

**Public Decision on the applications by
victims to participate in the proceedings**

Headline

DRC, *The Prosecutor v. Thomas Lubanga Dyilo*—Trial Chamber I grants 92 applicants status of victims authorised to participate in the case proceedings.

Brief Summary

On 15 December 2008, Trial Chamber I granted 92 of 117 applicants the status of victims authorised to participate in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. These applicants had provided sufficient evidence to establish, *prima facie*, that they were victims under rule 85 of the Rules of Procedure and Evidence¹.

In this decision, Trial Chamber I decided on applications filed by individuals who alleged to have, *inter alia*, suffered harm as a result of the alleged conscription and/or enlistment and/or use of children under the age of 15 to participate actively in the hostilities, between September 2002 and 13 August 2003.

In its determination of the individual applications, Trial Chamber I found, *inter alia*, that:

- not only an applicant's relative or legal guardian are allowed to act on behalf of victims under the age of 18;
- applicants, when they turn 18, are not required to furnish the Chamber with a fresh document formally authorising the person who has represented them so far to remain in that role, given that the applicant has indicated their wish to participate in the proceedings;
- the applicants' demobilisation certificates provided proved, *prima facie*, the applicants to be under 18 at the time of their demobilisation;
- though the Chamber would normally expect a person to act on behalf of a minor, the fact that an applicant is very close to the age of legal maturity at the time of the commencement of the trial creates a strong case for the Chamber to admit the application made by the minor him/herself.

In view of the number of applicants granted the status to participate at the trial, Trial Chamber I considered that active participation by this number of victims must not affect the accused's fair trial rights. Thus, given that the views and concerns of many victims overlapped, the opportunity of joint

¹ Rule 85 of the Rules of Procedure and Evidence.

representation at this stage should be carefully explored. Accordingly, the Victims Participation and Reparations Section (VPRS) was instructed to propose common legal representation after consultation with the legal representatives.

As regards the victims' request for anonymity, Trial Chamber I held that it would make a decision in due course on whether any victims were to be granted leave to participate actively whilst remaining anonymous and, if so, on the extent of their anonymity. Such fact-sensitive decisions must be made at each relevant stage in the trial.

Full Summary

On 15 December 2008, Trial Chamber I granted 91 of 117 applicants the status of victim authorised to participate in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. These applicants had provided sufficient evidence to establish, *prima facie*, that they were victims under rule 85 of the Rules of Procedure and Evidence².

In this decision, Trial Chamber I decided on applications filed by individuals who alleged to have, *inter alia*, suffered harm as a result of the alleged conscription and/or enlistment and/or use of children under the age of 15 to participate actively in the hostilities, between September 2002 and 13 August 2003.

At the outset, Trial Chamber I noted that it had carefully evaluated each application in accordance with the general criteria established in the Chamber's 18 January 2008 decision³, as confirmed or varied by the Appeals Chamber's 11 July 2008 judgement⁴ (para. 52). For the purpose of this decision, the applicants had been divided into groups, each reflecting particular features which individual victims share and which are of broad importance application (paras. 52-53).

Group 1: Applicants Granted Participating Status

1(a): Applicants currently participating in the proceedings

Trial Chamber I noted that Pre-Trial Chamber I had granted applicants in this group status to participate as victims in the case and that they had participated in the proceedings before the Trial Chamber thus far. The documents and materials provided demonstrate that the victims were under the age of 15 at the time of the material events and have given sufficient evidence to establish, *prima facie*, that they were victims under rule 85(a). They have suffered personal harm as a result of the alleged conscription and/or enlistment and/or use of children under the age of 15 to participate actively in the hostilities, between September 2002 and 13 August 2003 (paras. 55-57).

² Rule 85 of the Rules of Procedure and Evidence.

³ 18 January 2008 Trial Chamber I Decision (ICC-01/04-01/06-1119)

⁴ 11 July 2008 Appeals Chamber I Judgment (ICC-01/04-01/06-1432)

Trial Chamber I found it sufficiently established, *prima facie*, that one applicant who had not provided it with any identification document for himself but only for the person acting on his behalf was a victim under rule 85(a). The Chamber did so in view of his special and unique circumstances, that his application to participate had not been opposed by the Prosecution or Defence and that he had agreed to disclose his identity in full to the Defence (paras. 58-59).

