



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

Case No: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 15 September 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION DENYING ‘SABRA REQUEST FOR CERTIFICATION TO APPEAL
DECISION ADMITTING STATEMENT OF PRH024 UNDER RULE 158’**

Office of the Prosecutor:Mr Norman Farrell & Mr Alexander Hugh
Milne**Legal Representatives of
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Youssef Khalil**Counsel for Mr Hussein Hassan Oneissi:**Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Ms Natalie von Wistinghausen**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Geoffrey Roberts
Ms Sarah Bafadhel

INTRODUCTION

1. Counsel for the Accused, Mr Assad Hassan Sabra, request certification¹ under Rule 126 (C) of the Special Tribunal’s Rules of Procedure and Evidence to appeal a Trial Chamber decision,² in which Witness PRH024’s statement was declared admissible under Rule 158.³ The Prosecution responded, opposing the application.⁴

2. Witness 024 is Mr Sabra’s relative, who gave a statement providing evidence about mobile telephone numbers that the Prosecution attributes to Mr Sabra, including ‘Purple 018’.⁵ The Trial Chamber—with Judge Re partially dissenting—found that Witness 024 was untraceable, and hence ‘unavailable’, within the meaning of Rule 158, thus allowing the statement’s admission into evidence without requiring the witness to attend for cross-examination. The Trial Chamber, however, also ordered the Prosecution to continue with its efforts to have the witness attend for cross-examination.⁶

PROCEDURAL BACKGROUND

3. The relevant context is that, after interviewing Witness 024, the Prosecution unsuccessfully attempted to secure his attendance at the Special Tribunal’s Beirut Office for another interview.⁷

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3127, Sabra Request for Certification to Appeal Decision Admitting Statement of PRH024 under Rule 158, 5 May 2017 (‘Defence application’).

² F3107, Corrected Version of “Decision on ‘Prosecution Motion to Admit the Statement of PRH024 under Rule 158’ – with Partially Dissenting Opinion of Judge David Re” dated 28 April 2017, 1 May 2017 (‘Decision of 1 May 2017’).

³ The statement has since been marked for identification as exhibit P2103 MFI; *see* transcript of 20 July 2017, pp 52-55.

⁴ F3152, Prosecution Response to Sabra Request for Certification to Appeal Decision Admitting Statement of PRH024 under Rule 158, 22 May 2017 (‘Prosecution response’). Rule 158 permits a Chamber to admit into evidence the statement of a witness ‘who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally’ if it finds that the statement is reliable. The Chamber must also consider whether the statement goes to the acts and conduct of the accused as charged in the indictment.

⁵ Transcript of Audio Recording of Witness PRH024’s Interview and Investigators Notes from Witness PRH024’s Interview, 21 October 2010, P2103 MFI. The amended consolidated indictment pleads that ‘Purple 018’ is a one of a group of three mobiles, used from at least 1 January 2003 until 16 February 2005 to communicate amongst each other and with others outside the group, and used to coordinate a false claim of responsibility for the attack in Beirut on 14 February 2005 that killed Mr Rafik Hariri, the former Lebanese Prime Minister, and 21 others; *see* F2720, Amended Consolidated Indictment, 12 July 2016, para. 15 (e).

⁶ Decision of 1 May 2017, para. 40.

⁷ Statement of Prosecution Investigator, Mr Erich Karnberger (Witness PRH312), 22 March 2016, ERN 60316967-60316986, connected to Prosecution Motion to Admit the Statement of PRH024 under Rule 158 (confidential with confidential annex), 6 February 2017 (‘Prosecution Rule 158 motion’).

