

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 31 August 2008

**PRE-TRIAL CHAMBER III**

**Before: Judge Hans-Peter Kaul, Single Judge**

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

**URGENT  
Confidential**

**With confidential Annex *ex parte* Prosecutor only**

**First decision on the Prosecutor's request for redactions**

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

**The Office of the Prosecutor**

Fatou Bensouda, Deputy Prosecutor  
Petra Kneuer, Senior Trial Lawyer

**Counsel for the Defence**

Nkwebe Liriss  
Tjarda E. Van der Spoel  
Aimé Kilolo-Musamba

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Simo Vaatainen

**Detention Section**

Anders Backman

**Victims Participation and Reparations  
Section**

**Other**

Judge Hans-Peter Kaul,<sup>1</sup> acting as Single Judge for Pre-Trial Chamber III (the “Chamber”) of the International Criminal Court (the “Court”), received on 1 August 2008 the “Prosecutor’s Decision concerning the Prosecutor’s proposals for redactions”<sup>2</sup> requesting redactions of information in the “Prosecutor’s Application for Warrant of Arrest under Article 58”<sup>3</sup> (the “Prosecutor’s Application”) and the “Prosecutor’s Submission on Further Information and Materials”<sup>4</sup> (the “Prosecutor’s Further Submission”) and their respective annexes.

1. At the outset of this decision, it is clarified that the present decision deals only with the Prosecutor’s proposals for redactions with regard to the Prosecutor’s Application and the Prosecutor’s Further Submission.

## **I. Procedural History**

2. The Single Judge recalls that the Chamber issued an order setting out the course and timeframe for requests for redactions of information contained in the Prosecutor’s Application and the Prosecutor’s Further Submission.<sup>5</sup> Thereupon, the Prosecutor submitted his proposals for redactions on 30 June 2008 related to the Prosecutor’s Application and the Prosecutor’s Further Submission<sup>6</sup> to which the Victims and Witnesses Unit (the “VWU”) provided its observations<sup>7</sup> on 4 July 2008. On 16 July 2008 the Prosecutor filed the “Prosecution’s Application for Redaction Pursuant to Rules 81(2) and 81(4)”<sup>8</sup> requesting redactions of information contained in witness statements annexed to the Prosecutor’s Application and the Prosecutor’s

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<sup>1</sup> ICC-01/05-01/08-53.

<sup>2</sup> ICC-01/05-01/08-58-US-Exp.

<sup>3</sup> ICC-01/05-01/08-26-US-Exp.

<sup>4</sup> ICC-01/05-01/08-29-US-Exp.

<sup>5</sup> “Ordonnance sollicitant du Procureur et de la Division d’Aide aux Victimes et aux Témoins des observations relatives à la levée des scelles concernant certains documents et à la modification du niveau de confidentialité de ceux-ci”, ICC-01/05-01/08-21.

<sup>6</sup> “Prosecution’s Application Pursuant to Rules 81(2) and 81(4) for redactions to the Application for Warrant of Arrest and the Further Submission”, ICC-01/05-01/08-32-US-Exp.

<sup>7</sup> “Victims and Witnesses Unit’s Observations on the Prosecution’s Application Pursuant to rules 81(2) and 81(4) for redactions to the Application for a Warrant of Arrest and the Further Submission, ICC-01/05-01/08-39-US-Exp.

<sup>8</sup> ICC-01/05-01/08-44-US-Exp.

Further Submission (the “Prosecutor’s Further Proposal for Redactions”). The VWU was expected to submit its observations thereto by 31 July 2008.

