

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06

Date: 3 October 2007

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattman

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO**

Public Document

**Prosecution's Reply to Motion for Leave to File Written Corrigenda
to Oral Arguments**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers

Counsel for the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

Former Counsel for the Defence

Mr Jean Flamme

Background

1. On 13 September 2007,¹ a submission entitled “Motion by Former Counsel for Leave to File Written Corrigenda to Oral Argument” was filed in the case of the *Prosecutor v. Thomas Lubanga Dyilo* by Maître Jean Flamme (the applicant), former counsel for Thomas Lubanga Dyilo.² In this filing, the applicant seeks leave of the Trial Chamber to deem “as properly filed” an amendment to a statement made by him on the record before the Pre-Trial Chamber during the confirmation hearing of Thomas Lubanga Dyilo on 6 November 2006.

The Position of the Prosecution on Jurisdiction

2. The Prosecution opposes this application and submits that this Chamber is without jurisdiction to receive and rule on the motion. The Prosecution does not, in this filing, make submissions on the merits of the application. However, if this Chamber accepts and decides to exercise jurisdiction, the Prosecution requests to preserve the opportunity to make further submissions to the Chamber on the substantive issue, namely the request for *ex post facto* amendments to a record of proceedings.

3. The applicant does not suggest that any Article of the Rome Statute, Rules of Procedure and Evidence or Regulations specifically empower the Trial Chamber to receive and rule on his application. Indeed, the applicant cites no legal authority, statutory or jurisprudential, permitting any Chamber of the Court to issue the specific remedy sought.³ Instead, the applicant cites, as the

¹ The Prosecution was notified on 24 September 2007.

² ICC-01/04-01/06-958.

³ The exact nature of the remedy requested by the applicant, on the face of the material he has filed, is imprecise. It appears that he seeks an order of this Chamber that would have the effect of amending the record of proceedings which took place before the Pre-Trial Chamber. The

sole basis for his application, the duty or obligation cast on him by Article 24 the *Code of Professional Conduct for counsel*.³ The applicant intimates that this professional obligation corollarily gives this Chamber jurisdiction to grant the remedy requested. There is no legal basis advanced by the applicant to support this position.

4. The Prosecution submits that assuming, without conceding, the remedy sought by the applicant is one that the Court may grant,⁴ the proper venue for bringing an application to substantively amend a record of proceedings is, firstly, the Chamber in which the proceeding was conducted.⁵ This conclusion is congruent with the intent of the Code of Professional Conduct for counsel relied upon by the applicant, namely to ensure that counsel appearing before Chambers present accurate information. Therefore, if the applicant's intention is to correct an erroneous statement made to the Pre-Trial Chamber, he must bring that erroneous statement to the attention of that Chamber which he allegedly

Court to endorse a *corrigenda* or correction to the confirmation hearing record. It is also unclear from the application material whether the applicant seeks this proposed amendment to be an alteration to the record.

³ Resolution ICC-ASP/4/Res.1

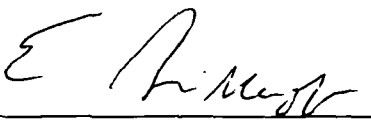
⁴ On the substantive issue of remedy, the Prosecution intends to submit that the specific remedy sought by the applicant, namely an *ex post facto* substantive alteration to a record, cannot be granted by any Chamber of this Court.

⁵ The Prosecution notes that the applicant does not seek an amendment to the record on the basis that the transcription of the proceedings is incorrect (e.g. a typographical error in the transcript). Indeed, the applicant implicitly confirms the accuracy of the transcription record. The applicant seeks, ten months *ex post facto*, to alter an accurate record of proceedings to reflect a different factual assertion. The following *ad hoc* tribunal cases address the issue of alterations to records of proceedings to address typographical or transcription errors: *The Prosecutor v. Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze* (30 October 2006) Decision on the Appellant Jean-Bosco Barayagwiza's Corrigendum Motion of 5. UN ICT (App)(Rwa), Dec 2006 (No. ICTR-99-52-A); *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana* (24 June 2004) Decision on the Defence Motion to Strike Annex B from the Prosecution Response Brief and for the Re-Certification of the Record. UN ICT (App)(Rwa), June 2004 (No. ICTR-96-10-A and ICTR-96-17-A); *The Prosecutor v. Zeljko Mejakic et al.*, Case No. IT-02-65-AR11bis. 1 Decision on Joint Defense Motion for Enlargement of Time to File Appellants' Brief, 30 August 2005.

mislead. It would then fall to that Chamber to rule on the application.⁶ It is not within the jurisdiction of the Trial Chamber to entertain an application to amend the record of a proceeding before another Chamber.

Order Requested

5. It is requested that the application for leave made to the Trial Chamber by former Defence counsel for Thomas Lubanga Dyilo be dismissed.



Luis Moreno-Ocampo
Prosecutor

Dated this 3rd day of October 2007

At The Hague, The Netherlands

⁶ In this instance, the Pre-Trial Chamber is best situated to properly analyze and inquire into the reasons justifying the request, ascertain whether the application raises a conflict of interest issue as between former counsel and client, identify the impact of the proposed amendment and weigh this against the concept of finality of proceedings.