

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: 28 April 2017

Original language: English

Classification: Public

The PROSECUTOR

v.

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

**DECISION ALLOWING THE PROSECUTION TO ADD TO ITS EXHIBIT LIST A
STATEMENT BY MR ANDREW DONALDSON (WITNESS PRH230)**

Office of the Prosecutor:
Mr Norman Farrell & Mr Alexander 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 Dorothee Le Fraper du
Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:
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Hassan & Ms Natalie von Wistinghausen

Counsel for Mr Assad Hassan Sabra:
Mr David Young & Mr Geoffrey Robert



INTRODUCTION

1. The Prosecution requests the Trial Chamber's leave to amend its exhibit list, filed under Rule 91 of the Special Tribunal's Rules of Procedure and Evidence, by adding a witness statement of Mr Andrew Donaldson (Witness PRH230), a Prosecution analyst. The statement, dated 13 October 2016, is proposed as an addendum to 'Evidence of Attribution Report – Hassan Habib Merhi', authored by the same witness.¹ Counsel for the Accused, Mr Hassan Habib Merhi, opposed the motion.² The Prosecution replied addressing a new issue raised in the response.³

THE PROPOSED EXHIBIT

Prosecution submissions

2. The witness describes two subjects in the statement, which are relevant to the attribution of mobile number 'Purple 231' to Mr Merhi and were not covered in the attribution report related to this Accused. The first is the attribution of two mobile numbers ending in 072 and 472—that were contacts of 'Purple 231'—to a close male relative of Mr Merhi. The second is a sequence of calls and movements during a fortnight period commencing on 21 September 2003, that would seemingly correspond to a Merhi family event.⁴

3. According to the Prosecution, the statement is *prima facie* relevant and probative of allegations pleaded in the amended consolidated indictment. With regard to the first issue analysed, the attribution of the two numbers offers a better picture of the top thirty contacts of 'Purple 231' and addresses the question of whether the close relative to whom the two numbers are attributed could have been the user of 'Purple 231'. As to the second analysis, the examination of the sequence of calls assists in understanding the nature and use of 'Purple 231'. 'Purple 231', while not being considered a 'network phone', has a complex nature which includes comparable characteristics. The normal call pattern for 'Purple 231' covers—as to contacts which could be attributed—male relatives of a similar age. Only during the

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3059, Prosecution Request to Amend its Exhibit List, 31 March 2017 ('Prosecution motion'), paras 1, 19.

² F3072, Merhi Defence Response to the "Prosecution Request to Amend Its Exhibit List" 10 April 2017 (public with confidential annexes A to C) ('Merhi response').

³ F3087, Prosecution Reply to Merhi Defence Response to Prosecution Request to Amend Its Exhibit List, 18 April 2017 ('Prosecution reply').

⁴ Witness Statement of Andrew Donaldson (ERN 60320166-60320189), para. 8; Prosecution motion, paras 7-8, 10.

relevant two week period in 2003, were calls made to relatives outside of that pattern (Mr Merhi's father, sisters and one brother in law) and one call to the Merhi family phone; all of these calls were outbound. The unusual nature of these calls in the usage profile of 'Purple 231' suggests that they took place in the context of an exceptional event and that 'Purple 231'—which also contacted numbers attributed to the co-accused Mr Assad Hassan Sabra and Mr Salim Jamil Ayyash—was not used for ubiquitous contact with family and friends but for other purposes.⁵ According to the statement, the four male relatives who were contacts of 'Purple 231' throughout the attribution period—including the relative to whom numbers 072 and 472 are attributed—were in some way connected to this purpose.⁶

4. The Prosecution submits that it has good cause for seeking to add the statement at this time, as it reflects the analysis of new evidence that the Prosecution has obtained since the attribution report was prepared as well as further detailed analysis and clarification of other attribution evidence. The new underlying evidence has been disclosed to the Defence. Its addition to the Prosecution's exhibit list—and admission into evidence—will be the subject of an upcoming motion. The Prosecution submits that the necessity of covering the two topics arose in the course of 2016, during the preparation of Mr Donaldson's evidence, as the complexity of the contact profile for 'Purple 231' prompted the need for further investigations and analysis. In particular, the attribution of two numbers was not featured in the attribution report due to the complexity of the required analysis. They have a similar profile to 'Purple 231', as the majority of their contacts cannot be evidentially attributed and they do not offer an immediate apparent user. Furthermore, the attribution required the acquisition of new evidence and a deeper analysis than that needed for any other third party contact attributed by Mr Donaldson. The statement derives from the Prosecution's efforts to provide the best possible evidence for the Trial Chamber's benefit.⁷

