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No.: **ICC-02/05**  
Date: **14 May 2009**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Sylvia Steiner, Presiding Judge  
Judge Sanji Mmasenono Monageng  
Judge Cuno Tarfusser

**SITUATION IN DARFUR, THE SUDAN**

**Public Document**

**Application for Leave to Reply and Reply of the Applicants to the Registry's  
Response of 1 May 2009**

**Source:** Applicants, represented by Sir Geoffrey Nice QC and Rodney Dixon

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

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**Unrepresented Victims**

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**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

### **Application for leave to reply**

1. On 1 May 2009 the Registrar pursuant to Regulation 24*bis* responded to the Applicants' Motion for Clarification for the Record of Annex 4 (the petitions) to the Application under Rule 103 filed on 24 April 2009 ("the Response").
2. The matter of the filing of the petitions in the previous proceedings under Rule 103 has become unnecessarily complicated. The simple point is that the petitions should be on the record as one of the annexes having been relied upon by the Applicants in their unsuccessful Application under Rule 103. It is a matter that has nothing to do with the outcome of the proceedings, and there is no proper justification under the Statute, Rules and Regulations of the ICC to single out the petitions as an annex that should be scrapped from the record. There is no good reason for the Registry's obdurate refusal generating an unnecessary dispute over the retention of documents that should be registered by the court for the completeness of its own record. The Applicants' arguments in this regard are set out in full in the Application of 24 April 2009 and they are of course not repeated here.
3. In seeking to legitimise the Registry's decision the Response has, *inter alia*, raised two specific new arguments not put forward in such terms before, to which the Applicants seek leave of the Pre-Trial Chamber, pursuant to Regulations 24(5) and 34(c), to reply.
4. First, the Registrar asserts in the Response without any reference to the Statute, Rules or Regulations of the ICC that the Registry itself had the authority to refuse to file the petitions on the basis that the Applicants no longer had any capacity to act once the Pre-Trial Chamber rejected the Applicant's Application under Rule 103 (see paras. 3, 5, and 7 of the Response). This is an important matter of practice concerning the purported powers of the Registrar that should be settled with the benefit of the Applicants' submissions in reply. The Applicants set out their position below.
5. Second, the Registrar suggests in the Response that one of the reasons that the petitions were refused for filing by the Registrar was that they were "political" documents which fall outside of the jurisdiction of the ICC (see para. 6 of the

Response). This is the first time such an assertion has been made by the Registry. The Registrar has no power to decide which exhibits are admissible under the Statute and Rules of the ICC, this being an issue exclusively for decision by Judges of the ICC. This matter needs to be clarified and the Applicants' submissions on point are set out below to assist the Pre-Trial Chamber.

6. It is submitted that the Applicants have good cause to reply in respect of these two important matters of procedure. They are both specific arguments, not raised in this way at any prior stage, on which the Applicants should be heard and in relation to which the Applicants should be given a fair opportunity to reply.

**Purported power to refuse petitions on grounds Applicants no longer had the capacity to act**

7. In the Response the Registrar asserts that the reason for not filing the petitions when they were physically delivered at the seat of the ICC on 9 February 2009 by the Applicants is that on 4 February 2009 the Pre-Trial Chamber rejected the Application under Rule 103. The Registrar claims both that the Registry was thereby hindered from filing the petitions and that the Applicants no longer had any capacity to act in the proceedings (see para. 3)<sup>1</sup>.
8. There is no provision in the Statute, Rules or Regulations of the ICC which states that the Registry is obliged to refuse any filing after a decision under Rule 103 has been rendered that has rejected the application. Indeed, the Registry accepted the filing of the Applicants' Application for Leave to Appeal *after* the Pre-Trial Chamber's Decision of 4 February. Had the petitions been annexed to this Application for Leave in support of it, or for that matter had any other document been annexed, by the Registrar's own logic the Registry would have been bound to refuse to file all of these annexes. That cannot be right. Clearly, any annexes to the Application for Leave would have been filed as part of the Application for the record, irrespective of the

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<sup>1</sup> It should be noted that the Applicants are working from an unofficial translation of the Response from French into English, there being no official translation of the Response in English by the time of having to file this Reply. No direct quotes from the Response have thus been referred to in this Reply.

prior decision of the Chamber. It would have been for the Chamber to decide whether to admit such documents on appeal.

9. Moreover, if the Applicants have no capacity to act, on what basis has the Registry then filed the current Application for clarification? The Registry is plainly obliged to receive these filings and any attachments as the principal administrative organ of the ICC. The Statute, Rules and Regulations require the Registrar to receive and file documents for the ICC. As set out in Article 43(1), “The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the court” and in Rule 13, “the Registrar shall serve as the channel of communication of the Court”. In particular, “The Registrar shall keep a database containing all particulars of each case brought before the Court” (Rule 15(1)), and the Regulations provide that the Registry shall receive documents which “shall, whenever possible, be submitted in electronic version for registration by the Registry” (Regulation 26(3)). “Documents” are defined as including “any motion, application, request, response, reply, observation, representation and any other submission in a form capable of delivering a written record to the Court” (Regulation 22).
  
10. It is surely on account of these provisions that the officials of the Registry agreed to accept the petitions on 9 February 2009 and, as they stated to Counsel for the Applicants at the time, in order to *register* the documents. It was not a mere “*courtesy*”, as the Registry in the Response now – and after the event – seeks to assert. The fact is that the Registry did not refuse to accept the petitions on 9 February, several days *after* the Decision had been rendered; they did not say at the time that they were receiving the documents only as a courtesy but not filing them. These are *ex post facto* attempts by the Registrar to deny to the court documents that, for some unrevealed reason, the Registrar wishes to keep from public or judicial scrutiny.
  
11. Significantly the Statute, Rules, and Regulations do not authorise the Registrar to exercise decision making power over which documents are to be filed and which are not. This would be tantamount to having a court of first instance sitting below the Judges of the ICC. The Registry is the conduit or “channel of communication” for the Court. It is solely the Judges of the ICC who have the power to issue orders and decisions in respect of filings. As provided for in numerous provisions of the Regulations, it is the Judges who make all decisions about representations and filings

before the ICC, and “In the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice” (Regulation 29(1)).

12. Furthermore, the Pre-Trial Chamber did not rule that the Applicants were no longer a party to the proceedings in its Decision of 4 February, or seek to “disqualify” the Applicants from making any further filings. The Chamber rejected the Application on the basis that it did not, in the Chamber’s opinion, address an issue before the Chamber in its consideration of the Prosecutor’s application for an arrest warrant pursuant to Article 58. Yet, the Registry now asserts in its Response that the reason for its refusal to file the petitions was because the Applicant’s lacked the capacity to act. In its report to the Pre-Trial Chamber of 17 February 2009 (filed before the Application for Leave to Appeal was refused) the Registry did not offer this as a reason for refusal. In the Applicants’ submission it is an *ex post facto* justification. And, as explained above, the Registry has no power under the Statute, Rules and Regulations to make a finding that the Applicants lack capacity and thereby to exclude their filings.
13. The fact that the Pre-Trial Chamber did not respond to the Registrar’s report of 17 February cannot be deemed to signify that the Chamber has endorsed the steps taken by the Registrar. Silence by a Chamber is no ruling. This issue is presently before the Chamber on the basis of representations made by the Applicants and by the Registrar under Rule 24*bis* on the merits, not by the Registrar assuming or hoping for the best in order to justify its assumption of authority and powers that it does not have.
14. None of these submissions detract from the Applicants’ primary point that the petitions were referred to and part of the original Application filed on 11 January 2009. Their existence was taken into account by the Chamber in its review of the submissions put forward by the Applicants – they should be there for the record on that basis alone. The decisions of the Pre-Trial Chamber were made with recognition of the existence of the petitions and having the petitions now properly lodged would do no more and no less than to leave a complete record of the Application made and rejected – vitally important for transparency and completeness of the record of ICC

proceedings. It would not permit the Applicants any other further actions that they would not have otherwise.

**Refusal on purported grounds that the petitions are political documents falling outside of the ICC's jurisdiction**

15. The Registry suggests in the Response that were the Chamber now to accept the petitions it would be tantamount to allowing any organisation that is not a participant in proceedings to deposit a petition before a judicial organ which should not serve the purpose of being a political gallery (see para. 6). The Registrar continues that these kinds of filings belong in the domain of political organs and cannot be considered to fall within the jurisdiction of the ICC, and that the Registry could not verify the authenticity of such documents.
16. No authority is provided for these sweeping conclusions. The Registrar is not empowered to decide whether submissions come within the jurisdiction of the ICC. As explained above, the Registry is only “responsible for the non-judicial aspects of the administration and servicing of the court”.
17. The suggestion that petitions are not capable of being material of relevance to the ICC conflicts totally with the expressed – and the Applicants would say necessarily implied – powers and duties of the Prosecutor and the Pre-Trial Chamber to consider the “interests of justice”. Any such broad discretion must take account of many considerations including the antipathy of those citizens – including the very citizens the Prosecutor seeks to characterise as victims – to the process of the court in respect of the Sudan situation. The petitions as documents would fall within the very broad definition given to “documents” in Regulation 22, cited above.
18. Furthermore, as explained in the Applicants’s original Application of 11 January 2009, the petitions were relied upon to demonstrate the representivity of the Applicants in seeking to have their Application accepted pursuant to Rule 103. As reiterated above, the Chamber was aware of the petitions, the numbers involved, the nature of the questions asked, how the signatures were collected, etc. from the pleadings when its decisions were rendered. This is not a case of any organisation

arriving after the event with a new petition that had nothing to do with the Application. The Chamber clearly accepted the nature and contents of the petitions in general – had it not done so then it might have rejected the Applicants claimed status, or deferred any question of status and any decision on the original Application and Supplementary Filing, until the petitions had been received and reviewed. No issue of status was raised by the Chamber until the refusal of leave to appeal sought so to do on the basis of the Applicants not having standing to appeal pursuant to Article 82(1) and Rule 155, not a determination that in any way turned on the petitions, their admissibility or inadmissibility. Indeed it can be argued that in the refusal of leave to appeal the Chamber must be taken to have accepted the representative status of the Applicants in line with their assertions in the original Application.

19. The unsubstantiated and dismissive attitude of the Registry towards the millions of people who contributed to the petitions will inevitably add to the disregard in which the ICC is now held in many parts of Africa generally and in Sudan in particular. It will be viewed, whether intended or not, as an attempt to deny the ordinary citizenry of a country its rights to voice elementary but sincerely held concerns for judicial consideration by the ICC.
20. The makeweight argument about “verification” of the petitions seeks for the Registrar a function that is never hers. Verification is not for the Registrar any more than it is for the Registrar to validate any other piece of evidence that comes through the Registry’s door (unless bolted). The Registrar does not make judgements about witnesses or paper exhibits – those judgements are for the Chamber and by seeking to keep the Applicants’ petition off the ICC record the Registrar is denying the Pre-Trial Chamber Judges their right to have the petitions for evaluation and testing at any time of their choosing.

### **Conclusion**

21. For all of the reasons set out in their Application of 24 April 2009 and in light of the submissions made in this Reply, the Applicants respectfully request the Chamber to clarify that the petitions are on the record and should be registered as such by the Registrar.



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For Sir Geoffrey Nice QC  
Rodney Dixon  
Counsel on behalf of the Applicants

Dated this 14<sup>th</sup> day of May 2009  
London, United Kingdom