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:	**2 June 2017**
Original language:	**English**
Classification:	**Public**

The PROSECUTOR
v.
SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

DECISION ON MERHI DEFENCE REQUEST FOR DISCLOSURE OF DOCUMENTS CONCERNING WITNESS PRH230

Office of the Prosecutor:
Mr Norman Farrell & Mr Alexander Hugh Milne

Legal Representatives of Participating Victims:
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Counsel for Mr Hassan Habib Merhi:
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Counsel for Mr Hussein Hassan Oneissi:
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Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Geoffrey Roberts & Ms Sarah Bafadhel

INTRODUCTION AND BACKGROUND

1. Counsel for the Accused, Mr Hassan Habib Merhi, seek an order for the disclosure of what they identify as eight categories of documents concerning Witness PRH230, Prosecution analyst Mr Andrew Donaldson, who was due to begin testifying before the Trial Chamber during the first or second week of May 2017.[1] The Merhi Defence reasons that these documents are subject to disclosure under Rule 110 (A) (ii) of the Special Tribunal's Rules of Procedure and Evidence.[2] The Prosecution opposed the request and the Merhi Defence replied.[3]

2. Mr Donaldson is expected to testify on the attribution to the Accused of numbers of mobile telephones allegedly used in the attack on former Lebanese Prime Minister, Mr Rafik Hariri, on 14 February 2005. His evidence, together with that of other Prosecution witnesses, is submitted to be important to the Prosecution's case against the Accused, as pleaded in the amended consolidated indictment. Mr Donaldson prepared and updated reports and slides that examine the evidence—including exhibits, witness evidence, official records and cell site evidence—that attribute the mobiles to each of the four Accused, and to the named co-conspirator, Mr Mustafa Amine Badreddine. The current versions of the reports are labelled as 'Version 3' for those dealing with Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra and 'Version 4' for those dealing with Mr Salim Jamil Ayyash, Mr Badreddine and Mr Merhi (with an addendum to the report concerning Mr Merhi in the form of a witness statement, dated 13 October 2016). Mr Donaldson's work includes his analysis of cell sector usage and 'contact profiles' for the purposes of 'geographical profiling'. Mr Donaldson is expected to testify that this data shows that Mr Badreddine and the four Accused used the mobile telephone numbers involved in the attack, as pleaded in the amended consolidated indictment.

3. Mr Donaldson was initially proposed as a Prosecution expert witness.[4] On 20 June 2016, the Prosecution filed an updated witness list in which Mr Donaldson was no

[1] *See* STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3126, Interim Decision on Joint Defence Motion *In Limine* to Exclude Evidence of Analyst Mr Andrew Donaldson, 5 May 2017, para. 2; F3096, Prosecution Witness Schedule for the Weeks Commencing 24 April & 1 May 2017, 21 April 2017.
[2] F3045, Merhi Defence Motion for Disclosure of Documents Relating to the Witness Andrew Donaldson (PRH230), 21 March 2017 (public with confidential annexes A-G) ('Defence motion').
[3] F3067, Prosecution Response to Merhi Defence Motion for Disclosure of Documents Relating to PRH230, 5 April 2017 ('Prosecution response'); F3079, Merhi Defence Reply to the "Prosecution Response to Merhi Defence Motion for Disclosure of Documents Relating to PRH230", 11 April 2017 ('Defence reply').
[4] STL-11-01/PT/PTJ, F0585, Prosecution Notice in Relation to Expert Witnesses, Annex A – Expert Witnesses with Disclosed Reports and CVs, 10 December 2012 (confidential) ('Prosecution Notice of 10 December 2012'), pp 3-5.

longer listed as an expert witness to be called under Rule 161.[5] The Prosecution stated in a 3 February 2017 letter to the Ayyash Defence that it no longer intends to call Mr Donaldson to testify as an expert witness, prompting a letter on 16 February 2017 from the Merhi Defence requesting the disclosure of:

> (1) any document, irrespective of the form it takes, containing questions put to or answers provided by Mr Donaldson;
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> (2) all the e-mails exchanged between member(s) of the Office of the Prosecutor and Andrew Donaldson relating to any subject(s) that he will refer to in his testimony;
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> (3) any document containing notes taken by members of the Office of the Prosecutor during discussions with Andrew Donaldson relating to the content of his testimony;
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> (4) any draft statement prepared by Andrew Donaldson, whether signed or unsigned;
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> (5) any draft report prepared by Andrew Donaldson, whether complete or not;
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> (6) any document or item of evidence annotated by Andrew Donaldson;
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> (7) any presentation support that Witness Donaldson intends to use in court, whether it is being prepared or has been finalised; and
>
> (8) any document, irrespective of the form it takes, containing an opinion or comments from Witness Andrew Donaldson which has not been disclosed to the Defence to date.[6]

4. The Trial Chamber notes that the requested disclosure of category 7 is now moot, as Mr Donaldson's PowerPoint slides relating to Mr Merhi were disclosed to the Merhi Defence on 24 April 2017.[7]

5. By letter of 22 February 2017, the Prosecution responded that it had disclosed 'all material subject to disclosure under the Rules', and pointed out that the PowerPoint slides were still being prepared. On 28 February 2017, the Merhi Defence wrote to the Prosecution,

[5] F2626, Prosecution Notice of Updated Revised Witness List, Annex A – List of Remaining Witnesses as at 20 June 2016, 20 June 2016 (confidential) ('Prosecution Notice of 20 June 2016'), p. 7.
[6] Defence motion, paras 2-3.
[7] Transcript of 24 April 2017, p. 103.

requesting it to state whether it had any of the items listed in its 16 February 2017 letter, without treating them as material subject to disclosure. On 2 March 2017, the Prosecution responded that 'it is not under a legal obligation under the [R]ules to notify [the Merhi Defence] of the existence of any material it may have in its possession which is not subject to disclosure'. On 7 March 2017, the Merhi Defence sent a final letter to the Prosecution, repeating its request of 28 February 2017. On 8 March 2017, the Prosecution stated that the Merhi Defence's request lacked a legal basis.[8]

6. After reviewing the Merhi Defence's request, the response and the reply, on 20 April 2017 the Trial Chamber ordered the Prosecution to disclose to the Trial Chamber, on an *ex parte* basis, three types of documents, to allow it to determine whether any of them should be disclosed to the Defence.[9] Following oral submissions, the order was varied on 21 April 2017 to encompass just a sample of these types of documents, with a view to the Trial Chamber determining whether further documents should be provided for its consideration.[10] Later that same day, the Prosecution disclosed a sample of nine documents to the Trial Chamber.[11] An oral order was also made later that day, suspending compliance with the requirement to disclose documents in category (i) of the written order and stating that the Trial Chamber will make a decision with respect to the documents in categories (ii) and (iii) of the written order which had already been provided to it.[12] This decision was taken as a result of the Prosecution stating that it would be unable to comply with the written order without delaying its disclosure of Mr Donaldson's PowerPoint slides.

7. On 8 May 2017, the Trial Chamber requested the Prosecution via email to resume compliance with the 20 April 2017 written order regarding disclosure of documents in category (i), which had been suspended by the oral order of 21 April 2017.[13] On 9 May 2017, the Prosecution disclosed three documents pursuant to the email request, annexed to further

[8] Defence motion, paras 4-8.
[9] F3094, Order on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230 (Andrew Donaldson), 20 April 2017. The three types of documents requested by the Trial Chamber were: "(i) any documents containing questions put to or answers given by Mr Donaldson directly relating to the subject matter of his expected testimony; (ii) any draft statements prepared by Mr Donaldson directly relating to the subject matter of his expected testimony; and (iii) any draft reports prepared by Mr Donaldson directly relating to the subject matter of his expected testimony".
[10] Transcript of 21 April 2017, pp 6-7.
[11] Email of 21 April 2017 from Prosecution Associate Trial Counsel to Trial Chamber Legal Officer.
[12] Oral Decision Suspending a Deadline and Deferring a Decision Until After Further Review with Respect to Order (ii) and (iii) in F3094, transcript of 21 April 2017, p. 115.
[13] Email of 8 May 2017 from Trial Chamber Legal Officer to Prosecution counsel.

public submissions on the issue of disclosure.[14] On 10 May 2017, the Merhi Defence responded, seeking an order for the Prosecution to withdraw its further submissions and comply fully with the 20 April 2017 written order.[15] On 12 May 2017, the Merhi Defence filed clarifications to its response.[16] On 15 May 2017, the Prosecution replied, alleging that the Merhi Defence's response violated the Code of Professional Conduct for Counsel Appearing Before the Tribunal.[17] Further submissions were also made in court on 17 May 2017.[18]

APPLICABLE LAW

8. Rule 110 (A) (ii) states:

> Subject to the provisions of Rules 115, 116, 117 and 118:
>
> (A) the Prosecutor shall make available to the Defence in a language which the accused understands,
>
> (i) [...]
>
> (ii) within the time-limit prescribed by the Trial Chamber or by the Pre-Trial Judge, copies of: (a) the statements of all witnesses whom the Prosecutor intends to call to testify at trial; (b) all statements, depositions, or transcripts taken in accordance with Rules 93, 123, 125, 155, 156, 157 and 158; and (c) copies of the statements of additional prosecution witnesses.

