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ARTICLE 85 CHAMBER

Before: Judge Miatta Maria Samba, Presiding Judge
Judge Keebong Paek
Judge Beti Hohler

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

THE PROSECUTION V. MAXIME JEOFFROY ELI MOKOM GAWAKA

Confidential

Mokom Defence Request for Leave to Reply to ‘Prosecution’s Response to Maxime Mokom’s Request for Compensation under Article 85 of the Rome Statute’, ICC-01/14-01/22-332-Conf

Source: Philippe Larochelle, Counsel for Mr. Mokom

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

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I. INTRODUCTION

1. Pursuant to Regulation 24(5) of the Regulations of the Court ('Regulations'), the Defence for Mr. Maxime Mokom ('Defence') hereby seeks leave to reply to the Prosecution's Response to Maxime Mokom's Request for Compensation under Article 85 of the Rome Statute ('Response').¹ The Response demonstrates a significant divide between the position of the Prosecution, the Defence, and in some cases the Pre-Trial Chamber on central issues of the scope of ethical obligations, the Prosecution obligations as regards exculpatory material, the migration process at the ICC, and the threshold for compensation under Article 85(3) of the Statute. For the reasons set out below, aspects of the Prosecution submissions on these four issues could not have been anticipated by the Defence. A reply would facilitate a full airing of these important questions, and to ensure all the relevant information is before the Article 85 Chamber prior to a decision being rendered on Mr. Mokom's request for compensation.

2. A request for leave to reply may be granted if the conditions set out in Regulation 24(5) of the Regulations are met, or if the Chamber considers a reply would otherwise be necessary for the adjudication of the matter.² The Defence submits that a reply is warranted to address four discrete issues arising directly from the Response that could not have been reasonably anticipated in the Defence Request.³

II. LEVEL OF CONFIDENTIALITY

3. Pursuant to Regulation 23bis(1) of the Regulations, the Defence files this request as confidential, given that the Response was filed confidentially and the Defence Request refers to confidential filings, documents and information. A public redacted version will be filed in due course.

¹ Prosecution's Response to Maxime Mokom's Request for Compensation under Article 85 of the Rome Statute, 29 April 2024, [ICC-01/14-01/22-332-Conf](#).

² See, e.g., *Situation in the Republic of the Philippines*, Appeals Chamber: Decision on the Republic of the Philippines' request for leave to reply to the "Prosecution's response to the Philippine Government's Appeal Brief against 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation' (ICC-01/21-65 OA)", [ICC-01/21-72](#), 2 May 2023, para. 7.

³ Request for Compensation under Article 85 of the Rome Statute, 17 April 2024, [ICC-01/14-01/22-329-Conf](#). A public redacted version was filed on 23 April 2024, [ICC-01/14-01/22-329-Red](#) ('Defence Request').

III. SUBMISSIONS

(i) The Prosecution obligations under Article 67(2)

4. The first issue relates to the scope of the Prosecution obligations under Article 67(2). In its Response, the Prosecution asserts that “there is no fundamental right to have Article 67(2) information identified in all disclosed items.”⁴ This position, stands in direct contrast to the Pre-Trial Chamber’s determination on 5 June 2023 that the Prosecution should have **formally** disclosed material to the Mokom Defence **with the relevant information specifically identified pursuant to its obligations under article 67(2) of the Statute**.⁵ The Pre-Trial Chamber also held that there were good reasons to consider that the Prosecution’s duty under Article 67(2) of the Statute has not been properly fulfilled in the case, and that the **Chamber’s intervention** was therefore warranted.⁶ In its 5 June Decision, the Pre-Trial Chamber had also raised “serious concern” about the Prosecution’s indication that as of that date, the Prosecution had only reviewed material assessed as potentially exculpatory in the *Yekatom & Ngaïssona* case for the purpose of the *Mokom* case.⁷ The Chamber qualified the Prosecution’s approach as **inappropriate, unprecedented and irreconcilable with the wording of article 67(2) of the Statute**.⁸ A reply by the Defence would accordingly address the divergence between the Pre-Trial Chamber’s rulings, and the Prosecution’s position now being asserted in its Response.

5. Moreover, the Defence could not have reasonably foreseen that the Response would misrepresent that the identification and communication of Article 67(2) information within items arises solely from the 5 June Decision.⁹ The Response circumvents the important fact that the Pre-Trial Chamber had instructed the Prosecution as early as 7 November 2022 to differentiate all evidentiary items in the case, by indicating, for **each** item, whether migrated or disclosed, **which sections are deemed to contain incriminating, exonerating and/or other information**.¹⁰ The Pre-Trial Chamber had reiterated such instructions on 30 November 2022.¹¹

⁴ *Contra*. [ICC-01/14-01/22-332-Conf](#), para. 19.

⁵ Decision on the Defence’s requests for disclosure and rectification of disclosure metadata, 5 June 2023, [ICC-01/14-01/22-219-Conf](#), see paras. 27-30 (‘5 June Decision’).

⁶ [5 June Decision](#), paras. 29 and 34.

⁷ [5 June Decision](#), para. 28.

⁸ [5 June Decision](#), para. 28.

⁹ See [ICC-01/14-01/22-332-Conf](#), paras. 11, 14 and 20.

¹⁰ Order on disclosure and related matters, 7 November 2022, [ICC-01/14-01/22-104](#), para. 8.

¹¹ See also Second order on disclosure and related matters, 30 November 2022, [ICC-01/14-01/22-116](#), para. 14.

