any event, the Defence's specific arguments in respect of CIL, JCE and arbitrary detention, including in respect of the application of the principle of legality, *will be addressed in the ensuing sections*").

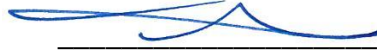
⁷¹ Impugned Decision, paras 80-103.

⁷² See footnote 61 above.

V. DISPOSITION

37. For the above-mentioned reasons, the Pre-Trial Judge hereby:

(a) **REJECTS** the Application.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 29 November 2021

At the Hague, the Netherlands.