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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

Public

Public Redacted Version of "Mokom Defence Reply to 'Prosecution's Response to Maxime Mokom's Request for Compensation under Article 85 of the Rome Statute'", ICC-01/14-01/22-337-Conf, 27 May 2024

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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 the Article 85 Chamber's 'Decision on Mr Mokom's request for leave to reply and request for a hearing,[1] the Defence for Mr Mokom' ('the Defence') responds to the 'Prosecution's Response to Maxime Mokom's Request for Compensation under Article 85 of the Rome Statute' ('the Response').[2]

II. PROCEDURAL BACKGROUND

2. On 3 May 2024, the Defence sought leave to reply to four issues in the Prosecution Response.[3] On 8 May 2024, the Prosecution filed a response.[4]

3. On 10 May 2024, the Article 85 Chamber the Defence leave to reply on the issues of (i) the Prosecution's obligations under Article 67(2) of the Statute, (ii) the prosecution failure to comply with its disclosure obligations at the arrest warrant stage and (iii) the migration process of material from the *Yekatom & Ngaïssona* case record to the *Mokom* case record.[5]

III. LEVEL OF CONFIDENTIALITY

4. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence files this Reply confidentially, given that the Response was filed confidentially and the Reply refers to confidential filings, documents and information. A public redacted version will be filed.

IV. SUBMISSIONS

(i) The Prosecution failed to comply with its obligations under Article 67(2)

5. There is no reasonable argument to be made that what happened to Mr Mokom represents the effective function of the Court's pre-trial and confirmation stages. A suspect detained for 19 months, without provisional release, before the Prosecution then announces that there is no reasonable prosect of a conviction. This is, objectively, a highly undesirable and unsatisfactory outcome, by any standard. How did it happen?

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[1] Article 85 Chamber, Decision on Mr Mokom's request for leave to reply and request for a hearing, 10 May 2024, ICC-01/14-01/22-336.
[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 ('Response').
[3] Request for Compensation under Article 85 of the Rome Statute, 17 April 2024, ICC-01/14-01/22-334-Conf.
[4] 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, 8 May 2024, ICC-01/14-01/22-335-Conf.
[5] ICC-01/14-01/22-336, para. 5.

6. At the centre of this process, was the Prosecution failure to properly identify exculpatory material in a timely manner. The Response sets out the Prosecution position that "there is no fundamental right to have Article 67(2) information identified in all disclosed items."[6] This is at odd with the practice and jurisprudence of this Court, and led to the situation in which Mr Mokom found himself; detained for 19 months when a credible case against him simply never existed.

7. Article 67(2) of the Statute is unambiguous: the Prosecutor must disclose anything in the Prosecution's possession or control which either a) shows or tend to show the innocence of the accused, b) mitigate the guilt of the accused or c) affect the credibility of prosecution evidence. **The manner in which** material is disclosed to the Defence has an impact on the right of the suspect under Article 67(l)(b) of the Statute to have adequate time and facilities for the preparation of his or her defence." As such, "in order to **fully realise the right of the suspect to have adequate time to prepare his defence"**, the Prosecutor must indicate, for each disclosed item, which sections are deemed to contain incriminating and/or exonerating information.[7]

8. In relation to the identification of exculpatory material, the mere transmission of allegedly exculpatory material in large amounts, with no effort of indicating its relevance to a case, may have an adverse impact on the evaluation of the time needed by the Defence to prepare for a confirmation hearing.[8] Indeed, **"the most important factor"** in safeguarding the rights of the Defence and putting the Defence in a position to "genuinely exercise its rights" is not for the Prosecution to disclose the greatest volume of evidence but for it to disclose the evidence which is of true relevance to the case, whether that evidence be incriminating or exculpatory.[9]

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[6] *Contra*. ICC-01/14-01/22-332-Conf, para. 19.

[7] *The Prosecutor v. Abd-Al-Rahman*, Second Order on disclosure and related matters, 2 October 2020, ICC-02/05-01/20-169, paras. 23; See also *The Prosecutor v. Al Hassan*, Decision on the Evidence Disclosure Protocol and Other Related Matters, 16 May 2018, ICC-01/12-01/18-31-tENG-Corr, paras. 24-25.

[8] *The Prosecutor v. Abu Garda*, Second Decision on issues relating to Disclosure, 15 July 2009, ICC-02/05-02/09-35, para. 14.