5. Adding the statement to the exhibit list is consistent with Mr Merhi's rights to adequate time to prepare for trial because it was disclosed to the Defence in November 2016 and Mr Donaldson will not be recalled to testify until the beginning of May 2017. Further, the Merhi Defence will have had more than a year and a half to prepare on the basis of the updated attribution report disclosed in November 2015. The statement will also assist the Merhi Defence's preparation for the attribution phase of the Prosecution's case. In particular,

⁵ Witness Statement of Andrew Donaldson (ERN 60320166-60320189), paras 73-75; Prosecution motion, paras 8-12.

⁶ Witness Statement of Andrew Donaldson (ERN 60320166-60320189), para. 75 (c).

⁷ Prosecution motion, paras 2, 9, 16-18.

the statement gives answers to some of the clarifications sought by the Merhi Defence when it highlighted, in court, the absence of contact between ‘Purple 231’ and the Merhi family number. In consideration of its view on the Prosecution’s theory, the Merhi Defence is in a position to prepare for Mr Donaldson’s cross-examination. The addition will not cause undue delay. Furthermore, the analysis in the statement does not reflect a change in the Prosecution’s theory, as it only confirms its initial position on the attribution of ‘Purple 231’ to Mr Merhi.⁸

6. Finally, if the request is granted, the Prosecution asks that the statement be given the same Rule 91 number as the attribution report related to Mr Merhi, as it will ultimately be added as an annex to the final version of that report.⁹

Defence response

7. Counsel for Mr Merhi strongly opposes the Prosecution’s request. While they acknowledge that the statement may be relevant, the significant prejudice that the late addition would cause must take precedence over the relevance and importance of the statement for the Prosecution. The Prosecution’s argument for obtaining the amendment of the exhibit list is contradictory as it relies on the importance of the recent analysis for its case on the one hand and, on the other, on the fact that it will assist the Defence in its preparation. Providing the Defence with clarifications under the form of ‘an extremely incriminating statement’ is not equivalent to facilitating Defence preparation.¹⁰

8. With regard to the attribution of mobiles 072 and 472 to a close relative of Mr Merhi, the Defence refers to previous submissions where it addressed the issue of the lateness and unexpected nature of this attribution.¹¹ The prejudicial effect consists in directly involving another member of the Merhi family in the conspiracy and implying that Mr Merhi is guilty by association. Further, the Prosecution distorts the content of the statement by suggesting that it advances that the relative of Mr Merhi to whom numbers 072 and 472 are attributed might have been the user of ‘Purple 231’; this assertion does not appear in the statement and

⁸ Prosecution motion, paras 2, 13-15; Prosecution reply, para. 3.

⁹ Prosecution motion, para. 4.

¹⁰ Merhi response, paras 6-8.

¹¹ Merhi response, para. 9, referring to F3022, Merhi Defence Response to “Prosecution Motion for the Admission of 10 Call Sequence Tables related to the Accused Ayyash and the Accused Merhi pursuant to Rule 154 and One Related Witness Statements pursuant to Rule 155”, 6 March 2017, paras 10-17.

the Prosecution has confirmed that it does not have exculpatory evidence linked to this issue.¹²

9. As to the addition of the subject related to the purported event in September 2003, it is late and inexplicable. Mr Donaldson had many years to analyse the telephone data linked to ‘Purple 231’. Relying on jurisprudence of the International Criminal Tribunal for Rwanda in the *Muvunyi* case, the Defence asserts that the Prosecution must refrain from adjusting its case in the course of the presentation of its evidence.¹³

10. The Prosecution has not demonstrated good cause to add the statement to its exhibit list at such an advanced stage of the presentation of its evidence. Its request—submitted one month before the testimony of its last witness—could not come any later. Further, the Prosecution announces that it will seek the addition of other evidence—the content of which is not explained—to the exhibit list. Granting the request would render the time limits provided by Rule 91 devoid of any significance. The Prosecution justifies the lateness of its request on the basis of the complexity of its work. However, the Prosecution employs many highly qualified individuals to analyse the evidence and the Defence should not suffer the consequences of their work not being completed within a reasonable time. The Prosecution also fails to explain what created the alleged necessity to cover these topics in 2016.

