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:	**13 September 2017**
Original language:	**English**
Classification:	**Public**

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

DECISION DENYING MERHI DEFENCE MOTION SEEKING DISCLOSURE OF MATERIAL RELATING TO POTENTIAL USERS OF PURPLE PHONE 231

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INTRODUCTION

1. The Prosecution's case concerns five interconnected mobile telephone groups—colour-coded as 'red', 'green', 'blue' and 'yellow', operating in four closed networks, and one group of 'purple' mobiles. These mobiles were allegedly involved in planning, preparing and executing the attack that resulted in former Prime Minister of Lebanon, Mr Rafik Hariri's death, and the death and injury of many others in Beirut on 14 February 2005. A key part of the Prosecution's case is the attribution of mobile telephone numbers to the four Accused and the named, but deceased, co-conspirator Mr Mustafa Amine Badreddine.[1]

2. The 'purple mobiles' (from at least 1 January 2003 until 16 February 2005) were allegedly used to communicate amongst each other and with others outside the group, and to coordinate a false claim of responsibility for the attack. 'Purple 231', in particular, is attributable to Mr Hassan Habib Merhi on the basis that he had allegedly used this and other mobiles to frequently contact and send text messages to his family members and associates.[2]

3. The Merhi Defence seeks an order for the disclosure, under Rules 113, 110 (A) (ii) and 110 (B) of the Special Tribunal's Rules of Procedure and Evidence, of all the material related to Prosecution analyst Mr Andrew Donaldson's (Witness PRH230) testimony which considers the possibility that Purple 231, attributed to Mr Merhi, could have been attributed to other users. The Defence also requests that the Trial Chamber issue a general declaration that Rule 111 is inapplicable in the circumstances of this motion.[3]

APPLICABLE LAW

4. 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, [...]

[1] STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016, paras 3, 14-51; F2819, Decision on Prosecution Motion to Admit Documents relating to Telephone Subscriber Records from the Touch Company, 7 November 2016 ('Decision of 7 November 2016'), para. 14; *see also* F0019-AR126.11, Decision on Badreddine Defence Interlocutory Appeal of the "Interim decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 11 July 2016; F2633, Order Terminating Proceedings Against Mustafa Amine Badreddine Without Prejudice and Ordering the Filing of an Amended Consolidated Indictment, 11 July 2016.
[2] Amended consolidated indictment, 12 July 2016, paras 15(e)-17.
[3] F3221, Merhi Defence Motion Seeking a Disclosure Order for Material relating to Potential Users of Purple Phone 231, 10 July 2017 ('Defence motion'), para. 1.

(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.

Rule 110 (B) states:

> The Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

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

Rule 113 (A) states:

> Subject to the provisions of Rules 116, 117 and 118, the Prosecutor shall, as soon as practicable, disclose to the Defence any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence.

SUBMISSIONS

Merhi Defence disclosure application

5. In its motion, the Defence requests the disclosure of:

(1) any written exchange exploring the possibility of someone other than Mr Merhi using Purple 231;

(2) any notes exploring the possibility of someone other than Mr Merhi using Purple 231;

(3) any opinion, provided in any form, exploring the possibility of someone other than Mr Merhi using Purple 231;

(4) any report, final or not, exploring the possibility of someone other than Mr Merhi using Purple 231;

(5) any statement, signed or not, exploring the possibility of someone other than Mr Merhi using Purple 231;

(6) any email exchange , exploring the possibility of someone other than Mr Merhi using Purple 231; and

(7) any other document exploring the possibility of someone other than Mr Merhi using Purple 231.[4]

Background to disclosure motion

6. In April and June 2017, counsel for Mr Merhi sent to the Prosecution two letters requesting the disclosure of material related to Mr Donaldson's analysis of the use of Purple 231. The Merhi Defence attached to its motion the correspondence with the Prosecution that preceded and prompted this motion.[5]

7. On 31 March 2017, the Prosecution filed an application to add to its exhibit list a statement prepared by Mr Donaldson, as an addendum to his attribution report entitled 'Evidence of Telephone Attribution—Hassan Habib Merhi', which suggests that a close relative of Mr Merhi could have been the user of 'Purple 231'.[6] The Defence contacted the Prosecution, in a letter dated 3 April 2017, noting that the Prosecution had not supported this hypothesis with any reference. Moreover, any material—regardless of its form—that might exonerate Mr Merhi must be disclosed pursuant to Rule 113. A list of the seven categories of material requested for disclosure, as outlined above, was provided.[7] In response, in a letter dated 5 April 2017, the Prosecution stated that it had disclosed all material subject to disclosure under Rule 113.[8]

[4] Defence motion, para. 2.
[5] Defence motion, annexes A to D.
[6] Defence motion, para. 3.
[7] Defence motion, para. 4.
[8] Defence motion, para. 5.

