

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09
Date: 3 February 2010

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

Public

Decision on Application to Appear as *Amicus Curiae* and Related Requests

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Nicholas Kaufman

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

Professor Max Hilaire
Professor William A. Cohn

REGISTRY

Registrar & Deputy Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy-Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court is seized of an application for leave to submit *amicus curiae* observations under rule 103 of the Rules of Procedure and Evidence (the “Rules”),¹ and related requests.²

1. On 26 November 2009, the Prosecutor filed the “Request for authorisation of an investigation pursuant to Article 15” in which he requested the Chamber to “authorise the commencement of an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008” (the “Prosecutor’s Request”).³

2. On 11 January 2010, Professors Max Hilaire and William A. Cohn (the “Applicants”) submitted an application to appear as *amicus curiae* for the sake of filing observations on some issues related to the Prosecutor’s Request “within 30 days or within such period” to be decided by the Chamber (the “*Amicus Curiae* Application”).⁴

3. On 15 January 2010, the Prosecutor submitted a request for leave to respond to the *Amicus Curiae* Application (the “Prosecutor’s Request for Leave to Respond”).⁵

4. On 20 January 2010, a legal representative for one of the victims filed a response to the *Amicus Curiae* Application in which he requested the Chamber to reject it on several grounds (the “Legal Representative’s Request”).⁶

¹ “Request by Professors Max Hilaire & William A. Cohn to Appear as *Amicus Curiae*”, ICC-01/09-8.

² “Request for leave to Respond to the ‘Request by Professors Max Hilaire & William A. Cohn to Appear as *Amicus Curiae*’”, ICC-01/09-9; “Victim’s Response to the Application of Professors Max Hilaire and William A. Cohn to Appear as *Amici Curiae*”, ICC-01/09-11.

³ ICC-01/09-3.

⁴ ICC-01/09-8.

⁵ ICC-01/09-9.

⁶ ICC-01/09-11.

5. On 27 January 2010, the Applicants responded to the Legal Representative's Request⁷ as well as to the Prosecutor's Request for leave to Reply (the "Applicants' Requests").⁸

6. The Chamber notes rule 103(1) of the Rules, according to which, the Chamber may, at any stage of the proceedings, "if it considers it desirable for the proper determination of the case, [...] grant leave to a State, organization or person to submit any observation on any issue that the Chamber deems appropriate".

7. The Chamber further notes that, in the "Decision on 'Motion for leave to file proposed Amicus Curiae submission of the International Criminal Bar pursuant to rule 103 of the Rules of Procedure and Evidence'", the Appeals Chamber underlined that, when acting within the context of rule 103 of the Rules, the respective Chamber should take into consideration whether the proposed submission of observations may assist it "in the proper determination of the case".⁹

8. The Chamber, having examined the *Amicus Curiae* Application and in particular, the different issues proposed by the Applicants in paragraph 9 of the said application, is of the view that the proposed submission of observations would not assist in reaching a proper determination on the Prosecutor's Request. Accordingly, the applicants' request to appear as *amicus curiae* must be rejected. This finding renders the Prosecutor's Request for Leave to Respond, the Legal Representative's Request and the Applicants Requests moot, and therefore, they must also be rejected *in limine*.

9. The Chamber, however, wishes to stress that the *amicus curiae* procedure is governed by rule 103 of the Rules which is the *lex specialis*, and as such, none of the

⁷ ICC-01/09-12.

⁸ ICC-01/09-13.

⁹ Appeals Chamber, "Decision on 'Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence'", ICC-01/04-01/06-1289, para. 8.

parties, participants or any other entity including the Applicants is entitled to file replies or responses until the Chamber has decided to grant leave in accordance with paragraph 1 of the said provision.¹⁰

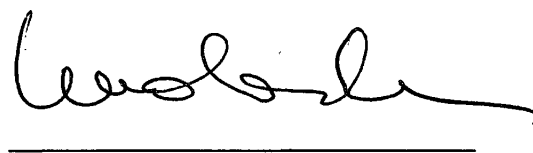
FOR THESE REASONS, THE CHAMBER HEREBY

- a) rejects the *Amicus Curiae* Application;
- b) rejects *in limine*:
 - i) The Prosecutor's Request for Leave to Respond;
 - ii) The Legal Representative Request; and
 - iii) The Applicants' Requests.

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


 Judge Ekaterina Trendafilova
 Presiding Judge


 Judge Hans-Peter Kaul
 Judge


 Judge Cuno Tarfusser
 Judge

Dated this Wednesday, 3 February 2010

At The Hague, The Netherlands

¹⁰ See also Appeals Chamber, "Reasons for 'Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply'", ICC-02/05-01/09-51, para. 8.