1(b): Applications appearing to meet the criteria for participation in the proceedings which do not involve the issues set out in the following categories

Trial Chamber I determined that the applicants in this group had given sufficient evidence to establish, *prima facie*, that they were victims under rule 85(a). They have suffered personal harm as a result of the alleged conscription and/or enlistment and/or use of children under the age of 15 to participate actively in the hostilities, between September 2002 and 13 August 2003. The overall material provided sufficiently indicates their identity and that they were under the age of 15 at the time of the relevant events, as well as the identity of those acting on their behalf and their relationship with the applicants (paras. 61-62).

1(c): Applicants where the person acting on the victim's behalf (with his or her consent) is not a relative or their legal guardian.

Trial Chamber I noted that the question to be resolved for this group of applicants was whether they individually need to establish that the person acting on their behalf is either their relative or legal guardian or, alternatively, whether the Chamber is entitled to act on applications submitted "by a person" on their behalf which indicate clearly in each instance that the victim wishes to participate in these proceedings (para. 66).

According to Trial Chamber I, the Statute framework is clear on this issue as no provision establishes categories of people who alone are allowed to act for victims, whether the victims are adults or children. Rule 89(3)⁵ states that the person acting on behalf of a victim does not have to be a relative or a legal guardian because, within the Rules of Procedure and Evidence, the "person acting" is undefined and unrestricted. Most, if not all, children who were recruited in the alleged circumstances would have been separated from their parents and other adult relatives at a relatively young age and thus often assisted by people such as school teachers and other similar community figures. According to the General Comment No. 6 (2005) of the Committee on the Rights of the Child⁶, in large-scale crisis, the rights and best interests of separated children should be safeguarded and promoted by States and organisations working on their behalf. In the Registry's opinion, legal guardianship is very rare in Eastern Congo (paras. 67-70).

⁵ Rule 89(3) of the Rules of Procedure and Evidence

⁶ Committee on 1 September 2005 Rights of the Child General Comment No. 6 (2005) (CRC/GC/2005/6).

Trial Chamber I noted that this group of victims who were over 18 years or close thereto had individually applied through a person acting on their behalf (who is not their next-of-kin or their legal guardian or there is no documental proof thereof) to participate in this trial as a victim. In each instance, the application accorded with the express requirement of rule 89(3). Thus, all the matters set out above provide strong support for the approach that the Rules have not restricted the types of people who are able to act on behalf of all victims including child victims. If particular individuals are unsuitable, the Chamber will be able to make an appropriate decision on a case-by-case basis (paras. 71-72).

Accordingly, Trial Chamber I determined that the applicants had given sufficient evidence to establish, *prima facie*, that they were victims under rule 85(a) (para. 73).

1(d): Applicants who were children when the application was originally filed, but are now adults (or are close thereto) and still represented by someone on their behalf

Recalling rule 89(3), Trial Chamber I considered it onerous and against the interests of justice to require applicants, when they turn 18, to furnish the Court with a fresh document formally authorising the person who has represented them so far to remain in that role. Given that each applicant (now adult or close thereto) had indicated his or her wish to participate in the proceedings, the Chamber inferred that upon becoming adults they consent to the person continuing to act for them. If that is not the case, the obligation rests upon the applicant to inform the Court (para. 78).

Trial Chamber I thus concluded that the applicants had given sufficient evidence to establish, *prima facie*, that they are victims under rule 85(a) (para. 79).

1(e): Applications where the date of birth is uncertain or the demobilisation date is in issue

Trial Chamber I found that it had been provided with sufficient information to determine, *prima facie*, that the applicants in this group were under the age of 15 at the time of the relevant events. The documents and other material provided proved, *prima facie*, the identity of the applicants in accordance with the Chamber's 18 January 2008 decision⁷ on victim participation. Furthermore, the demobilisation certificates provided proved, *prima facie*, the applicants to be under 18 at the time of their demobilisation. The applicants had set out their date of birth precisely and unequivocally in the application which had not been contradicted by any other evidence (paras. 81-84).

Trial Chamber I, having reviewed the applications on a case-by-case basis and the reports submitted by the Victims Participation and Reparations Section ("VPRS"), considered that the information provided in the applications

⁷ 18 January 2008 Trial Chamber I Decision (ICC-01/04-01/06-1119).

and the VPRS reports was sufficient to establish, *prima facie*, that the applicants were recruited between September 2002 and August 2003; particularly noting that the date of demobilisation can reasonably be inferred as being the date when the applicant received the demobilisation certificate (para. 85).

Trial Chamber I thus determined that the applicants had provided sufficient evidence to establish, *prima facie*, that they are victims under rule 85(a).

1(f): Applications where there are some inconsistencies within documents

Trial Chamber I noted that those included in this group of applicants had discrepancies between their year of birth as set out in the application form and in the document(s) provided to the Chamber. Having carefully weighed the inconsistencies in each case and the documents provided, the Chamber concluded that the differences did not *ipso facto* undermine the credibility of the applicants' assertion as to his or her age in the application form. The material, when considered overall, proved, *prima facie*, the identity and age of the applicants in accordance with the Chamber's 18 January 2008 decision and that they were under the age of 15 at the time of the events (paras. 88-89).

Trial Chamber I thus determined that the applicants had provided sufficient evidence to establish, *prima facie*, that they are victims under rule 85(a) (para. 90).

1(g): Applicants who are still under 18 where the application has not been made by a person acting on their behalf

Trial Chamber noted that the applicants in this group, though still children, were all relatively close to turning 18 years of age. Thus, the question arising for this group is whether it is a precondition of their participation that their application is made by a person acting on their behalf (paras. 92-93).

Trial Chamber I found that the absence of a person acting on these victims' behalf does not act as a bar to their participation. Rule 89(3) is a permissive rather than a mandatory provision where the wording of the provision, coupled with the absence of any provision denying children the opportunity of applying to participate without intermediaries, creates, at the very least, the opportunity for a child to apply on his or her own behalf to participate in the proceedings; depending always on their individual circumstances (*viz.* the age and apparent maturity of the child) and the interest of justice overall. The idea that the views of a child shall be given due weight in accordance with his or her maturity is consistent with internationally recognised human rights, as reflected in article 12(1)⁸ of the Convention on the Rights of the Child and the observations of the Committee on the Rights of the Child (paras. 94-95).

⁸ Article 12(1) of the Convention on the Rights of the Child.

Trial Chamber I held that, although the Chamber would normally expect a person to act on behalf of a minor, the fact that the applicants are very close to the age of legal maturity at the time of the commencement of the trial, creates a strong case for the Chamber to admit these applications. Any other decision at this point in time would effectively remove their opportunity to participate (para. 96).

Trial Chamber I thus determined that the applicants had provided sufficient evidence to establish, *prima facie*, that they are victims under rule 85(a) (para. 98).

1(h): Other

In this group, Trial Chamber I reviewed firstly the application submitted by one applicant alleging to have been abducted and held by the UPC for a period. In relation to her submission, that the UPC soldiers allegedly forcibly took and raped her, and made threats to her life, the Chamber found that it was reasonable to conclude, *prima facie*, that she had suffered these other crimes, as well as being a victim of the charges brought against the accused. The Chamber did so considering, *prima facie*, the systematic recruitment, enlistment or use of child soldiers at this time by the UPC (para.102).

Trial Chamber I found the applicant to have presented enough evidence to conclude, *prima facie*, that she was abducted in the broad context of the systematic conscription of children under the age of 15 into the UPC military forces. In such circumstances, the Chamber held, it is not necessary for the Chamber to engage in the critical question that otherwise arises in the application of article 8(2)(b)(xxvi)⁹ and (e)(vii)¹⁰, as to whether the “use” of children for sexual purposes alone, including forced marriage, can be regarded as conscription or enlistment into armed forces or the use of that person to participate actively in the hostilities (para. 103).

Secondly, Trial Chamber I reviewed the application submitted by one applicant wishing to participate as a “natural” person as well as the representative of a “legal” person, namely the school he supervised. As regards his application to participate as a natural person, the applicant alleged to be a victim who has suffered harm when intervening to help direct victims in the case in the sense that he sought to prevent children from becoming the victims of crimes confirmed against the accused. Recalling Pre-Trial Chamber I's 29 June 2006 decision¹¹ according to which persons intervening to help direct victims in the case or preventing the latter from becoming victims are victims in the case in accordance with rule 85, as well as the Appeals Chamber's 11 July 2008 decision that the harm suffered does not necessarily have to be direct but it must be personal, the Trial Chamber found the applicant to be an indirect victim of the crimes of enlistment and/or conscription and/or use to participate actively in hostilities of children under

⁹ Article 8(2)(b)(xxvi) of the ICC Statute.

¹⁰ Article 8(2)(e)(vii) of the ICC Statute.

¹¹ 29 June 2006 Pre-Trial Chamber I Decision (ICC-01/04-01/06-172-tEN)

the age of 15 (viz. the students of his school) in the relevant time period (paras. 107-109).

As regards the applicant's wish to participate as the representative of a "legal" person, Trial Chamber I inferred that, as the principal of the school, the applicant has sufficient authority to act on behalf of his institution (para.110).

Trial Chamber I thus determined that the applicants had provided sufficient evidence to establish, *prima facie*, that they are victims under rule 85(a) and (b) (para. 111).

Group 2: Applicants Refused Participating Status

Trial Chamber I refused participating status to 14 applicants, *inter alia*, on the following grounds:

- where the applications were materially incomplete because they lacked identification documentation (paras. 112-113);
- where the documents and information provided established, *prima facie*, that the applicant was 15 years or older at the time of the events or that the alleged recruitment took place at a time which is outside the scope of the charges (paras. 114-116);
- where it was not clear whether parents acting on behalf of their children wished to participate on their own behalf for the personal harm they allegedly suffered as a consequence (paras. 117-118); or
- where the applicants in their application form allege harm unrelated to the crimes included in the charges (paras. 119-120).

Legal Representation

Trial Chamber I, having thus far granted 91 applicants victim status to participate in the trial, considered that active participation by this number of victims must not affect the right of the accused to a fair trial without undue delay. Given that the views and concerns of many victims will coincide or overlap, the opportunity in this case for joint representation must be carefully explored. The Chamber instructed the VPRS to submit a proposal on common legal representation after consultation with the victims' legal representatives. Any victim wishing to participate in person at any stage of the proceedings shall apply in writing to the Chamber no later than the date set by it (paras. 121-122).

Protective Measures

Trial Chamber I stated that most victims had requested that their identity, along with other information included in their application forms, not be disclosed to the Prosecution, the Defence, the State Parties or the general public, due to their fears of retaliation and the safety of their own and their families' lives (para. 125).

In order to make an informed decision on individual protective measures for each applicant, Trial Chamber I sought the assistance of the Victims and Witnesses Unit (VWU). In this decision, the Chamber is essentially conducting a preliminary assessment on the merits of the applications by victims to participate. It is impossible at this point in time to determine the extent to which, if at all, victims will be permitted to retain their anonymity, particularly *vis-à-vis* the accused, whilst continuing to participate actively in the proceedings (paras. 126-127).

Trial Chamber I reiterated the Appeals Chamber's 13 October 2006 judgement¹² in which it endorsed the application of the principle of proportionality by setting out that protective measures should restrict the rights of the suspect or accused only as far as necessary and they should be put in place where they are the only sufficient and feasible measure. The Trial Chamber, in accordance with its 18 January 2008 decision will, when resolving a question of anonymity, scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants. Any victim wishing to participate must set out in a discrete written application the nature and detail of the proposed intervention, describing the way in which his or her personal interest is affected (paras. 129-130).

Trial Chamber I found that it would, in due course, make a decision on whether any victims are to be granted leave to participate "actively" whilst remaining anonymous, and if so, the extent of the anonymity. It follows that a fact-sensitive decision, addressing what will often be a complex range of issues, needs to be made on all issues concerning a victim's participation, at each relevant stage in the trial, and including whether or not he or she is to be permitted to remain anonymous, and if so, the extent of the anonymity (para. 131).

Trial Chamber I instructed the Registry to consult with the victims and their legal representatives generally as regards the level of protection necessary during the trial (para. 132). The Registry is also to submit to the Chamber, within a set date, a report on the requests for protective and special measures of victims that have been granted status to participate (para. 134).

As regards victims' participation in the proceedings, Trial Chamber I reiterated the presumption that victims will be permitted to make opening and closing statements during trial (para. 135).

¹² 13 October 2006 Appeals Chamber Judgement (ICC-01/04-01/06-568).