11. The Trial Chamber should consider the combined effect of this and all of the Prosecution’s late requests for addition of exhibits or witnesses, and their impact on the fairness of the proceedings. They require the Defence to continuously adapt to the late additions. When considered together, they demonstrate the Prosecution’s negligence for not having envisaged their addition at an earlier stage. In addition, according to the Defence, the Prosecution deliberately submitted this request now, six months after the finalization of Mr Donaldson’s statement, to argue that the Defence will have had more than six months to prepare.¹⁴

12. The new facts in the statement require the Defence to conduct additional investigations to test the reliability and veracity of those allegations. It is inevitable that the addition of this important document will result in delays in the proceedings, either before or during Mr Donaldson’s testimony, or before the presentation of the Defence evidence.

¹² Merhi response, paras 9-10.

¹³ Merhi response, paras 11-12, referring to ICTR, *Tharcisse Muvunyi v. the Prosecutor*, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008 (*‘Muvunyi Appeal Judgement’*), para. 18.

¹⁴ Merhi response, paras 14-21.

Furthermore, the Prosecution has not yet disclosed the latest version of the attribution report, which it plans to do at ‘the end of the Prosecution case’.¹⁵ The Prosecution’s arguments are also contradictory as they propose that the analysis is complex enough to justify the lateness of this request, but not so complex as to prevent the Defence from preparing in a timely fashion.¹⁶

13. Further, the amendment runs counter to the principle of good faith in the conduct of the proceedings. Counsel for Mr Merhi cite excerpts from Articles 13, 15, and 23 of the Code of Professional Conduct for Counsel Appearing Before the Tribunal and argue that, with the statement, the Prosecution reneges on its undertakings—expressed in previous correspondence and submissions¹⁷—not to attribute Purple associate numbers, including 472. The Defence invokes the principle of estoppel—whereby no one is allowed to contradict themselves to the detriment of another—and case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Milutinović* to assert that the Defence should not suffer the consequences of the Prosecution’s change in strategy.¹⁸ In conclusion, the addition is not in the interests of justice; in claiming so, the Prosecution fails to distinguish between the interests of justice and its own interests. When determining whether a request is in the interests of justice, the rights of the Defence must be taken into consideration.¹⁹

Prosecution reply

14. The Prosecution objects to the apparent allegations from the Defence that it breached the Code of Professional Conduct due to Mr Donaldson’s additional analysis attributing numbers 072 and 472. It also objects to the manner in which the allegations are raised: the breaches are implied, and not clearly stated.²⁰

15. As to the implied assertion, by reference to Article 13 of the Code, that ‘the Prosecution intends to take a new and reasonably unexpected trajectory in its case without

¹⁵ Merhi response, para. 25, referring to annex B to Merhi response (Prosecution letter to the Merhi Defence dated 15 November 2016).

¹⁶ Merhi response, paras 22-26.

¹⁷ Merhi response, para. 28, referring to annex C (Prosecution letter to the Merhi Defence dated 4 February 2015) and F2140, Prosecution Motion for the Admission of Call Sequence Tables related to the Movements of Rafiki Hariri and Related Events, 26 August 2015, para. 42.

¹⁸ Merhi response, para. 32, referring to ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Use of Prosecution Interviews of Accused, 20 March 2008 (‘*Milutinović* decision’), paras 8-9.

¹⁹ Merhi response, paras 2, 35.

²⁰ Prosecution reply, paras 1-2, 9.

reasonable advance notice’,²¹ the Prosecution submits that the Merhi Defence has not shown how the additional analysis changes the Prosecution’s allegations against Merhi. Nor have they explained why the Defence was unable to prepare in the five months that it had the statement or why those five months did not amount to reasonable notice.²²

16. As to the implied allegation of breach by reference to Article 15 of the Code—that the Prosecution did not honour a purported agreement with Defence counsel²³—the Prosecution responds that: (i) there was no agreement regarding the attribution of two numbers, as the Prosecution in a filing and a letter stated its intention at that time not to attribute those numbers; however, it is not prohibited from continuing its investigation and analysis, and the two phones were attributed based upon new evidence and analysis; (ii) the *Milutinović* decision relied upon by the Defence is distinguishable as here the additional analysis does not go to prove the acts and conduct of the Accused; the Prosecution was not already in possession of analysis that it undertook not to rely upon; and Mr Donaldson is available for cross-examination; (iii) as to the doctrine of estoppel, the Defence did not cite any authority from international criminal law procedural law, and it is not necessary to revert to it because the test for amendment of the Prosecution’s exhibit list addresses any potential undue prejudice by considering the Accused’s right to adequate time and facilities to prepare.²⁴

