

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-
Date: 27 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

**REPLY BY PROFESSORS MAX HILAIRE & WILLIAM A. COHN TO VICTIM'S
RESPONSE TO THE REQUEST 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:

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**REPLY BY PROFESSORS MAX HILAIRE & WILLIAM A. COHN VICTIM'S
RESPONSE TO THE REQUEST TO APPEAR AS AMICUS CURIAE**

1. The Applicants in the Request dated 11th January 2010¹ are in receipt of the response of a Victim, filed on 20th January 2010 without leave, and hereby reply thereto.

2. The Applicants appreciate that the Victim's subjective view, which quotes and cites the finding of *one* trial judge to support its contention, is that the local judicial mechanisms in Kenya have failed to render Justice. The Applicants submit that the response of a Victim raises one fundamental aspect of the complementarity principle that needs to be assessed, and that submissions by *amicus*, based on their well-researched opinion, may aid the Chamber in its deliberations. The issues for discussion that emerge from the Judgment quoted include:
 - a) The basis for assessment of the existence of a functional judicial system.
 - b) The extent of the independence of the Judiciary in the state party and the rights of the victim/prosecution, and the suspect/accused/defendant, and issues of fair trials generally.
 - c) The strengths and weaknesses of the local investigative mechanisms and solutions to inadequacies (Partly discussed in some reports² and researched by the applicant).
 - d) The effect of the outcome of trials (whether ending in conviction or acquittal) in assessment of the functional nature of the domestic Judicial system in the context of the complementarity principle.
 - e) The overall picture with regard to the investigations and trials so far conducted and ongoing.
 - f) The Consequences of non-disclosure to the State of alleged perpetrators of the alleged crimes conveyed to the Prosecutor in a sealed "envelope" on the complementarity principle.

3. If granted leave, the Applicants will address these issues exhaustively well beyond the analysis of the single case quoted by the Victim. Indeed, the issues arising from the

¹ ICC- 01/09-8 Request by Professors Max Hilaire and William A. Cohn to appear as amicus curiae, hereinafter referred to as "the Applicants".

² See especially Commission of Enquiry into post-election Violence (CIPEV) final report, also known as "Waki Commission report", annex 5 to Prosecutor's Motion dated 26th November 2009 as per paragraphs 9 and 10 of the Motion.

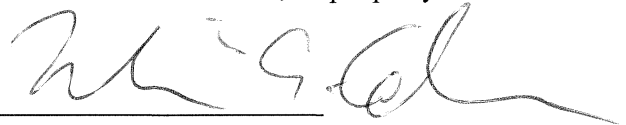
case quoted (and many others) serve to justify and reinforce the need for *amicus* submissions.

4. The Applicants respectfully submit that the reasons advanced for rejection of the Applicants' motion are unfounded for the following reasons:
 - a) The Applicants submit that the Victim proffers an erroneous interpretation of rule 103(1). The Victim seemingly fails to grasp the purpose of the rule 103(1) and as a result calls for an unduly narrow and restrictive interpretation which would prohibit *amicus* from playing their intended role. The Victim's interpretation of the term "case" in isolation fails to take into account that the rule provides for *amicus* "at any stage of the *proceedings*". A fair read of the Regulations of the Court (ICC-BD/01-01-04), as well as rule 103(1) and the entirety of the body of international jurisprudence, supports a much more expansive view of "Proceedings before the Court" than is called for by the Victim. The Applicants opine that the term "proceedings" is very broad and means or covers any legal proceedings before a court at whatever stage, including the Prosecutor's motion for leave to commence an investigation. As rule 103(1) reads, if the Chamber "considers it desirable" it may grant leave for *amicus* to provide observations. Any reasonable reading of rule 103(1) would allow the Chamber to grant leave for *amicus* under the present circumstances. The Applicant concedes that Article 15 provides for the possible parties or participants to proceedings thereunder, yet Article 15(2) recognizes that receiving information from many and diverse sources may well best serve the proceeding. Such indeed is the case with regard to most of the proceedings before the court. And, rule 103(1) is all-encompassing as relates to *amicus* as *amicus* is not strictly speaking a "party" to the proceedings in the strict sense but a *friend* of the court. There is neither any proper purpose nor basis to deny the Chamber an opportunity to receive the observations of *amicus* at the current state of the proceedings.
 - b) The applicant disagrees with the victim's opinion that *amicus* should be in a ". . . better position to opine on the issues at stake than the learned Judges. . ." to be qualified as such. Such logic would contradict the very of objective of rule 103(1) and the rationale for *amicus* in all legal systems as Judges, whose credentials are *not* an issue in this matter, would be presumed to perfectly understand all aspects of any matter before them, including research findings

by experts in various fields on factual issues. *Amicus* serve merely to afford the Chamber a more thorough basis for its deliberations and determinations.

- c) The applicants further submit that the Victim fails to appreciate that the jurisprudence that will be laid in the determination of this matter, which is initiated for the first time by the Prosecutor, is of widespread international interest, in particular, about how post-election conflicts and alleged crimes committed in member states and beyond within that context may be perceived and brought before the court, and regarding the principle of complementarity and other procedural and substantive international law issues of great import.
- d) The Victim has wrongly pre-judged the essence of the Applicants' intended submissions if leave is granted. The submissions may well be taken by the Chamber to suggest the circumstances and need for opening an investigation, and may well point out certain aspects with regard to complementarity and Jurisdiction that may demand a closer analysis. The Applicants believe that thoughtful and informed deliberation in the instant matter is of utmost importance, and stand ready to assist the Chamber by sharing their observations. If granted leave the Applicant is ready to file its submissions expeditiously and the Victim, with the benefit of such submissions, will be in a position to respond thereto from a more informed perspective.

- 5. For purposes of the expeditious determination of the Applicants' motion, the Applicants request that the present reply be deemed properly filed if the Chamber deems the Victim's response, filed without leave of the Chamber, as properly filed.



PROFESSORS MAX HILAIRE & WILLIAM A. COHN

Dated this 27 th January 2010

At [Prague, CZECH REPUBLIC]