

1 International Criminal Court

2 Trial Chamber I - Courtroom 1

3 Situation: Democratic Republic of The Congo - ICC-01/04-01/06

4 Case against Thomas Lubanga Dyilo

5 Ex Parte Hearing - OTP and Victims & Witnesses Unit

6 Closed Session

7 Wednesday, 1 April 2009

8 *(The hearing starts at 16:15)*

9 COURT USHER: All rise. The International Criminal Court is now in
10 session. Please be seated.

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Pursuant the Oral Ruling of the Chamber, expunctions have been made to the transcript which becomes Public

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24 (*Brief pause.*)

25 PRESIDING JUDGE FULFORD: There are two matters that we must briefly

1 deal with this afternoon: The first relates to the use of the risk assessments
2 provided by the Victims and Witnesses Unit in judicial review proceedings. The
3 risk assessment is a working document of the Victims and Witnesses Unit; it is
4 prepared in order to provide recommendations to the Registrar.

5 It is suggested that these assessments should not be disclosed to the
6 Chamber when there is a judicial review of one of the decisions taken by the
7 Victims and Witnesses Unit following, for instance, a challenge by one of the
8 parties or a participant. The Victims and Witnesses Unit submits, in essence, that
9 it needs to preserve its neutrality and to protect the confidentiality of
10 documents that were collected solely for the purpose of the assessment.

11 The Registrar has stressed that whenever there is a judicial
12 consideration of one of the assessments that has been made by the Unit, the
13 Chamber will be provided with a detailed report. In our judgment, in the majority
14 of cases, it is likely that it will suffice for the Victims and Witnesses Unit to
15 provide a report. However, the Unit must ensure that on each occasion the Chamber
16 is provided with the complete balanced picture, which must include all the
17 relevant information that is necessary for making a properly informed decision.

18 However, it is possible to imagine a situation ... albeit, it may be an
19 exceptional one ... where it may be necessary to investigate some of the original
20 documentation in order for the Chamber to be provided with a sufficiently full
21 background picture before making a decision.

22 In this instance, we have no doubt that the full report that we have
23 received provides a sufficient basis for our decision, and we do not require the
24 Victims and Witnesses Unit to provide us with its original assessment or
25 assessments.

1 Turning to the substantive issue that concerns this witness 04, the
2 relevant background is as follows: He was interviewed by the Prosecution in
3 January (Expunged) and in October (Expunged). (Expunged).

4 (Expunged) And he provides a general overview of the events and some of the
5 actors in the Ituri conflict.

6 In particular, he provides information about the creation and the
7 structure of the UPC/FPLC by the accused; the daily meetings between the accused
8 and certain individuals described as hard-liners within that group; Mr. Lubanga's
9 role in the UPC/FPLC and the control that he exercised; the chain of command
10 within the organisation (Expunged).

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15 The request for protection by the Victims and Witnesses Unit was made in
16 September 2007, and it was rejected on the 18 December 2007 with the Victims and
17 Witnesses Unit expressing the following reasons: (Expunged)

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2 From that date, the witness has consistently indicated that he is not
3 satisfied with the various security measures which have been outlined to him,
4 (Expunged), and that he will
5 not testify before this Court unless enhanced security measures are put in place.

6 (Expunged)

7 (Expunged)

8 The events which we have just described and the attitude of the witness,
9 which had founded the original refusal by the Victims and Witnesses Unit, were
10 reviewed by this Court on the 24 April 2008, and we upheld the decision of the
11 Victims and Witnesses Unit.

12 Quoting from part of our decision at paragraph 13, the Court stated as
13 follows: "Decisions made by the Victims and Witnesses Unit must be evidence-based,
14 and it would be wrong for it to be obliged to accept a witness into the program
15 because the latter expresses a desire for increased protection. Although the
16 attitude of the witness is a factor to be taken into consideration, it is not in
17 any sense determinative. Notwithstanding the expression of concern by the witness,
18 (Expunged), in the
19 judgment of the Chamber the decision of the Unit is not to be faulted."

20 Since the Victims and Witnesses Unit took its original decision, there
21 have been further events which require mention. (Expunged)

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12 The Victims and Witnesses Unit considered all of those matters and
13 conducted a new assessment.

14 We quote the essence of their conclusions taken from paragraph 16 of
15 their filing of the 18 March 2009, document 1780: (Expunged)

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6 We then move to paragraph 21, "The Victims and Witnesses Unit assess the level of
7 risk for the witness did not warrant participation in the ICCPP. (Expunged)

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11 In her helpful filing on behalf of the Office of the Prosecutor, Ms.

12 Samson at paragraph 12 has reduced the issue which she raises with us to its core
13 essentials, and, again, we quote: "The Prosecution submits that psychological
14 harassment and subtle intimidation is a recognised form of intimidation and
15 manipulation that can have a detrimental impact on the behaviour of the witness
16 and his or her willingness to testify.

17 The issue to be resolved by this Court is not whether the conduct
18 constitutes a direct and overt threat, but whether the conduct may be properly and
19 objectively perceived to be threatening. If the latter, the Court owes a duty of
20 protection. Indeed, the Court will be unable to function if witnesses are
21 dissuaded from testifying through intimidation that is both real and too subtle to
22 constitute an overt threat."

23 We have carefully considered that suggested approach by the Office of
24 the Prosecutor. However, in our judgment, it is critical to have in mind the way
25 in which this Chamber has expressed the proper approach that is to be taken in

1 these circumstances in its decision of the 16 December 2008, document 1557.

2 And we quote variously, beginning at paragraph 27, "Protection shall be
3 afforded to any witness following careful investigation if he or she is exposed to
4 ['faces'] an evidence-based ['established'] danger of harm or death."

5 "That this 'test' should be interpreted in a sufficiently flexible and
6 purposive manner to ensure proper protection for any witness who, following
7 careful investigation, faces an established danger of harm or death."

8 And a little later, "An established danger of harm can include physical
9 as well as psychological harm and evidence of intimidation, depending on the
10 circumstances, may be powerful evidence of the existence of a danger of harm."

11 Although the Chamber did not expressly use the expression "objective
12 test," there is no doubt in our minds but that it was an objective test that was
13 being established in our decision of the 16 December 2008, albeit, we made clear
14 that one of the factors that should always be taken into consideration is the
15 attitude of the witness.

16 Applying that test to the decision that has been taken by the Victims
17 and Witnesses Unit in this case, we are unable to find any fault with the approach
18 that has been adopted.

19 We repeat, that the conclusion of the Victims and Witnesses Unit has
20 been that the incidents described, even when considered together, do not
21 constitute what could be considered a concerted effort to harm or intimidate the
22 witness, not least because he has not received any direct threats.

23 In those circumstances, in our judgment, he has not been exposed to an
24 evidence-based danger of harm or death. In all the circumstances, therefore, we
25 decline to intervene in the way proposed by the Prosecution and we uphold the

1 decision that has been taken to refuse entry into the ICCPP.

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22 (The hearing ends at 16:57)