9. Rule 111 states:

> Reports, memoranda, or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation of a case are not subject to disclosure or notification under the Rules. For purposes of the Prosecutor,

[14] F3130, Prosecution Submissions Pursuant to Oral Order of 8 May 2017, 9 May 2017 (public with confidential and *ex parte* annex). A corrigendum and corrected version of these submissions were filed the following day: F3130, Corrigendum to Prosecution Submissions Pursuant to Oral Order of 8 May 2017, 10 May 2017; F3130, Corrected Version of Prosecution Submissions Pursuant to Oral Order of 8 May 2017, 10 May 2017 (public with confidential and *ex parte* annex) ('Prosecution corrected further submissions').
[15] F3131, Merhi Defence Response to the "Prosecution Submission Pursuant to Oral Order of 8 May 2017", 10 May 2017 ('Defence further response').
[16] F3138, Clarification de la « Réponse de la Défense de M. Merhi à 'Prosecution Submission Pursuant to Oral Order of 8 May 2017' », 12 May 2017 ('Defence clarification to further response').
[17] F3141, Prosecution Reply to "Réponse de la Défense de M. Merhi à 'Prosecution Submission Pursuant to Oral Order of 8 May 2017'", 15 May 2017 ('Prosecution further reply').
[18] Transcript of 17 May 2017, pp 9-24.

this includes reports, memoranda, or other internal documents prepared by the UNIIIC[19] or its assistants or representatives in connection with its investigative work.

10. In July 2011, the Special Tribunal's Appeals Chamber first dealt with the disclosure of witness statements in the *El Sayed* case, finding that a witness' statements are the witness' product and thus disclosable under Rule 110 (A) (ii). They are not protected from disclosure under Rule 111 because they are not the disclosing Party's work product.[20] In a later appeal from a decision of the Pre-Trial Judge in the *Ayyash* case in November 2013, the Appeals Chamber confirmed its *El Sayed* decision. It also rejected a Defence request for disclosure of a document, prepared for internal purposes by a former UNIIIC staff member, finding that the document did not become subject to disclosure by virtue of that individual later becoming a Prosecution witness.[21]

11. The Trial Chamber has also ruled on disclosure issues, notably finding that investigator's notes are disclosable if they contain statements from witnesses and that email correspondence between a witness and the Prosecution was disclosable insofar as it contained questions and answers concerning the subject matter of the witness' testimony. In one case, after examining, on an *ex parte* basis, emails between the Prosecution and a witness, Witness PRH707, it ordered the Prosecution to disclose some of these to the Defence.[22] Moreover, the Pre-Trial Judge found on 8 November 2012 that 'categories of material or information sought under the specific disclosure provisions should be defined as specifically as possible, and the categories of requests drafted with precision'.[23] Finally, in a decision in May 2013, the Pre-Trial Judge held that drafts of expert reports are not disclosable, unless the expert report refers to such a draft. He also distinguished the Appeals Chamber's *El Sayed* decision, finding that Parties are entitled to know how a witness' version of their testimony has evolved, as witnesses of fact are in a different category to expert witnesses.[24]

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[19] United Nations International Independent Investigation Commission.
[20] CH/AC/2011/01, *In the Matter of El Sayed*, F0005, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011 ('*El Sayed* Decision of 19 July 2011').
[21] F0003-AR126.5, Decision on Appeal by Counsel for Mr Sabra against Pre-Trial Judge's "Decision on Sabra's Tenth and Eleventh Motions for Disclosure", 6 November 2013 ('Appeals Chamber Decision of 6 November 2013').
[22] F2548, Decision on Motion by the Badreddine Defence for the Disclosure of Investigators' Notes, 13 April 2016 ('Investigators' Notes Disclosure Decision'); F2576, Order to Prosecution to Disclose Documents Relating to Witness PRH707 to the Defence, 29 April 2016 ('Witness PRH707 Disclosure Decision').
[23] STL-11-01/PT/PTJ, F0510, Decision on the Sabra Defence's First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012 ('Pre-Trial Judge's Decision of 8 November 2012'), para. 29.
[24] STL-11-01/PT/PTJ, F0913, Decision on Sabra's Seventh Motion for Disclosure – Experts, 24 May 2013 ('Pre-Trial Judge's Decision of 24 May 2013'), paras 30-33.

12. The Trial Chamber has identified the following general disclosure principles under international criminal law procedural law:

(i) The Prosecution has an obligation to disclose witness statements under the Rules equivalent to Rule 110 (A) (ii);

(ii) All stages of the preparation of a 'witness statement' can be important, as they enable the Chamber and the opposing Party to know how a witness' version has evolved;[25]

(iii) It is not just the final signed witness statement which is subject to disclosure; questions and answers, investigator's notes and emails can also constitute 'witness statements' under Rule 110 (A) (ii);[26]

(iv) The exemption from disclosure under the Rules equivalent to Rule 111 is confined to what has been created by a Party and its agents. The rule has no application to witness statements, which are not the Party's work product but are the witness' product;[27]

(v) Disclosure requests must be sufficiently specific;[28] and

(vi) The court before which a disclosure issue is raised has the ultimate responsibility for ensuring compliance with disclosure obligations under the Rules.[29]

[25] *El Sayed* Decision of 19 July 2011, paras 85, 87-88.
[26] *El Sayed* Decision of 19 July 2011, paras 83-89, citing at para. 89, SCSL, *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004 ('*Norman* Decision'), paras 8-10; ICTR, *Niyitegeka v. Prosecutor*, ICTR-96-14-A, Judgement, 9 July 2004 ('*Niyitegeka* Appeal Judgment'), paras 33-35; Witness PRH707 Disclosure Decision, paras 3-5. The Trial Chamber's reasoning in the Witness PRH707 Disclosure Decision as to why the emails in question were disclosable under Rule 110 (B) as material to the preparation of the Defence also demonstrates that they could be disclosable under Rule 110 (A) (ii) as witness statements.
[27] *El Sayed* Decision of 19 July 2011, para. 78.
[28] Pre-Trial Judge's Decision of 8 November 2012, para. 29.
[29] *See El Sayed* Decision of 19 July 2011, paras 71, 114-115. Moreover, when the court has to consider a voluminous amount of material, the alternative to unacceptable rubber-stamping of the Prosecution's assessment is for the court to establish a suitable sampling process to examine at least specimens of the disputed materials. If the sampling process indicates that the Prosecution's assessment methodology was reliable, it could be appropriate, depending on the circumstances, not to proceed further; however, should the initial examination reveal errors, further review by the court would be required. *See El Sayed* Decision of 19 July 2011, para. 74.

SUBMISSIONS

Defence submissions

13. The Merhi Defence submits that the Trial Chamber should arbitrate the difference of opinion between the Parties, order disclosure, and make a general order reminding the Prosecution of its disclosure obligations.[30]

Categories 1 and 3: any document, irrespective of its form, containing questions put to or answers provided by Mr Donaldson; and any documents containing notes taken by the Prosecution during discussions with Mr Donaldson relating to the content of his testimony

14. The Prosecution must disclose: (i) notes taken by Prosecution members during discussions with Mr Donaldson, as they contain his statements and information relevant to their probative value, which are necessary for preparing his cross-examination; and (ii) documents containing questions put to Mr Donaldson and answers, even if partial, he provided. It is reasonable to believe that such documents exist and were used to prepare Mr Donaldson's reports, PowerPoint slides, and his 13 October 2016 statement.[31]

15. The Appeals Chamber in *El Sayed* held that investigators' notes of interviews are not exempt from disclosure under Rule 111, as they may contain information from interviewees, which is their product rather than the interviewers' work product. It also held that all stages of the preparation of a formal statement can be important to showing consistency or inconsistency, highlighting the problems with the Prosecution's practice of producing a single statement summarising what it deems relevant from several witness interviews. The Appeals Chamber also disagreed with labelling investigators' notes, screening notes or pre-interview assessments as internal work product that need not be disclosed, as this may lead to an investigator 'sanitizing' the witness' original account, whereas the court and the opposing party are entitled to know how the witness' version has evolved.[32]

16. A Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) found that its equivalent to Rule 110 (A) (ii)[33] does not differentiate between witness statements based on their form, including 'unorthodox' ones. In addition, the ICTR Appeals Chamber held that

[30] Defence motion, paras 1, 9-10.
[31] Defence motion, paras 12, 18. A telephone attribution report examines evidence regarding the attribution of one or more mobile telephone numbers to one or more of the Accused or Mr Badreddine; *see* F1852, Decision on Prosecution Motion to Add Four Items to the Exhibit List, 13 February 2015, para. 11, fn. 22.
[32] Defence motion, paras 13-14, citing *El Sayed* Decision of 19 July 2011, paras 83, 85, 87-88.
[33] ICTR Rule 66 (A) (ii).