8. The Merhi Defence, however, notes that during a court hearing on 30 June 2017, Mr Donaldson confirmed that, at the start of the investigation, each Merhi family member was considered as a potential user of Purple 231. The witness explained that he then also attempted to gather evidence for attributing Purple 231 to a close relative of Mr Merhi.[9] Following this testimony, in a letter dated 30 June 2017, the Defence once again requested that the Prosecution disclose all the materials listed in its letter of 3 April 2017, pursuant to Rules 110 (B) and 113. On 4 July 2017, the Prosecution reiterated its refusal to disclose the material sought, relying on Rule 111.[10]

Defence submissions

Rule 111 exemption inapplicable

9. The Defence submits that the seven categories of requested material cannot be considered internal work documents and are therefore not exempted from disclosure under Rule 111.[11] According to the Defence, the Special Tribunal's Appeals Chamber held that the principle of non-disclosure of internal documents under Rule 111 must be interpreted narrowly.[12]

10. The aim and purpose of Mr Donaldson's analysis were to submit to the Trial Chamber the conclusions that he could reach.[13] In support, the Merhi Defence cites the Special Tribunal's Pre-Trial Judge and a decision of the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) in the *Niyitegeka* case, which found that, if a question is put to a witness, or disclosed outside the Office of the Prosecutor, it will no longer be characterised as an internal document.[14] It therefore argues that from the moment the material requested for disclosure was discussed in court before the Trial Chamber and the Parties, and as the Prosecution referred to this information in one of its requests, it lost any internal nature within the meaning of Rule 111.[15]

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[9] Defence motion, paras 6-7.
[10] Defence motion, paras 9-10.
[11] Defence motion, para. 11.
[12] Defence motion, para. 12, citing CH/AC/2011/01, *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 ('*El Sayed* Appeals Chamber Decision of 28 March 2013'), para. 28.
[13] Defence motion, para. 21(ii).
[14] STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0709, Order on the Defence Request to Compel Disclosure of the Lebanese Investigative Case Files, 8 February 2013, paras 24-25; ICTR, *Niyitegeka v. Prosecutor*, ICTR-96-14-A, Judgement, Appeals Chamber, 9 July 2004, para. 34.
[15] Defence motion, paras 13-16.

11. It is also argued that, as the requested material constitutes Mr Donaldson's work as a witness and not that of the Office of the Prosecutor, Rule 111 is inapplicable. Citing the Appeals Chamber's decision of November 2013, which held that there is no reason to differentiate between fact and expert witnesses for the purpose of disclosing draft statements and reports,[16] the Defence submits that the evidence gathered by Mr Donaldson became the source of his opinion and is thus subject to disclosure. Therefore, the status of the witness as an analyst at the Office of the Prosecutor does not exonerate the Prosecution of its disclosure obligation.[17] The Prosecution's reliance on Rule 111 also proves that the material sought for disclosure is in its possession.[18]

Rule 110 (A) (ii)

12. The Merhi Defence argues that the Prosecution is also under an obligation, pursuant to Rule 110 (A) (ii), to disclose all of the statements of Prosecution witnesses in its possession, regardless of who took them. It is clear that the Prosecution intended to present the evidence as the witness was specifically directed to these parts of his evidence during his testimony. This also demonstrated that there had been discussion on this material beforehand.[19]

Rule 110 (B)

13. Moreover, the material sought for disclosure is important for the preparation of the Defence and as such must be subject to disclosure pursuant to Rule 110 (B). The material will enable the Defence to identify the lines of enquiry that the Prosecution decided not to pursue but may be usefully explored. This will allow the Defence to fully consider all of the evidence which led to the attribution of Purple 231 to Mr Merhi, which will have a bearing on the preparation of its case.[20]

Rule 113

14. The Prosecution is under an obligation to disclose exculpatory material to the Defence. As the material sought explores the possibility that someone other than Mr Merhi was the user of Purple 231, it undermines the *prima facie* reliability of the incriminating evidence. This

[16] F3171, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017 ('Decision of 2 June 2017'), para. 81.
[17] Defence Motion, paras 17-18.
[18] Defence Motion, para. 24.
[19] Defence Motion, para. 30.
[20] Defence Motion, paras 28-29.

material may exonerate Mr Merhi fully or in part and, consequently, the Prosecution is obliged to disclose it to the Defence pursuant to Rule 113.[21]

Equality of arms

15. The inspection of evidence material to the defence of the Accused is a core element of the principle of equality of arms. Therefore, the disclosure of exculpatory material is an essential condition to ensure that the Accused does not suffer prejudice and his right to a fair trial is not violated.[22]