6. The Response suggests that the Prosecution relies upon a misconceived interpretation of the Prosecution's obligations under Article 67(2) and thereby increases the spectre of a grave miscarriage of justice. In the circumstances, the Defence should be granted the opportunity to address the Prosecution's approach to the established legal framework on this fundamental matter.

(ii) The Prosecution obligations as regards exculpatory evidence at the arrest warrant stage

7. If leave is granted, the Defence also intends to reply to the assertions contained at paragraphs 13-17 of the Response regarding the obligations of the Prosecution towards the Chamber concerning exculpatory evidence when seeking an arrest warrant.

8. The Prosecution seems to be implying that after a showing of incriminating evidence meeting the threshold of reasonable grounds to believe that the person has committed the alleged crime, the exercise abruptly stops. The case of Mr. Mokom demonstrates how dangerously flawed such a proposition is. Contrary to what the Prosecution is arguing at paragraph 17, what matters is whether the Pre-Trial Chamber would have issued the warrant of arrest had the Prosecution provided it an objective and balanced overview of the actual case against Mr. Mokom in its possession at that time.

9. When, such as in this case, and as demonstrated by the annexes to the Defence Request, there are also reasonable grounds to believe that the suspect has **not** committed the alleged crimes, the Prosecution should either refrain from seeking an arrest warrant, or make it clear to the relevant Pre-Trial Chamber that this is indeed the case. Failing to do so, not only misleads the Pre-Trial Chamber, but amounts to a breach of Article 54(1) of the Rome Statute and the Code of conduct of the Prosecution, at Articles 49 and 51.

10. Whereas the Defence Request for compensation rests, *inter alia*, on the persistence of the Prosecution to refuse to acknowledge **the existence** of exculpatory evidence, the Response reveals that the Prosecution, to this day, continues also to mischaracterise its duties regarding **the disclosure and communication** of exculpatory evidence, at all stages of the proceedings. Given the central importance of this question, both to Mr. Mokom's case and others before the Court, a reply is accordingly warranted.

(iii) *The migration process*

11. Thirdly, the Response relies on incorrect facts in relation to the migration process of material from the *Yekatom & Ngaïssona* case record to the *Mokom* case record, which could not have been anticipated by the Defence. Contrary to the Prosecution submissions, the migration process was not undertaken in stages between August 2022 and January 2023, and no migrated material 'became available to Maxime Mokom's Duty Counsel on an ongoing basis.'¹²

12. Should leave to reply be granted, the Defence intends to rely on email exchanges between the Defence and the Prosecution to justify that migrated material was made available to the Defence only on 30 January 2023 and 1 February 2023.

13. Moreover, the Pre-Trial Chamber had specifically emphasised that the Prosecution's statutory obligations are not fulfilled through the migration of documents from one case record to another case record.¹³ The Prosecution had itself acknowledged that the migration process does not constitute the Prosecution's disclosure and that the Prosecution will comply with its disclosure obligations only after releasing appropriate meta-data in relation to migrated items.¹⁴ The Defence could not have therefore reasonably anticipated that the Response would rely upon a mischaracterisation of the relevance of the migration process in relation to the Prosecution's disclosure obligations, in particular in relation to Article 67(2) of the Statute.

(iv) *The threshold for compensation under Article 85(3)*

14. Lastly, the Defence submits that a reply is warranted to address the Prosecution position on the threshold for granting compensation under Article 85(3). Being a suspect before the ICC is an exceptional circumstance. Being arrested, detained and thrown on the street afterwards, with no legal status, make the circumstances of Mr. Mokom truly unique.

15. A miscarriage of justice can be found not only in the judicial process that led to the current circumstances where Mr. Mokom finds himself, but also, it will be further reasoned in the reply, in those circumstances themselves.

¹² [ICC-01/14-01/22-332-Conf](#), para. 20.

¹³ Order on disclosure and related matters, 7 November 2022, [ICC-01/14-01/22-104](#), para. 6.

¹⁴ Prosecution's Submissions pursuant to the Chamber's Order on Disclosure and Related Matters (ICC-01/14-01/22-104), 11 November 2022, [ICC-01/14-01/22-109](#), para. 13.

IV. CONCLUSION AND RELIEF SOUGHT

16. The drafters of the Rome Statute were deliberate in creating a mechanism for compensation for people, like Mr. Mokom, who were the victims of a miscarriage of justice. The limited practice of the Court in adjudicating such claims, militates in favour of a full hearing on issues central to the compensation claim filed in the present case.

17. As such, the Defence respectfully submits that it should be granted the opportunity to address the Prosecution's mischaracterisation of the legal framework surrounding Article 67(2), the scope of exculpatory disclosure obligations when seeking an arrest warrant, rectify the errors contained in the Response regarding the migration process, and to address the question of the threshold for compensation at the ICC, thereby assisting the Chamber in its determination of the existence of a miscarriage of justice under Article 85(3) of the Statute.

18. The Defence also reiterates its request for an oral hearing,¹⁵ noting that the divergence between the parties on questions central to the compensation claim also supports the importance of a full and frank and public exchange.

19. In light of the above, the Defence respectfully requests that the Pre-Trial Chamber:

- **GRANT** leave to reply to the Response.

Respectfully submitted,



Philippe Larochelle,
Counsel for Maxime Mokom

The Hague, The Netherlands
Friday, May 03, 2024

¹⁵ [Defence Request](#), p. 22.