4. Upon the Prosecution's application, in a decision in July 2016, the Trial Chamber declared the interview admissible under Rule 155 (C), but required the Prosecution to make the witness available for Defence cross-examination. It also admitted the statements of three other witnesses into evidence without cross-examination.⁸ In a separate decision, in September 2016, the Trial Chamber also admitted into evidence, without cross-examination, the statements of four additional witnesses who also provided evidence related to attributing personal mobile usage to Mr Sabra.⁹

5. The Prosecution, in accordance with the decision, and using the assistance of the relevant Lebanese authorities, then unsuccessfully attempted to secure the witness' attendance at the Beirut Office to testify. The witness expressed his unwillingness to interact with the Special Tribunal unless this was cleared by the Hezbollah Security Committee and stated that any requests from the Special Tribunal should be referred to the Committee or to Mr Hajj Wafiq Safa, the Head of Hezbollah's Central Unit for Liaison and Coordination.¹⁰

6. On 28 September 2016, the Trial Chamber issued a summons requiring the witness to attend the Beirut Office for cross-examination via video-conference link. However, the Lebanese authorities were unable to serve the summons.¹¹

7. Following a Prosecution application to admit Witness 024's statement into evidence under Rule 158 due to the witness' unavailability and a Trial Chamber request for an update on his availability, on 9 March 2017, the Prosecution contacted the witness on his mobile. However, he reiterated his unwillingness to interact with the Special Tribunal, stating that he

⁸ F2644, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH024, PRH069, PRH106 and PRH051 pursuant to Rule 55, 12 July 2016 ('Decision of 12 July 2016'). The statements of Witnesses PRH106 and PRH051, and that of Witness PRH069 with associated investigator's note and a photograph, were admitted into evidence as exhibits P1149, P1151, P1150, and P1150.1, respectively.

⁹ F2730, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH590, PRH339, PRH449 and PRH685, 22 September 2016 ('Decision of 22 September 2016'). These witnesses' statements were admitted into evidence as exhibits P1157, P1155, P1156 and P1158, respectively.

¹⁰ Statement of Prosecution Investigator Mr Karnberger (Witness PRH312), 16 September 2016, ERN 60319886-60319889, connected to Prosecution Rule 158 motion; *see also* Exhibit P2091, Letter from the Lebanese Ministry of Justice to the Prosecutor of the Special Tribunal, 17 August 2010.

¹¹ F2743, Decision on Prosecution Application for a Summons to Appear for Witness PRH024 and Order Issuing a Summons for a Witness, Annex A – Order Issuing Summons for a Witness (confidential), 28 September 2016; F2794, Registry Submission pursuant to Rule 48(C) in relation to the Service of the Summons to Appear for Witness PRH024 (confidential with confidential annexes), 27 October 2016, para. 4 and annex A.

was only in Lebanon for two days and that he would change his mobile SIM card to avoid further contact with the Special Tribunal.¹²

8. When this was brought to the Trial Chamber's attention later that day, it immediately issued another summons, *proprio motu*,¹³ requiring the witness to attend the Beirut Office the following morning to testify via video-conference link. Although Registry officials in Beirut had the summons by the afternoon of 9 March 2017 and were prepared to transmit it to the Lebanese Government that same day, the Lebanese Government representatives could not receive it until the morning of 10 March 2017. The unfortunate result was that it was transmitted to them only after the time set for the witness' attendance for cross-examination. The Lebanese authorities then attempted service of the summons, but only *after* the date set for the witness' testimony, by visiting his home on the afternoon of Saturday, 11 March 2017. He was not, however, at home that day.¹⁴

9. On 17 March 2017, the Registry received correspondence from the Lebanese authorities describing its unsuccessful attempts to serve this second summons on the witness. The correspondence was filed on 4 April 2017. Thereafter, the Prosecution made further submissions on its unsuccessful attempts to contact the witness via telephone and, on 1 May 2017, the Trial Chamber, by majority, declared Witness 024's statement admissible under Rule 158.¹⁵

LEGAL REQUIREMENTS – RULE 126 (C)

10. Rule 126 (C) provides that a decision may only be subject to interlocutory appeal 'with 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, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings'. The

¹² Transcript of 9 March 2017, pp 3-4; Prosecution Rule 158 motion; Statement of Witness PRH539, 9 March 2017, ERN 60321720-60321723 (the statement was subsequently formally filed by the Prosecution on 15 March 2017, connected to F3039, Prosecution Further Submissions to its Motion to Admit the Statement of PRH024 under Rule 158 (confidential), 15 March 2017).