Request to shorten the deadline for the Prosecution response

16. The Defence requests that given the urgency of the need for a decision on its motion, Mr Donaldson's ongoing testimony and the potential prejudice caused to the Defence in the event its cross-examination occurring before the disclosure of the requested documents, the Trial Chamber shorten, under Rule 9 (A) (i), the deadline for responses.[23]

Confidentiality

17. The Defence requests the Trial Chamber to maintain the confidentiality of the correspondence between the Defence and the Office of the Prosecutor, annexed to its motion, as this facilitates exchanges and agreements between Parties.[24]

Prosecution response

18. In its response, the Prosecution submitted that the fact that other members of the Merhi family were initially considered as potential users of Purple 231 does not mean that there are undisclosed materials that Mr Donaldson and his team used in eliminating the possibility that someone other than Mr Merhi was the user of Purple 231.[25] During cross-examination, the Defence can ask Mr Donaldson about the methodology and any documents he used to eliminate the possibility of someone other than Mr Merhi using Purple 231. Moreover, the Merhi Defence failed to meet its burden under each of Rules 110 (A) (ii), 110 (B) and 113.

[21] Defence Motion, paras 26-28.
[22] Defence motion, paras 31-32.
[23] Defence motion, para. 33.
[24] Defence motion, para. 34 and annexes A-D.
[25] F3250, Prosecution Response to "Merhi Defence Motion Seeking a Disclosure Order for Material Relating to Potential Users of Purple Phone 231", 10 July 2017 ('Prosecution response'), para. 2.

Addressing specific categories of documents requested

Rule 110 (A) (ii)

19. With respect to the disclosure request under Rule 110 (A) (ii), the Prosecution submitted, while it is aware that Mr Donaldson and his team sought to eliminate the possibility that someone other than Mr Merhi was the user of Purple 231, the disclosed addendum to Mr Donaldson's attribution report for Mr Merhi is a result of this work.[26] In addition, the Trial Chamber has already rejected a similar request by the Merhi Defence seeking any document containing questions put to or answers provided by Mr Donaldson, all email exchanges between Mr Donaldson and other Prosecution members relating to his testimony, and any document containing notes taken by Prosecution members during discussions with Mr Donaldson relating to his testimony. The Trial Chamber held that the requested documents fall under the protection of Rule 111.[27]

20. Finally, the Merhi Defence did not provide a legal basis for its request for a blanket declaration that Rule 111 'cannot be applied in the present circumstances', nor did it substantiate its application for the Trial Chamber to make such a declaration in the abstract.[28]

Rule 110 (B)

21. The Merhi Defence seeks, under Rule 110 (B), disclosure of documents material to the preparation of the defence, but without fulfilling the requirements of the rule. The Defence did not specifically identify the evidence material for the preparation of its case and did not substantiate its claim that there are undisclosed documents supporting the attribution of Purple 231 to other members of the Merhi family. For instance, searching Mr Donaldson's computer files and emails alone may involve around 70,000 computer files and 60,000 emails requiring weeks or months of work. Moreover, Mr Donaldson and his team sought to verify a negative inference that others were not the user of Purple 231.[29]

Rule 113

22. The Prosecution maintains that it has disclosed all Rule 113 material and that it consulted disclosed material, including call data records and call sequence tables, to verify the

[26] Prosecution response, para. 26.
[27] Prosecution response, para. 27, referring to Decision of 2 June 2017, para. 63.
[28] Prosecution response, para. 28.
[29] Prosecution response, paras 10-12.

Merhi Defence's negative inference. According to the Prosecution, the Merhi Defence did not (i) specifically identify the material sought; (ii) present a *prima facie* showing of the probable exculpatory nature of the material; nor (iii) prove that the material is in the custody or under the Prosecution's control, all of which are essential requirements in order to succeed under this head of the request.[30]

Applicability of Rule 111

23. The Merhi Defence's disclosure request is too broad and covers internal documents of the Prosecution which are exempt from disclosure under Rule 111, including emails, written exchanges, opinions and notes. The Merhi Defence erroneously asserted that the documents referred to in its request cannot be considered as internal work documents and therefore are not subject to Rule 111. The Prosecution disagreed with the Defence's interpretation of the Appeals Chamber's decision of 28 March 2013, asserting instead that the Appeals Chamber found that the exceptions to Rule 111 must be narrowly defined, while the benefits of the Rule should be protected.[31]

24. The Merhi Defence also relied on the *Niyitegeka* judgment to support its argument that a question once put to a witness is no longer a protected internal note. However, in its decision of 2 June 2017, the Trial Chamber held that the *Niyitegeka* judgment was premised on the standard practice for preparing the statement of an external witness, but seemed not to have contemplated the situation of an in-house analyst informally discussing aspects of his potential evidence with colleagues. The Trial Chamber therefore distinguished the *Niyitegeka* judgment from Mr Donaldson's situation as Mr Donaldson's methodology used in preparing his reports and statements does not fit within the broad definition of a witness statement.[32]