[9] *The Prosecutor v. Abd-Al-Rahman*, Second Order on disclosure and related matters, 2 October 2020, ICC-02/05-01/20-169, paras. 23-24; *The Prosecutor v. Al Hassan*, Decision on the Evidence Disclosure Protocol and Other Related Matters, 16 May 2018, ICC-01/12-01/18-31-tENG-Corr, paras. 24-25; *The Prosecutor v. Bemba*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, ICC-01/05-01/08-55, para. 67; *See also The Prosecutor v. Gicheru*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 21 December 2020, ICC-01/09-01/20-67, paras. 31-32; *The Prosecutor v. Gbagbo*, Decision Establishing a Disclosure System and a Calendar for Disclosure, 24 January 2012, paras. 24-25.

9. As such, decisions taken by the Prosecution in the fulfilment of its duty of disclosure under Article 67(2) of the Statute are **important and essential prosecutorial obligations**, which must be discharged scrupulously and fairly, and therefore warrant a Chamber's intervention if this duty has not been properly fulfilled by the Prosecution.[10]

10. In Mr Mokom's case, there was no scrupulous or fair discharge of the Prosecution obligations. The Defence wrote to the Prosecution pointing to evidence which was directly at odds with the Prosecution case, and showed Mr Mokom's innocence, which had not been identified as exculpatory. The Pre-Trial Chamber found "good reasons to consider that the Prosecution's duty under article 67(2) of the Statute has not been properly fulfilled in the present case", warranting its intervention, and an order to the Prosecution to identify information as potentially exculpatory a few weeks before the confirmation hearing, years after the issuance of the warrant of arrest.[11] The Pre-Trial Chamber reminded the Prosecution that the Chamber had twice instructed the Prosecution in November 2022 to differentiate all evidentiary items in the case, by indicating, for **each** item the **sections deemed to contain incriminating, exonerating and/or other information**.[12] The Prosecution had made a strategic decision not to do so, to the detriment of Mr Mokom.

11. There is also a question of timing. The Prosecution is required to disclose exculpatory evidence *immediately* after having *identified* any such evidence, unless there are justified reasons that prevent the Prosecutor from doing so.[13] The Prosecution is also bound to disclose potentially exculpatory material falling under Article 67(2) 'as soon as practicable' and the fact that a document contains incriminatory information is not a valid reason to disregard any potentially exculpatory information contained in the document.[14]

[10] Decision on the Defence's requests for disclosure and rectification of disclosure metadata, 5 June 2023, ICC-01/14-01/22-219-Conf, para. 31 ('5 June Decision'); *The Prosecutor v. Bemba*, Trial Chamber III, Decision on the defence application for additional disclosure relating to a challenge on admissibility, 2 December 2009, ICC-01/05-01/08-632 (the 'Bemba Decision'), para. 22.
[11] 5 June Decision, paras. 33-34; *See also The Prosecutor v. Lubanga*, Trial Chamber I, Decision on Disclosure Issues, Responsibility for Protective Measures and other Procedural Matters, ICC-01/04-01/06-1311-Anx2, 24 April 2008, para. 94.
[12] 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.
[13] *The Prosecutor v. Abd-Al-Rahman*, Second Order on disclosure and related matters, 2 October 2020, ICC-02/05-01/20-169, para. 17; *The Prosecutor v. Yekatom*, Public Redacted Version of Decision on Disclosure and Related Matters, 23 January 2019, ICC-01/14-01/18-64-Red, para. 16; *The Prosecutor v. Ongwen*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 27 February 2015, para. 18.
[14] *The Prosecutor v. Yekatom and Ngaïssona*, Decision on the Yekatom Defence Request Concerning Disclosure Violation and Disclosure of Exculpatory Material, 22 July 2020, ICC-01/14-01/18-595, para. 21; *The Prosecutor*

12. In Mr Mokom's case, it was not done. Following the 5 June Decision, the Prosecution was ordered to properly identify exculpatory evidence before 21 June 2023.[15] The Prosecution then disclosed over that period of time 406 items containing exculpatory evidence. This disclosure then abruptly stopped on 21 June 2023, with no other exculpatory disclosure having been forthcoming **to this day**. In the background, however, the proceedings in the trial of *Yekatom & Ngaïssona* continued. Important exculpatory evidence was being generated through the testimonies of witnesses in *Yekatom & Ngaïssona*. It is utterly inconceivable that no additional exculpatory information came into the possession of the Prosecution after the deadline of 21 June 2023, and through confirmation hearing and the months that followed.