questions put to and answers given by a witness, and records of witness interviews not prepared in the ideal format, are subject to disclosure. According to ICTR case law, disclosure obligations apply to all relevant responses, not just to evidence that the Prosecution deems particularly 'material and necessary'. The practice of only disclosing consolidated documents could lead to miscarriages of justice. Rule 111 must be interpreted restrictively.[34]

Category 2: all emails exchanged between the Prosecution and Mr Donaldson relating to any subjects that he will refer to in his testimony

17. All emails exchanged between the Prosecution and Mr Donaldson, relating to his testimony or to subjects linked to it, may be disclosable 'witness statements'. It is illusory to believe that none of these contain Mr Donaldson's answers to questions or requests for clarification or comments. The Trial Chamber has held that this type of email is disclosable. Emails containing Mr Donaldson's comments, opinions, answers to questions or clarifications are his product and a statement in an 'unorthodox' form.[35]

Category 4: any draft statement prepared by Mr Donaldson, whether signed or unsigned

18. Mr Donaldson's preliminary and unsigned statements, draft statements and statements on which he commented are disclosable, regardless of whether their contents have been incorporated into a final signed statement. International criminal courts and tribunals use a broad definition of a 'witness statement' under their equivalents to Rule 110 (A) (ii). The *Haradinaj* Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) emphasized that a witness statement's form is irrelevant, finding that disclosure is not limited to official final statements, signed and adopted by a witness; the obligation includes preliminary versions of a witness statement transcribed by another person. Moreover, it held

[34] Defence motion, paras 15-17, citing ICTR, *Prosecutor v. Nzirorera et al.*, ICTR-98-44-I, Decision on the Defence Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures, 20 October 2003, para. 5; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Sixth, Seventh and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures, 29 November 2007, para. 20; *Niyitegeka* Appeal Judgement, paras 33, 35; *Prosecutor v. Nizeyimana*, ICTR-00-55C-PT, Decision on Urgent Defence Motion for Disclosure of Prior Statements, 31 January 2011, paras 4-5; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Inspection of Report on Interahamwe, 28 June 2007 ('*Karemera* Decision of 28 June 2007'), para. 12.
[35] Defence motion, paras 19-21, referring to Witness PRH707 Disclosure Decision.

that anything said or written by a witness, relevant to an indictment, is a disclosable statement, including when it has been transcribed or reported by another.[36]

Category 5: any draft report prepared by Mr Donaldson, whether complete or not

19. Mr Donaldson's draft reports, complete or not, signed or not, are disclosable as 'witness statements' under Rule 110 (A) (ii); the Prosecution has itself referred to them as such. As Mr Donaldson is not an expert witness, the Pre-Trial Judge's decision on prior versions of an expert report is inapplicable.[37] As he is an ordinary witness, his prior reports are his product and not the Prosecution's work product; the Defence is entitled to know how his version developed. Given the significance of Mr Donaldson's evidence, the Defence should be in an equivalent position to the Prosecution and have access to prior versions of the analyses he conducted relating to his testimony.[38]

Categories 6 and 8: any document or item of evidence annotated by Mr Donaldson; and any document, irrespective of its form, containing an opinion or comments from Mr Donaldson which has not been disclosed to the Defence to date

20. According to the Appeals Chamber's general principle in the *El Sayed* decision, evidentiary materials annotated by Mr Donaldson and documents containing his opinion or comments are disclosable as they are the witness' product and not the Prosecution's work product.[39]

Admissibility of the reports

21. Although the Prosecution has yet to make clear its intentions regarding the Merhi attribution report and Mr Donaldson's 13 October 2016 statement, the Merhi Defence intends to object to their admissibility.[40]

Conclusion

22. The Merhi Defence concludes that its request is distinguishable from instances where the Trial Chamber, relying on the principle that 'Parties make representations in good faith

[36] Defence motion, paras 22-24, citing ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84*bis*-T, Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Respect of Witness81, 18 November 2011 ('*Haradinaj* Decision'), paras 27, 32.
[37] Defence motion, para. 25, referring to Pre-Trial Judge's Decision of 24 May 2013, paras 30-33.
[38] Defence motion, paras 26-27.
[39] Defence motion, para. 28.
[40] Defence motion, para. 29.

and in accordance with the conduct expected of counsel', has previously dismissed disclosure requests.[41] Here, the Prosecution has never stated that it is *not* in possession of the requested material, and the Defence has made repeated attempts to obtain its cooperation. Granting the request would protect the Defence's right to a fair trial and adequate time and resources to prepare a defence. The Prosecution should inform the Defence of material in its possession and disclose it as soon as possible. The Trial Chamber should clarify the legal standard applicable to the disclosure of the requested categories of materials.[42]

Prosecution response

23. The Prosecution argues that the requested documents are not subject to notification or disclosure as they are, under Rule 111, internal documents that Mr Donaldson or other Prosecution staff created for the Prosecution's internal use. In contrast, Mr Donaldson's statements and reports were disclosed, as their purpose is admission into evidence and use in court.[43]

24. Internal work product, produced by or relating to Mr Donaldson, does not lose its Rule 111 protection solely due to his witness status. The Appeals Chamber, in its November 2013 decision, held that the Rule 111 exemption applies to disclosure under Rule 110 (A) (ii) so that an internal document prepared by an individual who then becomes a witness, is not subject to disclosure. Labelling a document 'internal' is not sufficient for it to fall under Rule 111. In that case, the appellant (counsel for Mr Sabra) had not argued that the requested document was not an internal document created for internal use. When rejecting the appellant's request for the same document under Rule 110 (B), the Appeals Chamber found that the determinative factor was the document's internal status, and not the witness' status. The Appeals Chamber took into account its July 2011 decision, in which it held that the scope of Rule 111 'is confined to the internal product of the Party, or those whose conduct is fairly attributable to the Party or analogous to that of the Party'.[44]

25. It is irrelevant whether the requested documents were created before or after Mr Donaldson became a witness, as 'the exception of Rule 111 applies to *all* disclosure'. The

[41] Defence motion, para. 30, referring to Investigators' Notes Disclosure Decision, para. 11.
[42] Defence motion, paras 30-31.
[43] Prosecution response, paras 1, 9; citing Appeals Chamber Decision of 6 November 2013. Regarding the meaning of 'statements and reports', the Prosecution makes reference, 'for example' to statements and versions of the reports which it added to its exhibit list.
[44] Prosecution response, paras 4-7; citing Appeals Chamber Decision of 6 November 2013, paras 25-27; *El Sayed* Decision of 19 July 2011, paras 91, 99-100.

sole exception to Rule 111, where exculpatory evidence is disclosable under Rule 113,[45] does not apply to Mr Donaldson's work product as he is not a Prosecution decision maker. The Prosecution need not take a position on whether the requested documents are 'witness statements', as in either case the material is exempt from disclosure under Rule 111. The Merhi Defence has failed to substantiate its request for notification of such material.[46]

26. The request potentially affects thousands of documents. Category 2 may require reviewing thousands of emails, and at least two categories, 6 and 8, are overly broad and amount to fishing expeditions. Draft versions of category 7 documents—presentation support to be used in court—are exempt from notification or disclosure under Rule 111, while the final version must be disclosed no later than three days before they are due to be used in court.[47] The Trial Chamber decision relied upon by the Merhi Defence is distinguishable from the present request as it did not involve a Prosecution staff member and was decided under Rule 110 (B).[48]

27. The 11 decisions from international criminal courts and tribunals relied on by the Merhi Defence cannot supplant the Appeals Chamber's 6 November 2013 decision and, in any event, 10 of them are distinguishable as they do not concern the internal work product of a witness who is a 'member of a party'. The remaining ICTR Trial Chamber decision in *Karemera* did involve disclosure of a Prosecution analyst's report, but is distinguishable because the report: (i) had been disclosed in another ICTR case and was no longer internal; and (ii) was requested under the ICTR equivalent of Rule 110 (B) and was clearly and sufficiently identified in the request.[49]

28. At the latest, the Prosecution's June 2016 updated witness list described Mr Donaldson as a '*viva voce* witness', while the intended expert witnesses 'were listed in the notice as Rule 161'. It is not explained how his non-expert status affects the documents in

[45] Pursuant to Rule 113, the Prosecution must disclose to the Defence any information in its possession or actual knowledge that may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution's evidence, unless the information falls within specific exemptions from disclosure, such as State security interests.
[46] Prosecution response, paras 9-11.
[47] The Trial Chamber notes that, as discussed below, the PowerPoint slides mentioned here were disclosed on 24 April 2017.
[48] Prosecution response, paras 12-14; citing Witness PRH707 Disclosure Decision.
[49] Prosecution response, para. 15; citing *Karemera* Decision of 28 June 2007, para. 14. In the *Karemera* decision, an accused had asked to inspect an internal analyst's report under ICTR Rule 66 (B). The report had already been made available to an expert witness who was due to testify in another case before the ICTR.

categories 1-4 and 6-8. It is unclear why the Merhi Defence chose to make the request now, given that it cross-examined Mr Donaldson in 2015 without raising the matter.[50]

