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Date: 11 January 2010

PRE-TRIAL CHAMBER II

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

SITUATION IN KENYA

URGENT

Public Document

**REQUEST BY PROFESSORS MAX HILAIRE & WILLIAM A. COHN TO APPEAR
AS AMICUS CURIAE**

Source: PROFESSORS MAX HILAIRE & WILLIAM A. COHN]

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

The Office of the Prosecutor
[MORENO OCAMPO]

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants
(Participation/Reparation)

The Office of Public Counsel for
Victims

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Amicus Curiae

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INTRODUCTION

1. Pursuant to rule 103 of the Rules of Procedure and Evidence of the International criminal Court¹, Professor Max Hilaire and William A. Cohn respectfully request leave to be granted status of *Amicus Curiae* in the matter of the situation of Kenya and to make submissions on factual and legal aspects relating to the motion by the Prosecutor for leave to commence investigations.² The Applicants believe they have considerable knowledge of and experience in International Criminal Law and Practice and have carried out extensive research and study on the International response to African Conflicts.

THE APPLICANTS

2. Professor Max Hilaire is an Associate Professor and Chair of the Department of Political Science at Morgan State University. He has several years of international and academic experience, in the United States, Central Europe, Latin America and several African countries. He is a two-time Fulbright Scholar and has extensive international travel experience as a public diplomacy speaker for the U.S. Department of State. Professor Hilaire is a distinguished teacher and mentor and enjoys working with people of different cultural backgrounds.
3. As an Expert on U.S. Foreign Relations Law, Public International Law & Organization and United Nations Law. Professor Hilaire has taught Public International Law at the Faculty of Law, Charles University, Prague, Czech Republic, Central European University, Budapest, Hungary and Universidad de las Americas, Puebla, Mexico. In addition, Professor has taught intensive seminars in International Human Rights & Humanitarian Law at Empire State College in Prague, and International Organizations & International Humanitarian Law at the Washington Center in Washington. Professor

¹ Rules of Procedure and Evidence, Adopted by the Assembly of State Parties, First Session, New York, 3-10 September 2002, Official records ICC-ASP/1/3; Sub-rule 1 provides, "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate."

² Prosecution Request for Authorisation of an Investigation pursuant to Article 15, No. ICC-01/09, dated 26 November 2009.

Hilaire has also worked with the Africa Center for Strategic Studies in Washington, where he coordinated break-out sessions for senior African leaders in seminars on national security, human rights, rule of law, counter-terrorism and democratization in Africa. Professor Hilaire has worked on a number of alternative conflict resolution cases in various African conflicts, and is currently engaged on researching ways to resolve the Kenyan conflict using indigenous dispute resolution mechanisms. Professor Hilaire thinks it is necessary to give the domestic African legal framework sufficient chance to work and permit the ICC intervention in exceptional circumstances.

4. As an Expert Witness he has provided Professional testimony before U.S. Courts, testified on political situations, human rights violations, and civil wars and ethnic conflicts in African States. Professor Hilaire has extensive knowledge of the jurisprudence of the ad hoc tribunals of Rwanda and the former Yugoslavia, the International Criminal Court, the Extraordinary Chamber of the Court of Cambodia, the Sierra Leone Special Court and other regional courts and tribunals.
5. He has previously worked on multilateral issues related to the United Nations and other international organizations; monitored daily activities of the Security Council and the General Assembly; monitored U.S. participation in the UN system; organized seminars, conferences and workshops for visiting diplomats and scholars; organized and coordinated distinguished international panels on global governance; written briefing papers and reports on peacekeeping, U.N. reform and international cooperation and participated in several U.N. conferences on disarmament and conflict management. He has conducted interviews and researched on issues of foreign policy in Europe, Africa and Asia and written reports on his findings. Professor Hilaire has published a number of books and articles on International Law, United Nations Law and United States Foreign Relations Law. He is currently working on a manuscript on, based on extensive research in Africa, entitled: *"The International Response to African Conflicts:*

Rwanda, Sierra Leone, Democratic Republic of the Congo, Kenya and the Horn of Africa".³

6. William A. Cohn has practiced as an Attorney at Law San Francisco, California, USA and represented and counseled clients in transactional, civil litigation, and appellate practice areas. He has also worked as an Advisor/Consultant to a leading international law firm in the Czech Republic, on transactional and litigation matters, including: negotiations, dispute resolution and litigation; drafting of contracts, pleadings, law briefs, due diligence reports, status reports, and correspondence; preparation of speeches, lectures and seminars for the 2005 annual conference of the International Bar Association. He has extensively consulted with European attorneys on substantive law and drafting of documents.
7. He has lectured and addressed students *inter alia* at the University of New York and DePaul University College of Law on international organizations and on emerging issues in international law and human rights law to students in the Peace, Conflict and Environmental Studies program. He has also written extensively on International Law.⁴
8. The applicants are not affiliated to the State of Kenya or any organization that has taken any partisan position with regard to the Kenyan situation or any known suspect.