13. In the end, it appears the Prosecution did not comply with its obligations, because of its fundamental misconception, repeated again in its Response, that "there is no fundamental right to have Article 67(2) information identified in all disclosed items."[16] Different Chambers of the Court have been repeatedly clear that this obligation exists. Mr Mokom's case is a breathtaking example of the concrete dangers and unfairness that arise from the Prosecution's contrary position, which must now be corrected.

(ii) The Prosecution failed to comply with its obligation as regards exculpatory evidence at the arrest warrant stage

14. According to the Prosecution, on 16 October 2023, nearly two months after the confirmation hearing, it finally reached the conclusion that it no longer had a "reasonable prospect of conviction"[17] against Mr Mokom. If the Prosecution is to be believed, it moved from a complete and unwavering belief in every corner of its case against Mr Mokom in September 2023, to an admission that its case was unsustainable by mid-October.

15. To justify this reversal, the Prosecution stated that "several critical witnesses are unavailable to testify and that ongoing investigative efforts are unlikely to result in new evidence of comparable probative value", and that "[a]mong the unavailable witnesses are insider witnesses who provide critical information regarding the charges against Mr.

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v. Yekatom and Ngaïssona, Decision on the Yekatom Defence Motion for Finding of Disclosure Violation and Additional Remedies, 7 December 2021, ICC-01/14-01/18-1202-Red, para. 13.

[15] Decision on the Defence's requests for disclosure and rectification of disclosure metadata, 5 June 2023, ICC-01/14-01/22-219-Conf, paras. 38-39.

[16] *Contra*. ICC-01/14-01/22-332-Conf, para. 19.

[17] Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka, 16 October 2023, ICC-01/14-01/22-275, para. 5.

Mokom".[18] This unavailability was the ***only information*** that was provided by the Prosecution to justify the withdrawal of charges against Mr Mokom.

16. Here, it is important to note that on 7 December 2022, the Prosecution was ordered by the Pre-Trial Chamber to submit "monthly reports indicating whether it is undertaking or intends to undertake further investigative activities in relation to the present proceedings prior to the confirmation of charges hearing, and if so, a detailed schedule of and the estimated time line for completing any investigative steps the Prosecution may plan to conduct, highlighting any obstacles that may arise".[19] In the final monthly report produced pursuant to this decision, on 1 August 2023, the Prosecutor said it had been carrying limited investigative activities, the scope and purpose of which should not "in any way affect the preparation of Parties and Participants for the confirmation hearing".[20]

17. During the confirmation hearing, held between 22 and 24 August 2023, the Prosecution provided no indication to the Pre-Trial Chamber or the parties that any of its witnesses were unavailable, and the question of availability of witnesses was never raised in the monthly reports provided by the Prosecution between December 2022 and August 2023.[21]

18. Then, in its additional submissions of 14 September 2023, the Prosecution continued to seek the confirmation of each and every charge against Mr Mokom relying, *inter alia,* on "detailed evidence of insider witnesses who were with Mr. Mokom [REDACTED] for large portions of the charged period (*e.g.* P-0889 and P-2232)", insider witnesses participating in large-scale attacks who were purportedly linked in some way to Mr Mokom (*e.g.* P-0966, P-1521, P-0446, P-1339 and P-2269), witnesses on the ground in Bangui in frequent touch with

[18] Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka, 16 October 2023, ICC-01/14-01/22-275, para. 3

[19] Order on disclosure and related matters, 7 November 2022, ICC-01/14-01/22-104, para. 11.

[20] Confidential redacted version of Prosecution's seventh Notification, 1 August 2023, ICC-01/14-01/22-252-Red, para. 4.