29. Finally, the Prosecution notified all Parties informally that it intends to seek admission of Mr Donaldson's written evidence during his examination-in-chief.[51]

Defence reply

30. The Merhi Defence submits that a document's classification as 'internal' depends on *its* status and not on that of the witness who created it. The Prosecution erroneously interprets Rule 111 and the Appeals Chamber's November 2013 decision, which held that the fact that an investigator who authored an internal document becomes a witness has no impact on the document's status. Therefore, a witness statement does not become an internal document because the witness works for the Prosecution or gave the statement as part of his duties.[52]

31. The Appeals Chamber rejected the use of a witness' status to avoid disclosure by labelling everything produced by him as 'internal'. The case law of the international criminal courts and tribunals is applicable as it defines a 'witness statement' under Rule 110 (A) (ii), which does not become internal based on its author or the contractual framework within which it was created.[53]

32. In the November 2013 decision, the Sabra Defence had not contested the internal classification of the requested documents, while here the Merhi Defence has consistently asserted that the documents it requests are witness statements under Rule 110 (A) (ii), which the Prosecution does not contest. The Prosecution's arguments under Rule 111 deprive it of meaning and the Defence of documents to which it is entitled to prepare its case. As Rule 111 is an exception to the general rule, it must be interpreted restrictively. If the drafters of the Special Tribunal's Rules had intended to link a document's classification to its author's status, they would have done so. The obligation to disclose witness statements is subject to the status of the documents and not that of their author, as the Prosecution previously conceded.[54]

33. The Merhi Defence made a limited request for disclosure of documents connected to Mr Donaldson's testimony which do not fall under Rule 111. The Prosecution does not deny

[50] Prosecution response, paras 2-3.
[51] Prosecution response, para. 16.
[52] Defence reply, paras 1-6.
[53] Defence reply, paras 7-8.
[54] Defence reply, paras 9-12.

possessing such documents and, other than invoking Mr Donaldson's status, does not explain why they are 'internal'. As they originated from Mr Donaldson in preparing his testimony, the documents are his product and do not fall under Rule 111. The request for disclosure of emails is limited to those in which he discusses the subject matter of his testimony. The Merhi Defence does not seek disclosure of any exchanges he had as a Prosecution employee regarding his opinion on a witness or on an investigatory route or strategy. The request is reasonable, well founded and is not a 'fishing expedition'. If Mr Donaldson responds to an email requesting clarification of a choice of attribution date, if he gives his opinion on points of attribution, if he comments on evidence used for attribution, if he produces draft reports on attribution—these are Mr Donaldson's product as a witness.[55]

34. As attribution is at the heart of this case, the Prosecution should not gain an undue advantage from Mr Donaldson's status as its employee.[56]

Prosecution additional submissions in court

35. The Prosecution also made submissions in court on several occasions, notably with regard to the scale of the task of identifying the materials falling under category (i) of the Trial Chamber's 20 April 2017 order, describing it as a 'trawling expedition'.[57] The Prosecution submitted that many thousands of documents were classified as internal over the lifespan of the UNIIIC and the Special Tribunal. The requested documents may be located on the computers drives of several Prosecution staff members and an electronic word-search would be insufficient to retrieve them. Each document would have to be manually examined—and in the case of emails attachments would also have to be opened—requiring the assistance of Mr Donaldson and several other staff members. The process may take weeks or months, and would involve around 70,000 computer files and around 60,000 emails. Mr Donaldson would be unavailable to give his evidence for at least a month.[58]

Prosecution further submissions

36. The Prosecution filed submissions further to the Trial Chamber's 8 May 2017 email order to resume compliance with the 20 April 2017 order for *ex parte* disclosure, as clarified in court on 8 May 2017 to refer to 'things which are in between, which may be defined for the

[55] Defence reply, paras 13-18.
[56] Defence reply, para. 19.
[57] Transcript of 21 April 2017, p. 8.
[58] Transcript of 21 April 2017, pp 101-102; transcript of 8 May 2017, p. 4; transcript of 17 May 2017, pp 11-16.

purposes of international criminal law procedural law as "a statement"'. A confidential *ex parte* annex contains 'material sourced from Mr Donaldson's holdings which may feasibly be deemed to fall into that category'; as the Trial Chamber has yet to define 'statement', the materials 'may, or may not, fall within any final determination'. The Prosecution refers to its earlier argument that it need not take a position on whether the requested documents are 'witness statements' because, in either case, they fall under Rule 111. In its November 2013 decision, the Appeals Chamber held that '[a]n internal document, created for a party's internal use, does not assume a different, non-internal, use merely because its author has become a witness.' Finally: (i) in light of 'the broad sweep of items that might fall within th[e] definition [of a witness statement]', the disclosed materials 'do not and cannot reflect a comprehensive review of the Prosecution's holdings, the scope of which would require months to complete'; and (ii) the indicated time limits 'preclude a more detailed or nuanced assessment of the material held by Mr Donaldson or those working with him'. [59]

Defence further response and clarification

37. The Merhi Defence then filed a motion requesting an order for the withdrawal of the Prosecution's further submissions from the case file and full compliance with the Trial Chamber's 20 April 2017 order. The submissions 'reflect a repeated and clear attempt to circumvent' the order and the 8 May 2017 email (requiring resumption of compliance with the order following its earlier suspension). The Prosecution has had multiple opportunities to advance its arguments, in writing and in court.[60]

38. The Prosecution is unacceptably trying to reopen the discussion to convince the Trial Chamber to amend or rescind the order and email under various 'pretexts'. It had already raised arguments under Rule 111 and regarding the time and resources necessary to disclose the documents to the Trial Chamber and how this would affect disclosure of other materials; the Trial Chamber upheld the order and the 8 May 2017 email. The Prosecution's further submissions are another attempt to avoid compliance with this order, by unacceptably repeating arguments already dealt with in earlier filings. Neither the quantity of material to be disclosed, nor the time required to disclose it, affects the Prosecution's obligations under

[59] Prosecution corrected further submissions, paras 7-12.
[60] Defence further response, paras 1-4, 13, request for relief.

Rule 110 (A) (ii) and in no way justifies being granted leave to avoid these obligations to the detriment of the Defence's recognised rights.[61]

39. The Merhi Defence also questions the quality and reliability of the sample the Prosecution provided to the Trial Chamber. It can only be a tiny portion of the disclosable documents, which the Prosecution acknowledged does not adequately reflect all of category (i), and will not allow an informed assessment. Failure to examine all of the category (i) material would irreparably damage the Defence's rights. It also objects to the Prosecution's discretionary selection of materials, in light of the clear disagreement on disclosure. It is not the first time that the Prosecution has attempted to avoid its disclosure obligations by misinterpreting the applicable law. Its repeated reluctance to submit material, even to the Trial Chamber, is another concern. Finally, as the 8 May 2017 email contains no deadline, the deadlines mentioned by the Prosecution appear to be another 'pretext' for not complying with the 20 April 2017 order.[62]

40. On 12 May 2017, at the Prosecution's request, the Merhi Defence submitted a clarification regarding the use of the term 'pretext' and variations on this theme in its response. The Merhi Defence stated that this should not be interpreted as suggesting that the Prosecution lied to the Trial Chamber or to the Defence. The Defence did not intend to accuse the Prosecution of dishonesty or inappropriate conduct, and does not doubt the Prosecution's integrity and ethics.[63]

Prosecution further reply

41. The Prosecution argues that the Merhi Defence's response violates Articles 26 to 29 of the Code of Professional Conduct for Counsel Appearing Before the Tribunal,[64] by making serious and unwarranted allegations of bad faith, dishonesty and underhand dealing against the Prosecution and its counsel. The term 'pretext' suggests that Prosecution counsel lied about the true reasons for the Prosecution's actions. The Merhi Defence's clarification is

[61] Defence further response, paras 4-9, 13.
[62] Defence further response, paras 10-13.
[63] Defence clarification to further response, paras 1-2.
[64] A Code of Professional Conduct for Counsel Appearing Before the Tribunal, 28 February 2011. Article 26 states: 'Counsel shall avoid ill-considered or uninformed criticism of the competence, conduct or character of other Counsel.' Article 27 states: 'During trial, Counsel shall not make any allegation of impropriety against other Counsel unless such accusation is well-founded and without first giving reasonable notice so that other Counsel has an adequate opportunity to respond.' Article 28 states: 'Counsel shall avoid disparaging personal remarks or acrimony towards other counsel.' Article 29 states: 'Counsel shall not ascribe a position to other Counsel that they have not taken, or otherwise seek to create an unjustified inference based on other Counsel's statements or conduct.'

insufficient. The response's tone 'verges on the vituperative', attacks the integrity of the Prosecution and its counsel, and repeatedly suggests that the Prosecution is dishonest. The Merhi Defence objects to the 'discretionary selection' of samples without knowing what the samples are or explaining how they could be selected without exercising discretion. It is improper to suggest that the Prosecution knows the law and is deliberately misleading the court in order to avoid its legal obligations.[65]

DISCUSSION

42. The Trial Chamber has carefully reviewed the Parties' submissions in light of Rule 110 (A) (ii), which governs the Prosecution's disclosure obligations for witness statements, and Rule 111, which exempts internal documents and work product from disclosure.