25. The Prosecution also disagrees with the Merhi Defence's argument that since the Prosecution questioned Mr Donaldson in court on the 'subject of the material requested for disclosure', the material lost its internal nature and must be disclosed. According to the Prosecution, a witness referring to a document during his testimony does not necessarily remove its protected status under Rule 111, nor does the witness have the authority to waive such protection. If it would suffice to question a witness on the 'subject of the material

[30] Prosecution response, paras 2, 5-9.
[31] Prosecution response, paras 13-16, referring to *El Sayed* Appeals Chamber Decision of 28 March 2013, paras 28-29.
[32] Prosecution response, para. 17, referring to ICTR, *Niyitegeka v. Prosecutor*, ICTR-96-14-A, Judgement, 9 July 2004, para. 34; Decision of 2 June 2017, paras 12(iii) (fn. 26), 16 (fn. 34), 46 (fn. 70), 49, 56 (fn. 82), 57-58, 65 (fn. 95-96), 66 (fn. 97), 67-68.

requested for disclosure' for the Rule 111 protection to be lost, then the vast majority of the Prosecution's internal documents would lose such protection since the Prosecution's internal work is predominantly related to the subjects raised in court with witnesses.[33] Further, the Trial Chamber has already rejected a similar previous claim by the Merhi Defence that all documents produced by Mr Donaldson in connection with preparing for his testimony are his product and therefore excluded from the scope of Rule 111. The Trial Chamber found that such a definition would be far too broad and cast far too wide a net, dragging in all manner of internal documents.[34] The Merhi Defence can ask Mr Donaldson during cross-examination about the methodology and the documents, if any, he used to eliminate the possibility that someone other than Mr Merhi was the user of Purple 231.[35]

Confidentiality

26. The Prosecution concurs with the Merhi Defence and requests that the annexes to the Defence motion remain confidential. The annexes contain *inter partes* correspondence and should remain confidential to facilitate open and frank discussion between the Parties, potentially resolving matters without judicial intervention. Turning such correspondence into public filings removes the incentive for Parties to use this common litigation tool which is intended to promote expeditious and efficient proceedings.[36]

Merhi Defence reply

27. The Merhi Defence argued, in its reply, that the Prosecution submissions that it had not fulfilled its burden under Rules 110 (A) (ii) and 110 (B) and that the Defence can ask during its cross-examination about the methodology and any relevant documents shows that the Prosecution has withheld material disclosable under these Rules.[37]

28. The formulated subject of the disclosure request—the potential users of Purple 231—is sufficiently specific, and the excessive delay the Prosecution claims the search for the requested material would take is a result of the Prosecution's inadequate record-keeping.[38] The Prosecution submission that the Defence application seeks access to material protected

[33] Prosecution response, paras 18-19.
[34] Prosecution response, para. 20, referring to Decision of 2 June 2017, para. 61.
[35] Prosecution response, paras 2 and 22.
[36] Prosecution response, para. 30.
[37] F3252, Merhi Defence Reply to the "Prosecution Response to 'Merhi Defence Motion Seeking a Disclosure Order for Material relating to Potential Users of Purple Phone 231'", 27 July 2017 ('Merhi Defence reply'), paras 4-5.
[38] Merhi Defence reply, para. 6.

under Rule 111 such as emails, written exchanges, opinions and notes clearly demonstrates that the requested material is in the Prosecution's control or custody.[39]

Issues for determination

29. The issues for determination by the Trial Chamber are whether the Prosecution must disclose the requested material, under Rule 110 (A) (ii), 110 (B) and or 113, 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 the Prosecution's product.

DISCUSSION

Rules 110 (A) (ii) and 111

30. The key disclosure principles under international criminal law procedural law and the Special Tribunal's case law dealing with disclosure under Rule 110 (A) (ii), the Rule 111 exemption from Rule 113 disclosure, and the meaning of the term 'witness statement' were explained by the Trial Chamber in its decision of 2 June 2017. They also apply here. The Trial Chamber relevantly held that, 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'.[40]

Rule 110 (B)

31. Under Rule 110 (B), the Trial Chamber must decide what information is material to the Defence preparations for trial. The Trial Chamber has previously ruled on the parameters of disclosure under Rule 110 (B).[41] In those decisions, the Trial Chamber noted that the Appeals Chamber had interpreted the Rule—consistent with international criminal law case law—to mean that, (1) the Defence must demonstrate *prima facie* that what is requested is 'material to the preparation of the defence'; and (2) the test for materiality, under Rule 110

[39] Merhi Defence reply, paras 7-8 and 10-11.
[40] Decision of 2 June 2017, paras 8-12 and 45-54.
[41] F1490, Decision on Disclosure of List of Student Information, 9 April 2014 (Decision on disclosure of 9 April 2014), paras 5-6; F1252, Decision on Call Data Records and Disclosure to Defence (on Remand from Appeals Chamber), 4 December 2013 ('Decision on call data records'), paras 16-18.