[21] Confidential Redacted Version of "Prosecution's First Notification on Investigative Activities, 5 December 2022, ICC-01/14-01/22-117-Conf-Red; Confidential Redacted Version of "Prosecution's Second Notification on Investigative Activities", 6 January 2023, ICC-01/14-01/22-129-Red; Confidential Redacted Version of "Prosecution's Third Notification on Investigative Activities", 3 February 2023, ICC-01/14-01/22-152-Red; Confidential Redacted Version of "Prosecution's Fourth Notification on Investigative Activities", 1 March 2023, ICC-01/14-01/22-172-Red; Confidential Redacted Version of "Prosecution's Fifth Notification on Investigative Activities", 3 April 2023, ICC-01/14-01/22-187-Red; Confidential Redacted Version of "Prosecution's Sixth Notification on Investigative Activities", 1 May 2023, ICC-01/14-01/22-197-Red; Confidential redacted version of "Prosecution's Sixth Notification on Investigative Activities", 1 June 2023, ICC-01/14-01/22-216-Conf-Exp; Confidential Redacted Version of "Prosecution's Sixth Notification on Investigative Activities", dated 3 July 2023, 3 July 2023, ICC-01/14-01/22-239-Red; Confidential redacted version of "Prosecution's Seventh Notification on Investigative Activities", 1 August 2023, ICC-01/14-01/22-252-Red.

Mr Mokom in the relevant period (*e.g.* P-0884) and witnesses well connected with senior Anti-Balaka leadership (*e.g.* P-1847).[22] The Prosecutor spent 24 pages explaining how its multiple insider witnesses were corroborated and completed by eyewitness accounts of victims of the crimes charged and documentary evidence emanating from Mr Mokom.

19. Critically, however, these same 14 September submissions is the first acknowledgement by the Prosecution of the vacuous nature of its case. The Prosecution **admitted** in footnote 64, that the evidence of some insider witnesses was inconsistent with the Prosecution theory of the case, but that this was due to "a lack of candour given the witnesses' own involvement and potential exposure".[23] What is entirely inexplicable, was how the 14 September admission of the 'lack of candour' of the key insider witnesses, then somehow turned into an availability problem by 16 October 2023.

20. This 180-turn is easily explained by the fact that, as detailed in the Compensation Claim annexes, a review of the Prosecution evidence reveals that there was ***never*** any reasonable prospect of conviction, including at the time the Prosecution made an application for a Warrant of Arrest. It is this reality which elevates Mr Mokom's situation to a grave and manifest miscarriage of justice. Mr Mokom was arrested and detained for 19 months precisely because the exculpatory evidence in this case was withheld not only from Mr Mokom, but also from the Pre-Trial Chamber that issued the warrant of arrest against him.

21. The Defence has asserted that the Prosecution had a duty of candour to that Pre-Trial Chamber and was required to reveal and identify the evidence undermining the alleged charges against Mr Mokom.[24] In Response, the Prosecution disingenuously claims: (i) that it is not obliged to communicate all the evidence in its collection;[25] (ii) that it identified, **in June 2023,** possible exculpatory evidence;[26] (iii) that 65 exculpatory items out of 156 in its possession were before the Pre-Trial Chamber, so that it would "necessarily have considered and reviewed them in determining that reasonable grounds existed"[27] and therefore, (iv) that Mr Mokom

[22] Prosecution's Additional Submissions following the Confirmation of Charges Hearing, 14 September 2023, ICC-01/14-01/22-269-Conf, para. 3.
[23] Prosecution's Additional Submissions following the Confirmation of Charges Hearing, 14 September 2023, ICC-01/14-01/22-269-Conf, para. 39, footnote 64.
[24] Request for Compensation under Article 85 of the Rome Statute, 17 April 2024, ICC-01/14-01/22-334-Conf, para. 21.
[25] Response, para. 13.
[26] Response, paras. 14-15.
[27] Response, para. 16.

cannot now speculate whether the Pre-Trial Chamber would have issued the arrest warrant if it had seen the remaining items in the Prosecution's possession at the time.

22. In response to (i), Mr Mokom never asserted that the Prosecution is obliged to communicate all evidence in its possession, but rather that it must communicate, at all stages of the proceedings, that evidence which is relevant, and which allows the parties concerned to perform as accurate assessment of facts as possible.

23. As regards (ii), namely that the Prosecution finally identified in June 2023, give years after it sought a warrant of arrest against Mr Mokom, ***some*** exculpatory evidence in its collection, is of little comfort to Mr Mokom, and certainly of little assistance to the Pre-Trial Chamber who functioned without the benefit of that exculpatory evidence when agreeing that he should be arrested, taken from his home and family and detained in The Hague.