43. The issue for determination by the Trial Chamber is:

> Whether the Prosecution has an obligation, under Rule 110 (A) (ii), to disclose the requested documents as comprising (or on the basis that they qualify as) 'witness statements' under Rule 110 (A) (ii), or whether the Prosecution is entitled to claim, under Rule 111, exemption from disclosure of the documents, or any of them, on the basis that the disputed item is an internal document or internal work product of the Prosecution.

44. The Trial Chamber further identifies the following questions and sub-issues in dispute between the Parties:

- The meaning of a 'witness statement' under Rule 110 (A) (ii);
- Whether the disputed documents are internal work product or fall outside of this ambit, because they are the product of the witness; and
- Whether the Prosecution may claim exemption from disclosure of the disputed documents solely on the basis of Mr Donaldson's status as a staff member.

[65] Prosecution further reply, paras 1-13.

Definition of 'witness statement'

45. The Trial Chamber first turns to the meaning of the term 'witness statement'. The Appeals Chamber has taken an expansive view of what constitutes a 'witness statement', as well as the various forms it might take.[66] It noted that 'the usual meaning [of] a witness statement is an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime'.[67] It further cited the definition from Black's Law Dictionary (Seventh Edition): 'An account of a person's (usu. a suspect's) knowledge of a crime, taken by the police pursuant to their investigation of the offence.'[68]

46. Meanwhile, the International Criminal Court's Appeals Chamber has held that a witness statement is made when witnesses are questioned about their knowledge of the case.[69] The ICTR Appeals Chamber held that records of questions put to witnesses and answers given constitute witness statements.[70]

47. Upon careful review of the international case law, there is no single definition as to the term 'witness statement'. More than one definition exists, together with numerous examples as to which types of material or documents constitute 'witness statements', and also which documents may properly be classified as internal work product and which may not. In light of the international criminal law procedural law principles and the Special Tribunal's case law guiding and informing which documents or material could constitute 'witness statements', any single definition employed should be able to address or encompass the statements of not only a fact-based witness, but also those who are analytical, summarising and opinion-based or otherwise. However, the more extensive definition set in the ICTY *Haradinaj* case—'[a]nything that a witness says or writes which is relevant to an indictment'[71]—is overly broad and all encompassing, running the risk of opening the floodgates to include documents falling expressly outside of the terms of witness statements under Rule 110 (A) (ii), such as a Party's internal work product.

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[66] *See El Sayed* Decision of 19 July 2011, paras 83-87, 89.
[67] *El Sayed* Decision of 19 July 2011, para. 89 (internal quotation marks and emphasis omitted).
[68] *El Sayed* Decision of 19 July 2011, para. 89 (internal quotation marks omitted). *See also Norman* Decision, fn. 4.
[69] ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06 OA 3, Judgement on the Appeal of Mr Bosco Ntaganda Against the "Decision on Defence Requests Seeking Disclosure Orders and a Declaration of Prosecution Obligations to Record Contacts with Witnesses", 20 May 2016, para. 16. *See also* paras 29, 32, 38. The ICC Appeals Chamber rejected the defence's argument that 'witness statements' should also encompass statements concerning other matters, such as security issues or logistical arrangements. *Id.* at paras 10, 33, 38.
[70] *Niyitegeka* Appeal Judgment, para. 33.
[71] *Haradinaj* Decision, para. 32.

48. What is clear from the case law is that the list of documents and material that amount to witness statements is not closed, and each document or category of documents in dispute has to be dealt with on a case-by-case basis, according to the type of testimony the witness will give, the character of the witness, and the content, use, function and source of the document or material itself.

49. These principles will guide the Trial Chamber as it applies the case law regarding witness statements to the unusual circumstances here, namely Mr Donaldson's dual and overlapping roles: (1) as a Prosecution staff member who is part of the team investigating the case; and (2) as a Prosecution witness who will testify at trial based on these investigations. He is providing analytical summary evidence in respect of attribution as well as opinion evidence in respect of co-location and attribution.

Rule 111 and witness statements

50. Given Mr Donaldson's dual roles, the Trial Chamber next addresses the Prosecution's argument that the Merhi Defence's disclosure request for documents should be denied pursuant to Rule 111, which exempts from disclosure the Prosecution's internal work product.

51. The Trial Chamber agrees with the Prosecution that the Merhi Defence's motion for disclosure is broad and could run the risk of encompassing internal work product created by Mr Donaldson.[72] The Trial Chamber finds, notwithstanding, that some of the requested documents, namely Mr Donaldson's witness statements, are not the Prosecution's internal work product.

52. In this regard, the Prosecution has incorrectly interpreted the Appeals Chamber's Decision of November 2013 to assert that even if some of the requested documents are witness statements, they are nevertheless 'not subject to disclosure under Rule 111'.[73] Witness statements are not covered by this Rule.[74] The exemption in Rule 111 'is confined to what has been created by the Party [and] its agents[. I]t has no application to statements of witnesses, which are not the Party's work product; *they are the product of the person interviewed.*'[75]

53. As for the portion of the Appeals Chamber's November 2013 Decision relied on by the Prosecution—'the exemption of Rule 111 applies to *all* disclosure that is ordinarily

[72] Prosecution response, para. 9.
[73] Prosecution response, para. 10. *See* also para. 5.
[74] *El Sayed* Decision of 19 July 2011, paras 78, 83, 85, 109.
[75] *El Sayed* Decision of 19 July 2011, para. 78 (emphasis in original).

required between the parties, including disclosure under Rule 110 (A) (ii)'[76]—the highlighted passage does not bear the interpretation the Prosecution puts upon it.[77] Contrary to the Prosecution's submission, the Appeals Chamber did not, in this passage, repudiate its prior holding that witness statements are not covered by Rule 111. Indeed, the Appeals Chamber confirmed in this same decision that a witness statement such as 'an investigator's note containing the record of an interview with a third person' would not fall within Rule 111.[78] Subsequently, the Trial Chamber has reaffirmed that witness statements are not covered by Rule 111.[79]

54. Therefore, contrary to its submissions, the Prosecution cannot rely on Rule 111 to exempt Mr Donaldson's 'witness statements' from disclosure.

Categories of documents requested by the Merhi Defence

55. In light of the above, the Trial Chamber must next evaluate, for each category of documents requested by the Merhi Defence, whether it is a proper request for a 'witness statement' under Rule 110 (A) (ii). The following observations apply to the Trial Chamber's evaluation of all of the requested categories of documents.

56. The Trial Chamber recognises that, when other Chambers have defined the term 'witness statement',[80] they did not necessarily have in mind witnesses such as Mr Donaldson, a Prosecution analyst and long-time staff member.[81] For example, the ICTR Appeals Chamber in *Niyitegeka* has noted that the creation of a witness statement can involve an investigator interviewing a witness, the investigator creating a record, the witness reviewing the record for accuracy, and then the witness signing it.[82]

57. The procedure for preparing Mr Donaldson's witness statement does not appear to conform to this 'standard' practice. Instead of being interviewed by a Prosecution

[76] Appeals Chamber Decision of 6 November 2013, para. 25 (emphasis in original). *See* Prosecution response, paras 5, 9.
[77] As the Appeals Chamber held in the context of a prior disclosure dispute, 'relevant paragraphs of the Decision [in question] cannot be read in isolation. […] the Decision must be read in totality." CH/AC/2013/01, *In the Matter of El Sayed*, F0005, Public Redacted Version of Decision on Appeal by the Prosecutor Against Pre-Trial Judge's Decision of 11 January 2013, Dated 28 March 2013, 28 March 2013 ('*El Sayed* Decision of 28 March 2013'), para. 29.
[78] Appeals Chamber Decision of 6 November 2013, para. 26.
[79] Investigators' Notes Disclosure Decision, para. 12.
[80] *Above* paras 45-46.
[81] Mr Donaldson has worked for the UNIIIC and then the Special Tribunal's Prosecution for ten years, transcript of 17 May 2017, pp 12-13, 16.
[82] *See Niyitegeka* Appeal Judgment, paras 30-33.

investigator, he is a Prosecution analyst himself. Instead of someone creating a record of what he said, it appears that he created his own record by drafting his own reports and statements.[83]

58. The Trial Chamber is further mindful that Mr Donaldson wears two hats in this case; he is a Prosecution employee as well as a witness. Moreover, as the Prosecution noted, everything Mr Donaldson has worked on as a member of the UNIIIC and the Prosecution leads up and relates to the subject matter of his testimony, namely the attribution of various telephone numbers to the Accused and to Mr Badreddine.[84]

