



Original: English

No.: ICC-01/09

Date: 20 January 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 Document

**Victim's Response to the Application of Professors Max Hilaire and William A. Cohn
to Appear as Amici Curiae**

Source: Legal Representative for Victim Applicants

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

The Office of the Prosecutor Mr. Luis Moreno-Ocampo Ms. Fatou Bensouda	Counsel for the Defence
Legal Representatives of the Victims	Legal Representatives of the Applicants Mr. Nicholas Kaufman
Unrepresented Victims	Unrepresented Applicants (Participation/Reparation)
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States' Representatives REGISTRY	Amici Curiae Professor Max Hilaire Professor William A. Cohn
Registrar Ms. Silvana Arbia Deputy Registrar Mr. Didier Preira	Defence Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section Ms Fiona McKay	Other

Procedural Background

1. On 23 November 2009, the Prosecutor of the International Criminal Court issued a notice inviting victims of alleged crimes committed in Kenya during the post-election violence of 2007-2008 to submit observations on the initiation of an investigation.
2. On 26 November 2009, the Prosecutor filed his *“Request for authorization of an investigation pursuant to Article 15”*.¹
3. On 10 December 2009, Pre-Trial Chamber II ordered that all communication between victims and the Court, pursuant to Article 15(3) of the Rome Statute, be conducted through the intermediacy of the Victims Participation and Reparations Section (“VPRS”).²
4. On 21 December 2009, a power of attorney and submissions were filed with VPRS on behalf of the herein represented victim who was severely injured during the infamous Kiambaa (Eldoret) church massacre on 1 January 2008.
5. On 11 January 2010, Professors Max Hilaire and William A. Cohn filed an application requesting that they be recognised as *amici curiae* for the purpose of the Prosecutor’s application to open an investigation (“Application for Leave”).³

Submission

6. In the Application for Leave, the proposed *amici curiae* justify their intervention on the grounds that it could benefit the Pre-Trial Chamber *“to obtain supplementary and/or divergent views and submissions on the applicable legal principles”*.

¹ ICC-01/09-3.

² ICC-01/09-4.

³ ICC-01/09-8.

7. The Application for Leave also stipulates that Professor Max Hilaire “is currently engaged on researching ways to resolve the Kenyan conflict using indigenous dispute resolution mechanisms” and that he “thinks that it is necessary to give the domestic African legal framework sufficient chance to work and permit the ICC intervention in exceptional circumstances”.

8. The undersigned Legal Representative expresses his concern that such divergent views and submissions could prejudice the rights and interests of the victims of the Situation in the Republic of Kenya – in particular the herein represented victim of the Kiambaa (Eldoret) church massacre.

9. As set out in his observations of 21 December 2009, the concerned victim of the Kiambaa (Eldoret) church massacre is of the view that the “domestic African legal framework” has abjectly failed both him and his fellow victims as evidenced by the outcome of a criminal trial in the High Court of Kenya at Nakuru.⁴ In his judgment acquitting all four defendants accused of orchestrating the attack on the Kiambaa church, His Honour Judge D.K. Maraga stated as follows:

“The case before me is not an ordinary murder case but one relating to the post-election violence which, as I have pointed out, brought this country almost to the brink of a precipice, and coming at the time when allegations are rife that the courts are unleashing criminals to the general populace, I have to point out the shoddy police investigations in this case so that the blame is placed where it belongs. Call it a blame game or what you like but it is the truth of the matter

....

In this case, without placing any evidence on record, the prosecution wants me to find that the Accused had a common intent with the murderers of the deceased and were part of that joint enterprise. That cannot be. Our security agencies have to do their work and do it properly otherwise our people will be despondent and will take the law into their hands as is already happening in some parts of the country. And the consequences of that is obvious: total anarchy. If there is any problem in the police force like not being adequately facilitated to combat crime, that issue should be urgently addressed otherwise we will continue crying foul and crime will continue

⁴ Republic v. Stephen Kiprotich Leting et al. Criminal Case 34 of 2008.

soaring. As I said at the beginning of this judgment we cannot afford to have a recurrence of the chaos we experienced in January 2008”.

10. Indeed, it is the failure to fix accountability for those most responsible for his personal tragedy that motivates the herein represented victim to support the Prosecution application under Article 15 of the Rome Statute.

11. Accordingly, the undersigned Legal Representative submits that Pre-Trial Chamber II ought not to be seized of the Application for Leave at such a premature stage:

(i) Rule 103(1) of the Rules of Procedure and Evidence states quite clearly that intervention by an *amicus curiae* will be permitted if it is “*desirable for the proper determination of the case* [emphasis added – N.K.]”. The legal proceedings concerning the Republic of Kenya presently before the International Criminal Court are in the “situational” phase and have not, as of yet, given rise to a “case”;

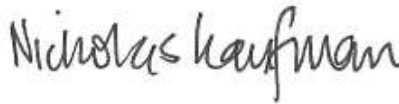
(ii) Article 15 of the Rome Statute envisages only two relevant participants in the pre-investigational stage of the process; the Prosecutor and the Victim;

(iii) the Application for Leave does not justify why the experience of the proposed *amici curiae* places them in any better position to opine on the issues at stake than the learned judges of Pre-Trial Chamber II who are, themselves, possessed of the necessary professional and academic credentials as set out in Article 36(3)(b) of the Rome Statute;

(iv) the Application for Leave, contrary to its purported intent, is not neutral but seeks to persuade the Pre-Trial Chamber why an investigation should not be opened.

Relief Sought

12. In light of the aforementioned, the learned Pre-Trial Chamber is hereby respectfully requested to reject the application of Professors Max Hilaire and William A. Cohn to be recognised as *amici curiae* for the purpose of the Prosecutor's application pursuant to Article 15 of the Rome Statute.



Nicholas Kaufman

Legal Representative for the Victim Applicant

Done this 20th Day of January 2010,
The Hague, the Netherlands