17. With regard to the alleged breach by reference to Article 23 of the Code of Conduct,²⁵ the Defence has not established that the Prosecution did not act in good faith. On the contrary, the Prosecution provided reasonable notice of the additional analysis, and intends to seek its admission during Mr Donaldson’s examination-in-chief, after which the witness will be available for cross-examination.²⁶

DISCUSSION

18. The Trial Chamber may, in the interests of justice, allow a party to amend its exhibit list. In doing so, it must balance the Prosecution’s interest in presenting any available evidence against the rights of an accused person to adequate time and facilities to prepare for

²¹ Article 13 of the Code of Professional Conduct for Counsel Appearing Before the Tribunal, provides: ‘When Counsel intends to take a new and reasonably unexpected trajectory in a proceeding, he or she shall provide other Counsel with reasonable advance notice’.

²² Prosecution reply, paras 1-3.

²³ Article 15 of the Code of Professional Conduct for Counsel Appearing Before the Tribunal, provides: ‘Counsel shall honour agreements with other counsel, whether oral or in writing’.

²⁴ Prosecution reply, paras 4-7.

²⁵ Article 23 of the Code of Professional Conduct for Counsel Appearing Before the Tribunal provides, in the part quoted by the Merhi Defence: ‘Counsel shall act in good faith towards other counsel’.

²⁶ Prosecution reply, para. 8.

trial. The evidence must be *prima facie* relevant and probative, and the Trial Chamber may consider, among other factors, i) whether the Prosecution has shown good cause for not seeking the amendments at an earlier stage; ii) the stage of the proceedings; and iii) whether granting the amendment would result in undue delay.²⁷

19. The Trial Chamber has carefully reviewed Mr Donaldson's statement. The attribution of telephones to the Accused is a key part of the Prosecution's case as alleged in the amended consolidated indictment.²⁸ The statement covers the same subject matter as the attribution report related to Mr Merhi, which examines evidence regarding the attribution of three mobile numbers: 'Purple 231', 'Green 071' and a personal mobile phone (PMP) 091.²⁹

20. In particular, the statement presents further analysis relevant to the attribution of 'Purple 231' to Mr Merhi. The amended consolidated indictment pleads that Mr Merhi used 'Purple 231' in relation to preparations for the attack of 14 February 2005 and in carrying out the false claim of responsibility.³⁰ The additional analysis contained in the statement concerns the attribution of two numbers which were among the top thirty contacts of 'Purple 231' to a relative of Mr Merhi and a sequence of calls and movements in 2003, which may assist in understanding the nature of use of this mobile number. The Merhi Defence does not object to the relevance and probative value of the statement, and it actually acknowledges its relevance. The Trial Chamber finds that the statement is *prima facie* relevant and probative.

21. The Trial Chamber has previously held, when admitting into evidence the call sequence tables for the mobile numbers ending in 072 and 472, that the attribution of these numbers does not create any new allegations against Mr Merhi and therefore does not change the nature of the Prosecution's case.³¹ The same can be said with regard to the analysis of the sequence of calls and movements in 2003. This distinguishes the situation from the *Muvunyi*

²⁷ F2544, Decision on Prosecution Motion to Add Inventory and Supporting Documents relating to the Searches of the Residence of Ahmed Abu Adass, 11 April 2016, para. 4; F2270, Decision Authorising the Prosecution to Amend Its Exhibit List, 15 October 2015, para. 4; F2149, Decision on Prosecution Motion to Admit 62 Photographs, 28 August 2015, para. 3; F1901, Decision on Prosecution Motion to Amend its Exhibit List and Oneissi Defence Request to Stay the Proceedings, 13 April 2015 (Decision of 13 April 2015), para. 34; F1820, Decision on the Prosecution Motion for Admission under Rule 155 of Written Statements in Lieu of Oral Testimony relating to 'Red Network' Mobile Telephone Subscriptions, 19 January 2015, para. 5.

²⁸ F2720, Amended consolidated indictment, 12 July 2016, paras 3 (b), 14-47.

²⁹ A telephone attribution report examines evidence regarding the attribution of one or more telephone numbers to each one of the Accused and to Mr Mustafa Amine Badreddine. See F1852, Decision on Prosecution Motion to Add Four Items to the Exhibit List, 13 February 2015, para. 11, fn. 22. PMP 091 is attributed, according to the Prosecution's updated pre-trial brief dated 23 August 2013, to Mr Merhi and other members of his family; see F1077, Prosecution's Updated Pre-Trial Brief, dated 23 August 2013, 23 August 2013 (confidential) para. 59.