3. On 23 July 2008 the Chamber issued the “Decision concerning the Prosecutor’s proposals for redactions”<sup>9</sup> ordering the Prosecutor to consult with VWU in order to establish which measures of protection are currently available for the individual persons concerned by the proposed redactions in conformity with rule 81(4) of the Rules of Procedure and Evidence (the “Rules”) and whether non-disclosure of the identity of the persons in question is the only appropriate measure under the current circumstances. In addition, lacking sufficient factual information and explanations, the Prosecutor was ordered to re-submit by 31 July 2008 a proposal for redactions on the Prosecutor’s Application and the Prosecutor’s Further Submission with their respective annexes substantiated properly with the applicable standards as summarized and developed in that decision. The time-limit for the VWU to submit its observations by 31 July 2008 on the Prosecutor’s Further Proposal for Redactions was suspended.

4. In the said decision, the Chamber likewise ordered the Prosecutor to complete his assessment, taking into consideration the observations of the VWU, by 31 July 2008 and to inform accordingly the Chamber (i) whether he has decided to refer the persons mentioned in his Application or in his Further Submission and their annexes to the VWU, (ii) who these persons are, and (iii) what the reasons are for this referral or non-referral of such persons to the VWU.

5. On 31 July 2008 the Chamber issued the decision on the evidence disclosure system and set a calendar for disclosure.<sup>10</sup> It was ordered that the Prosecutor disclose

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<sup>9</sup> ICC-01/05-01/08-48-US-Exp.

<sup>10</sup> “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”, ICC-01/05-01/08-55.

to the defence all evidence in the Prosecutor's possession or control under article 67(2) of the Statute as soon as practicable and on a continuous basis. Furthermore, disclosure of evidence falling under rules 76 and 77 of the Rules was ordered to be conducted as soon as possible and no later than 3 October 2008.

6. On 31 July 2008 the Prosecutor requested an extension of time of 24 hours to file his proposals for redactions<sup>11</sup> as ordered by the Chamber which was granted by decision of the Single Judge on 1 August 2008<sup>12</sup>. The same day, the Prosecutor submitted the "Prosecutor's Decision concerning the Prosecutor's proposals for redactions".<sup>13</sup>

7. On 18 August 2008 the VWU submitted the "Victims and Witnesses Unit's observations on the protection measures available in relation to the individuals concerned by the Prosecutor's proposals for redaction".<sup>14</sup>

8. On 26 August 2008 the Single Judge decided to convene a status conference *ex parte* and *in camera* with the Prosecutor and the VWU<sup>15</sup> on the Prosecutor's proposals for redactions with a view to receive further relevant information and clarifications which was held on 28 August 2008.

9. On 29 August 2008 the Prosecutor submitted further information as requested by the Single Judge during the status conference of 28 August 2008.

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<sup>11</sup> "Motion for extension of time", ICC-01/05-01/08-56-US-Exp.

<sup>12</sup> "Decision on extension of time-limit", ICC-01/05-01/08-57-US-Exp.

<sup>13</sup> ICC-01/05-01/08-58-US-Exp.

<sup>14</sup> ICC-01/05-01/08-72-US-Exp.

<sup>15</sup> "Decision convening a status conference", ICC-01/05-01/08-79-Conf-Exp.

## II. The Law

10. The Single Judge recalls articles 21, 54(3)(f), 57(3)(c), 64(2), 67 and 68(1) of the Rome Statute (the “Statute”) and rules 81(2), 81(4), 87 and 121 of the Rules as well as regulation 23*bis* of the Regulations of the Court and regulation 175 of the Regulations of the Registry.

11. The Single Judge first wishes to recall the relevant law which is to be applied in determining the issues under examination. To this end, the Single Judge also refers to the jurisprudence of Pre-Trial Chamber I and that of the Appeals Chamber.<sup>16</sup>

12. The Single Judge recalls that the Chamber’s principal responsibility related to redactions prior to the confirmation hearing is to ensure that the proceedings are fair and expeditious and that they are conducted with full respect for the rights of the defence and with due regard to the protection of victims and witnesses.

13. The Single Judge further emphasizes the overriding principle that full disclosure should be made and that non-disclosure is an exception to this general rule which requires prior authorization of the Chamber pursuant to rule 81 of the Rules. Furthermore the Single Judge stresses that any case of non-disclosure will require a careful assessment by the Chamber on a case-by-case basis.

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<sup>16</sup> Pre-Trial Chamber I, “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, ICC-01/04-01/06-108-Corr; Appeals Chamber, “Judgement on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence’”, ICC-01/04-01/06-568; Appeals Chamber, “Judgement on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, ICC-01/04-01/06-773; Appeals Chamber, “Judgement on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, ICC-01/04-01/06-774; Appeals Chamber, “Judgement on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, ICC-01/04-01/07-475; Appeals Chamber, “Judgement on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, ICC-01/04-01/07-476.

14. In the view of the Single Judge, rules 81 and 82 of the Rules establish the procedure for requesting authorisation to redact certain information. According to rule 81(4) the Prosecutor can request authorization to redact information in order (i) to ensure the confidentiality of information in accordance with articles 54, 72 and 93, and (ii) in accordance with article 68, to protect the safety of witnesses and victims and members of their families. The non-disclosure of information is also accepted with regard to the identity of persons at risk on account of the activities of the Court.<sup>17</sup>

15. The Single Judge recalls the criteria in respect of non-disclosure of identifying information of victims, witnesses, their family members and other persons at risk on account of the activities of the Court, which comprise: (i) the danger caused by disclosure of their identity and whether non-disclosure could reduce that danger; (ii) the “necessity” of non-disclosure in the sense that less intrusive protective measure are not available; and (iii) proportionality of non-disclosure in view of the prejudice caused thereby to the rights of the accused and a fair and impartial trial. The danger must involve an objectively justifiable risk to the safety of the person concerned and must arise from disclosing the particular information to the defence, as opposed to the information to the public at large.

16. In this respect the Appeals Chamber has held that “it may be permissible to withhold the disclosure of certain information from the defence prior to confirm the charges that could not be withheld prior to trial.”<sup>18</sup>

17. According to rule 81(2) of the Rules, the Prosecutor may request authorisation for redactions where material or information are in his possession or control and which

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<sup>17</sup> Appeals Chamber, ICC-01/04-01/07-475, para. 1.

<sup>18</sup> Appeals Chamber, ICC-01/04-01/07-475, para. 68.

must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations.

18. The Single Judge points out that the criteria and considerations as elaborated above apply *mutatis mutandis* to redactions sought pursuant to rule 81(2) of the Rules.<sup>19</sup> Thus, for redactions to be granted, the Prosecutor will have to establish that the potential prejudice to investigations is objectively justifiable, would result from disclosure to the defence (as opposed to the public) and could be overcome or reduced by redactions.<sup>20</sup>

### **III. The Submissions**

19. This decision refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential or under seal. With a view to balancing the principle of publicity and fairness of proceedings on the one hand and the protection of witnesses and victims on the other, the Single Judge is of the view that the making of such references in the present decision is required by the principle of publicity and fairness of proceedings and considers that the revelation of the existence or, to a certain extent, the content of such documents is not prejudicial to the protection of witnesses and victims and is not inconsistent with the confidential and under seal nature of the documents referred to.

20. The Prosecutor in his submission of 1 August 2008 requests redactions of a temporary nature related to selected information in the Prosecutor's Application and

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<sup>19</sup> Appeals Chamber, ICC-01/04-01/07-475, para. 97.

<sup>20</sup> Appeals Chamber, ICC-01/04-01/07-475, para. 98.

the Prosecutor's Further Submission and their respective annexes. He submits that "[w]hile the general situation in the Central African Republic (the "CAR") is calm and stable, the actual arrest of Jean-Pierre Bemba Gombo ("Mr Jean-Pierre Bemba") and the subsequent mobilization of supporters of the accused, in particular in the DRC, makes it necessary at least to reassess the risks for each witness should their names be disclosed, making them identifiable".<sup>21</sup>

21. The Prosecutor submits that Mr Jean-Pierre Bemba and his supporters may well have the capability to intimidate, bribe or harm the witnesses concerned. He bases his assumptions "on the analysis of the past behaviour of Mr. Jean-Pierre Bemba and others in relation to retaliation, their resources (network of supporters, forces) and the ability to use them in the area where [the] witnesses reside".<sup>22</sup> The Prosecutor refers to past events where MLC supporters attacked MONUC buildings and a staff residence, an NGO office and intimidate staff of NGOs known to work on human rights and justice issues. He further alleges that while the MLC took a diplomatic approach at the same time it promised that the arrest of Mr Jean-Pierre Bemba would lead to 'consequences'. A demonstration in support of the accused was reportedly held by 8000 persons close to the river where easy access to Bangui is possible. This demonstrates that he still has a very large basis of support which can be mobilized. Several persons received threats after the arrest of Mr Jean-Pierre Bemba.

22. The Prosecutor further submits that at this stage a number of protective measures are already in place but that "the ongoing risk assessment will allow us to determine if such measures will be sufficient once the names of the witnesses have been disclosed".<sup>23</sup> He continues to submit that "temporary redactions are the least intrusive means available, while allowing the Prosecution to provide Mr. Bemba

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<sup>21</sup> ICC-01/05-01/08-58-US-Exp, para. 6.

<sup>22</sup> ICC-01/05-01/08-58-US-Exp, para. 16.

<sup>23</sup> ICC-01/05-01/08-58-US-Exp, para. 11.

with the largest amount of information in the shortest timeframe possible, and while allowing for completion of consultations with VWU on the risk to witnesses and the measures required”.<sup>24</sup> The current protective measures are an “adequate response to imminent threats provided that the disclosure of the names is delayed as late as possible on a rolling basis as the proceedings continue”.<sup>25</sup> The Prosecutor concludes that “as soon as the identity of the witnesses is disclosed, they will be exposed to a security risk that can not be managed according to the OTP with the present measures”.<sup>26</sup>

23. Subsequently, the Prosecutor provided an individual security assessment relating to a number of witnesses whose names and identifying information he seeks to redact.

24. The VWU in its observations of 18 July 2008 submitted that “any individual or organisation acting with malicious intent to harm, kill or otherwise negatively influence the testimony of a witness in order to have adverse impact on the proceedings before the Court requires time to plan and act on such intent. Consequently, it can be in the interest of an effective protection regime to disclose sensitive information as late as possible (rolling system of disclosure)” which is characterized as “a manageable unintrusive means to reduce the risk to the witness concerned”.<sup>27</sup>

25. However, in the present case, the VWU observed that “to this date the VWU has not identified or been provided with any information to support that disclosure of witnesses’ identities to the defence would result in communicating this information to individuals with malicious intent. Consequently, (...) the VWU does not object in

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<sup>24</sup> ICC-01/05-01/08-58-US-Exp, para. 12.

<sup>25</sup> ICC-01/05-01/08-58-US-Exp, para. 14.

<sup>26</sup> ICC-01/05-01/08-58-US-Exp, para. 22.

<sup>27</sup> ICC-01/05-01/08-72-US-Exp, para. 24.

principle that the identities of the witnesses concerned by the Prosecution's proposal for redactions are disclosed to the defence".<sup>28</sup> The VWU also concluded that the present protective measures available "provide an adequate response, if necessary and based on the assessed level of risk at the time, after disclosure of witnesses' identities to the defence".<sup>29</sup>

#### **IV. Conclusions of the Single Judge**

26. The Single Judge bases his findings on the information provided by the Prosecutor and the VWU in their respective filings of 1 August 2008, respectively 18 August 2008. In addition, the Single Judge refers to information provided by both participants in the status conference on 28 August 2008.<sup>30</sup> The Single Judge observes that the Prosecutor provided information at times of a rather general nature which did not allow the Single Judge with regard to some witnesses to ascertain whether a witness was exposed to a specific danger. Albeit the VWU had not been provided prior with the assessment conducted by the Prosecutor, the Single Judge is of the view that the observations of the VWU were sufficiently reliable due to the VWU's presence in the field, its mandate and expertise in protection issues.

27. In this context, the Single Judge recalls that the Prosecutor was ordered by the Chamber's decision of 23 July 2008 to complete his assessment, taking into consideration the observations of VWU, by 31 July 2008 and to inform the Chamber accordingly about the further course of action. However, the Prosecutor at the status conference on 28 August 2008 reiterated several times that his assessment was still ongoing and would be concluded soon and that he would share it with the VWU.

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<sup>28</sup> ICC-01/05-01/08-72-US-Exp, para. 38.

<sup>29</sup> ICC-01/05-01/08-72-US-Exp, para. 39.

<sup>30</sup> ICC-01/05-01/08-T-4-CONF-EXP-ENG ET 28-08-2008.

With a view to the expeditiousness of proceedings, the Single Judge avails himself of the opportunity to stress the importance of timely completion of the assessment as ordered by the Chamber by the Prosecutor and to share it, as announced during the status conference, at the earliest opportunity with VWU.

#### **A. The danger caused by disclosure of the identity of witnesses**

28. The Single Judge first wishes to provide clarification on the definition of “danger” upon which the Single Judge bases his determination.

29. Such a danger must involve an objectively justifiable risk to the safety of the person concerned. The source of the risk can be defined as an “organisation or an individual acting with malicious intent seeking to harm, kill or otherwise negatively influence a witness in order to have an adverse impact on the proceedings before the Court, or retaliate against a witness”.<sup>31</sup>

30. The Single Judge considers that any assessment as to the danger of disclosing the type of information for which authorization for redactions have been requested to the defence must be carried out against the backdrop of the above-mentioned submissions of both the Prosecutor and the VWU. In this respect the Single Judge recalls that according to the Prosecutor’s submission and the observations of the VWU in their written submissions and during the status conference the general situation in CAR is currently calm and stable. However, the Single Judge is of the view that the danger caused by disclosure of the witnesses’ identity to the defence must be assessed with regard to each individual witness taking into account his or her specific personal situation. The Single Judge is of the view that particular weight should be given (i) to the witness’s personal circumstances, (ii) to the fact whether the witness concerned benefits from any protection or security measures, (iii) to the

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<sup>31</sup> As set out by the Victims and Witnesses Unit in its observations of 18 August 2008, ICC-01/05-01/08-72-US-Exp, para. 17.

fact whether the witness has faced threats originating from Mr Jean-Pierre Bemba or his supporters and (iv) to the fact whether the witness himself has undertaken any activities to endanger his personal safety.

31. In this respect it is worth noting that the Prosecutor requested redactions of information relating to 11 of the 14 witnesses presented so far. Against this background, the Single Judge will only consider redactions to the disclosure of the identity of those 11 witnesses. An analysis of the individual security assessment of each witness will be provided separately in the annex to this decision filed confidential *ex parte* to the Prosecutor only.

32. Taking into consideration the safety situation of the witnesses and the overall information provided by the Prosecutor and the VWU at this stage of the proceedings, the Single Judge is of the view that the names of the 11 witnesses shall be disclosed to the defence 30 days before the date of the confirmation hearing pursuant to rule 121(3) of the Rules.

33. However, taking into consideration the personal circumstances of some witnesses and the necessity to ensure that protective measures are in place before disclosure is made to the defence, the Single Judge considers that for some witnesses, as detailed in the annex to this decision, it is advisable to authorize temporarily the redaction of their names and other identifying information. In this context, the Single Judge wishes to clarify that the temporary redaction of information fits into the legal framework of the Statute and the disclosure regime. Where there is an objectively justifiable risk for the safety of the witness concerned, the Single Judge accepts the proposal submitted by the Prosecutor and the VWU that the disclosure of the names is delayed as late as possible within the timeframe of the evidence disclosure system as set forth in the Chamber's decision of 31 July 2008.

34. The Single Judge believes that this system of late disclosure allows him to balance the rights of the accused and the principle of protection of witnesses for the following reasons: (a) the Prosecutor's Application and the Prosecutor's Further Submission will be disclosed immediately to the defence, albeit in a redacted form; (b) the temporary redactions will be lifted at the latest 30 days before the confirmation of the charges hearing in accordance with rule 121(3) of the Rules, thus preserving the rights of the defence; and (c) additional time is thus given to assess the security situation further and to put in place appropriate measures for the protection of the witnesses concerned.

35. Those temporary redactions will be lifted automatically at the latest 30 days before the confirmation of the charges hearing and without a new decision of the Chamber, unless the Prosecutor or VWU submit new precise and detailed information which would make it necessary for the Chamber to reconsider its decision.

36. Failing such a submission, the Prosecutor is therefore under an obligation to disclose at the latest 30 days before the confirmation of the charges hearing the Prosecutor's Application and the Prosecutor's Further Submission without the temporary redactions as detailed in the annex to this decision.

#### **B. Monitoring of non-privileged communication of the person prosecuted**

37. The Single Judge considers that further safeguards need to be taken in order to avoid breaches of the present decision which allows for the names of some witnesses to be disclosed fully to the defence at this stage of the proceedings.

38. The Single Judge recalls that the defence shall respect and actively exercise all care to ensure respect of professional secrecy and confidentiality of information, in

particular relating to the name and identifying information of the witnesses disclosed at this stage of the proceedings.<sup>32</sup>

39. Reference is also made to the recommendation of the VWU which suggested monitoring the non-privileged communication of the accused after information is disclosed to the defence, at least on a random basis.<sup>33</sup>

40. The Single Judge recalls that, as stressed by the Chamber in its Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo,<sup>34</sup> Mr Jean-Pierre Bemba has a large number of supporters who have threatened and intimidated persons in the past, incidents which were not only confined to the Democratic Republic of Congo. This allows the Single Judge to establish that there are reasonable grounds to believe that the detained person may be attempting to interfere with or intimidate a witness or to breach an order for non-disclosure of the Single Judge.

41. Therefore, as an additional safeguard and in accordance with article 68 of the Statute, the Single Judge is of the view that actively monitoring the non-privileged communication of Mr Jean-Pierre Bemba is necessary.

## **FOR THESE REASONS, THE SINGLE JUDGE**

**(a) authorizes** the Prosecutor to disclose as soon as possible to the defence the "Prosecutor's Application for Warrant of Arrest under Article 58" and the

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<sup>32</sup> See also article 8(4) of the Code of Professional Conduct for counsel.

<sup>33</sup> ICC-01/05-01/08-72-US-Exp, para 40.

<sup>34</sup> ICC-01/05-01/08-14-tENG.

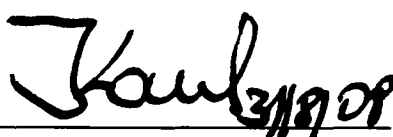
“Prosecutor’s Submission on Further Information and Materials” with the redactions as detailed in the annex to this decision.

**(b) orders** the Prosecutor to lift the temporary redactions as detailed in the annex to this decision at the latest 30 days before the confirmation of the charges, subject to any further submission presented by the Prosecutor of the VWU in accordance with paragraphs 35 and 36 of this decision.

**(c) requests** the defence to keep the information disclosed confidential and to ensure that it is not passed on to the public.

**(d) orders** the Registry to actively monitor regularly the non-privileged communication via telephone of Jean-Pierre Bemba Gombo, subject to review by the Chamber.

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

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Judge Hans-Peter Kaul  
Single Judge

Dated this 31 August 2008

At The Hague, the Netherlands