(B), is whether the books, documents, photographs or tangible objects are relevant to the preparation of the defence case.[42]

32. The Appeals Chamber reiterated that 'preparation is a broad concept',[43] and that what is material to Defence preparations need not be strictly limited to being 'directly linked to exonerating or incriminating evidence',[44] or 'related to the Prosecution's case-in-chief'.[45] The Prosecution is responsible—before disclosing evidence falling within Rule 110 (B)—for determining whether that evidence is material for the Defence.[46] The Defence may seek judicial intervention if it believes the Prosecution has withheld evidence material to its preparation, but may not rely on unspecific and unsubstantiated allegations or a general description of the information.[47] When assessing the Prosecution's disclosure obligations for Defence requests for materials related to preparing for cross-examining a witness, the Prosecution should consider, among other things, 'whether the material could reasonably lead to further investigation by the Defence and the discovery of additional evidence'.[48] This international case law has also consistently held that 'fishing expeditions' are not permitted

[42] F0004-AR126.4, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records", 2 October 2013 ('Appeals Chamber decision of 2 October 2013'), paras 21-22. On demonstrating materiality, *see*: ICTR, *Prosecutor v. Karemera*, ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 ('*Karemera* Decision'), paras 12, 14; *Karemera v. The Prosecutor*, ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, paras 12-13; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012 ('*Karadžić* Decision'), paras 6-9; ICTR, *Prosecutor v. Bagosora*, ICTR-98-41-AR73, Decision on Interlocutory Appeal relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006 ('*Bagosora* Decision'), para. 9; International Criminal Court, *Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 11, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008 ('*Lubanga* Decision'), para. 77; *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09, Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, 23 January 2013, para. 12.

[43] *Karadžić* Decision, para. 9; *Lubanga* Decision, paras 77-78; *Karemera* Decision, para. 14; *Bagosora* Decision, para. 9.

[44] *Lubanga* Decision, para. 77.

[45] *Karadžić* Decision, para. 9; *Bagosora* Decision, paras 8-9.

[46] *Prosecutor v. Sesay,* SCSL-2004-15-T, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004 ('*Sesay* Decision'), paras 26-27; ICTY, *Prosecutor v. Delalić*, IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996 ('*Delalić* Decision'), para. 9.

[47] *Sesay* Decision, paras 26-27; *Delalić* Decision, para. 9; ICTR, *Kamuhanda v. The Prosecutor*, ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para. 14.

[48] ICTR, *Nahimana v. The Prosecutor*, ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, Public Redacted Version, 27 November 2006, ('*Nahimana* Decision'), para. 16.

and Rule 110 (B) does not provide an unfettered right to inspection triggered by unsubstantiated claims of relevance.[49]

33. Moreover, the Trial Chamber has to distinguish between the statutory roles of the Prosecutor and the Defence. The Prosecutor of the Special Tribunal—as an international Prosecutor complying with the international criminal law procedural law—has a dual role: to investigate and prosecute. An international Prosecutor thus gathers far more information than is required to indict and prosecute an individual accused of specific crimes. The Defence, by contrast, has a much more limited role of defending an accused in relation to those specific crimes. An absolute Defence right under Rule 110 (B) to access all information in the Prosecutor's possession would thus be inconsistent with the purpose and the spirit of the Special Tribunal's Statute and Rules, which differentiate between the role of the Prosecutor and that of the Defence. Accordingly, materiality to Defence preparation cannot be demonstrated based only on the Prosecution's possession of the material sought.[50]

Rule 113

34. International criminal law case law holds that before a chamber can order the disclosure of exculpatory material under the applicable Rule, the Party seeking disclosure must: specifically identify the material sought, present a *prima facie* showing of the probable exculpatory nature of the material, and prove that the material is in the custody or under the control of the Prosecution.[51]

Rule 111 and Mr Donaldson's dual status

35. The Trial Chamber is required to 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[52] with other important principles for the proper administration of justice,

[49] Appeals Chamber Decision, paras 21-22; *Karadžić* Decision, para. 8; *Nahimana* Decision, para. 11.
[50] Decision on disclosure of 9 April 2014, Trial Chamber Decision, para. 13, citing Decision on call data records, para. 13, referring to Article 11 (1) of the Statute of the Special Tribunal; *see also*, Article 16, ICT, ICTR Statutes; Article 15, ICC Statute; Article 15, SCSL Statue.
[51] F1519, Decision on Prosecution Witness Expenses, 9 May 2014, para. 13, citing ICTR, *Prosecutor v. Karemera*, ICTR-98-44-AR73.13, Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion, 14 May 2008, para. 9; ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, para. 179.
[52] Article 16 (4) (b) states: 'In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality: [...] (b) To have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing'.