59. In these circumstances, drawing a line that divides Mr Donaldson's product as a Prosecution employee, created for internal use, from his product as a witness, created for use in court, is challenging. Nevertheless, the Trial Chamber does not agree with the Prosecution's suggestion that only a Prosecution employee's finalised written testimony is disclosable and that everything else he or she creates is internal work product.[85] Similarly, the Trial Chamber does not concur with the Pre-Trial Judge's position from a May 2013 decision: 'With respect to Prosecution employees, no clear line can be drawn between internal work produced in the daily execution of their duties and their final written testimony'.[86]

60. As the Merhi Defence points out, this line of reasoning leads to the incorrect conclusion that classification of the disputed documents turns on the status of their author, Mr Donaldson.[87] In fact, the opposite is true. As the Appeals Chamber held, a document's status, and not the status of the witness, is determinative as to whether the document is internal.[88] The Prosecution and Pre-Trial Judge's positions also conflict with the well-established principle that disclosable and protected information, even when co-existing within the same document, can be accurately identified and separated for purposes of disclosure.[89]

61. Neither does the Trial Chamber concur with the Merhi Defence that all 'documents [...] produced by Mr Donaldson in connection with preparing for his testimony [...] are his

[83] *See e.g.* Witness Statement of Andrew Donaldson, 13 October 2016 (ERN 60320166-60320189); Report of Andrew Donaldson: 'Evidence of Telephone Attribution: Hassan Habib Merhi', 13 November 2015, version 4 (ERN D0481043-D0481215).
[84] Transcript of 17 May 2017, pp 12, 16.
[85] Prosecution response, para. 9.
[86] Pre-Trial Judge's Decision of 24 May 2013, para. 26. *See also* para. 53. Of note, the Pre-Trial Judge's decision applied to internal Prosecution expert witnesses. *Below* para. 80.
[87] Defence reply, paras 7, 11-12.
[88] Appeals Chamber Decision of 6 November 2013, para. 31.
[89] *See e.g.*, *El Sayed* Decision of 19 July 2011, para. 109.

product and therefore excluded from the scope of Rule 111'.[90] Such a definition would be far too broad and cast far too wide a net, dragging in all manner of internal documents.

62. So where should the line be drawn to separate the Prosecution's internal work product from Mr Donaldson's product as a witness, in respect of the requested categories of documents? First, the Trial Chamber will assess whether each category constitutes a 'witness statement' for the purposes of Rule 110 (A) (ii) on the basis of how Mr Donaldson's finalised statements and reports were actually prepared, rather than how a typical witness statement might be prepared. When doing so, the Trial Chamber is guided by the principle that '[p]roper categorisation depends not on a document's title but on its content, function, purpose and source.'[91] Second, the Trial Chamber will assess whether the Merhi Defence has formulated each category of documents as specifically and precisely as possible, as required by international criminal law procedural law,[92] or whether the description of documents is too general and vague. In this way, the Trial Chamber can properly balance the Merhi Defence's right to adequate time and facilities to prepare for trial under Article 16 (4) (b) of the Special Tribunal's Statute with other important principles for the proper administration of justice, including the need to safeguard the Prosecution's internal work product and the need to conserve finite Tribunal resources.[93]

Questions and answers, notes and emails (categories 1-3)

63. The Merhi Defence request:

(1) any document [...] containing questions put to or answers provided by Mr Donaldson;

(2) all the emails exchanged between member(s) of the Office of the Prosecutor and Andrew Donaldson relating to any subject(s) that he will refer to in his testimony; and

(3) any document containing notes taken by members of the Office of the Prosecutor during discussions with Andrew Donaldson relating to the content of his testimony.[94]

[90] Defence reply, para. 16.
[91] *El Sayed* Decision of 19 July 2011, para. 117.
[92] *See e.g.*, Pre-Trial Judge's Decision of 8 November 2012, para. 29, where he held that 'it is well settled in the jurisprudence of other international jurisdictions[...] that categories of material or information sought under the specific disclosure provisions should be defined as precisely as possible, and the categories of requests drafted with precision'.
[93] *See El Sayed* Decision of 19 July 2011, para. 112.
[94] Defence motion, paras 3(1)-(3).

64. The Trial Chamber addresses these categories together because the requests for emails and notes are subsumed within the broader request for records of questions and answers.

65. As the Merhi Defence correctly submits, under international case law, records of questions and answers, investigators' notes, and emails can constitute 'witness statements'.[95] However, the decisions cited by the Defence were premised on the Prosecution following the standard practice of preparing a witness' final, signed statement, whereby an investigator interviews an external witness and creates a record of it.[96] Those cases seem not to have contemplated the situation of an in-house analyst informally discussing aspects—in the broadest possible sense—of his potential evidence with his colleagues, while working with them over a period of some years.

66. The expectation that this standard practice was being followed also underlies the various Chambers' explanations as to why disclosure of these kinds of materials is necessary. An investigator's notes, as well as a record of questions and answers captured in a transcript or in an email exchange, represent the original version of the evidence of the witness who was interviewed.[97] Non-disclosure of such materials 'runs the risk that an investigator may sanitize the original account of the witness'.[98] Indeed, such material might also be disclosable under Rule 113 as affecting the credibility of the witness, or otherwise containing exculpatory information.[99]

67. Here, the 'original version' of Mr Donaldson's evidence is unlikely to be found in someone else's notes, records of questions and answers, or emails. It is most likely contained in the earlier drafts of his own statements and reports (which are addressed below). So the purpose underlying why investigators' notes, emails and other records of questions and answers fall within the definition of a 'witness statement' that must be disclosed does not apply in these circumstances.

68. Indeed, as the Prosecution stated, '[t]he definition of questions asked and answers provided [...] simply does not fit with [Mr Donaldson's] style of work [...]; and [...] was

[95] *See* Defence motion, paras 13-14, 16, 21 (citing *El Sayed* Decision of 19 July 2011, paras 83, 85, 87-88; *Niyitegeka* Appeal Judgment, paras 33, 35; and Witness PRH707 Disclosure Decision).
[96] *See Niyitegeka* Appeal Judgment, paras 31-33. *See also El Sayed* Decision of 19 July 2011, paras 83-89, 109; Witness PRH707 Disclosure Decision, paras 3-5.
[97] *See Niyitegeka* Appeal Judgment, para. 33; *El Sayed* Decision of 19 July 2011, paras 85, 87; Witness PRH707 Disclosure Decision, para 5.
[98] *El Sayed* Decision of 19 July 2011, para. 87.
[99] *El Sayed* Decision of 19 July 2011, paras 85, 97.

never designed to do so.'[100] It is thus apparent that Mr Donaldson's working methodology in preparing his reports and statements does not fit within the broad international definition of what a 'witness statement' is. These cases are thus distinguishable from Mr Donaldson's situation.

69. On the other hand, the Merhi Defence request for these materials touches directly on the core of the Prosecution's internal work product. The purpose of Rule 111 is 'to protect the free exchange of ideas and an open discussion within the Prosecutor's or Defence counsel's teams'.[101] Such free exchanges and open discussions likely occur in the meetings and correspondence between Mr Donaldson and his colleagues that the Merhi Defence have targeted.[102] The Trial Chamber would not expect, in the case of Mr Donaldson, that notes from these meetings or emails from this correspondence could be neatly divided into separate boxes labelled 'internal use' and 'in court use'.

70. However, the Trial Chamber does not exclude the possibility that in other circumstances regarding other witnesses, such notes and emails would be readily identifiable as disclosable materials, such as, for example, in the case of Witnesses 705 and 707 and their email correspondence with the Prosecution on the subject of their testimony.[103] The matter should be approached on a case-by-case basis. Indeed, the Trial Chamber ordered the disclosure—but under Rule 110 (B), not Rule 110 (A) (ii)—of some email communications between Witness 707 (but not Witness 705) and the Prosecution, that the Trial Chamber had reviewed for itself, on the basis that they were 'material to the preparation of the Defence'.[104]

71. The situation of Witness 707, however, is distinguishable. He was a telecommunications fact witness, albeit one who could provide some opinion evidence on telecommunications and cell-site matters generally, as opposed to Mr Donaldson, who is an analyst providing summary evidence and giving some limited non-expert opinion evidence. Moreover, the testimony, witness statements and documents underlying Mr Donaldson's reports are almost all in evidence.

72. But even if the material sought is potentially disclosable in the case of other witnesses, such as Witness 707, the Merhi Defence requests here are formulated far too broadly. In this

[100] Transcript of 17 May 2017, p. 12.
[101] *El Sayed* Decision of 28 March 2013, para. 28.
[102] *See* Transcript of 17 May 2017, p. 13. *See also* Defence motion, paras 12, 18-19; Defence reply, para. 6.
[103] Investigators' Notes Disclosure Decision; Witness PRH707 Disclosure Decision.
[104] Witness PRH707 Disclosure Decision.

respect, Prosecution counsel submitted that the request is 'couched in such wide terms as it could encompass hundreds, if not thousands, of documents'.[105] Mr Donaldson's five reports have evidently evolved over the years as additional evidence has been discovered and analysed. The Defence has this material, and, moreover, the main contention appears to be the possible evolution of Mr Donaldson's opinion, rather than the source material itself.

