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No.: **ICC-02/05**
Date: **24 April 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

Clarification for the Record of Annex 4 to the Application under Rule 103

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:

The Office of the Prosecutor

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Legal Representatives of Victims

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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Defence**

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States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 11 January 2009 the Applicants (namely the Sudan Workers Trade Unions Federation and the Sudan International Defence Group) filed an Application under Rule 103 (“the Application”), which they supplemented with an additional filing on 3 February 2009 (“the Supplement”). The Registry has refused to file for the record certain petitions which were an annex (Annex 4) to the Application and the Supplement.
2. These petitions were signed by over 1.8 million Sudanese citizens requesting the ICC not to issue arrest warrants.
3. The Applicants who co-ordinated the signature campaign, and who filed the Application and the Supplement with the petitions as annex thereto, hereby request the Pre-Trial Chamber to clarify that the petitions are in fact an annex to the filings and to order that the petitions be filed as such for the record.

Background

4. In the Application under Rule 103 the Applicants submitted in support of their application that a petition campaign had been undertaken in Sudan (see para. 4). The Applicants marked the petitions as “Annex 4” to the Application (see footnote 4) and undertook to forward copies of the petitions as materials in support of the Application to the Pre-Trial Chamber from Sudan “very shortly.”
5. The petitions were thus referred to and marked as an annex to the Application for the record at the very outset.
6. In the Supplement that followed the Applicants stated that as the signature sheets of the petitions were voluminous, “the Applicants are arranging for the signed petitions to be brought from Sudan to the ICC and filed through the Registry on Monday 9 February 2009” (see para. 7).

7. Indeed, telephonic communications took place before the filing of this Supplement and thereafter between Counsel for the Applicants and the Court Officer and members of the Court Management Section (CMS) in which it was agreed that the petitions would be delivered to the Registry and received for filing on Monday afternoon 9 February 2009. This arrangement was specifically referred to in the Supplement of 3 February (see para. 7).
8. The Registry was thus expecting to receive the petitions on Monday 9 February in order to file them for the record.
9. On 4 February 2009 the Pre-Trial Chamber refused the Application under Rule 103 on the basis that “the matters to which the Application refers are unrelated to any issue currently before the Chamber”. The Chamber reasoned that “only if the interests of justice are a factor to be taken into consideration at this stage would the matters to which the Application refers be related to an issue currently before the Chamber” (at para. 10).
10. On Monday 9 February a representative of the Applicants (having travelled from Khartoum over the weekend with the petitions in marked boxes) delivered the petitions to a representative of the Registry at the ICC for filing, as agreed and arranged.
11. On 11 February 2009 the Applicants filed their Application for Leave to Appeal against the Pre-Trial Chamber’s Decision.
12. On 17 February 2009, over one week after the petitions were delivered and after the Application for Leave had been filed, the CMS of the Registry wrote to the Applicants’ Counsel stating that “in accordance with the Decision [of the Pre-Trial Chamber of 4 February 2009] ... the Registry will not file any documents pertaining to the Application received since the date of the issuance of the Decision”. The petitions were immediately returned to Counsel for the Applicants in London. The Registry submitted to the Pre-Trial Chamber a “Report on documents submitted after the issuance of the ‘Decision on Application under Rule 103’” on 17 February stating that the petitions had been returned.

13. This unilateral decision taken by the Registry was contrary to the agreement with the Registry to receive and file the petitions on 9 February. Moreover, the Pre-Trial Chamber's Decision of 4 February did not order or require that any documents received after the issuance of the decision should be returned to the Applicants. Most importantly, the petitions were *already* an annex to the Application – they were not introduced and added after the Pre-Trial Chamber's Decision had been issued. In the submission of the Applicants, the Registry had no authority to decide on its own account to remove the petitions from the record.

14. Counsel for the Applicants wrote immediately to the Registry on 18 February stating:

“As a clarification it should be noted that the petitions are not an additional filing of the Applicants (and not filed as such after the Pre-Trial Chamber's Decision of 4 February 2009) - they are part of the original filings of the Applicants. As is acknowledged in the Registrar's Report of 17 February 2009 (which we received this morning) the petitions are annex 4 to the "Supplement to the Application and Annexes" which was filed on 3 February 2009 before the Decision of 4 February 2009. The petitions represent the voice and views of ordinary citizens of The Sudan and were annexed to the filing of 3 February 2009 in order that these views were placed before the court. As an annex to this filing, the petitions do need to be retained by you and filed for the record. We appreciate that it may be an onerous task to scan each page of the petitions and would have no objections to you filing the petitions for the record in some other way.

In addition, the Applicants have applied for leave to appeal the Decision and the petitions as Annex 4 to the filing of 3 February would thus need to be part of the record for any appeal if leave were granted. Were leave to be refused, as explained above, the petitions as Annex 4 to the filing of 3 February have to be on the record for the accuracy and completeness of the record.

We trust that this clarification assists and that the petitions as annex 4 to the Applicant's filing of 3 February will be retained and filed for the record.”

15. No response was received from the Registry to this email.

16. On 19 February leave to appeal was refused by the Pre-Trial Chamber on the basis that the Applicants had no procedural standing to appeal the Decision as they “are not ‘a party’ to the proceedings relating to the investigation into the Darfur situation”.

17. On 24 February Counsel for the Applicants again wrote to the Registry stating:

“We have not received any response from you to our email of 18 February 2009 concerning the petitions.

We set out therein the reasons for why the petitions as an annex to the Applicants' filings had to be retained by the Registry for the court record, even in the event of leave to appeal being refused (which was so refused on 19 February 2009).

Kindly acknowledge receipt of our email and reply to same.

You will recall that in our email of 18 February we expressed contentment with the petitions being stored in some way less labour intensive than by the full scanning of every page. But we must observe that to those who contributed to the petition its cursory rejection may seem as discourteous to them as to lawyers it may seem legally and technically incorrect. We can call on you in person on Monday 2 March in order to discuss this further, should you wish; we will be in The Hague in any event on that day.”

18. Having still received no reply, Counsel for the Applicants telephoned the Director of the Division of Court Services on Friday 27 February. The Director explained that a letter in reply would be forthcoming shortly and that once it had been reviewed by Counsel further contact could be made as a meeting may be arranged between Counsel for the Applicants and the Registry to seek to resolve the matter.

19. On Tuesday 3 March 2009, the Registry emailed to the Applicants' Counsel a letter (dated 27 February 2009) in reply to the Applicants' letters of 19 and 24 February. The Registry stated that the Chamber had found that the Applicants “could not be considered as ‘a party’” and “as a consequence ... the Registry will not file” the petitions. In the letter the Registry also indicated that for the same reason “the Registry will not answer further communications related to this matter”.

20. The Applicants responded in a letter dated 5 March 2009. They highlighted the excessively bureaucratic position taken without consultation by the Registry; that the Pre-Trial Chamber had not originally dismissed the Application under Rule 103 on the basis that the Applicants could not be a party to the proceedings; that the petitions were an annex referred to and incorporated into the filings and could not be excluded from the record by the Registry; that the petitions had been accepted by the Registry

on 9 February; and that, the Registry had shown disrespect for the opinions of nearly two million Sudanese citizens by its unilateral action.

21. As no reply has been received to this letter; not even an acknowledgement, the Applicants had no other option but to seek this clarification from the Pre-Trial Chamber.

Clarification

22. The submission of the Applicants is that irrespective of the outcome of the Application under Rule 103, the petitions must remain on the record. The filing of the petitions is not dependent on whether the Application was successful or not. The public record must reflect that the Application was supported by those who signed the petitions (as stated in the Application) even if the Application was rejected.
23. The fact that the Pre-Trial Chamber held when it considered the Applicants' Application for Leave to Appeal that the Applicants were not "a party" to the proceedings (despite not doing so in rejecting the original Application) cannot preclude the filing for the record of an annex to the Application. The Applicants' Application in its entirety must remain for the record no matter what the various reasons were for rejecting it, and even if it was held not to be a party. The Registry has not suggested that any of the other annexes should be removed from the record, and it would be wrong to do so.
24. The Application and the Supplement, as well as the Application for Leave to Appeal, are referred to as having been filed and rejected by the Pre-Trial Chamber in the Chamber's Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir of 4 March 2009 (see paras. 8, 13, 15, 17, and 20). These filings and all of the annexes to these filings must therefore be on the court record so that they can be reviewed and referenced by the court, parties to proceedings, and the public.
25. The present Applicants or others may seek to make further applications in the Darfur situation or any of the cases. The petitions need to be available to them as a document on the court record in order properly to do so. Moreover, it must be possible for any

observer to have access to the public annexes of the Application, including the petitions, that were relied upon and about which submissions were made in the Application and related filings. This is standard court practice, and there is no reason to make any exception in this case in respect of the petitions in Annex 4 to the Application.

26. To the extent that the Registry's position is motivated by a concern of how to register and number each of the numerous pages of the petitions, the Applicants have suggested that the petitions could be kept under a single number or filed in some other way so that the burden of numbering every page can be avoided. The fact that there are numerous pages to the exhibit cannot be reason to refuse to file it.
27. The petitions were physically delivered to the ICC a few days after the Pre-Trial Chamber's decision was rendered; however, this is of no consequence. The petitions were an annex, and referred to as such, in the original Application and the Supplement. They must be preserved for the record so that the court, the parties and the public are aware of the Application that was made and the material relied upon in support. The Registry agreed to accept and did accept the petitions on 9 February.
28. In any event, the petitions were physically delivered to the Registry before the decision on the Application for Leave to Appeal was decided. Had it been known that the Registry would have attempted to exclude the petitions altogether at the time of filing the Application for Leave to Appeal (the Applicants were only informed by the Registry on 17 February nearly a week after any Application for Leave had to be filed), then this would have been relied on in argument in the Application for Leave as a sign of institutional determination to avoid consideration of the underlying merits of the Application and Supplement and as an act of discourtesy by the court to the views of citizens of Sudan.
29. For all of the above reasons, the Applicants request the Pre-Trial Chamber to clarify for the record that the petitions must be filed on the record as an annex to the Application and Supplement as Annex 4.



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

Dated this 24th day of April 2009
London, United Kingdom