³⁰ Amended consolidated indictment, paras 16-19, 23, 44.

³¹ F3061, Decision Admitting 10 Call Sequence Tables related to Mr Salim Jamil Ayyash and Mr Hassan Habib Merhi under Rule 154 and Two Related Witness Statements under Rule 155, 31 March 2017 ('Decision of 31 March 2017'), para. 21.

case, where the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) stated, as noted by the Defence, that ‘the Prosecution is expected to know its case before proceeding to trial and cannot mould it in the course of it depending on how the evidence unfolds’. In that case, the ICTR Appeals Chamber found that there were variances between the indictment and the evidence, which reflected that the indictment alleged a different criminal event than the one for which the accused, Muvunyi, was convicted. In addressing whether Muvunyi had sufficient notice of the material facts underpinning his conviction for a specific event, it concluded that the indictment did not properly inform him of the material facts for the crime for which he was ultimately convicted. As stated, nothing in the additional analysis in the statement creates new allegations against Mr Merhi.³²

22. Allowing these additions will not adversely affect the Defence’s ability to prepare for trial or cause undue delay given that the statement was disclosed to the Defence in November 2016. Therefore, the Merhi Defence already had five months to prepare on the issues analysed in the statement. In a decision of 31 March 2017, the Trial Chamber held that the Prosecution put the Defence on notice in a timely manner about Mr Donaldson’s statement of 13 October 2016.³³ As to the argument that prejudice results from the Prosecution directly involving another member of the Merhi family in the conspiracy and implying that Mr Merhi is guilty by association, the Trial Chamber finds it unsubstantiated.

23. However, with regard to the Defence’s argument that the statement requires it to conduct additional investigations, in order to avoid that any prejudice may derive from this late addition, the Trial Chamber will consider any reasonable and substantiated request for adjournment the Defence may wish to present as well as any request for recalling Prosecution witnesses for cross-examination. Further, the Trial Chamber urges the Prosecution to disclose as soon as possible to the Merhi Defence the latest version of the attribution report, if the Prosecution intends to rely on a version different from that which the Trial Chamber authorized the Prosecution to add to its exhibit list on 12 July 2016.³⁴ However, whether changes in any latest version will only cover the inclusion of the relevant exhibit numbers and transcript of testimonies,³⁵ this will not seemingly have any (prejudicial) effect on the Defence preparation.

³² *Muvunyi* Appeal Judgement, paras 18, 21-22, 24, 26.

³³ Decision of 31 March 2017, para. 21.

³⁴ F2645, Decision Allowing the Prosecution to Amend Its Exhibit List to Replace Attribution Reports of Mr Andrew Donaldson (Witness PRH230), 12 July 2016.

³⁵ See annex B to Merhi response (Prosecution letter to the Merhi Defence dated 15 November 2016).

24. The analysis in the statement appears to reflect new attribution-related evidence, obtained after the attribution report was produced, although not clearly identified, as well as to provide additional analysis of existing evidence. Where underlying evidence was obtained after the production of the attribution report, its analysis could not have been contained in that report. The Prosecution further argues the complexity of the contact profile of ‘Purple 231’ and of the analysis required for the attribution of numbers 072 and 472 as the reason for the late production and sought addition of the statement. While the complexity reason may not amount of itself to a good cause for the late addition—at such an advanced stage of the proceedings—the Trial Chamber, having balanced the right of the Prosecution to present evidence to support its case with the rights of counsel for the Accused to adequately prepare for trial, it is satisfied that it is in the interests of justice to allow the amendment of the exhibit list.

25. The arguments that the Prosecution, in attributing numbers 072 and 472, reneges on previous undertakings that it did ‘not intend to offer evidence in relation to the identity of the users of purple associate phones’ was already raised by the Merhi Defence in another filing.³⁶ In its decision of 31 March 2017 adjudicating that filing, the Trial Chamber found—as recalled above—that the attribution of these numbers does not change the nature of the Prosecution case, and that the Defence was put on notice on a timely manner about the attribution.³⁷

26. In the *Milutinović* case relied upon by the Defence, the ICTY Trial Chamber dealt with the issue of the use of certain evidence, namely interviews of accused against co-accused. While the Prosecution had maintained to adopt a certain approach (not using against co-accused the interviews’ portions addressing the acts and conducts of co-accused), subsequently the ICTY Appeals Chamber allowed a wider approach in a different case (permitting use against co-accused without cross-examination, even when going to the acts and conduct of the co-accused). The *Milutinović* Trial Chamber noted that ‘the issue before [it] was whether it would be *unfair* to the Defence to use the interviews in accordance with the

³⁶ F3022, Merhi Defence Response to the “Prosecution Motion for the Admission of 10 Call Sequence Tables related to the Accused Ayyash and the Accused Merhi pursuant to Rule 154 and One Related Witness Statement pursuant to Rule 155”, 6 March 2017, paras 10-15.