including the need to safeguard the Prosecution's internal work product and the need to conserve finite Tribunal resources.[53]

36. The following observations apply to the Trial Chamber's evaluation of all of the requested categories of documents. The Trial Chamber held, in its decision of 2 June 2017, that the meaning of the term 'witness statement' established in international criminal law procedural law did not contemplate Mr Donaldson's status as a Prosecution analyst and long-time staff member. The 'standard' practice in creating a witness statement—where a witness is interviewed by a Prosecution investigator—is distinguishable from Mr Donaldson's situation. As Prosecution analyst, he created his own record by drafting his own reports and statements.[54]

37. The Trial Chamber needs to draw a line between Mr Donaldson's products created as a Prosecution employee, created for internal use, from his product as a witness. This complies 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.[55]

Specific categories of documents requested by the Merhi Defence

38. In light of the above, for each category of documents requested by the Merhi Defence, the Trial Chamber will first assess whether any constitutes a 'witness statement' for the purpose of Rule 110 (A) (ii). Second, the Trial Chamber will assess whether the Merhi Defence has formulated each category of documents as specifically and precisely as possible or whether the description of documents is too general and vague. Third, the Trial Chamber will evaluate whether the Defence has demonstrated the required *prima facie* materiality of the requested material as required under Rule 110 (B). Fourth, the Trial Chamber will assess whether the Defence addressed the requirements for a disclosure request under Rule 113.

Any document, including written exchanges, notes and emails (categories 1-2 and 6-7)

39. The Merhi Defence requests the disclosure of:

[53] Decision of 2 June 2017, para. 62, referring to 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, para. 112.
[54] Decision of 2 June 2017, paras 56-59.
[55] Decision of 2 June 2017, paras 60-61.

(1) any written exchange exploring the possibility of someone other than Mr Merhi using Purple 231;

(2) any notes exploring the possibility of someone other than Mr Merhi using Purple 231;

(6) any email exchange, exploring the possibility of someone other than Mr Merhi using Purple 231; and

(7) any other document exploring the possibility of someone other than Mr Merhi using Purple 231.

40. The disclosure request in relation to these categories of material is premised on the Merhi Defence's inference from Mr Donaldson's clarification, made during his examination-in-chief on 30 June 2017, about the elimination of the possibility that someone other than Mr Merhi was the user of Purple 231. The Defence concluded from this that Prosecution counsel and Mr Donaldson had, beforehand, discussed his analytical work and that therefore materials regarding such out of court discussions, which constitute disclosable witness statements, must exist.[56] The Prosecution explained in its response that the entirety of Mr Donaldson's analytical work on this matter was fully covered in the disclosed addendum to his attribution report for Mr Merhi and the Prosecution's questions about this addendum had led to this testimony.[57]

41. The Trial Chamber agrees with the Merhi Defence submission that any records, including written exchanges, notes and emails can constitute 'witness statements' under international case law.[58] However, those cases seem not to have envisaged the situation of an in-house analyst informally discussing aspects of his potential evidence with his colleagues. The case law relied upon by the Defence was based on the Prosecution's standard practice of an investigator interviewing an external witness and subsequently creating a witness' final statement.[59]

[56] Defence motion, para. 30.
[57] Prosecution response, para. 26.
[58] Defence motion, para. 30.
[59] Defence motion, para. 30, citing ICTY, *Prosecutor v. Milutinović and others,* IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 29 September 2006, para. 15, footnote 17; ICTR, *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Judgement, Appeals Chamber, 9 July 2004, para. 34.

42. Furthermore, the Trial Chamber has already found that it is unlikely that the 'original version' of Mr Donaldson's evidence is to be found in written exchanges, notes and emails. It is most likely contained in the earlier drafts of his own statements and reports. Here, the purpose underlying why investigators' notes, emails and written exchanges similarly fall within the definition of a 'witness statement' that must be disclosed does not apply in these circumstances.[60]

43. The Defence request for these materials also relates to the core of the Prosecution's internal work product. The Trial Chamber already held that 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'. Free exchanges and open discussions likely occur in the meetings and correspondence between Mr Donaldson and his colleagues.[61]

44. The Trial Chamber does not agree with the Defence's interpretation of the Appeals Chamber's decision of 28 March 2013, namely that the principle of non-disclosure of internal documents must be interpreted narrowly. Contrary to this interpretation, the Appeals Chamber found that the exceptions to Rule 111 must be narrowly defined under specific and strict circumstances, while protecting the benefits of this Rule.[62]

45. With respect to the Defence request, the Trial Chamber would similarly not expect that notes from such meetings, written exchanges between Mr Donaldson and his colleagues or emails from this correspondence could be accurately divided into distinct categories such as 'in court use' and 'internal use'.