ISSUES *AMICUS CURIAE* PROPOSE TO ADDRESS IF GRANTED STATUS:

9. If granted the status of *Amicus Curiae*, the applicants propose to submit on the following issues:
 - a. The threshold requirements for exercise of Jurisdiction and Authorization to commence investigations under Article 15;
 - b. The application of the principle of complementarity in the circumstances of Kenya, the relevance of investigations and

³ Curriculum Vitae Annexed

⁴ Curriculum Vitae Annexed

Prosecutions carried out so far and the nature and extent of inactivity in that regard;

- c. The timing of the Prosecutor's application;
- d. The long-term political and social aspects relating to the Prosecution that have a bearing on the decision to commence investigations;
- e. The cumulative effect of the efforts to set up a local tribunal and actions of the President and Prime Minister of Kenya on the complementarity principle and the interests of justice in allowing commencement of an investigation;
- f. The extent of and progress in investigations and prosecution of crimes against humanity in Kenya and the effect thereof on the complementarity principle under the ICC statute;
- g. General issues of jurisdiction; and
- h. Any other issue that the Pre-Trial chamber may deem appropriate and within the competence of the proposed *Amicus Curiae*.

JUSTIFICATION FOR AMICUS CURIAE

10. The orders sought by the Prosecution are precedent-setting. This is the very first time in the history of the ICC that the Prosecutor seeks authorization under article 15. It is important that the court clearly establishes the parameters for the exercise of jurisdiction in circumstances where a state with a functional judicial system has not referred a situation to the court.
11. As the Prosecutor's Motion under article 15 of the rules is essentially *ex parte*, it may be useful for the Chamber to obtain supplementary and/or divergent views and submissions on the applicable legal principles.
12. There is no dispute that International Criminal Law and Procedure are relatively new concepts in which scholarly work is ongoing and judicial precedent is at its infancy. The role of amicus is a common and useful feature in these proceedings hence the rule on amicus in ICC rules as well as

the related International Tribunals (ICTR and ICTY).⁵ There are numerous examples of decisions by international courts granting amicus status to organizations or persons⁶ including scholars and professors.

13. The importance of issues raised in a particular matter is a critical factor in determining whether *Amicus Curiae* should be invited or accepted. In one ICTY case the Appeals Chamber in dealing with an Appeal relating to orders issued to a sovereign State considered the issues sufficiently important to issue a blanket order inviting *Amicus Curiae* from States, NGOs and persons.⁷ The current situation is analogous to that case in that the issues in both relate to issuance of orders touching on the sovereignty of a state.

14. At the level of "policy" or precedent, it is important that a clear standard is set by the Chamber to ensure uniformity in application of this standard subsequently in other situations more so in view of the perceived selective nature of Prosecutions by the ICC.

FOR ALL THE ABOVE REASONS, MAY IT PLEASE THIS HONOURABLE PRE-TRIAL CHAMBER TO: -

STAY the Decision on the Prosecutor's motion pending the decision on this motion.

ALLOW the Applicants to appear as *Amicus Curiae* and to file their Brief within 30 days or within such period as the Chamber may direct.

⁵ See for instance Rule 74 of the ICTR rules

⁶ The *Amicus Curiae* of Professor Antonio Cassese and members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine, Filed on 27 October 2008, Before the Pre-trial Chamber Extra-Ordinary Chambers in the Courts of Cambodia, Case No. 001/18-07-2007 ECCC/OCCIJ (PTCO2). Found at <http://www.antoniocassese.it/italiano/reports/Amicus-Curiae-Brief-27-October-2008.pdf>; Amicus Curiae presented in trial against Fujimori by the George Washington University, found at http://www.dplf.org/uploads/1214590529_June_10_2008.pdf (available in Spanish); At the ICTY, Order on *Amicus Curiae* observations proprio motu on the desirability on the alternative basis of individual criminal responsibility alleged in the case and on the issue of trials in absentia, *Milosevic* (IT-02-54-T) 1 July 2005; The ICTR has also granted *Amicus Curiae* motions for instance in: *Prosecutor v. Ildephonse Hategekimana*, Decision on *Amicus* Requests and Pending Defence Motions and Order for Further Submissions, granting *Amicus Curiae* status to the Republic of Rwanda, the Kigali Bar Association, the ICDA, ADAD, IBUKA, AVEGA, and HRW, 20 March 2008; *Prosecutor v. Yussuf Munyakazi*, the Decision on the Request by Human Rights Watch for Leave to Appear as *Amicus Curiae*, 10 March 2008; and the *Prosecutor v. Yussuf Munyakazi*, Decision on the Application by the International Criminal Defence Attorney's Association (ICDAA) for Leave to file a Brief as *Amicus Curiae*, 6 December 2007.

⁷ ICTY, *Prosecutor v. Tihofil* (also known as *Tihomir Blaskic*), Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of Subpoenae Duces Tecum) and Scheduling Order, 29 July 1997, granted the status of *Amicus Curiae* proprio motu.



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PROFESSORS MAX HILAIRE & WILLIAM A. COHN

Dated this 11th January 2010

At [The UNITED STATES OF AMERICA]