24. For (iii), the Prosecution's application for a warrant of arrest against Mr Mokom,[28] dated 30 October 2018 ('Application'), is substantially based on the same key insider witnesses listed in the 14 September submissions. In the Application, Witness P-0446 is mentioned 38 times in the footnotes, P-0884's evidence is relied on 77 times, P-0889's evidence is cited 36 times, P-0966's evidence is cited 58 times, P-1339's evidence is cited 63 times, P-1521's evidence is cited 55 times, P-1719's evidence is cited 45 times, and P-1847's evidence is cited 48 times. Witnesses P-2232 and P-2269 are not mentioned. The Prosecution made detailed references to ***specific lines*** of the statements of these insider witnesses throughout the Application. Critically, the Prosecution then refers **nowhere** to specific instances of exculpatory evidence. Effectively, this exculpatory evidence is buried in the thousands of pages of supporting materials, thereby leaving to chance – **and speculation** – whether the Pre-Trial Chamber would be able to identify it. It did not.

25. The Prosecution's approach to identifying exculpatory evidence was then replicated with the Defence. The Prosecution dumped hundreds of thousands of pages of evidence on the Defence and failed to identify the exculpatory portions of that evidence. The only difference being, the Defence did locate the exculpatory material, and bring the Prosecution failures to

[28] Confidential Redacted Version of "Prosecution's Application for Warrants of Arrest for Patrice Edouard Ngaissona, Maxime Mokom, Alfred Yekatom, 30 October 2018 ('the Application'), ICC-01/14-01/22-1-Conf-Red.

light. Having done so, the Prosecution was then properly reprimanded by the Pre-Trial Chamber in the 5 June decision.[29]

26. The Prosecution's claim that "[a]s these 65 items [of exculpatory evidence] were before the Pre-Trial Chamber, it would necessarily have considered and reviewed them in determining that reasonable grounds existed to believe that Maxime Mokom was responsible for the crimes committed by the Anti-Balaka […]"[30] is preposterous and a complete afterthought. Indeed, when the Defence was pointing at these portions of the Prosecutor's evidence as being exculpatory, Mr Vanderpuye, the Prosecution Senior Trial Attorney, was vehemently denying that the casefile contained any other exculpatory material.[31]

27. As regards (iv), the Prosecution frames this issue as being whether the Pre-Trial Chamber properly assessed the 65 items of exculpatory evidence before issuing the Warrant of Arrest, and whether it would have issued the Warrant of Arrest, had the remaining 91 items of exculpatory evidence been properly communicated to the Pre-Trial Chamber. This is the wrong question entirely.

28. The key allegations in the Application rest solely on the key insider witnesses mentioned above. Paragraph 55 (footnote 50) alleges that Mr Mokom coordinated the march of Anti-Balaka groups to Bangui, based on the evidence of P-1521, P-0884 and P-0446. Paragraph 56 (footnote 57) alleges that Mr Mokom coordinated attacks from Zongo, based on the evidence of P-0889 and P-0446. Paragraph 67 (footnote 83) alleges that Mr Mokom coordinated local Anti-Balaka leaders, based on the evidence of P-0884 and P-0446. Paragraph 75 (footnote 116) alleges that Mr Mokom provided money for weapons and ammunitions, based on the evidence of *inter alia* P-0884 and P-1847. Paragraph 131 (footnotes 256 and 256) alleges that Mr Mokom was the *de facto* Anti-Balaka operations coordinator from Zongo, based on the evidence of P-0884, P-0966, P-1521, P-1339, P-1719 and P-1847.

29. The Prosecutor created a patchwork with carefully selected extracts of their evidence to mislead the Pre-Trial Chamber into issuing a Warrant of Arrest against Mr Mokom. Amongst the 156 items of exculpatory evidence in possession of the Prosecution when it submitted its

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[29] Decision on the Defence's requests for disclosure and rectification of disclosure metadata, 5 June 2023, ICC-01/14-01/22-219-Conf, para.28.
[30] Response, para. 16.
[31] Request for Compensation under Article 85 of the Rome Statute, 17 April 2024, ICC-01/14-01/22-334-Conf, paragraph 12, referring to Annex A.

Application, 29 were directly linked to insider witnesses mentioned in that Application: P-0446 (18 items), P-0884 (7 items), P-0889, P-0966, P-1339, P-1719 (1 item each).