73. In such circumstances, the Trial Chamber does not agree with the Merhi Defence that its requests are 'clear and restricted'.[106] Rather, these requests lack sufficient detail to meet the requirement of specificity. They are far too broadly formulated, and in the circumstances described, might ultimately amount to a 'fishing expedition'.

74. Given these categories of documents sought probably bear little to no relation as to how Mr Donaldson's reports and statements were likely prepared, and the requests are formulated far too broadly, the Trial Chamber finds that they do not constitute proper requests for a 'witness statement' under Rule 110 (A) (ii), and dismisses the requests.

Draft statements and reports (Categories 4-5)

75. The Merhi Defence requests:

(4) any draft statement prepared by Andrew Donaldson, whether signed or unsigned; and

(5) any draft report prepared by Andrew Donaldson, whether complete or not.[107]

76. Because both categories concern drafts of Mr Donaldson's written evidence, the Trial Chamber addresses them together.

77. Unlike categories 1-3, these requests concern materials that bear directly on the preparation of Mr Donaldson's finalised statements and reports. As the Appeals Chamber has explained, '[b]oth the Trial Chamber and the opposing party are entitled to know how the *witness's* version has evolved.'[108] For Mr Donaldson, the process by which his evidence evolved is best reflected in the drafts he prepared leading up to his finalised statements and reports. Disclosure of these materials would provide the Merhi Defence with Mr Donaldson's original account, and allow it to assess whether his original account was subsequently

[105] Transcript of 17 May 2017, p. 14.
[106] Defence reply, para. 15.
[107] Defence motion, paras 3 (4)-(5).
[108] *El Sayed* Decision of 19 July 2011, para. 87 (emphasis in original).

'sanitised', or otherwise altered as to affect his credibility or the reliability of his conclusions.[109]

78. Moreover, the Merhi Defence have defined the parameters of its request for these two categories of documents with sufficient specificity such that the Prosecution can easily identify the relevant documents. The Prosecution has already confirmed that drafts of Mr Donaldson's statements and reports are in its possession,[110] and has provided samples of such drafts to the Trial Chamber on an *ex parte* basis.[111]

79. The Trial Chamber therefore finds that these are proper requests for a 'witness statement' under Rule 110 (A) (ii).

80. The remaining issue is whether Mr Donaldson's draft statements and reports are otherwise exempt from disclosure. The Trial Chamber finds the Pre-Trial Judge's decision holding that drafts of expert reports are generally not disclosable to be inapplicable here.[112] As the Merhi Defence points out, the Pre-Trial Judge's decision would not apply in the present circumstances, because Mr Donaldson will not be testifying as an expert.[113]

81. In any event, the Trial Chamber notes that the Pre-Trial Judge's decision appears to conflict with the Appeals Chamber's earlier decision that 'all stages of the preparation of a witness's formal statement can be important, whether to exhibit consistency or the reverse',[114] and that Parties are entitled to know how a witness' version has evolved.[115] The Pre-Trial Judge acknowledged this decision but found that it applied only to fact witnesses.[116] The Trial Chamber does not agree; the Appeals Chamber's reasoning applies with equal force to expert witnesses as well as witnesses offering opinion evidence, such as Mr Donaldson. There is no legitimate reason to differentiate between fact and expert witnesses for the purpose of disclosing draft statements and reports.

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[109] *See El Sayed* Decision of 19 July 2011, paras 85, 87, 97.
[110] Transcript of 21 April 2017, pp 3, 98.
[111] Prosecution corrected further submissions, paras 3-5.
[112] Pre-Trial Judge's Decision of 24 May 2013, paras 30-33.
[113] Defence motion, para. 25. The Prosecution originally intended to call Mr Donaldson as an expert witness. Prosecution Notice of 10 December 2012, pp 3-5 (confidential). The Parties dispute when the Prosecution notified the Defence that Mr Donaldson would no longer be called as an expert witness. *Compare* Defence motion, para. 2 *with* Prosecution response, para. 2. The Trial Chamber is satisfied that, by 20 June 2016, the Prosecution expressly informed Defence counsel that it was no longer intending to call Mr Donaldson as an expert. *See* Prosecution Notice of 20 June 2016, p. 7, which listed Mr Donaldson as a live witness rather than as an expert witness.
[114] *El Sayed* Decision of 19 July 2011, para. 85.
[115] *El Sayed* Decision of 19 July 2011, para. 87.
[116] Pre-Trial Judge's Decision of 24 May 2013, para. 32.

82. Furthermore, the Prosecution already disclosed voluntarily to the Defence a draft report of Mr Gary Platt, a Prosecution staff member and expert witness.[117] So such disclosures would not be unprecedented in this case.

83. In light of the above, the Trial Chamber finds that Mr Donaldson's draft reports and statements are disclosable pursuant to Rule 110 (A) (ii).

Annotated documents and documents containing opinion or comments (Categories 6 and 8)

84. The final set of categories of documents requested by the Merhi Defence are:

> (6) any document or item of evidence annotated by Mr Donaldson; and
>
> (8) any document [...] containing an opinion or comments from Witness Andrew Donaldson which has not been disclosed to the Defence to date.[118]

85. The Merhi Defence has not cited any case law demonstrating that these categories of documents amount to 'witness statements' for purposes of Rule 110 (A) (ii). The Defence only refers broadly to the *El Sayed* Decision of 19 July 2011 and argues that such documents would be the product of Mr Donaldson.[119] But the definition of a 'witness statement' is not so broad.

86. A greater difficulty is that these requests likely target documents that are part and parcel of the process by which Mr Donaldson regularly creates documents for the Prosecution's internal use and thereby exempt from disclosure under Rule 111. As with the notes and emails referred to above at paragraph 69, the Trial Chamber would not have expected the Prosecution to divide documents annotated by Mr Donaldson or documents containing his opinion and comments into two groups, namely those used to prepare his written evidence versus those used to prepare his internal documents.

87. The Trial Chamber therefore agrees with the Prosecution that these requests, as formulated, 'are overly broad'.[120] They are so general and lacking in specificity as to present significant challenges for the Prosecution to search and identify the relevant documents in response.

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[117] Transcript of 25 January 2017, pp 54-56; transcript of 26 January 2017, pp 21, 73, 112-113.
[118] Defence motion, para. 3 (6), (8).
[119] Defence motion, para. 28.
[120] Prosecution response, para. 12.

88. Given the requests for these categories of documents lack specificity, the Trial Chamber finds that they do not constitute proper requests for a 'witness statement' under Rule 110 (A) (ii). The Trial Chamber further finds that including these overly broad, imprecise categories within the scope of 'witness statements' is not supported by international criminal law procedural law.

Conclusion

89. In sum, the Trial Chamber finds that the Merhi Defence requests for documents in categories 4-5—Mr Donaldson's draft statements and draft reports—are proper requests for a 'witness statement' under Rule 110 (A) (ii) and therefore disclosable. The Merhi Defence's remaining requests for documents in categories 1-3, 6 and 8—questions put to or answers given by Mr Donaldson, emails between Mr Donaldson and other Prosecution employees, notes from other Prosecution employees, documents annotated by Mr Donaldson and documents containing Mr Donaldson's opinion or comments—are dismissed.

Other matters raised by the Parties

90. The Parties have also raised a number of issues ancillary to the Merhi Defence's request for disclosure of the eight categories of documents.

Request for a list of materials and a general order

91. The Trial Chamber denies the Merhi Defence request that the Prosecution provide it, on a continuous basis, with a list of materials relating to Mr Donaldson that it has in its possession.[121] The Defence made no arguments nor cited to any Rules or principles of international criminal law procedural law justifying such relief.[122] Moreover, generating such a list most likely requires the Prosecution to create new work product, which it is not required to satisfy a request for disclosure. The Prosecution need only disclose that which is already in its possession.[123]

92. Similarly, the Trial Chamber finds it unnecessary to issue a general order reminding the Prosecution of its disclosure obligations, as requested by the Merhi Defence.[124]

[121] Defence motion, p. 12.
[122] Prosecution response, para. 11.
[123] *See* Pre-Trial Judge's Decision of 8 November 2012, para. 31; Pre-Trial Judge's Decision of 24 May 2013, paras. 37, 42.
[124] Defence motion, para. 1.

Admissibility of Mr Donaldson's statement and report

93. The Merhi Defence noted its intention to object to the admission of Mr Donaldson's report and statement relating to Mr Merhi, but provided no argument in support.[125] The Trial Chamber need not consider this issue unless and until the Defence actually objects to the admission of this evidence[126] and provides a valid basis for doing so.

Withdrawal of a Prosecution filing and full compliance with the Trial Chamber's order of 20 April 2017

94. The Merhi Defence seeks the withdrawal from the case file of the Prosecution's corrected further submissions.[127] The Trial Chamber finds that the Prosecution's submissions were appropriately filed. They were filed in response to the Trial Chamber's request for a further sample of documents falling within the category of records of questions and answers.[128] The submissions include a sample of such documents (in a confidential and *ex parte* annex), and a cover filing in which the Prosecution provided *caveats* as to how the sample was selected. There was repetition of some arguments from the Prosecution response. However, the Trial Chamber does not agree that these submissions represent an unacceptable attempt to circumvent the Prosecution's obligations or improper repetition of arguments.[129] The remedy sought by the Merhi Defence is therefore unwarranted.