¹³ Of its own volition.

¹⁴ F3027, Order Issuing a Summons for a Witness (confidential), 9 March 2017; F3035, Registry Submission pursuant to Rule 48(C) in Response to the Trial Chamber's Order of 13 March 2017 (confidential), 14 March 2017; F3056, Further Registry Submission pursuant to Rule 48(C) in Response to the Trial Chamber's Order of 13 March 2017, Annex A (confidential), 29 March 2017.

¹⁵ F3056, Addendum to "Further Registry Submission pursuant to Rule 48(C) in Response to the Trial Chamber's Order of 13 March 2017" (confidential with confidential annex A), 4 April 2017; F3083, Prosecution Second Further Submissions to its Motion to Admit the Statement of PRH024 under Rule 158, Annex A (confidential), 13 April 2017; Statement of Prosecution Investigator, Mr Gregory Purser (Witness PRH448), 6 April 2017, ERN 60322937-60322940; Decision of 1 May 2017.

Trial Chamber has set out the principles applicable to the certification of issues for interlocutory appeal.¹⁶ These refer both to decisions of the Appeals Chamber and to international case law.

11. The Trial Chamber again emphasizes that decisions on the admission of evidence are discretionary and highlights its finding that ‘certification to appeal is the absolute exception when deciding on the admissibility of evidence. A question for certification relating to admitting something into evidence will therefore rarely meet the standard in Rule 126 (C).’¹⁷ These findings are applicable here.

SUBMISSIONS

Defence submissions

12. The Sabra Defence seeks certification, under Rule 126 (C), to appeal:

whether the Trial Chamber abused its discretion by admitting the statement of PRH024 pursuant to Rule 158, having previously admitted Seven Statements pursuant to Rule 155 on the understanding that PRH024’s testimony would be subject to cross-examination.¹⁸

13. First, it submits that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. Witness 024’s testimony is critical to the Prosecution’s attribution of three numbers to Mr Sabra, including ‘Purple 018’.¹⁹

14. Although a lack of cross-examination does not bar admission under Rule 158, the Trial Chamber has admitted into evidence the statements of seven witnesses without cross-examination on the ‘sole understanding’ that Witness 024 would attend for cross-examination. As a consequence, the witness’ failure to attend is uniquely prejudicial to the Defence and

¹⁶ See e.g. F2987, Written Reasons for Decision Denying Certification to Appeal the “Decision Clarifying Mr Gary Platt’s Area of Expertise” dated 25 January 2017, 14 February 2017, paras 5-6; F2874, Decision Denying Certification to Appeal ‘Decision on the Admission of Call Sequence Tables related to the Movements of Mr Rafik Hariri and Related Events, and Four Witness Statements’, 6 December 2016, paras 5-6; F1798, Decision on Application for Certification of Decision regarding the Scope of Marwan Hamade’s Evidence, 18 December 2014, paras 12-14.

¹⁷ F1841, Decision on ‘The Defence for Hussein Hassan Oneissi Request for Certification of the “Decision on Prosecution’s Motion for Admission into Evidence of 485 Documents, Photographs and Witness Statements Relevant to Rafik Hariri’s Movements and to Political Events” of 30 December 2014’, 3 February 2015 (‘Decision of 3 February 2015’), para. 11.

¹⁸ Defence application, paras 4, 18.

¹⁹ Defence application, paras 2-3, 9-10.

should bar the statement's admission into evidence under Rule 149 (D) in order to safeguard the fairness of the proceedings.²⁰

15. The Trial Chamber's decisions on these seven other witnesses and on securing Witness 024's attendance have significantly impacted Defence strategy, including in regard to challenging documents admitted under Rule 154.²¹ Given the significance of attribution in the case against Mr Sabra, the inability to challenge Witness 024 or the other seven witnesses will significantly impact the cross-examination of Prosecution analyst, Mr Andrew Donaldson (Witness PRH230), the number of documents and witnesses the Defence may seek to use in its case, and the need for a Rule 167 application.²² Finally, Witness 024's evidence on critical matters in the case against Mr Sabra could, if unchallenged, significantly affect the outcome of the trial.²³

16. Second, an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. Given Mr Donaldson's reliance on the statements of Witness 024 and the seven other witnesses for the attribution of three numbers to Mr Sabra, the admissibility of Witness 024's statement will significantly impact Mr Donaldson's cross-examination, whether the Defence needs to present any evidence, and whether the Trial Chamber needs to write a judgment on Mr Sabra.²⁴

17. Moreover, the Prosecution initially proposed three additional witnesses pertaining to the attribution of three numbers to Mr Sabra, but later stated its intention to withdraw them. In the absence of a formal withdrawal, the admissibility of written statements is likely to arise again, such that an appellate determination on Witness 024's statements would ensure the continuation of the trial 'on the correct course'.²⁵

²⁰ Defence application, paras 11-12. Rule 149 (D) allows the Trial Chamber to 'exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial'.

²¹ Rule 154 allows the admission of evidence from the 'bar table', without requiring a witness to produce or identify it. The evidence must meet the basic requirements of Rule 149 (C) and (D): it must be relevant and probative, and its probative value must not be outweighed by its prejudicial effect.

²² Rule 167 (A) states: 'At the close of the Prosecutor's case, the Trial Chamber shall, by oral or written decision and after hearing submissions of the Parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction on that count.'

²³ Defence application, paras 13-15.

²⁴ Defence application, para. 16.

²⁵ Defence application, para. 17, fn. 9.

18. The Defence has repeatedly raised concerns about its inability to challenge witnesses testifying to core allegations against Mr Sabra, either due to alleged obstacles in calling a witness or because the Prosecution no longer intends to call a witness.²⁶

Prosecution response

19. The Prosecution argues that the application should be dismissed because it does not fulfil the stringent cumulative requirements of Rule 126 (C), as set out by the Appeals Chamber, and ignores the Trial Chamber's findings that certification to appeal an issue relating to the admissibility of evidence is exceptional.²⁷

20. First, the issue would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Trial Chamber has found that the absence of cross-examination will go to the weight of Witness 024's evidence, assessed at the end of trial. In addition, the issue merely expresses disagreement with the Trial Chamber's decision and the application reruns already considered arguments.²⁸

21. The application must show that the issue would significantly affect both the fairness and the expeditiousness of the proceedings. Regarding fairness, the Trial Chamber admitted seven other witnesses' statements not due to Witness 024's expected cross-examination, as argued by the Sabra Defence, but rather considered their admission in the context of Witness 024's evidence because their evidence is cumulative of his evidence, militating in favour of admission without cross-examination.²⁹

22. The Sabra Defence failed to include portions of these decisions which show that: (i) it did not seek to cross-examine four of the seven witnesses; (ii) Witness 024's cross-examination was required due to its claim that a portion of the statement affects the Prosecution's allegation regarding the addressee of an SMS sent to Purple 018 from the witness' telephone number, but the Trial Chamber did not link the purpose of this cross-examination with the admission of evidence from the remaining three of the seven witnesses;

²⁶ Defence application, para. 17.

²⁷ Prosecution response, paras 2-4, citing, with regard to the Trial Chamber, Decision of 3 February 2015, para. 11.

²⁸ Prosecution response, para. 4.

²⁹ Prosecution response, paras 5-6.

and (iii) the Trial Chamber declined to defer the admission of two of the seven witnesses' statements until after Witness 024's cross-examination.³⁰

23. The Sabra Defence claims that its reliance on Witness 024's cross-examination led to its consideration of whether to challenge the admission of documents under Rule 154, but does not explain how this significantly affects the fairness of the proceedings and why Witness 024's expected cross-examination obliged it to take a certain position on other evidence, given that the two are not mutually exclusive.³¹

24. In addition, contrary to the Defence argument that the importance of Witness 024's evidence means that the issue for certification would significantly affect the fair conduct of the proceedings, the Trial Chamber has yet to assess the weight of the evidence and has already determined that it goes to proof of matters other than the Accused's acts and conduct as charged. This evidence is only one of several pieces which the Prosecution relies on to attribute telephone numbers to the Accused.³²

25. Moreover, the Sabra Defence made speculative and unsubstantiated submissions on why the issue for certification would significantly affect the expeditious conduct of the proceedings, and failed to explain how its claims relate to expeditiousness. It merely speculated that Witness 024's evidence, rather than the issue for certification, 'could' significantly affect the outcome of the trial.³³

26. In any event, the application does not meet the second requirement of Rule 126 (C). It makes speculative and unsubstantiated submissions on whether the immediate resolution of the issue for certification may materially advance the proceedings. It also fails to explain how the resolution of the issue would affect the admissibility of statements from the three witnesses whom the Prosecution has indicated it no longer intends to call. The Sabra Defence can interview or call any of those witnesses for its case.³⁴

³⁰ Prosecution response, para. 7.

³¹ Prosecution response, para. 8.

³² Prosecution response, para. 9.

³³ Prosecution response, paras 10-11.

³⁴ Prosecution response, paras 12-13.

DISCUSSION

Whether the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial

27. To illustrate why the Trial Chamber's discretionary decision of May 2017 declaring the statement admissible under Rule 158 cannot *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it is useful first to examine the decision of July 2016 which required the witness to attend for cross-examination under Rule 156.

28. The relevant portion of that discretionary decision is at paragraphs 39 and 40 (footnotes omitted), where the Trial Chamber held:

In this case, the Trial Chamber finds that the proposed evidence goes to a live and important issue between the Parties: the attribution to Mr Sabra of 'Purple 018'. This is a factor which makes it appropriate to require cross-examination.

In consideration of the Defence's claim that a portion of Witness 024's statement puts into question the Prosecution's allegation that the SMS sent to 'Purple 018' from his telephone number was addressed to Mr Sabra, the Trial Chamber agrees with counsel for Mr Sabra that cross-examination would specifically be justified with regard to this witness. The witness apparently does not remember the user of 'Purple 018' (and the addressee of the message) or having sent the relevant SMS. This may limit the probative value of his oral testimony on that specific aspect. In the exercise of its discretion, however, pursuant to Rule 155 (C), the Trial Chamber orders the Prosecution to make Witness 024 available for cross-examination according to Rule 156.

29. When the witness' attendance for cross-examination was not secured, the Trial Chamber made another discretionary decision to declare Witness 024's statement admissible, this time under Rule 158, albeit with expressed caveats as to the weight that it could be given in the absence of cross-examination.

30. This Rule 158 decision was simply one among many discretionary decisions admitting evidence in the case, and one—as is evident from the two paragraphs of the July 2016 decision extracted immediately above—which carries no major evidentiary implications.

31. The Defence application also argues that the Trial Chamber admitted the statements of seven other witnesses into evidence without cross-examination 'on the sole understanding that

PRH024 would attend for cross-examination'. Although this was a consideration, it was not the 'sole understanding' in the Trial Chamber's discretionary decision to require only Witness 024 to attend for cross-examination.

32. In the decisions of July and September 2016, the Trial Chamber merely considered that the other witnesses' evidence was cumulative of the evidence of Witness 024, who was expected to be cross-examined, as one of the factors in deciding whether to admit their statements into evidence under Rule 155.³⁵ As extracted above, paragraph 40 of the decision stated that 'the Trial Chamber agrees with counsel for Mr Sabra that cross-examination would *specifically* be justified with regard to this witness'. The Trial Chamber considered that the statements of the other three, Witnesses PRH051, PRH069 and PRH106, were cumulative of Witness 024's,³⁶ and noted in admitting the statements of Witnesses Ms Zeina Younane (PRH590), PRH339, PRH449 and PRH685 that Witness 024 would be cross-examined and that the statements were cumulative.³⁷ However, it is incorrect to state that the Trial Chamber decided that the cross-examination of Witness 024 was a necessary and sufficient condition to admit these seven other witness statements into evidence.

33. Further, the Defence application argues that the decision has negatively impacted Defence 'strategy', specifically in deciding not to challenge the admission into evidence of (unspecified) documents under Rule 154, but without explaining how. However, before deciding that the decision admitting the statement into evidence without cross-examination could *significantly* affect the fair and expeditious conduct of the proceedings—and is thus certifiable for interlocutory appeal—the Trial Chamber needs to know how the decision has negatively impacted Defence strategy.

34. The Sabra Defence also failed to explain how the admission of Witness 024's statement without cross-examination would significantly affect its cross-examination of Mr Donaldson. It therefore failed to explain how this would *significantly* affect the fair *and* expeditiousness of the proceedings or the outcome of the trial.

35. As pointed out in the decisions of July and September 2016, Witness 024's evidence is cumulative of seven other witnesses' evidence, admitted under Rule 155, without cross-examination. The admission of Witness 024's statement under Rule 158, without cross-

³⁵ Decision of 12 July 2016, paras 37-43; Decision of 22 September 2016, para. 22.

³⁶ Decision of 12 July 2016, para. 42.

³⁷ Decision of 22 September 2016, paras 22-23.

examination, would merely add an eighth piece of untested cumulative evidence in support of this part of the Prosecution's case against Mr Sabra. The Trial Chamber will carefully assess the weight of each statement, including that of Witness 024, taking into consideration the lack of cross-examination and that a conviction cannot be based solely or decisively on insufficiently corroborated untested evidence.³⁸

36. The evidence of Witness 024 is one piece of evidence among many. The identified issue therefore cannot *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

Whether an immediate resolution by the Appeals Chamber may materially advance the proceedings

37. The Trial Chamber does not need to consider the second part of Rule 126 (C). However, the application would also fail to meet this part of the test.

38. In particular, the Defence argument that the issue may arise again in relation to three additional witnesses is probably now moot, if Mr Donaldson is the last live Prosecution witness. Further, the Trial Chamber determined in its decision that 'the Prosecution must continue, with the assistance of the Lebanese Government, its diligent efforts to secure the witness' attendance during the course of the trial'.³⁹ An order to the Prosecution seeking an update in this matter has also been issued.⁴⁰ As the issue of whether Witness 024 will attend for cross-examination during the trial has not yet been fully resolved, certification for interlocutory appeal could be premature.

39. The Defence argument concerning 'whether the Chamber needs to write a judgement in respect of Mr. Sabra',⁴¹ in support of this second limb of Rule 126 (C), is quite puzzling. The Trial Chamber must write a reasoned judgement 'in respect of Mr. Sabra', either one of acquittal under Rules 167 or 168, or one of conviction under Rule 168. This argument is therefore irrelevant.

³⁸ STL-14-05/A/AP, *In the Case Against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, F0028, Public Redacted Version of Judgment on Appeal, 8 March 2016, fn. 378; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 53; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Request for Admission of the Statement of Jadranko Prlić, 22 August 2007, para. 33.

³⁹ Decision of 1 May 2017, para. 40.

⁴⁰ F3323, Order to Prosecution to Update the Trial Chamber on Its Continuing Efforts to Secure Witness PRH024's Attendance for Cross-Examination, 14 September 2017.

⁴¹ Defence application, para. 16.

40. A final consideration is the late stage of the Prosecution case and whether certifying such a matter for interlocutory appeal would actually delay the completion of the trial. This is especially so when considering that interlocutory appeals are exceptional because of their capacity to significantly delay a trial, thus militating in favour of deferring appellate proceedings until judgment and limiting interlocutory appeals.⁴²

41. The Trial Chamber therefore finds that neither criterion in Rule 126 (C) has been satisfied. The application for certification to appeal is therefore denied.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the application for certification to appeal.

Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,
The Netherlands
15 September 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

⁴² See e.g. ICC, *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters", 16 December 2008, para. 25, citing ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06, Decision on the Prosecution's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 60(3)(b), 19 August 2005, para. 19.