30. However, this debate is now purely speculative, because the Prosecution only acknowledged that these items were exculpatory **in June 2023**. As such, at the time of the Warrant of Arrest, there was no acknowledgement, let alone a concrete indication for the Pre-Trial Chamber, that this material was exculpatory. On this issue, the Defence can assure this Article 85 Chamber that the review of exculpatory evidence performed by the Prosecution between 5 and 21 June 2023, and which abruptly ceased on that day, is far from exhaustive.

31. Accordingly, the proper question is not whether the Pre-Trial Chamber seized with the Application would have issued the Warrant of Arrest. Rather, it is whether the Prosecution misrepresented the strength and probative value of its evidence to seek this Warrant of Arrest. Put differently, the issue is not whether the Pre-Trial Chamber managed to identify the exculpatory evidence in the haystack it received with the Application, the issue is whether the Prosecution occasioned a grave and manifest miscarriage of justice towards Mr Mokom by failing to properly identify that evidence, from the very beginning of this case.

32. The identification of exculpatory material by the Prosecution is necessary to place the Pre-Trial Chamber in the position of an **objective observer** when assessing the evidence underlying an application for a warrant of arrest. In interpreting the Article 58(1)(a) standard of "reasonable grounds to believe" that a person has committed a statutory crime, the Court has been guided by the "reasonable suspicion" standard under Article 5(1)(c) of the European Convention of Human Rights, which "requires the existence of some facts or information which would satisfy an **objective observer** that the person concerned may have committed the offence".[32]

33. As such, the status of "*objective observer*" of a Pre-Trial Chamber during the assessment of the reasonable grounds to believe that a person may have committed a Statutory crime under

[32] *The Prosecutor v. Al Bashir*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 3 February 2010, ICC-02/05-01/09-73, para. 31; *The Prosecutor v. Bemba*, ICC Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para. 24. See also European Court of Human Rights, Fox, Campbell and Hartley v. United Kingdom, 30 August 1990, Application no. 12244/86, 12245/86, 12383/86, para. 32; ECtHR, Włoch v. Poland, 19 October 2000, Application no. 27785/95, para. 108, stating that "[t]he question then is whether the arrest and detention were based on sufficient objective elements to justify a 'reasonable suspicion' that the facts at issue had actually occurred."

Article 58(1)(a) is dependent on the material put before the Chamber by the Prosecution, and therefore on the level of identification and provision of exculpatory material by the Prosecution at the time. In other words, if a Pre-Trial Chamber decides to issue an arrest warrant based on the evidentiary material 'A-B-C' put before it by the Prosecution, the Chamber is not *per se* in the position of an *objective observer* assessing evidentiary material gathered by the Prosecution if the Chamber was not given access to exculpatory material 'D-E-F'. This is precisely what happened in Mr Mokom's case. The selective patchwork was presented, and only five years later did the Prosecution start to look into the vast swathes of material which undermined the very case it sought to bring. This was a grave and manifest miscarriage of justice, stemming directly from the refusal or incapacity of the Prosecution to identify exculpatory evidence in its casefile, including the fact that an unknown number of its witnesses lacked candour and provided evidence inconsistent with the Prosecutor's theory.

(iii) The Prosecution failed to comply with its obligation to pursue all reasonable lines of inquiry

34. In cases where reasonable lines of enquiry have remained unexplored or not adequately investigated by the Prosecution without providing reasonable explanation, the Court has found that the Prosecution's failure to conduct a full and thorough pre-confirmation investigation violated its statutory obligations under Article 54(l)(a) of the Statute and that the timing, manner and volume of disclosure of new evidence, including exculpatory evidence, failed fully to respect the accused's rights, including under Articles 54(1)(c) and 67(2) of the Statute.[33] In a concurring opinion in *Kenyatta*, Judge Van den Wyngaert held that "there can be no excuse for the Prosecution's negligent attitude towards verifying the trustworthiness of its evidence", thereby highlighting the "grave problems in the Prosecution's system of evidence review" which led to the **Prosecution's failure to investigate properly prior to confirmation**.[34]

35. In this context, the admission by the Prosecution on 14 September – that the evidence of some of its witnesses was inconsistent with the Prosecution's theory, possibly because they lacked candour – is important.[35] The use of this language, "inconsistent with the Prosecution's

[33] *The Prosecutor v. Kenyatta*, Trial Chamber V, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, para. 123.
[34] *The Prosecutor v. Kenyatta*, Trial Chamber V, Concurring Opinion of Judge Christine Van den Wyngaert, 26 April 2013, ICC-01/09-02/11-728-Anx2, paras. 4-5.
[35] Prosecution's Additional Submissions following the Confirmation of Charges Hearing, 14 September 2023, ICC-01/14-01/22-269-Conf, para. 39, footnote 64.

theory", is significant, and demonstrates the tunnel vision which undermined the work of the Prosecution throughout this case. The Prosecution's role is not to blow life into its pre-determined theories and reject the evidence that does not conform with them. The Prosecution's role is to investigate the gravest crimes and form a rational and objective opinion as to the existence or not of probative evidence to prosecute those suspected of having committed them.

36. This was not done in the present case. The Prosecution never presented the full picture of the evidence in this case, either at the arrest warrant or confirmation stage. It failed to pursue all lines of inquiry, preferring to sculpt the evidence to match its theory, and then dropping the charges against Mr Mokom entirely when the two were utterly incompatible. This fundamentally erroneous approach undermines confidence in the Prosecution's commitment to establishing the truth in the case and amounts to a "grave and manifest miscarriage of justice" following Mr Mokom's wrongful prosecution, leading to violations of his fundamental right to liberty based on the issuance of an erroneous warrant of arrest and of his fundamental rights under Article 67(2) of the Statute.

(iv) The migration process of material from the Yekatom & Ngaïssona case record to the Mokom case record

37. The Prosecution Response is based on incorrect assertions of fact in relation to the migration process of material from the *Yekatom & Ngaïssona* case record to the *Mokom* case record. The Prosecution stated:

> […] In particular, [the Prosecution] promptly took steps to advance the disclosure of all relevant material to Maxime Mokom. […] In particular, it sought and obtained the Pre-Trial Chamber's authorisation to "migrate" material in eCourt that was disclosed in the *Yekatom and Ngaïssona* to the *Mokom* eCourt database, so as to allow Maxime Mokom and his duty counsel to have immediate access to all evidence potentially material to his case. This process was undertaken in stages, beginning in August 2022 and completed by 26 January 2023. This migrated material encompassed a total of 31,848 items. Thus, it became available to Maxime Mokom's duty counsel on an ongoing basis, and access was immediately provided to his permanent counsel upon his appointment on 23 January 2023.[36]

38. By its imprecise use of the terms "migration" as opposed to "disclosure", and "made available" as opposed to "formally disclosed", the Prosecution submissions are misleading. To be clear, and contrary to the Prosecution submissions, the migration process was not

[36] Response, para.20.

"undertaken in stages, beginning in August 2022 and completed by 26 January 2023". No migrated material "became available to Maxime Mokom's Duty Counsel on an ongoing basis."[37] These statements are factually incorrect.

39. If a "first round of migration of 3,107 redacted documents"[38] out of 31,848 had been completed in August 2022, it was not made available to the Defence. No material has been migrated to the Defence in August 2022.

40. On 19 January 2023, only 920 documents were available[39] on Registry JEM following two disclosures. One disclosure of 805 documents had been made following the Pre-Trial Chamber's order on 27 June 2022 to disclose the documents that had been used in the Prosecution's application for arrest warrant against Mr Mokom.[40] The second disclosure of 116 documents was made following the Order of 7 November 2022 regarding exculpatory material to be disclosed.[41]

41. The idea of migrating the *Yekatom & Ngaïssona* case record to the *Mokom* case record had not even been discussed by August 2022, and was only raised in September 2022, by the Prosecution, during a Status Conference.[42] The Pre-Trial Chamber issued its order authorising the migration on 30 November 2022.[43]

42. Again, contrary to the Prosecution submissions,[44] the migration of the remainder of the items, being 28,741 documents out of 31,848, was not made available to the Defence on 23 January 2023. This is factually incorrect. The Defence was given access to these documents only on 30 January 2023.[45] Nor can the Prosecution try to re-write this process by alleging it had "[taken] steps to advance the disclosure of all relevant material to Maxime Mokom" in an attempt to prove that it has not been negligent.[46] The Prosecution, itself, had insisted that migrated documents were not part of the *Mokom* case record.[47]

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[37] Response, para. 20.
[38] ICC-01/14-01/22-335-Conf, para. 17.
[39] While searching "Document ID has value". See Annex A, p. 2.
[40] ICC-01/14-01/22-62, para. 26.
[41] ICC-01/14-01/22-104, paras. 8,12.
[42] ICC-01/14-01/22-T-004-CONF-ENG ET, pp. 8-13, 22-24, 28-29, 33.
[43] Second order on disclosure and related matters, 30 November 2022, ICC-01/14-01/22-116, p. 8.
[44] ICC-01/14-01/22-332-Conf, para. 20.
[45] See Annex A, p. 2.
[46] ICC-01/14-01/22-332-Conf, para. 20.
[47] *Inter partes* meeting with the Prosecution on 27 June 2023; See also Annex B.

43. As explained in the Request for Compensation, the facts are simple. Mr Mokom was arrested and transferred to the ICC on 14 March 2022. The first disclosure of 805 documents occurred in July 2022. 116 documents, supposed to indicate exculpatory material, were then disclosed with incorrect disclosure notes in November 2022. On 30 January 2023, 28,741 documents were thrown out to the Defence without any corresponding metadata – no information as to date, source identity, type of document, link to a witness – and without these documents then forming part of the *Mokom* case record. During *inter partes* meetings and emails, the Defence shared its view that migration ***must*** properly form part of the case record, which the Prosecution rejected.[48] As such, by 1 June 2023, only 4,707 documents had been formally disclosed to the Defence.

44. This meant that the Defence had seven months until the confirmation of charges to familiarise itself with more than 32,000 documents – whether migrated or disclosed. While doing so, the Defence pointed out the Prosecution's massive disclosure failings.[49] The Chamber ordered the Prosecution to remedy this and an attempt was made with the disclosure of 406 documents containing exculpatory evidence and the modification of previously incorrect disclosure notes of the 116 first exculpatory documents.[50] Submitting that the 406 documents, disclosed only two months before the confirmation of charges hearing, were somewhere "made available" to the Defence – and not disclosed - does not relieve the Prosecution from its disclosure obligations.[51]

45. There are no doubts that it is these disclosure failings that translated into the so-called unavailability of witnesses after the confirmation hearing. Upon finally realising, through the annexes of exculpatory evidence filed by the Defence, that the case had indeed no reasonable prospect of conviction, The Prosecution, rather than do the honourable thing and admit it had

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[48] *Inter partes* meeting with the Prosecution on 27 June 2023; See also Annex B: "[PTC:] As to the status of the 'migrated' materials, the Chamber recalls that, in ICC-01/14-01/22-116, the Chamber explicitly held that the Prosecution must formally disclose such materials. In addition, in ICC-01/14-01/22-157, the Chamber further addressed the status of the 'migrated' materials, and concluded that 'the "migrated" materials that will not be formally disclosed in the present proceedings in accordance with the Chamber's instructions will not be taken into account in any manner'. In more specific terms, 'migrated materials' that have been 'made available' to the Defence through Nuix without having been formally disclosed by the Prosecution under the appropriate classification (or potentially by the Defence should it wish to rely on such materials), will not be considered for the purposes of the confirmation of charges hearing. […] OTP proposal : Then, all materials not formally considered disclosed would be removed from the existing Mokom Nuix database. […] The Defence position is that the migrated material forms part of the case record.".
[49] Mokom Defence Request for Disclosure, 4 May 2023, ICC-01/14-01/22-198-Conf.
[50] Decision on the Defence's requests for disclosure and rectification of disclosure metadata, 5 June 2023, ICC-01/14-01/22-219-Conf, p. 20.
[51] Response, para. 21.

failed to properly assess its evidence, continued to mislead the Court, and have, to this day, failed to reveal, to the Pre-Trial Chamber and Mr Mokom, the real reasons behind the withdrawal of the indictment.

V. CONCLUSION

46. In reality, in order to defend its conduct of the case against Mr Mokom, the Prosecution has been forced to take positions on disclosure, identification, and disclosure/migration that are not only wrong, but are wholly incompatible with the practice and caselaw of this Court.

47. In this case, mistakes were made. Due care was not taken. Accordingly, Mr Mokom's fundamental rights under Article 67(2) of the Statute were not respected. For all the reasons set out in the Request for Compensation, Mr Mokom is the victim of a wrongful prosecution and miscarriage of justice under Article 85(3) of the Statute.

Respectfully submitted,

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The Hague, The Netherlands
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