46. Even if the material sought is potentially disclosable in the case of other witnesses,[63] the Merhi Defence request here is formulated far too generally. The Prosecution relevantly submitted that the request is so overly broad that it may require weeks or months of work to search and identify the requested materials.[64] Mr Donaldson's report for Mr Merhi has developed over the years as additional evidence has been discovered and analysed and the addendum to his attribution report for Mr Merhi illustrates this ongoing process. The Prosecution has already disclosed this material to the Defence.

[60] Decision of 2 June 2017, para. 67.
[61] Decision of 2 June 2017, para. 69, citing *El Sayed* Appeals Chamber Decision of 28 March 2013, para. 28.
[62] *El Sayed* Appeals Chamber Decision of 28 March 2013, paras 28, 31.
[63] Decision of 2 June 2017, paras 70-71.
[64] Prosecution response, paras 7 and 11.

47. In light of the above, the Merhi Defence application lacks sufficient detail to meet the requirement of specificity. It is far too generally formulated, and in the circumstances described, might amount to a 'fishing expedition'. Provided that these categories of documents sought likely bear little to no relation to Mr Donaldson's testimony on his analytical work in eliminating the possibility that other than Mr Merhi was the user of Purple 231, and the request is couched far too broadly, the Trial Chamber considers that it does not constitute a proper request for a 'witness statement' under Rule 110 (A) (ii).

48. As for the Defence disclosure application in relation to these categories of material under Rule 110 (B), the Trial Chamber acknowledges that, in international case law, the concept of relevance, as recognised in Rule 110 (B), is not necessarily confined by the scope of an indictment, nor is it necessarily limited to material relevant in countering the Prosecution's evidence.[65] Nevertheless, Rule 110 (B) does not invite a 'fishing expedition'. Accordingly, given that the Prosecution has already disclosed Mr Donaldson's attribution report for Mr Merhi and its addendum, the Defence's assertion that unspecified documents, including written exchanges, notes and emails is potentially relevant does not establish *prima facie* that the information sought is material to Defence preparation. The scope of this request comes close to a 'fishing expedition' and, consequently, the Defence arguments do not demonstrate that having access to any document about the users of Purple 231, other than Mr Merhi, is relevant to the Defence preparation, and thus material.

49. With respect to the application under Rule 113, the Defence has failed to establish that the Prosecution has undisclosed exculpatory material or information in its possession or actual knowledge of such material, or substantiate its claim that the Prosecution has not disclosed any exculpatory material. It has provided no basis for the Trial Chamber to disbelieve the Prosecution's submissions that it has already disclosed all materials under this Rule. Further, the Defence did not present a *prima facie* showing of the probable exculpatory nature of the information sought, or prove that the material requested is in the custody or under the control of the Prosecution. Finally, the Trial Chamber is not persuaded that Mr Donaldson's in-court testimony on 30 June 2017—in which he explained how he eliminated the possibility that someone other than Mr Merhi was the user of Purple 231—necessarily implies or is indicative that the Prosecution is withholding disclosable material.

[65] Appeals Chamber decision of 2 October 2013, para. 22.

Any opinion provided in any form (category 3)

50. The Merhi Defence requests:

(3) any opinion, provided in any form, exploring the possibility of someone other than Mr Merhi using Purple 231.

51. The Merhi Defence has not relied on any international case law demonstrating that 'opinion provided in any form' constitutes a 'witness statement' for purposes of Rule 110 (A) (ii). The Defence merely refers generally to an International Criminal Tribunal for the former Yugoslavia (ICTY) decision in *Milutinović* and the ICTR appeal judgement in *Niytegeka*, but without specifically explaining how a 'witness statement' within the meaning of Rule 110 (A) can encompass Mr Donaldson's 'opinion provided in any form'.

52. As with the request for written exchanges, notes and emails, this request prospectively targets documents that are part of the process by which Mr Donaldson regularly produces documents for the Prosecution's internal use and are therefore exempt from disclosure under Rule 111. Similar to the material in categories 1-2 and 6-7 above, the Trial Chamber cannot reasonably expect the Prosecution to categorise documents or records containing Mr Donaldson's opinion into two sets, namely into those used to prepare his written evidence and those used for internal purposes.

53. In its decision of 2 June 2017, the Trial Chamber has already rejected—as being formulated in an overly broad manner—a Merhi Defence request to disclose, under Rule 110 (A) (ii), documents that contain Mr Donaldson's opinion.[66] Here, the request is similarly so general and lacking in specificity as to present significant challenges for the Prosecution to search and identify the relevant documents.

