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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
IN THE CASE OF THE PROSECUTOR v. MAXIME JEOFFROY ELI
MOKOM GAWAKA**

Confidential

**Prosecution's Response to
Maxime Mokom's Request for Leave to Reply to Prosecution's Response to his
Request for Compensation under article 85 of the Rome Statute**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Prosecution respectfully requests the Compensation Chamber to reject Maxime Mokom's Request to Reply to the Prosecution's Response to his Request for Compensation ("Request to Reply").¹ Maxime Mokom does not identify any new issues arising from the Prosecution's Response² that he could not have reasonably anticipated in his Request for Compensation.³ Nor does he identify any issue that would otherwise merit a reply. Instead, he misstates the Prosecution's submissions and seeks to provide further details or clarity that were lacking from his Request for Compensation. This is not the purpose of a reply and would not assist the Chamber.

Classification

2. This Response is classified as confidential pursuant to regulation 23*bis*(2) of the Regulations of the Court ("Regulations") as it responds to a filing bearing the same classification. A public redacted version will be filed as soon as practical.

Submissions

3. The granting of leave to reply under regulation 24(5) of the Regulations is a matter for a chamber's discretion, to be decided on a case-by-case basis.⁴ A reply may be warranted where the applicant seeks to provide arguments on matters that could not reasonably have been anticipated, or are otherwise necessary to adjudicate the matter.⁵ The four issues identified by Maxime Mokom for a proposed reply do not meet the test for leave to reply. He instead misstates the Prosecution's submissions, and seeks to use a reply to address shortcomings in his Request for Compensation. As such, Maxime Mokom has not demonstrated that the

¹ 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', 3 May 2024, ICC-01/14-01/22-334-Conf ("[Request to Reply](#)").

² 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 ("[Prosecution Response](#)" and "[Response](#)").

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

⁴ [Yekatom Reply Decision](#), para. 8; ICC-01/04-02/06-2530 ("[Ntaganda Second Reply Decision](#)"), para. 7; ICC-01/04-02/06-2488 ("[Ntaganda First Reply Decision](#)"), para. 7.

⁵ [Yekatom Reply Decision](#), para. 8, citing Regulation 24(5); ICC-02/18-66 ("[Venezuela Reply Decision](#)"), para. 11; ICC-01/21-72 [Philippines Reply Decision](#), para. 7.

Chamber should grant him leave to reply on any of the four issues. The Prosecution respectfully asks the Chamber to reject his Request.

(i) *The Prosecution's obligations under article 67(2) (paragraph 19 of Prosecution Response; and paragraphs 11,14 and 20 of Prosecution Response)*

4. Maxime Mokom seeks leave to reply to the Prosecution's assertion in paragraph 19 of the Response that "there is no fundamental right to have article 67(2) information identified in all disclosed items."⁶ He contrasts this with the Pre-Trial Chamber's 5 June 2023 Decision,⁷ and requests leave to reply to address the divergence between the Pre-Trial Chamber's rulings and the Prosecution's position, and the Prosecution's alleged misconception about its obligations under article 67(2).⁸ He also submits that he could not have reasonably foreseen that the Prosecution's Response would "misrepresent" that the requirement to identify and communicate article 67(2) information within disclosed items arose solely from the Pre-Trial Chamber's 5 June 2023 Decision, and not also in its previous disclosure decisions on 7 and 30 November 2022.⁹

5. Maxime Mokom misstates the Prosecution's position and arguments. The Prosecution acknowledges that the Pre-Trial Chamber's 5 June 2023 Decision, and its earlier disclosure orders¹⁰—all part of the case record—contained the requirement to identify and communicate article 67(2) information within disclosed items. In its Response, the Prosecution had referred to an even earlier order of 27 June 2022, wherein the Chamber had instructed the Prosecution to indicate for evidence disclosed as potentially exonerating, the relevant sections by page and paragraph numbers.¹¹ The Prosecution's position, however, is that a person seeking compensation under article 85(3) of the Statute for a grave and manifest miscarriage of justice must show conclusive facts that their *fundamental rights* were violated as to have caused them serious harm. Such fundamental rights are found in the Statute and regulatory framework. Relevant to his claim, they require the Prosecution to *disclose* evidence falling under article

⁶ [Request to Reply](#), para. 4.

⁷ Decision on the Defence's requests for disclosure and rectification of disclosure metadata, 5 June 2023, ICC-01/14-01/22-219-Conf ("5 June 2023 Decision"), referred to in [Prosecution Response](#), paras. 11, 20.

⁸ [Request to Reply](#), paras. 4, 6.

⁹ [Request to Reply](#), para. 5, referring to Order on disclosure and related matters, 7 November 2022, [ICC-01/14-01/22-104](#), para 8; Second order on disclosure and related matters, 30 November 2022, [ICC-01/14-01/22-116](#), para.14.

¹⁰ Order on disclosure and related matters, 7 November 2022, [ICC-01/14-01/22-104](#), para 8. Second order on disclosure and related matters, 30 November 2022, [ICC-01/14-01/22-116](#), para. 14.

¹¹ [Prosecution Response](#), para. 20 bullet 4, fn.5.

67(2) of the Statute to him, but not to *specifically identify and communicate portions of* evidence within evidence otherwise properly disclosed under the required classifications of INCRIM, PEXO, Rule 77.¹² A Chamber's order to provide further details does not create a fundamental right to such additional information.

6. Maxime Mokom conflates a Chamber's power to order the Prosecution to identify/communicate article 67(2) information found in sections of all properly classified and disclosed items of evidence (as occurred in this case), with the fundamental right to disclosure provided for in the Statute. The facts do not establish that the fundamental right to disclosure was violated by the Prosecution not having fully identified all possible article 67(2) information within previously disclosed items (correctly) classified as INCRIM, PEXO and Rule 77 until June 2023—some four months after the initial disclosure deadline. Since Maxime Mokom's request to reply is based on a misconception of the Prosecution's position, his further submissions would not assist the Chamber and his request to reply should be rejected.

(ii) *The Prosecution's obligations regarding exculpatory evidence at the arrest warrant stage (paragraphs 13-17 of the Prosecution Response)*

7. In seeking leave to reply to paragraphs 13 to 17 of the Prosecution's Response, Maxime Mokom misstates the Prosecution's arguments on its obligations towards the Chamber when applying for an arrest warrant.¹³ Again, his request for reply should be rejected.

8. *First*, Maxime Mokom submits that 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."¹⁴ *Second*, he claims that since the Annexes to his Request for Compensation demonstrate that there are reasonable grounds to believe that Maxime Mokom has *not* committed the alleged crimes, the Prosecution should not have sought the arrest warrant or clarified to the Chamber that that was the case.¹⁵ He argues that a reply is warranted because his Request relied on the Prosecution's "refusal to acknowledge the **existence** of exculpatory evidence", and the Prosecution "continues to

¹² See, e.g. [article 67\(2\)](#): "In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of Prosecution evidence." See also [rules 76–79](#) of the Rules of Procedure and Evidence relating to disclosure and inspection of evidence.

¹³ [Request to Reply](#), paras. 7-10.

¹⁴ [Request to Reply](#), para. 7.

¹⁵ [Request to Reply](#), para. 9.

mischaracterise its duties regarding **the disclosure and communication** of exculpatory evidence".¹⁶

9. Maxime Mokom mischaracterises the Prosecution's arguments. *First*, the Prosecution expressly acknowledged in its Response the need for it to assess all evidence in its possession, both incriminating and exonerating, before bringing an arrest warrant. In paragraph 13 of its Response, it stated: "having determined that the totality of the evidence in its possession meets the relevant standard (*having evaluated the incriminating and exonerating evidence in its possession* at the relevant time), the Prosecution must substantiate its application with sufficient evidence to establish reasonable grounds to believe that the person committed the alleged crime."¹⁷ This directly contradicts Maxime Mokom's assertion that the Prosecution "implied" that once a showing of incriminating evidence meeting the reasonable grounds threshold is reached, the Prosecution stopped its assessment.

10. Nor do paragraphs 16 and 17 of the Prosecution's Response support Maxime Mokom's (mis)understanding of the Prosecution's position. In paragraph 16, the Prosecution observed that in its application for the arrest warrant, it had cited 65 of the items listed in Annex D of his Request for Compensation, which contained possible article 67(2) information. In paragraph 17, the Prosecution submitted that Maxime Mokom cannot now challenge whether the Chamber properly assessed those 65 items when deciding to issue the warrant. It also submitted that, as the applicant requesting compensation under article 85(3), Maxime Mokom has the burden to substantiate his claim that the Chamber might not have issued the warrant had it also had the remaining items in the Prosecution's possession at the time. Nowhere in these paragraphs, or elsewhere in its Response, did the Prosecution take the position that Maxime Mokom now (incorrectly) attributes to it.

11. *Second*, his claim that the Annexes to his Request for Compensation showed that evidence in the Prosecution's possession could not have supported the "reasonable grounds" standard for an arrest warrant, is unsupported.¹⁸ Annex D to his Request for Compensation lists 390 items which—save for 14 items—had been formally disclosed by the Prosecution to him by the initial disclosure deadline of 23 February 2023. In accordance with the applicable Court-wide eCourt Protocol they had originally been classified as PEXO, INCRIM or Rule 77.

¹⁶ [Request to Reply](#), para. 10 (bolding in original).

¹⁷ [Prosecution Response](#), para. 13 (emphasis added).

¹⁸ [Request to Reply](#), para. 9.

In June 2023, the Prosecution identified and communicated to Maxime Mokom further information in those items possibly falling under article 67(2). Such a list, or his mere citing of portions of items containing information assessed as possible article 67(2) evidence, is insufficient to meet his burden of showing that the Prosecution did not meet the standard of reasonable grounds to believe that Maxime Mokom committed the alleged crimes when it applied for the arrest warrant. A reply should not be granted to address shortcomings in an initial application. In any event, as stated in the Prosecution's Response, the evidence in the Prosecution's possession was sufficient to meet the "reasonable grounds to believe" standard required for an arrest warrant under article 58, notwithstanding the existence of possible article 67(2) information. In particular, article 67(2) is not limited to evidence demonstrating innocence, but also comprises evidence mitigating guilt. As such, information falling under article 67(2) does not necessarily impact on a chamber's assessment of "reasonable grounds to believe" under article 58, or the "substantial grounds to believe" standard required to confirm charges under article 61.¹⁹ Maxime Mokom has not demonstrated otherwise.

12. *Finally*, his assertion as to the Prosecution's allegedly persistent failure to acknowledge the existence of exculpatory evidence, and its mischaracterisation of its duties regarding disclosure and communication, is unclear.²⁰ In its Response, the Prosecution outlined the multiple steps it took throughout 2022 to facilitate Maxime Mokom's access to relevant evidence pending the resolution of the issue of his permanent counsel, and in June 2023, to identify within each previously disclosed item (whether classified as INCRIM, PEXO or Rule 77), portions which could fall within article 67(2). As such, further submissions in reply would not seem justified.

13. Given that Maxime Mokom has mischaracterised the Prosecution's submissions, a reply on these aspects is not warranted. His request should be rejected.

(iii) *The migration process (paragraph 20 of the Prosecution Response)*

14. Maxime Mokom submits that he could not have anticipated the Prosecution's submissions about the migration process in paragraph 20 of its Response and therefore should have the opportunity to reply.²¹ *First*, he states that contrary to the Prosecution's submissions, the migration process was not undertaken in stages between August 2022 and January 2023,

¹⁹ [Prosecution Response](#), paras.25, 26.

²⁰ [Request to Reply](#), para.10.

²¹ [Request to Reply](#), paras. 11-13.

nor did the migrated material become available to his duty counsel on an ongoing basis.²² Rather, the migrated material was made available to the Defence only on 30 January 2023 and 1 February 2023.²³ *Second*, he asserts that since the Pre-Trial Chamber had clearly stated that the Prosecution's statutory disclosure obligations could not be fulfilled by migrating documents from one case record to another—a matter which the Prosecution had itself agreed to—Maxime Mokom could not have reasonably anticipated that the Response “would rely on 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).”²⁴

15. Maxime Mokom again misstates the Prosecution's arguments. Paragraph 20 of the Prosecution Response contains a brief summary of the multiple steps taken by the Prosecution throughout 2022—while the litigation on Maxime Mokom's legal representation was ongoing—and then in 2023, to assist Maxime Mokom's preparations including, in particular, his access to evidence. These steps demonstrate that the Prosecution's conduct was far from “wilfully or recklessly refusing to acknowledge” potential article 67(2) information or negligently blind to it, as Maxime Mokom had suggested.²⁵

16. *First*, as for the description of the migration process in the third bullet point of paragraph 20, this highlighted a particular step taken by the Prosecution to reduce or mitigate any prejudice which may have flowed to Maxime Mokom from the Pre-Trial Chamber's decision to condition disclosure on the assignment of permanent counsel. It correctly states that the Prosecution undertook the migration process in stages beginning in August 2022, and completed the migration process by 26 January 2023, encompassing 31,848 items of evidence.²⁶

17. To clarify any ambiguity, the next sentence in the third bullet point—stating in part, “[t]hus, it became available to Maxime Mokom's duty counsel on an ongoing basis”—is meant to indicate that the migrated evidentiary materials were made available to duty counsel on an ongoing basis. Some 805 documents which had been referenced in the Application for the Arrest Warrant were disclosed to the Defence in July 2022. In parallel, the Prosecution set out to migrate all items in the *Yekatom & Ngaissona* case which had been disclosed in that case by

²² [Request to Reply](#), para. 11, referring to [Prosecution Response](#), para. 20 bullet 3.

²³ [Request to Reply](#), para. 12.

²⁴ [Request to Reply](#), para. 13.

²⁵ *Contra* [Request for Compensation](#), paras. 13-14.

²⁶ [Prosecution Response](#), para. 20 bullet 3.

the date of Mokom's arrest. The first round of migration of 3,107 redacted documents was completed in August 2022. Some of these items were promptly released to the Defence following the Chamber's 30 November 2022 authorisation of the migration process. However, due to a technical error, the vast majority of these items were not released, and the process resumed and completed only in January 2023. The larger phase of the intended migrated material—some 28,741 items—was also the subject of several technical setbacks which the eCourt Support Unit was only able to resolve for the remainder of the material on 26 January 2023, and to release it on 27 January 2023. The material became accessible to permanent counsel a few days after his appointment on 23 January 2023. This was a full month *before* the 28 February 2023 formal disclosure deadline. With this clarification, a reply on this issue is thus unnecessary.

18. *Second*, the Prosecution Response does not show that the Prosecution “mischaracteris[ed] 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”.²⁷ Again, Maxime Mokom misstates the Prosecution’s arguments. In paragraph 20 of its Response, the Prosecution referred to steps it took to implement the migration of evidentiary materials so that they would be accessible to Maxime Mokom before the formal disclosure process began, given that the Pre-Trial Chamber had conditioned this on the appointment of permanent counsel, and that there was no certainty as to when this might occur. The Prosecution did so to demonstrate the substantial efforts it made to reduce and mitigate any potential prejudice to Maxime Mokom which could have resulted from conditioning the formal disclosure of evidence on the appointment of permanent counsel (as the Pre-Trial Chamber had decided). The Prosecution agrees, as it did previously before the Pre-Trial Chamber, that disclosure through eCourt – in accordance with the uniform eCourt Protocol – remains the only way to formally disclose items to the Defence. It completed such formal disclosure of evidence (through eCourt) by the deadline of 23 February 2023 (save for the 14 documents mentioned in the Prosecution’s Response)²⁸. A reply is unnecessary to underscore a point that the Prosecution takes no issue with, and is not justified by Maxime Mokom’s misstatement of the relevance of the Prosecution’s reference to the migration process in its Response.

²⁷ *Contra* [Request to Reply](#), para. 13.

²⁸ [Prosecution Response](#), paras. 11, 20-22.

19. Accordingly, a reply on these aspects of the Prosecution's Response is not warranted and his request should be rejected.

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

20. Maxime Mokom does not identify the paragraphs of the Prosecution's Response that he wishes to reply to regarding the threshold for compensation under article 85(3).²⁹ The Prosecution assumes he wishes to reply to paragraphs 5 to 9 of its Response and answers his request for reply on these submissions accordingly.

21. As the applicant for compensation under article 85(3), it would be expected that Maxime Mokom would have made submissions on the threshold and how it was met in the request. He does not demonstrate how he could not have anticipated that the Prosecution would address the high standard for compensation in the Court's jurisprudence and the criteria to be met, and argue that Mokom's request fell far short. Again, a reply should not be granted to address shortcomings in the Request for Compensation.

22. In any event, Maxime Mokom's suggestion that the standard in article 85(3) could be met simply by showing that his circumstances in and of themselves are "exceptional"³⁰ is legally incorrect under the Court's well established test for article 85(3). As the Court's case law referred to in the Prosecution's Response makes clear,³¹ to succeed in a claim under article 85(3), a person seeking compensation under article 85(3) must show conclusive facts that they suffered from a miscarriage of justice. Even then, compensation does not ensue as of right. A reply along the lines that Maxime Mokom has outlined in his Request to Reply would not assist the Chamber given the Court's already clear and consistent case law on the standard under article 85(3).

23. In sum, Maxime Mokom has not shown that leave to reply is warranted to address any of the four issues. The Prosecution accordingly respectfully requests the Chamber to reject his Request to Reply.

²⁹ [Request to Reply](#), paras. 14-15.

³⁰ [Request to Reply](#), paras. 14-15.

³¹ [Prosecution Response](#), paras. 5-8.

Conclusion

24. For the foregoing reasons, the Prosecution respectfully requests the Compensation Chamber to reject the Request to Reply.



Karim A. A. Khan KC, Prosecutor

Dated this 8^h day of May 2024
At The Hague, the Netherlands