

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08

Date: 11 December 2014

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO**

Public

Public redacted version of "Decision on 'Defence Request for Disclosure and Investigative Assistance concerning Witnesses 169 and 178'"

No. ICC-01/05-01/08

1/20

11 December 2014

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”), hereby issues the following Decision on “Defence Request for Disclosure and Investigative Assistance concerning Witnesses 169 and 178” (“Decision”).

I. Background

1. On 3 October 2013, the Office of the Prosecutor (“prosecution”) filed its confidential, *ex parte*, prosecution and Victims and Witnesses Unit (“VWU”) only, “Information on contacts of Witnesses 169 and 178 with other witnesses [...]” (“Prosecution’s Information”),¹ informing the Chamber that Witness 169, called to testify by the prosecution, sent letters to, amongst others, the prosecution and the VWU (“Letters”).² In the Letters, the witness, *inter alia*, listed alleged outstanding claims, including loss of income and “money promised by the Prosecutor for witnesses”, and provided a list [REDACTED] of 22 individuals, including 21 witnesses called by the prosecution (“Relevant Witnesses”), who he alleged had been contacted and gathered by Witness 178, called to testify by the prosecution, to “look at loss of income claims”.³

¹ Information on contacts of Witnesses 169 and 178 with other witnesses [...], 3 October 2013, ICC-01/05-01/08-2827-Conf-Exp and confidential *ex parte* Annexes A and B. A second confidential lesser redacted version of Information on contacts of Witnesses 169 and 178 with other witnesses located [REDACTED], 3 October 2013, (ICC-01/05-01/08-2827-Conf-Exp), ICC-01/05-01/08-2827-Conf-Red2 and confidential redacted Annexes A and B were filed on 9 January 2014.

² The letters were appended as Annexes A and B to the Prosecution’s Information and appear to be addressed to several Court officials and [REDACTED]. Annex A includes a letter sent by Witness 169 to the prosecution and an email sent by Witness 169 on 7 June 2013. Annex B includes the same letter sent by Witness 169 to the prosecution, a letter sent by Witness 169 to the VWU, as well as an email sent by Witness 169 on 10 June 2013. One of the addressees of the letters is the Presiding Judge of this trial, who has never received these letters before.

³ ICC-01/05-01/08-2827-Conf-Red2, paragraphs 7, 9, and 10.

2. On 25 October 2013, the Chamber issued its "Decision on the prosecution's 'Information on contacts of Witnesses 169 and 178 with other witnesses located [REDACTED]" ("Decision 2845").⁴ In this decision,⁵ the Chamber:
 - (i) determined that any information relating to the allegations made by Witness 169 as to "outstanding claims" and "money promised by the Prosecutor for witnesses" may be material for the preparation of the defence and should therefore be disclosed under Rule 77 of the Rules of Procedure and Evidence ("Rules");
 - (ii) ordered the prosecution to prepare, in coordination with the VWU, a proposed confidential redacted version of the Prosecution's Information and its annexes;
 - (iii) ordered the VWU to submit a report on the issues addressed in the Prosecution's Information, including [REDACTED]; and
 - (iv) ordered the prosecution to submit a report on the measures it intended to take in relation to the conduct of Witnesses 169 and 178.⁶

3. On 8 November 2013, the prosecution filed its "Report pursuant to Chamber's decision on the Prosecution's information on contact of witnesses 169 and 178 with other witnesses" ("Prosecution Report").⁷

4. On 11 November 2013, the defence filed its "Defence Motion concerning

⁴ Decision on the prosecution's 'Information on contacts of Witnesses 169 and 178 with other witnesses located [...]' (ICC-01/05-01/08-2827-Conf-Exp)", 25 October 2013, ICC-01/05-01/08-2845-Conf-Exp. A confidential redacted version was filed on 5 November 2013: Confidential redacted version of "Decision on the prosecution's 'Information on contacts of Witnesses 169 and 178 with other witnesses located [REDACTED]' (ICC-01/05-01/08-2827-Conf-Exp)" of 25 October 2013, 5 November 2013, ICC-01/05-01/08-2845-Conf-Red.

⁵ In view of the number of issues addressed in the various filings related to the conduct of Witnesses 169 and 178, the Chamber will confine its summary of the procedural background to those submissions and findings that are of direct relevance for the purpose of the present Decision.

⁶ ICC-01/05-01/08-2845-Conf-Red, paragraphs 10, 11, 12 and 13.

⁷ Report pursuant to Chamber's decision on the Prosecution's information on contact of witnesses 169 and 178 with other witnesses, 8 November 2013, ICC-01/05-01/08-2867-Conf.

'Information on contacts with witnesses 169 and 178 with other witnesses'" ("Defence Motion"),⁸ in which it requested the recall of Witness 169 and Witness 178.⁹

5. On 29 November 2013, pursuant to the Chamber's instruction,¹⁰ the VWU filed its confidential *ex parte*, VWU only, "Victims and Witnesses Unit's Report in relation to the Defence Motion ICC-01/05-01/08-2872-Conf pursuant to the Status Conference held on 26 November 2013" ("VWU Report 2912"), together with three confidential *ex parte*, VWU only, Annexes A, B, and C.¹¹ On 6 December 2013, further to the Chamber's instruction,¹² the VWU filed a confidential *ex parte* addendum to Annex C,¹³ entitled Annex D,¹⁴ containing information provided in Annex B which the Chamber considered to be potentially material to the preparation of the defence.
6. On 18 December 2013, the Chamber issued its "Decision on 'Defence Motion concerning 'Information on contacts [of] Witnesses 169 and 178

⁸ Defence Motion concerning "Information on contacts with Witnesses 169 and 178 with other witnesses", 11 November 2013, ICC-01/05-01/08-2872-Conf.

⁹ ICC-01/05-01/08-2872-Conf, paragraph 50.

¹⁰ Transcript of hearing of 26 November 2013, ICC-01/05-01/08-T-358-CONF-EXP-ENG ET.

¹¹ Victims and Witnesses Unit's Report in relation to the Defence Motion ICC-01/05-01/08-2872-Conf pursuant to the Status Conference held on 26 November 2013, 29 November 2013, ICC-01/05-01/08-2912-Conf-Exp and confidential *ex parte* Annexes A, B and C. Annexes A, B and C respectively provide the information requested by the Chamber during the status conference. Pursuant to the Decision on "Defence Motion concerning 'Information on contacts [of] Witnesses 169 and 178 with other witnesses'", 18 December 2013, ICC-01/05-01/08-2924-Conf, Report 2912 and Annexes A and C were reclassified as confidential.

¹² Email from the Chamber to the VWU on 3 December 2013 at 15.53.

¹³ Addendum to "Annex C to Victims and Witnesses Unit's Report in relation to the Defence Motion ICC-01/05-01/08-2872-Conf pursuant to the Status Conference held on 26 November 2013" (ICC-01/05-01/08-2912-Conf-Exp-AnxC), 6 December 2013, ICC-01/05-01/08-2917-Conf-Exp.

¹⁴ ICC-01/05-01/08-2912-Conf-Exp-AnxD. Pursuant to ICC-01/05-01/08-2924-Conf, the document was reclassified as confidential.

with other witnesses” (“Decision 2924”),¹⁵ in which it, *inter alia*, rejected the defence’s request to recall Witnesses 169 and 178.¹⁶

7. On 14 February 2014, the Chamber issued its “Decision on ‘Defence Request for Leave to Appeal the Decision on the Defence Motion concerning contact between Witnesses 169 and 178 and other witnesses” (“Decision 2980”),¹⁷ in which it dismissed the defence’s request for leave to appeal the issue of “[w]hether the Trial Chamber erred in failing to consider the Defence arguments concerning the breach of witness protective measures in place, and preventing further investigation and exploration of issues central to the credibility of the Prosecution evidence in this case”.¹⁸
8. On 17 February 2014, the VWU filed its “Victims and Witnesses Unit’s Report pursuant to ICC-01/05-01/08-2845-Conf-Exp” (“VWU Report 2975”),¹⁹ in which it informed the Chamber that it had only been able to establish contact with [REDACTED],²⁰ and appended [REDACTED].
9. On 12 March 2014, the defence filed its “Defence Request for Disclosure and Investigative Assistance

¹⁵ ICC-01/05-01/08-2924-Conf.

¹⁶ ICC-01/05-01/08-2924-Conf, paragraph 38 (vi).

¹⁷ Decision on ‘Defence Request for Leave to Appeal the Decision on the Defence Motion concerning contact between Witnesses 169 and 178 and other witnesses, 14 February 2014, ICC-01/05-01/08-2980-Conf.

¹⁸ ICC-01/05-01/08-2980-Conf, paragraph 9.

¹⁹ Victims and Witnesses Unit’s Report pursuant to ICC-01/05-01/08-2845-Conf-Exp, 17 February 2014, ICC-01/05-01/08-2975-Conf-Exp. A confidential redacted version was filed on 28 February 2014, ICC-01/05-01/08-2975-Conf-Red.

²⁰ ICC-01/05-01/08-2975, paragraphs 4 to 8.

concerning Witnesses 169 and 178" ("Defence Request"),²¹ in which it requests that the Chamber order the prosecution to (i) provide the defence with the telephone numbers and/or other contact details of Witnesses 169 and 178 ("First Request"); (ii) "disclose by way of a written report to the Chamber to be provided to the Defence [...] the investigative steps it has taken concerning the breaches of orders for protective measures in the present proceedings, and the timing, extent of and motivation for [REDACTED] its witnesses" ("Second Request"); (iii) "disclose by way of a written report to the Chamber to be provided to the Defence the investigative steps it has taken [...] with regards to the addressees of the [...] Letters, and any further correspondence or publications concerning the [REDACTED]" ("Third Request"); and (iv) "in the absence of any investigative steps having been taken as regards the above [...] initiate such an investigation and provide a written report to the Chamber disclosable to the Defence" ("Fourth Request").²²

10. On 13 March 2014, the Chamber issued its "Decision on 'Defence Motion for the Admission of Documents related to Witness 169 and Witness 178'" ("Decision 3015"),²³ in which it granted the defence's request for admission into evidence of the Letters and Annexes A, C and D to VWU Report 2912.²⁴

²¹ Defence Request for Disclosure and Investigative Assistance concerning Witnesses 169 and 178, 12 March 2014, ICC-01/05-01/08-3013-Conf.

²² ICC-01/05-01/08-3013-Conf, paragraph 39.

²³ Decision on "Defence Motion for the Admission of Documents related to Witness 169 and Witness 178", 13 March 2014, ICC-01/05-01/08-3015-Conf.

²⁴ ICC-01/05-01/08-3015-Conf, paragraph 33.

11. On 2 April 2014, the prosecution filed its response to the Defence Request,²⁵ asking the Chamber to reject it,²⁶ on the basis that it raises issues that have either become moot or have already been addressed.²⁷
12. On 7 May 2014, the Chamber issued its “Decision on defence further request for reclassification of documents related to Witness 169 and Witness 178” (“Decision 3063”),²⁸ in which it (i) directed the parties, the legal representative of victims, Maître Marie-Edith Douzima-Lawson (“Me Douzima”), and the Registry to file public redacted versions of a number of documents related to Witnesses 169 and 178; and (ii) ordered the VWU to continue its efforts to complete the remaining [REDACTED] as soon as practicable.²⁹

II. Analysis and Conclusions

13. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber has considered Articles 54(1), 64(2) and (7), 67(1), 68 and 70 of the Statute, Rules 77 and 165(1) of the Rules and Regulations 20, 23*bis*(3) and 77 of the Regulations of the Court.

²⁵ Prosecution’s Response to “Defence Request for Disclosure and Investigative Assistance concerning Witnesses 169 and 178”, 2 April 2014, ICC-01/05-01/08-3030-Conf.

²⁶ ICC-01/05-01/08-3030-Conf, paragraph 44.

²⁷ ICC-01/05-01/08-3030-Conf, paragraph 2.

²⁸ Decision on defence further request for reclassification of documents related to Witness 169 and Witness 178, 7 May 2014, ICC-01/05-01/08-3063-Conf.

²⁹ ICC-01/05-01/08-3063-Conf, paragraph 31.

(i) *Request for provision of contact details*

14. In support of its First Request, the defence refers to Decision 2980, in which the Chamber held that it had “allowed further investigation and exploration of issues central to the credibility of the prosecution’s evidence on numerous occasions”.³⁰ According to the defence, allowing the defence to contact and, if necessary, take written statements from Witnesses 169 and 178 “should be the minimum next step in the ‘further investigation and exploration of issues central to the credibility of the prosecution’s evidence’”.³¹ In the view of the defence, such authorisation would afford the defence an opportunity to provide a basis for its assertions regarding “collusion” of witnesses, and assist the Chamber in the proper determination of the credibility of the Relevant Witnesses.³²

15. In opposing the First Request, the prosecution submits that (i) since the beginning of the *Bemba* case, the practice has been that contact details were not provided to the other party;³³ (ii) the Chamber has ordered the redaction of information on contact details of Witnesses 169 and 178 and [REDACTED];³⁴ (iii) “any argument that Prosecution’s [REDACTED] witnesses had a financial interest in testifying and collusion between them existed is unfounded and unsubstantiated”; (iv) the defence’s request to further investigate the contacts and potential collusion between prosecution witnesses is “excessive and unnecessary”; and (v) Witness

³⁰ ICC-01/05-01/08-2980-Conf, paragraph 42.

³¹ ICC-01/05-01/08-3013-Conf, paragraph 27.

³² ICC-01/05-01/08-3013-Conf, paragraphs 28 and 29. The defence refers to the Chamber’s finding in Decision 2924 that “on the basis of the material before it, the Chamber finds that the defence’s assertion regarding ‘collusion’ of witnesses is unsubstantiated” (ICC-01/05-01/08-2924-Conf, paragraph 34).

³³ ICC-01/05-01/08-3030-Conf, paragraph 27.

³⁴ ICC-01/05-01/08-3030-Conf, paragraph 27.

169's allegations refer to a timeframe long after the completion of his and the other witnesses' testimony and do not warrant re-examination by the defence of Witnesses 169 and 178.³⁵ The prosecution further recalls that the Chamber admitted into evidence a number of documents related to Witnesses 169 and 178,³⁶ which, as held by the Chamber, "may provide the parties and participants with an adequate basis to make any related submissions on the witnesses' credibility which they consider necessary."³⁷

16. The prosecution further states that [REDACTED] having been contacted by either Witness 169 or Witness 178 [REDACTED] individuals rejected their proposals.³⁸ In addition, the prosecution reports that Witness 169 informed the prosecution that, to his knowledge, "the project never materialised and the meeting [with the Relevant Witnesses] never took place".³⁹

17. Pursuant to its duties under Article 68(1) of the Statute, in Decision 2845, the Chamber subjected disclosure of the Prosecution's Information, including the Letters, to the application of redactions to, *inter alia*, the witnesses' "current and past contact details".⁴⁰ In the same vein, in Decision 2924, when ordering the prosecution to file a lesser redacted version of the Prosecution's Information, the Chamber ordered the

³⁵ ICC-01/05-01/08-3030-Conf, paragraph 29. The prosecution quotes the submission made in ICC-01/05-01/08-2924-Conf, paragraphs 18 to 20.

³⁶ ICC-01/05-01/08-3015-Conf, paragraph 33.

³⁷ ICC-01/05-01/08-3030-Conf, paragraphs 32; referring to ICC-01/05-01/08-2924-Conf, paragraph 37.

³⁸ ICC-01/05-01/08-3030-Conf, paragraphs 40 to 42.

³⁹ ICC-01/05-01/08-3030-Conf, paragraph 42.

⁴⁰ ICC-01/05-01/08-2845-Conf-Red, paragraph 12.

prosecution to lift redactions to “the content of the letter of 8 June 2013, *with the exception of the witness’s contact details*”.⁴¹

18. In addition, the Chamber recalls that in Decision 2924, it addressed a request by the defence for “[f]urther investigation into the circumstances of contact and potential collusion between prosecution witnesses” and a request to recall Witnesses 169 and 178.⁴² In that context, the Chamber noted that “the attempted contact allegedly initiated by Witness 178 took place *after* the relevant witnesses testified [...] and those witnesses who could be contacted by the prosecution to verify the information stated that they refused to attend any such meeting.”⁴³ Accordingly, the Chamber found “*on the basis of the material before it* [...] that the defence’s assertion regarding ‘collusion’ of witnesses [was] unsubstantiated.”⁴⁴

19. In the view of the Chamber, the information provided in the Prosecution Response, and notably the submission that the nine witnesses contacted by the prosecution reported that they had rejected the proposals for a meeting made by Witness 169 or Witness 178, and that, according to Witness 169, such a meeting never took place, supports the Chamber’s previous assessment.

20. The Chamber further recalls the VWU’s submission that “none of the Individuals received any financial assistance that goes beyond the

⁴¹ ICC-01/05-01/08-2924-Conf, paragraph 21 (emphasis added).

⁴² ICC-01/05-01/08-2924-Conf, page 18.

⁴³ ICC-01/05-01/08-2924-Conf, paragraph 34 (emphasis in original).

⁴⁴ ICC-01/05-01/08-2924-Conf, paragraph 34 (emphasis added).

requirements of ordinary subsistence”,⁴⁵ which is supported by the information provided in Annex A to VWU Report 2912. In relation to the specific situation of Witnesses 169 and 178, the Chamber stresses that the VWU provided the parties and participants with detailed information on the financial assistance provided to the two witnesses [REDACTED], which indicates that the relevant payments emanated from the VWU and were all related to [REDACTED].

21. In addition, the Chamber notes that according to the information provided in VWU Report 2912, Witnesses 169 and 178 [REDACTED].⁴⁶ This information further militates against a departure from the Chamber’s previous decisions not to reveal the witnesses’ contact details.

22. Finally, the Chamber recalls that in Decision 2924-Conf, it extended the deadline for the submission of applications for the admission into evidence of material relevant to Witnesses 169 and 178, considering that it “may provide the parties and participants with an adequate basis to make any related submissions on the witnesses’ credibility which they consider necessary”,⁴⁷ and eventually admitted these documents into evidence in Decision 3015.⁴⁸

23. In view of the above, the Chamber rejects the First Request.

⁴⁵ ICC-01/05-01/08-T-358-CONF-EXP ENG ET, page 9, lines 6 to 11, quoted in Decision 2924-Conf, paragraph 33.

⁴⁶ ICC-01/05-01/08-2912-Conf, footnote 12 and ICC-01/05-01/08-2912-Conf-AnxC.

⁴⁷ ICC-01/05-01/08-2924-Conf, paragraph 37.

⁴⁸ ICC-01/05-01/08-3015-Conf, paragraph 33.

(ii) *Request for disclosure of a report on investigative steps concerning the breaches of orders for protective measures*

24. The defence stresses that [REDACTED] Witness 169 includes [REDACTED] and that “none of the reports disclosed to the defence by either the Prosecution or VWU shed any light on how this patent breach of witness protective measures occurred”.⁴⁹ As a result, the defence submits that pursuant to the prosecution’s obligation under Article 54(1) of the Statute to “act as a minister of justice, and investigate incriminating and exonerating circumstances equally”, the prosecution should be ordered to provide a report on the outcome of the steps it has taken concerning the breaches of orders for protective measures in the present proceedings, and the timing, extent of and motivation for contact between its witnesses.⁵⁰

25. The prosecution responds that the defence “attempts to blur the lines”⁵¹ between an inquiry related to (i) incriminating and exonerating circumstances regarding the credibility of the evidence, for which it has already provided the participants with the information on relevant measures considered and its assessment thereof; and (ii) a breach of witness protective measures impacting witnesses’ safety and well-being, for which information has been previously provided in the Prosecution’s Information and the Prosecution Report.⁵²

⁴⁹ ICC-01/05-01/08-3013-Conf, paragraph 31.

⁵⁰ ICC-01/05-01/08-3013-Conf, paragraphs 32 to 33.

⁵¹ ICC-01/05-01/08-3030-Conf, paragraph 34.

⁵² ICC-01/05-01/08-3030-Conf, paragraphs 35 to 37. The prosecution refers to ICC-01/05-01/08-2827-Conf-Red2, paragraphs 16 to 18 and ICC-01/05-01/08-2867-Conf, paragraphs 6 to 9.

26. At the outset, the Chamber finds that the prosecution's submissions set out in paragraph 25 above are well-founded. Indeed, the Chamber is of the view that the defence failed to demonstrate the link between the apparent breach of protective measures after the testimony of the Relevant Witnesses - and the measures taken by the prosecution in this regard – and the prosecution's obligation to disclose exonerating information pursuant to its obligations under Article 54(1) of the Statute.

27. The Chamber notes the prosecution's submission that it had contacted Witnesses 169 and 178 and "briefed them about the [REDACTED] of their behaviour, their impact on the [REDACTED], offences under Article 70 and the consequences therein".⁵³ In this context, according to the prosecution's submissions, Witness 178 repeatedly refused to provide information on the [REDACTED].⁵⁴ In this regard, the Chamber further notes the prosecution's conclusion that absent any "reports [REDACTED] witnesses 169 and 178", it had "no reason to undertake any measures pursuant to Article 70 of the Statute regarding the conduct of witnesses 169 and 178" and that it "will continue to monitor the situation."⁵⁵

28. The Chamber considers that the prosecution's submissions mainly relate to the measures taken in relation to the [REDACTED], while, with regard to the apparent breach of protective measures, the prosecution merely states that "it briefed Witnesses 169 and 178 about the [REDACTED] of their behaviour, their impact on the [REDACTED], offences under Article 70 and the consequences therein", that Witness 178 repeatedly refused to

⁵³ ICC-01/05-01/08-2827-Conf-Red2, paragraph 15.

⁵⁴ ICC-01/05-01/08-2827-Conf-Red2, paragraph 15; ICC-01/05-01/08-3030-Conf, paragraph 42.

⁵⁵ ICC-01/05-01/08-2867-Conf, paragraphs 8 and 9; quoted in ICC-01/05-01/08-3030-Conf, paragraph 36.

[REDACTED],⁵⁶ and that absent any “reports [REDACTED] it had no reason to undertake any measures pursuant to Article 70 of the Statute regarding the conduct of witnesses 169 and 178”.⁵⁷ Regarding the appropriateness of initiating any measures under Article 70 of the Statute, the Chamber recalls that according to Rule 165(1) of the Rules, the responsibility to initiate and conduct investigations in the context of Article 70 of the Statute lies with the prosecution.⁵⁸ Considering further that the prosecution submits that it will continue to monitor the situation, the Chamber will not assess the measures taken or to be taken by the prosecution at this stage.

29. However, in view of the seriousness of the alleged breach and the necessity to prevent any such incidents in the future, the Chamber finds that the Registry should contact Witnesses 169 and 178, emphasize the importance of and rationale behind protective measures, and seek to obtain information on [REDACTED]. The Registry shall file a confidential report on its contact with Witnesses 169 and 178 by 27 June 2014.

30. In relation to the [REDACTED], the Chamber reminds the prosecution and the VWU to continue their efforts in [REDACTED] and report on any further developments as soon as practicable.

⁵⁶ ICC-01/05-01/08-2827-Conf-Red2, paragraph 15; ICC-01/05-01/08-3030-Conf, paragraph 42.

⁵⁷ ICC-01/05-01/08-2867-Conf, paragraphs 6 to 8; ICC-01/05-01/08-3030-Conf, paragraph 36.

⁵⁸ Rule 165(1) of the Rules provides: “The Prosecutor *may* initiate and conduct investigations with regard to the offences defined in Article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source” (emphasis added).

(iii) *Request for disclosure of a report on investigative steps with regard to the addressees of the Letters and “any further correspondence or publications” concerning the Relevant Witnesses*

31. The defence submits that the prosecution should provide a report on “the investigative steps it has taken with regards to enquiries it has made of the apparent addressees of the [...] Letters, and any further correspondence or publications concerning the [Relevant] Witnesses”.⁵⁹ For that purpose, the defence lists a number of measures it “presumes”⁶⁰ the prosecution has taken. These include that: (i) since the receipt of the letters, the prosecution has “contacted the addressees of [the Letters] and the recipients of the emails, to determine the extent of the [REDACTED] Witness 169”; (ii) the prosecution has taken “appropriate remedial steps, including return of and/or destruction of the [L]etters”;⁶¹ (iii) the prosecution has taken “steps to determine whether the [L]etters or indeed other correspondence [REDACTED], particularly in light of Witness 169’s threats that a failure to meet his demands will result in his denouncing the ICC publicly in the international media and through other channels”.⁶²

32. On the basis of the information received, the prosecution submits that “to this date, there is no information to indicate that there has been any further dissemination or publication of [REDACTED].”⁶³ Finally, the

⁵⁹ ICC-01/05-01/08-3013-Conf, paragraph 39.

⁶⁰ ICC-01/05-01/08-3013-Conf, paragraph 37.

⁶¹ ICC-01/05-01/08-3013-Conf, paragraph 37.

⁶² ICC-01/05-01/08-3013-Conf, paragraph 37.

⁶³ ICC-01/05-01/08-3030-Conf, paragraph 44.

prosecution asserts that “[i]nitiating contact with all the addressees and possible recipients of the letters [...] would potentially [REDACTED].”⁶⁴

33. The Chamber is satisfied with the prosecution’s justification as to why it did not initiate any contact with the addressees and possible recipients of the Letters. In addition, in line with its observations made in paragraph 26 above, the Chamber notes once again the failure by the defence to demonstrate the link between the measures taken by the prosecution in relation to the addressees and possible recipients of the letters sent by Witness 169 and the prosecution’s obligation to disclose exonerating information pursuant to its obligations under Article 54(1) of the Statute.

34. Concerning the defence’s request for a report on “any further correspondence or publications concerning the Relevant Witnesses”, the Chamber notes that in the Prosecution Response, the prosecution reports on [REDACTED].⁶⁵ The prosecution did not report on any additional correspondence or similar documents received from these witnesses. In case any additional correspondence or similar documents are in the prosecution’s possession or come to its attention in the future, the prosecution shall advise the Chamber without delay. Likewise, should the Registry receive any such information in the context of its continued efforts to contact the Relevant Witness, or in the context of its contact with Witnesses 169 and 178 ordered in paragraph 29 above, it shall inform the Chamber immediately.

⁶⁴ ICC-01/05-01/08-3030-Conf, paragraph 44.

⁶⁵ ICC-01/05-01/08-3030-Conf, paragraphs 20 to 43.

(iv) Request for an order to the prosecution to initiate an investigation

35. As outlined above, in its various filings on the matter underlying the present Decision, the prosecution has already reported on the measures it has taken to examine the circumstances of the apparent breach of protective measures and to monitor the impact on the [REDACTED]. Regarding the required investigation in relation to the addressees and recipients of the Letters, as set out in paragraph 32 above, the prosecution conveyed its assessment that “[i]nitiating contact with all the addressees and possible recipients of the letters [...] would potentially [REDACTED]”.

36. It follows from these submissions that the prosecution has taken certain measures as a consequence of the conduct of Witnesses 169 and 178. Concerning additional investigative measures that may be taken by the prosecution, the Chamber recalls its finding in paragraph 28 above that the responsibility to initiate and conduct investigations in the context of Article 70 of the Statute lies with the prosecution. As a result, the Chamber rejects the defence’s request to order the prosecution to initiate further investigations.

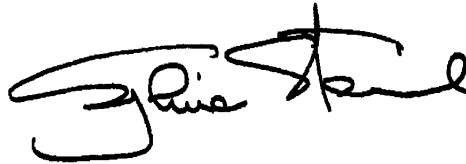
37. In view of the above, the Chamber hereby

- (i) REJECTS the Defence Request;
- (ii) ORDERS the Registry to contact Witnesses 169 and 178, emphasize the importance of and rationale behind protective

measures, and seek to obtain information on the [REDACTED];

- (iii) ORDERS the Registry to file a confidential report on its contact with Witnesses 169 and 178 by 27 June 2014;
- (iv) REMINDS the prosecution and the VWU to continue their efforts in [REDACTED] and report on any further developments as soon as practicable;
- (v) DIRECTS the parties to file public redacted versions of the Defence Request and the Prosecution Response by 25 June 2014.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 11 December 2014

At The Hague, the Netherlands