54. With respect to the disclosure request in relation to this category of material under Rule 110 (B), the Defence's general and unspecified assertion that Mr Donaldson's *opinion provided in any form* about the users of Purple 231 other than Mr Merhi is relevant to the preparation of defence does not demonstrate the required *prima facie* materiality.

55. As for the application under Rule 113, the Defence also did not substantiate its claim that the Prosecution has not disclosed all exculpatory evidence and did not offer any basis for the Trial Chamber not to trust the Prosecution's assertion that it had disclosed all materials in

[66] Decision of 2 June 2017, paras 84-88.

its possession under this Rule. Neither did the Merhi Defence prove, on a *prima facie* standard, the probable exculpatory nature of the information sought under this Rule.

Draft or final reports and statements (categories 4-5)

56. The Merhi Defence also seeks:

(4) any report, final or not, exploring the possibility of someone other than Mr Merhi using Purple 231; and

(5) any statement, signed or not, exploring the possibility of someone other than Mr Merhi using Purple 231.

57. Insofar as these categories of the Defence application refer to Mr Donaldson's attribution report for Mr Merhi and its addendum, the Prosecution has previously disclosed, pursuant to the Trial Chamber's decision of 2 June 2017, Mr Donaldson's final reports and statements under Rule 110 (A) (ii), and his draft reports and statements.[67]

58. Further, to the extent that these categories generally relate to any other report or statement in the Prosecution's custody or control addressing the possibility of someone other than Mr Merhi using Purple 231, as with the request in relation to categories 1-2 and 6-7 above, this request is far too broadly formulated and thus amounts to a 'fishing expedition'. The Trial Chamber considers that it does not constitute a proper request for a 'witness statement' under Rule 110 (A) (ii).

59. As far as the Defence application in relation to these categories of materials under Rule 110 (B) refers to Mr Donaldson's attribution report for Mr Merhi and its addendum, the request is moot because the Prosecution disclosed, pursuant to the Trial Chamber's decision of 2 June 2017, Mr Donaldson's final reports and statements under Rule 110 (A) (ii), and his draft reports and statements. With respect to the same request in relation to any other report or statement prepared by the Prosecution addressing the possibility of someone other than Mr Merhi using Purple 231, as with the request for written exchanges, notes and emails, this Merhi Defence request is formulated too broadly. The Defence did not *prima facie* establish that the information sought is relevant to Defence preparation, and is therefore material.

[67] Prosecution response, para. 4.

60. Finally, as with the application under Rule 113 in relation to categories 1-3 and 6-7, the Defence failed to substantiate its claim that the Prosecution has not disclosed all exculpatory evidence and provided no reason for the Trial Chamber to distrust the Prosecution's submissions to the contrary. Further, the Merhi Defence did not offer a *prima facie* demonstration of the probable exculpatory nature of the information sought.

Defence motion for a general declaration on the applicability of Rule 111

61. The Merhi Defence, arguing that the requested materials all constitute Mr Donaldson's rather than Prosecution's work to which the Rule 111 exemption does not apply, also requests the Trial Chamber to find that Rule 111 is inapplicable to all the categories of materials sought in its motion.[68] The Trial Chamber finds it unnecessary to issue a general declaration in relation to these specific seven categories of material which clearly require a case-by-case approach to the applicability of Rule 111. Neither did the Defence make any arguments nor cite to any Rules or principles of international criminal law justifying such relief. The Trial Chamber therefore denies this Defence application.

Conclusion

62. For the above reasons, the Trial Chamber finds that in relation to the requests for materials in:

(i) categories 1-3 and 6-7 (any document, including written exchanges, notes and emails, and opinion provided in any form), the Defence application is formulated in an overly broad manner for the purpose of Rule 110 (A) (ii); the Defence did not demonstrate the required materiality under Rules 110 (B); and the application under Rule 113 is unsubstantiated; and

(ii) categories 4-5 (draft or final reports and statements), the Defence did not demonstrate the required materiality under Rule 110 (B); the application under Rules 110 (A) (ii) and 110 (B) is moot in relation to Mr Donaldson; in relation to any other material in Prosecution's possession, it is not a proper application for a 'witness statement' under Rule 110 (A) (ii); and the application under Rule 113 is unsubstantiated.

[68] Defence motion, paras 1, 17, relief sought.

CONFIDENTIALITY

63. The Defence and the Prosecution submit that the annexes to its request were filed confidentially as they contain confidential *inter partes* correspondence. The Prosecution argues that the annexed correspondence should remain confidential, as this facilitates frank discussion between the Parties, potentially resolving issues without judicial intervention. However, the annexes should be reclassified.

64. However, these letters 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 t its motion, after consulting with the Prosecution.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Merhi Defence motion; and

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

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

Leidschendam,
The Netherlands
13 September 2017

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy