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## LEGAL MEMORANDUM

**TO:** Chief Prosecutor, International Criminal Court  
Oude Waalsdorperweg 10, 2597 AK  
P.O. Box 19519, 2500 CM, The Hague, The Netherlands

**FROM:** Haitian American Leadership Council (HALEC)/Haiti Pathway Forward  
(HPF)/Greater Haitian Diaspora  
P.O. Box 23224, Washington, DC 20026

**DATE:** October 11, 2023

**Re:** Request for *Sua Sponte* Investigation into Alleged Crimes Against  
Humanity and Genocide in Haiti

Dear Chief Prosecutor:

### I. INTRODUCTION:

We write to formally request that the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) initiate a preliminary examination, and subsequently a full investigation, into the alleged crimes against humanity and genocide occurring in Haiti. This request is anchored on the OTP's past practice of *sua sponte* investigations, where the Prosecutor's Office has proactively sought to address heinous crimes of international concern.

### II. BACKGROUND:

Over the past two years, there have been credible reports and substantial evidence suggesting that state and non-state actors within Haiti have committed acts that may amount to crimes against humanity and genocide. These accounts are corroborated by victims, NGOs, international observers, and independent media outlets. See Exhibit A. Widespread and systematic attacks have been documented, including [specific types of violations, e.g., "mass killings, forced displacement, sexual violence, torture, and the targeting of specific ethnic or religious groups"]. See Exhibit B.

In previous instances, the OTP has recognized its duty to act, even absent external promptings, when confronted with such compelling evidence. For example:

1. **Kenya Situation (Post-Election Violence):** In March 2010, the Prosecutor's Office initiated a *a proprio motu* investigation into crimes against humanity allegedly committed in the context of the 2007-2008 post-election violence in Kenya. The investigation

focused on widespread attacks, including killing, forcible displacement, and sexual violence. This move led to charges against six individuals, including Uhuru Kenyatta and William Ruto, though the cases were later withdrawn due to witness interference and a lack of evidence.

2. **Georgia Situation:** In January 2016, the Prosecutor's Office moved forward with a *proprio motu* investigation into alleged crimes associated with the Russo-Georgian war of 2008. This probe aimed to address reports of displacement of persons, attacks against peacekeeping forces, and other alleged crimes committed during the short-lived conflict.

Given the precedent and the gravity of the current situation in Haiti, there is a compelling need for the OTP to actively intervene and lead a thorough investigation.

We note that both the Kenyan and Georgian investigations were marked by complex geopolitical considerations and challenges. However, they remain good examples of the ICC Prosecutor taking initiative based on available evidence and information. The outcomes of these cases also illustrate the complexities and potential difficulties associated with international criminal justice processes.

As for the gravity of the country's plight and dire circumstances, the situation in Haiti has raised alarm bells not just for its inherent human rights implications, but also for its reverberations on the international stage. While domestic upheaval is not unusual in the context of global affairs, what sets the situation in Haiti apart is the widespread acknowledgment and corresponding actions of the international community.

**The United Nations (UN) Statement:** Following its 9311<sup>th</sup> meeting as shown on its 26 April 2023 Meetings coverage, Maria Isabel Salvador, Special Representative of the Secretary-General and Head of the United Nations Integrated Office in Haiti (BINUH), "stressed that gang violence is expanding at an alarming rate in areas previously considered relatively safe in the capital, Port-au-Prince. Compared to the first quarter of 2022, criminal incidents - homicide, rape, kidnappings and lynching - more than doubled in the same period in 2023 to 1,647. Some residents have begun to take matters in their own hands, as two days ago, a group of civilians seized 13 suspected gang members from police custody, beat them to death and burned their bodies." See Exhibit C.

**International Sanctions:** The response from countries like Canada and the US is a telling sign of the gravity of the situation. Both these nations have, historically, been proponents of international human rights and have extensive mechanisms in place to evaluate and respond to global crises.

**Canadian Sanction Regime:** Canada's imposition of sanctions against certain individuals from Haiti is indicative of its assessment of the situation. These sanctions typically involve a freeze on assets and a ban on dealings, which are only imposed after comprehensive consideration. The fact that Canada, known for its measured approach in international affairs, felt compelled to enact such a regime speaks volumes about the severity of the infractions in Haiti.

**US Sanctions and Senate Bill:** The United States, too, has taken a firm stance. The imposition of sanctions is significant as such decisions often follow rigorous deliberations within various

arms of the government. These sanctions, usually reserved for the most pressing of international concerns, reflect a clear condemnation of the actions within Haiti. Furthermore, the current consideration of a bill<sup>1</sup> by the US Senate, mandating further sanctions, underscores the evolving nature of this crisis. The legislative move indicates a bipartisan acknowledgment of the situation's gravity and an urgency to act beyond the already-imposed sanctions.

**Global Media Attention:** It is also essential to consider the role of international media in spotlighting the situation in Haiti. Multiple reputed news organizations<sup>2</sup> have run in-depth features and analyses, drawing attention to the alleged crimes against humanity and possible genocidal actions.

**Humanitarian Crisis:** Beyond the political and economic ramifications, there are undeniable humanitarian concerns. Reports from international NGOs suggest widespread displacement, food and medical shortages, and other crises typical of conflict zones. These dire circumstances have prompted international humanitarian agencies to call for urgent interventions.

**Calls for Accountability:** Various international human rights bodies and coalitions have voiced their concerns, urging the International Criminal Court and other international judicial bodies to intervene. The universal clamor for accountability is a testament to the perceived gravity of the situation.

In summary, while the internal dynamics of Haiti are undoubtedly complex, the unanimous and escalating response from the global community is an unequivocal indicator of the situation's severity. Such concerted actions are rare and are reserved for scenarios where the international community sees a clear and present danger to human rights and global stability. The situation in Haiti, as evidenced by international responses, fits this alarming profile.

### III. LEGAL GROUNDS:

#### A. Crimes Against Humanity

Under Article 7 of the Rome Statute, a crime against humanity includes a range of acts, committed as part of a widespread or systematic attack directed against any civilian population. The evidence available suggests that criminal actions, e.g., "the forced displacement of thousands, kidnappings, rape, lootings, burning of people's homes and the killing of hundreds" in Haiti meet the criteria set out in the Statute.

#### B. Genocide

Genocide, as defined under Article 6 of the Rome Statute, involves acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. The actions in

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<sup>1</sup> S 396 – 118<sup>th</sup> Congress (2023-2024) – Haiti Criminal Collusion Transparency Act of 2023.

<sup>2</sup> Violence in Haiti escalates amid civilian vigilante movement. Sept 2, 2023, 8:21 AM ET. National Public Radio (NPR) Scott Simon speaks to *Miami Herald* Caribbean Correspondent Jacqueline Charles about the horrific uptick of violence in Haiti, where vigilantes and gangs are engaged in deadly clashes.

Haiti, specifically targeting Carrefour Feuilles, etc. arguably demonstrate such an intent and therefore necessitate a thorough investigation by the OTP.

#### **IV. JURISDICTION OF THE ICC:**

While Haiti has not ratified the Rome Statute, the ICC may still exercise its jurisdiction over crimes committed within its territory or by its nationals under certain conditions. The basis for this jurisdiction is found in the provisions of the Rome Statute and the precedents set by previous situations referred to the Court. The following compelling arguments underscore the need and legality of the ICC's intervention:

**UN Security Council Referral:** According to Article 13(b) of the Rome Statute, the Security Council, acting under Chapter VII of the UN Charter, can refer a situation in any state to the Prosecutor of the ICC, irrespective of whether that state has ratified the Rome Statute.

**Example:** Darfur, Sudan. In 2005, the Security Council adopted Resolution 1593, referring the situation in Darfur to the ICC despite Sudan not being a State Party. This referral led to several arrest warrants, including one for Sudanese President Omar al-Bashir.

**Declaration Accepting the ICC's Jurisdiction:** As per Article 12(3) of the Rome Statute, a non-State Party can lodge a declaration with the Court, accepting its jurisdiction over crimes outlined in the Statute. This would allow the ICC to exercise jurisdiction over crimes occurring in the state's territory or by its nationals from that point forward.

**Example:** Côte d'Ivoire. Though not a State Party at the time, the Ivorian government accepted the ICC's jurisdiction in 2003 regarding crimes within its territory. Later, when post-election violence erupted in 2010, the ICC was able to investigate and prosecute individuals responsible for crimes against humanity.

**Gravity and Unaddressed Impunity:** One of the core principles underpinning the ICC's mandate is the gravity of crimes. Given the evidence suggesting grave crimes in Haiti, there is a moral imperative for the international community to address these violations. Furthermore, if Haiti is unwilling or unable to genuinely carry out investigations or prosecutions, the principle of complementarity could provide an avenue for the ICC's intervention.

The principle of complementarity is foundational to the jurisdiction and operation of the International Criminal Court (ICC). It determines the relationship between the ICC and national judicial systems.

#### **Principle of Complementarity:**

The principle of complementarity is premised on the idea that the ICC is not meant to supplant national courts, but rather to complement them. Essentially, the ICC is a court of last resort. National courts have the primary responsibility to prosecute international crimes. The ICC steps in only when States are unwilling or genuinely unable to carry out the investigation or prosecution of those crimes.

The authority for the principle of complementarity is primarily found in the Rome Statute, the treaty establishing the ICC:

**Article 1 of the Rome Statute:** "The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute." This establishes the framework where the ICC's jurisdiction is guided by the subsequent articles, including those outlining complementarity.

**Article 17 - Issues of Admissibility:** This article is the cornerstone of the complementarity principle. It sets out the criteria for determining the admissibility of cases before the ICC. It specifies:

The Court shall determine that a case is inadmissible where:

“(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or genuinely unable to carry out the investigation or prosecution.

The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.”

### **Key Aspects from Jurisprudence and Practice:**

**"Unwilling or Unable" Criterion:** The determination of whether a State is "unwilling or unable" is critical. A State might be deemed "unwilling" if proceedings are being conducted to shield a person from criminal responsibility, if there's an unjustified delay in the proceedings, or if the proceedings are not conducted impartially. A State might be "unable" if its national judicial system is in a state of collapse or unavailability.

**"Gravity" of Crimes:** Another aspect of admissibility under Article 17 is the gravity of the crimes. If the crimes are not of sufficient gravity to justify further action by the ICC, they might be deemed inadmissible.

**Case Law:** In the Situation in Uganda, the Pre-Trial Chamber noted the importance of complementarity, stating that the ICC's jurisdiction "does not replace, but complements national criminal justice systems". Similarly, in the Prosecutor v. Jean-Pierre Bemba Gombo, the Pre-Trial Chamber emphasized the primary responsibility of States to prosecute the most serious crimes affecting the international community.

In practice, the ICC has shown deference to genuine national proceedings, in line with the principle of complementarity. However, when there are clear indications that national processes are insufficient or are being manipulated to shield individuals from justice, the Court has not hesitated to assert its jurisdiction.

In summation, the principle of complementarity is not just a procedural guideline, but an affirmation of the ICC's role within the broader landscape of international justice. It respects the sovereignty of states while ensuring that the most heinous crimes do not go unpunished. In the

present case, Haiti has no functioning judicial system. The rule of law is inexistant in Haiti. The legal system is not independent and is riddled with corruption. Legal and judicial reforms are critical strategies to address the challenges associated with weak or outdated legal frameworks, inefficient judicial systems, and lack of access to justice. See Exhibit D.

Considering the abovementioned avenues, we strongly urge the OTP to seek ways to exercise its jurisdiction in Haiti, ensuring accountability for the alleged crimes and upholding the values of international justice.

## V. RECOMMENDATION:

Taking into consideration the aforementioned precedents where the OTP has recognized its autonomous authority and responsibility to initiate investigations:

**Preliminary Examination:** We advocate for the OTP to commence a preliminary examination into the situation in Haiti, considering the weight of available evidence and the severity of reported crimes.

**Full Investigation:** If the preliminary examination provides a reasonable basis, we strongly urge the OTP to launch a full investigation, mirroring its proactive stance in similar past situations.

## VI. CONCLUSION:

The ICC, through instruments like the Rome Statute, embodies the international community's pledge to end impunity for the gravest crimes. Given the dire situation in Haiti and in line with past proactive interventions by the OTP, we believe that a *sua sponte* investigation is not only appropriate but also necessary.

We are committed to assisting the OTP in any manner, including providing access to evidence, witnesses, and other resources that may aid in the examination.

Respectfully submitted,

cc: United Nations Secretary General  
United Nations Security Council  
Caribbean Community and Common Market (CARICOM)  
Organization of American States (OAS)  
The African Union

=====SIGNATURE PAGE FOLLOWS=====

This document, titled Legal Memorandum, dated September 8, 2023 has been duly reviewed and agreed upon by the undersigned parties. By affixing their signatures below, each party acknowledges their understanding, acceptance, and commitment to the terms and provisions contained within said document.

1. Haitian American Leadership Council (HALEC)

By: // FRANCKY LOUIS//  
Francky Louis, Interim President Date: Oct. 6, 2023

2. Haiti Pathway Forward (HPF)

By: // FRITZ CLAIRVIL//  
Fritz Clairvil, MBA Interim President Date: Oct. 6, 2023

3. Haiti Première Classe (HPC)

By: // THEODORE FAYETTE//  
Theodore Fayette, Ph.D. President Date: Oct. 6, 2023

4. INCIDIAH (Initiative Citoyenne De La Diaspora Haïtienne)

By // MARCUS DARBOUZE// Executive Director Date: Oct. 6, 2023

5. DAPH (Diaspora en Action Pour Le Progres d'Haïti)

//GESNER SAINT JEAN// President

Oct. 6, 2023

6. HAITIAN AMERICAN INITED INC OF EL PASO, TX

//FRANÇOIS P DELANCER//, General Secretary

Oct. 6, 2023

7. CORREC (Collectif d'organisation du Réveil Pour La Révolte Citoyenne)

// FRITZ BISSERETH//. Ph.D President

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8. COSEH d'Haïti (Comté de Soutien À l'Education En Haïti)

//JEAN BERNARD JEAN CHARLES// President

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9. CEHAH, Centre Haïtien D'Actions Humanitaires  
//KETTLY EXCELLENT// President  
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10. APPLIED Leadership  
SAMUEL JEAN TREZIL, President  
Oct. 6, 2023
  
11. DKA Best (Dyaspora Kanpe Pou Ayiti)  
NADIA MONDESIR, President  
Oct. 7, 2023
  
12. HAITI ECONOMIE  
ROUDY BERNADIN, President  
Oct.7, 2023