95. As for the Merhi Defence's related request that the Prosecution be ordered to comply fully with the Trial Chamber's order of 20 April 2017 and submit to the Trial Chamber *all* documents consisting of records of questions and answers for the Trial Chamber to review,[130] the Trial Chamber finds this request moot in light of its determination that this category of documents is not disclosable.

Complaint about breach of the Code of Professional Conduct for Counsel Appearing before the Tribunal

96. The Prosecution complained about the language used by counsel for Mr Merhi in their further response. The Prosecution argues that they accused the Prosecution of bad faith and

[125] Defence motion, para. 29.
[126] *See* Prosecution response, para. 16 (noting its intention to seek admission of Mr Donaldson's written evidence during his examination-in-chief).
[127] Defence further response, paras 1, 13.
[128] Prosecution corrected further submissions, para. 1; transcript of 8 May 2017, pp 4-9.
[129] Defence further response, paras 2, 4, 8, 13.
[130] Defence further response, para. 13.

dishonesty during the course of the litigation, in particular by repeated use of the term 'pretext', or 'prétexte', in the filing, which was in French.[131] Defence Counsel stated in a short clarification that they did not intend to accuse the Prosecution of lying, and the use of the term 'pretext' did not imply dishonesty or inappropriate conduct.[132]

97. The Oxford on-line English dictionary, however, defines 'pretext' as 'a reason given in justification of a course of action that is not the real reason'. A French on-line dictionary, le-dictionnaire.com, provides a similar definition of the word 'prétexte', namely, 'Cause simulée, supposée; raison apparente dont on se sert pour cacher le véritable motif d'un dessein, d'une action'. The choice of words was thus very unfortunate.

98. The Trial Chamber accepts the explanation that Defence counsel did not intend to accuse the Prosecution of dishonesty. In these circumstances, the Trial Chamber finds that the Defence's language does not rise to such a level as to invoke the provisions of the Code of Professional Conduct for Counsel Appearing Before the Tribunal cited by the Prosecution. Counsel, however, are reminded to take particular care with their choice of words in describing the actions of opposing counsel. And in this respect the Trial Chamber repeats its reminder to counsel of their obligations under the Code,[133] and in particular Article 6 (e) which requires counsel to 'engage with all Counsel, and in particular opposing Counsel, in a civil manner including when faced with disagreement'.

Final observations

99. The Trial Chamber is troubled by the manner in which the Parties have proceeded in the course of this disclosure dispute.

100. On the one side, the Merhi Defence acted with undue delay in requesting disclosure. The Prosecution first disclosed Mr Donaldson's report to the Merhi Defence by February 2014,[134] (once his case was joined to that of the other four Accused). Mr Donaldson

[131] Prosecution further reply, paras 3-4, 8, 11.
[132] Defence clarification to further response, para. 2.
[133] F2644, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH024, PRH069, PRH106 and PRH051 Pursuant to Rule 155, 12 July 2016, para. 22; in that case it was counsel acting for Mr Sabra. *See also*, F2901, Decision Admitting Statements of Witness PRH103 under Rule 158, 12 December 2016 (confidential), para. 57, in respect of other Defence counsel.
[134] STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, and STL-13-04/PT/TC, *Prosecutor v. Merhi*, Joint Hearing, Decision on the Joinder of cases STL-11-01 and STL-13-04, Transcript of 11 February 2014, pp 91-96; F1424, Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014, para. 108; Transcript of 12 February 2014, pp 115-117.

first testified in this case in 2015, almost two years ago,[135] albeit on a different topic (the creation of call sequence tables). Yet the Defence did not make a similarly wide-ranging request for disclosure for him at that time, or for ten other Prosecution analysts who also testified in this case.[136] Instead, the Defence waited until 16 February 2017 to make the present disclosure request to the Prosecution, which led to the Trial Chamber not being seized of this issue until March 2017. If the Defence wanted the Prosecution to have sufficient time to respond to such a broad disclosure request that would require time-consuming searches and document review, they should have asked for these materials much earlier in the trial.

101. As for the several reasons offered by the Merhi Defence to excuse the lateness of its actions, the Trial Chamber does not see how any of them justify the delay here. The Defence's workload for the past three years, between the joinder litigation at the beginning of trial and the two Prosecution witnesses who testified earlier this year (Mr Gary Platt and Mr John Edward Philips), does not excuse its inaction.[137] The specific issues identified by the Defence as arising from Mr Platt's testimony, such as the Prosecution's non-disclosure of updated draft reports,[138] do not explain the overly broad nature of the greater number of its requests for disclosure. Neither would the Prosecution's notification of the change in Mr Donaldson's status from expert to non-expert witness justify the Defence's delay.[139] To the extent the Defence felt constrained by the Pre-Trial Judge's decision limiting disclosure for Prosecution internal expert witness,[140] the Defence was free to raise this matter with the Trial Chamber at a much earlier date. The Trial Chamber, as counsel must be aware, is not bound by the Pre-Trial Judge's decisions.

102. On the other side, this litigation has revealed that the Prosecution's record-keeping is inadequate in significant aspects with regard to its disclosure obligations. The Prosecution has admitted that, for the thousands of documents it classifies as internal work product, it has not gathered them into a central database. Instead, these documents are scattered across various computer drives, including the personal drives of Prosecution employees.[141] As a result, searching for and identifying documents responsive to the category of records of questions

[135] Transcript of 21 July 2015, pp 76-100.
[136] Transcript of 17 May 2017, p. 12.
[137] Transcript of 17 May 2017, pp 21-23.
[138] *See* Defence motion, para. 3, Annex B (confidential); transcript of 17 May 2017, p. 21; F3117, Requête de la Défense de M. Merhi et de M. Sabra en Demande du Report du Témoignage du Témoin Andrew Donaldson (PRH230), 3 May 2017, para. 23.
[139] Transcript of 17 May 2017, pp 23-24; Defence motion, para. 3.
[140] *See* Defence motion, paras 25-26; Pre-Trial Judge's Decision of 24 May 2013.
[141] *See* Transcript of 17 May 2017, pp 11-14.

and answers would have required the Prosecution to *manually* review around 70,000 computer files[142] and around 60,000 emails,[143] a process that would have taken weeks or months to complete and would have delayed Mr Donaldson's testimony in the meantime.[144]

103. As the Pre-Trial Judge rightly stated, 'a wide measure of discretion is afforded to the Prosecution, with the full expectation that it will fulfil its disclosure obligations in an organised, comprehensible, useful and effective manner so as to ensure delays are minimised and the accused's fundamental rights to a fair trial are respected'.[145] The Trial Chamber finds it highly unlikely that the Prosecution would be able to meet this standard in the event it was required to conduct an extensive review of its internal documents as part of its obligation to search and categorise its documents that are disclosable.[146] Moreover, when there is a voluminous amount of material to be properly categorised, the Prosecution cannot, for all practical purposes, throw up its hands but must establish a suitable process for reviewing and disclosing documents in batches as appropriate. The Trial Chamber expects the Prosecution to take appropriate steps going forward—such as maintaining a 'correspondence log' or something similar for communications relating to a witness' evidence—to ensure it can meet its disclosure obligations under the Rules in an appropriate and timely manner.

CONFIDENTIALITY

104. The Merhi Defence submits that the annexes to its request were filed confidentially as they contain confidential correspondence between the Defence and the Prosecution. However, the annexes should be reclassified.[147] The Prosecution argues that the annexed correspondence should remain confidential, as this facilitates frank discussion between the parties, potentially resolving issues without judicial intervention.[148] These letters, however, were clearly written with the intention of annexing them, if necessary, to filings. The Trial Chamber finds, in the circumstances, that in order to facilitate the public nature of these proceedings, the Merhi Defence should file a public redacted version of the annexes, after having first consulted with the Prosecution.

[142] Transcript of 8 May 2017, p. 4. *See also* Transcript of 17 May 2017, p. 14.
[143] Transcript of 17 May 2017, pp 13, 16.
[144] Transcript of 21 April 2017, p. 101. *See also* Transcript of 17 May 2017, pp 13-16.
[145] Pre-Trial Judge's Decision of 8 November 2012, para. 32.
[146] *El Sayed* Decision of 19 July 2011, paras 71-74, 117.
[147] Defence motion, para. 32.
[148] Prosecution response, paras 17-18.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

GRANTS the Merhi Defence's motion for disclosure in part;

ORDERS the Prosecution to immediately disclose Mr Donaldson's draft reports and statements to Defence counsel;

DENIES all other requests for relief by the Merhi Defence and the Prosecution; and

ORDERS counsel for Mr Merhi to file public redacted versions of the annexes to its motion.

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

Leidschendam,
The Netherlands
2 June 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy