

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13

Date: 22 June 2016

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Redacted Document

**Public redacted version of "Prosecution's Response to Arido's Request for
Protective Measures for Witness CAR-D24-P-0001", 16 March 2016,
ICC-01/05-01/13-1723-Conf**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes Arido’s Request for Protective Measures for Witness D24-P-0001 (the “Request”).¹ The Request does not provide sufficiently precise and specific grounds to justify Trial Chamber VII’s (“Chamber”) granting the protective measures sought.

2. Alternatively, any determination of the Request should be considerate of the independent assessment of the Victims and Witnesses Unit (“VWU”).

II. Confidentiality

3. This response is filed as “*Confidential*” as it responds to a filing of the same designation. A “*Public Redacted*” version will be filed shortly.

III. Submissions

4. Article 64(7) of the Rome Statute (“Statute”) creates a statutory presumption that “[t]he trial shall be held in public” unless “special circumstances” exist requiring the use of protective measures.² Article 68(1) of the Statute and rule 87 of the Rules of Procedure and Evidence govern the Chamber’s authority to order protective measures. As already held by the Single Judge: “bearing in mind the general principle of publicity, protective measures should be granted only on an exceptional basis following a case-by-case assessment. It must be considered whether the measures are necessary in light of an objectively justifiable risk and proportionate, bearing in mind the rights of the accused”.³

¹ ICC-01/05-01/13-1716-Conf; ICC-01/05-01/13-1716-Conf-AnxA; and ICC-01/05-01/13-1716-Conf-AnxB.

² That presumption is reiterated in the Chamber’s *Directions on the Conduct of the Proceedings*, which requires that all witness testimony “[i]nsofar as possible” [...] shall be given in public ICC-01/05-01/13-1209, para. 26.

³ ICC-01/05-01/13-1306, para. 3; *see also* ICC-01/09-01/11-902-Red2, para. 13.

5. That an Accused has brought the Request is not the sole determinative factor of the question of proportionality here. Rather, the Chamber must evaluate the request in view of the fair trial rights of the remaining Accused in this case and of the Prosecution.⁴ The right to a public trial also belongs to the public at large,⁵ a matter this Chamber has continuously emphasised throughout these proceedings.

6. The Request does not identify any objective and justifiable risk to the Witness that would necessitate the granting of the protective measures. The Request concedes that “originally”, D24-P-0001 desired to testify publicly.⁶ None of the factors now advanced in the Request present any issues that were unknown to the Arido Defence when initially deciding to call the Witness without the benefit of protective measures. That D24-P-0001 is a [REDACTED]; [REDACTED];⁷ and [REDACTED]⁸ are not new issues. Nor is D24-P-0001’s receipt of anonymous calls, as explained in [REDACTED],⁹ novel. Likewise, Arido’s status as an Accused at the ICC, regardless of whether the presumption of innocence may be less well understood or respected amongst the wider public,¹⁰ is not a matter recently brought to the Defence’s attention.

7. Although the Request contends that “threatening incidents have forced [D24-P-0001] to reconsider [REDACTED] original position”, it does not identify the specific threats that justify the requested protective measures at this stage, much less that any

⁴ ICC-01/04-02/12-271-AnxA (Dissenting Opinion of Judges Ekaterina Trendafilova and Cuno Tarfusser), paras. 6, 12 (noting at para. 6 that the “right to a fair trial [which] is guaranteed under [a]rticle 64(2) [of the Statute] [...] obliges the Court to ensure that neither party is put at a disadvantage when presenting its case”. Although the notion of fair trial is perceived predominantly with respect to the accused, fairness “also extends to other parties in proceedings such as the Prosecution” (citations omitted) and, at para. 12, “the judicial duty to ensure fairness of the trial, as enjoined by virtue of article 64(2) of the Statute, encompasses the obligation of the Trial Chamber to safeguard the rights of the accused and equally the procedural rights of the Prosecutor.”); see also article 64(2) of the Statute.

⁵ Cassese A et al., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford 2002), p. 1281.

⁶ D24-P-0001 was identified as a witness on 3 December 2015 (ICC-01/05-01/13-1510-Conf-AnxB). No protective measures were requested in the Defence’s filing dealing with the matter (ICC-01/05-01/13-1557, para. 7).

⁷ ICC-01/05-01/08.

⁸ ICC-01/05-01/13-1716-Conf, para. 5.

⁹ ICC-01/05-01/13-1716-Conf, para. 6.

¹⁰ ICC-01/05-01/13-1716-Conf, paras. 7, 8.

such risk arises from D24-P-0001's involvement with this case, or will otherwise materialize "on account of testimony given."¹¹

8. Furthermore, the Request's contention that "investigations of [D24-P-0001] – in particular [REDACTED] - have put more focus on D24-P-0001 and this exposes D24-P-0001 [REDACTED] further",¹² does not substantiate or explain any corresponding resulting increase to any pre-existing risk. Contact with individuals in full compliance with the applicable Protocol,¹³ cannot in and of itself constitute an objective and justifiable risk.

9. Finally, the Request does not contain all relevant information in support of each of the individual protective measures sought, so as to enable the Chamber to strike a proper balance between its obligation to protect witnesses and to ensure the publicity of the proceedings, as well as accord the Parties their respective fair trial rights.

10. Alternatively, any adjudication of the Request should be considerate of the VWU's independent assessment. The Request suggests that the VWU has not finalized its assessment of purported security threats to the Witness.¹⁴ As the Court's independent agency specialized in such assessments, the Chamber would be guided by the VWU's considered position.

¹¹ See rule 87(1).

¹² ICC-01/05-01/13-1716-Conf, para. 3.

¹³ Namely the Protocol on the Handling of Confidential Information during Investigations and Contact between a Party and Witnesses of the Other Party: ICC-01/05-01/13-1093-Anx.

¹⁴ ICC-01/05-01/13-1716-Conf, para. 3.

IV. Relief Requested

11. For the foregoing reasons, the Request should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 22nd Day of June 2016
At The Hague, The Netherlands