³⁷ Decision of 31 March 2017, para. 21. The Merhi Defence, relying on the *Milutinović* case-law, has requested certification to appeal the 31 March 2017 decision on the basis of the Trial Chamber’s alleged error in failing to consider that the Prosecution was bound by its past statement on the matter of the Purple associate numbers. See F3073, Corrected Version of the Merhi Defence Request for Certification of the “Decision Admitting 10 Call Sequence Tables related to Mr Salim Jamil Ayyash and Mr Hassan Habib Merhi under Rule 154 and Two Related Witness Statements under Rule 155” dated 10 April 2017, 18 April 2017, paras 1-2.

[...] Appeals Decision, when the Prosecution has maintained throughout the trial that it will adopt a more restrictive approach'.³⁸ It concluded it would have been unfair. However, it allowed for a more expansive use in case the accused who has provided the interview was available for cross-examination.³⁹

27. Besides reiterating that the attribution of numbers 072 and 472 does not change the nature of the Prosecution case, unlike the *Milutinović* case, the use or even the admission of evidence is not at issue here. The purpose of this decision is only to determine whether to authorise the Prosecution to add the statement of Mr Donaldson to the exhibit list. The Trial Chamber has consistently held that it may, in the interests of justice, allow a party to amend its exhibit list. The legal standard applied requires the Trial Chamber to balance the Prosecution's interest in presenting any available evidence against the rights of an accused person to adequate time and facilities to prepare for trial. The Trial Chamber has done so. It has been satisfied that the Merhi Defence already had five months to prepare on the issues analysed in the statement, since when it was put on notice of it. Furthermore, the Trial Chamber has held that it will consider any request for adjournment resulting from the necessity to conduct additional investigations as well as any request for recalling Prosecution witnesses for cross-examination. In addition, the Merhi Defence will be able to cross-examine Mr Donaldson in relation to his statement. Therefore, no *unfairness* to the Defence results from the addition of Mr Donaldson's statement to the exhibit list.

28. For the same reason, having the Trial Chamber found that no prejudice will result from the amendment of the exhibit list and having addressed any potential prejudice, it does not need to consider the applicability here of the doctrine of estoppel.⁴⁰ Furthermore, the Trial Chamber has seen no evidence of breach of the Code of Professional Conduct by the Prosecution.

29. Allowing the addition of the statement to the Prosecution exhibit list does not mean that the Trial Chamber will receive it into evidence.

³⁸ *Milutinović* decision, para. 8 (emphasis added).

³⁹ *Milutinović* decision, paras 2-10.

⁴⁰ Counsel for Mr Merhi rely, with regard to the estoppel doctrine, on the case law of the International Court of Justice and from the International Centre for Settlement of Investment Dispute (ICSID). In international public law, according to the estoppel principle 'a state must not be permitted to benefit by its own inconsistency to the prejudice of another state'. The ICSID Tribunal held that the same general principle is applicable in international economic relations where private parties are involved. See ICJ, Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), 1962, Separate Opinion of Vice-President Alfaro, pp 39-51; ICSID, *AMCO v. Republic of Indonesia*, Decision on Jurisdiction, 25 September 1983, ICSID Case no. ARB/81/1, para. 47.

CONFIDENTIALITY

30. The Merhi Defence submits that it filed the annexes to its response confidentially because they concern correspondence between the Defence and the Office of the Prosecutor, which in principle must remain confidential.⁴¹ Reiterating the public nature of these proceedings, the Merhi Defence should file a public redacted version of the annexes or have those which do not contain confidential information reclassified as public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

ALLOWS the Prosecution's motion for leave to amend its exhibit list by adding the statement of Mr Andrew Donalson (Witness PRH230) dated 13 October 2016; and

ORDERS the Merhi Defence to file a public redacted version of the annexes to the Merhi Defence response or have those which do not contain confidential information reclassified as public.

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

Leidschendam,
The Netherlands
28 April 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

⁴¹ Merhi response, para. 37.

