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**International  
Criminal  
Court**

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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**

**Public with Confidential Annex A**

**Public Redacted Version of "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**

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***Court to:***

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## I. INTRODUCTION

1. On 16 October 2023, the Prosecution notified Pre-Trial Chamber II of its withdrawal of all charges against Maxime Jeoffroy Eli Mokom Gawaka, pursuant to article 61(4) of the Rome Statute.<sup>1</sup> The proceedings were terminated the following day.<sup>2</sup> In his Request for Compensation,<sup>3</sup> Maxime Mokom claims, *inter alia*, that he suffered a grave and manifest miscarriage of justice under article 85(3) of the Statute based on alleged prosecutorial misconduct.<sup>4</sup> He also claims compensation for alleged judicial and administrative misconduct by the Court's judiciary and the Registry under articles 85(1) and (3).<sup>5</sup> In total, Maxime Mokom seeks €2,850,000 as compensation for himself, and a further €500,000 as compensation for his wife and children.<sup>6</sup>

2. Maxime Mokom's claim of alleged prosecutorial misconduct is without merit, and his Request fails to meet the requirements of article 85(3). Maxime Mokom has not shown that he has suffered a grave and manifest miscarriage of justice arising from the Prosecution's conduct. Maxime Mokom's allegations, taken individually or cumulatively, do not constitute conclusive facts showing that there has been a grave and manifest miscarriage of justice that caused the termination of the proceedings against him, as required by article 85(3). Rather, his Request is predicated on incorrect facts and speculation, and conflates materially distinct factual and legal issues. Contrary to Maxime Mokom's submissions,<sup>7</sup> both the Prosecution's Arrest Warrant Application<sup>8</sup> and the subsequent Arrest Warrant<sup>9</sup> issued by the Pre-Trial Chamber, were lawful. Further, Maxime Mokom's contention that he was "the target of a

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<sup>1</sup> ICC-01/14-01/22-275 ("[Notice of Withdrawal](#)").

<sup>2</sup> ICC-01/14-01/22-276 ("[Withdrawal Order](#)").

<sup>3</sup> ICC-01/14-01/22-329-Red ("[Request](#)").

<sup>4</sup> [Request](#), paras. 9-28.

<sup>5</sup> [Request](#), paras. 29-61.

<sup>6</sup> [Request](#), p. 23.

<sup>7</sup> [Request](#), para. 20.

<sup>8</sup> ICC-01/14-18-US-Exp ("Arrest Warrant Application").

<sup>9</sup> ICC-01/14-01/22-2-Red2 ("[Arrest Warrant](#)").

wrongful prosecution”<sup>10</sup> is baseless. His arrest and detention were properly founded on the requisite “reasonable grounds to believe” standard for issuance of an arrest warrant under article 58(1).<sup>11</sup> Moreover, the Prosecution was of the view that the evidence met the “substantial grounds to believe” standard for confirmation of charges under article 61.<sup>12</sup> These statutory thresholds differ from the standard of “reasonable prospect of conviction” which the Prosecution applied, in accordance with the Office of the Prosecutor’s policy, in withdrawing the charges based on its assessment of the evidence in light of the prevailing circumstances. Maxime Mokom conflates these thresholds in his Request.

3. The Prosecution addresses Maxime Mokom’s contentions against the Prosecution only,<sup>13</sup> and not the claims he advances against other Organs of the Court.<sup>14</sup> None of the allegations advanced in the Request against the Prosecution demonstrate a miscarriage of justice.<sup>15</sup> The Prosecution therefore respectfully requests that his Request be rejected.<sup>16</sup>

## II. CONFIDENTIALITY

4. Pursuant to regulation 23bis(1) of the Regulations of the Court, the Prosecution files this response including its Annex A as confidential since they refer to confidential documents and information. A public redacted version will be filed as soon as practical.

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<sup>10</sup> [Request](#), para. 25.

<sup>11</sup> [Arrest Warrant](#), para. 19.

<sup>12</sup> As the Prosecution submitted in ICC-01/14-01/22-269-Red (“[Prosecution’s Additional Submissions following the Confirmation of Charges Hearing](#)”), paras. 2 and 58.

<sup>13</sup> [Request](#), paras. 9-28.

<sup>14</sup> [Request](#), paras. 20-61.

<sup>15</sup> ICC-01/05-01/08-3694 (“[Bemba Compensation Decision](#)”), paras. 33-34 (“[article 85(3) encompasses] scenarios of exceptional nature, [different from those typical of a trial with] specific opportunities of review. [It guarantees] against serious violations of [fair trial], including [possible compensation for] serious abuse of the judicial process.”).

<sup>16</sup> [Request](#), para. 62 *et seq.*

### III. COMPENSATION UNDER ARTICLE 85(3) IS AN EXCEPTIONAL REMEDY

5. Article 85(3) requires “exceptional circumstances” and is predicated on a judicial finding—namely, “conclusive facts”—that a “grave and manifest miscarriage of justice” has occurred.<sup>17</sup> These exceptional circumstances are limited to cases of “certain and undeniable miscarriage of justice”, following, for instance, an erroneous decision or wrongful prosecution,<sup>18</sup> leading to “a clear violation of the applicant’s fundamental rights” and “serious harm to the applicant.”<sup>19</sup> This miscarriage of justice must have led to the person’s acquittal or the termination of the proceedings, as denoted by the phrase “for that reason” at the end of the provision.<sup>20</sup> Although “wrongful prosecution” may also include instances of gross negligence,<sup>21</sup> procedural errors or violations of the person’s rights which are not the basis for their acquittal or the termination of the proceedings cannot sustain an article 85(3) compensation claim.<sup>22</sup>

<sup>17</sup> Article 85(3), [Statute](#); rule 173(2), [RPE](#); G. Bitti, Compensation to an arrested or convicted person, in R. S. Lee, *The International Criminal Court, Elements of the Crimes and Rules of Procedures and Evidence*, Transnational Publisher (2001) (‘Bitti’), p. 629. See [Bemba Compensation Decision](#), para. 39.

<sup>18</sup> See [Ngudjolo Compensation Decision](#), para. 45 (fn. 79) (endorsing the Prosecution’s view on article 85(3) to cases of *mala fide* prosecutions, [Ngudjolo Compensation Hearing](#), T.21, ls. 4-12); [Bemba Compensation Decision](#), para. 41; H. Brady and M. Jennings, Appeal and Revision, in R. S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International (1999) (‘Brady and Jennings’), p. 304 (“[article 85(3)] exceeds current conventional and customary international law...[it] was seen to encapsulate the common law requirement for *mala fides* [for] the Prosecutor, ...it will only be in exceptional circumstances that [compensation for release following acquittals will be awarded]”).

<sup>19</sup> [Bemba Compensation Decision](#), para. 41; [Ngudjolo Compensation Decision](#), para. 41 (Black’s Law Dictionary: “miscarriage of justice” is “returning an unfair verdict based on the evidence presented as a legal justice failure”; *Oxford Dictionary*: a “grave and manifest miscarriage of justice” is a “failure of a court or judicial system to attain the ends of justice, especially one which results in the conviction of an innocent person”); [Granger v. United Kingdom](#), para. 26 (regarding an appeal against conviction, “miscarriage of justice” covers such matters as misdirections to the jury or wrong decisions on the admissibility of evidence, as well as breaches of natural justice).

<sup>20</sup> V. Nerlich, Article 85, in K. Ambos, *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4<sup>th</sup> ed (2022) (‘Nerlich’), p. 2437 (mn. 24).

<sup>21</sup> [Bemba Compensation Decision](#), para. 42 (“similarly grave instances” including “examples of gross negligence in the administration of justice to the detriment of the suspect or the accused”); [Ngudjolo Compensation Decision](#), paras. 41, 43; *E.g.*, [Law Commission of India Report](#), p. 78 (where police or prosecutorial misconducts (malicious or negligent) led to wrongful prosecution with a court making such a finding; [Blé Goudé Compensation Decision](#), para. 38 (“affecting the pre-trial chamber’s ability to evaluate the evidence brought before it and resulting in an incorrect decision”).

<sup>22</sup> Nerlich, p. 2437 (mn. 24).

6. In *Bemba*, the Compensation Chamber held that:

“reference to a grave and manifest miscarriage of justice (under article 85(3)) was never meant to address situations falling within the scope of the dynamics inherent to the natural developments of criminal proceedings. Rather, it was meant to encompass scenarios of an exceptional nature, substantially differing from those that are typical of procedural phases of a trial and for which there are specific opportunities for review”.<sup>23</sup>

For instance, an acquittal would not automatically constitute grounds for compensation.<sup>24</sup> Similarly, not every flaw in the proceedings, or even violation of fair trial rights, amounts to a grave and manifest miscarriage of justice.<sup>25</sup> Rather, a violation must be shown to be “so serious and exceptional” that “the proper administration of justice was compromised.”<sup>26</sup>

7. To this extent, article 85(3) imposes a particularly high threshold.<sup>27</sup> Thus, Chambers have held that “a grave and manifest miscarriage of justice [...] is a certain and undeniable miscarriage of justice following, for example, an erroneous decision by a trial chamber or wrongful prosecution, *which must have given rise to a clear violation of the applicant’s fundamental rights and caused serious harm to the applicant*”.<sup>28</sup> A

<sup>23</sup> *Bemba Compensation Decision*, para. 33.

<sup>24</sup> See Brady and Jennings, p 303; Biti, p. 623 (fn. 3), citing the report of the Working Group on Procedural Matters at the Rome Conference, noting “[t]here are delegations which believe that there should be an unfettered right to compensation where a person is acquitted or released prior to the end of trial. [article 85(3)] is intended to limit the right to compensation to cases of grave and manifest miscarriage of justice. Others (*sic*) delegations considered this text to be too restrictive”); see also *Rwamakuba Compensation Decision*, paras. 21-31, (there is no right to compensation for an acquittal), upheld in *Rwamakuba Compensation AD*, paras. 10, 15, 25; *Zigiranyirazo Compensation Decision*, paras. 19-22 (“[t]he language of [article 85] is permissive rather than compulsory”), upheld in *Zigiranyirazo Compensation AD*, paras. 7-8.

<sup>25</sup> *Bemba Compensation Decision*, para. 42.

<sup>26</sup> *Bemba Compensation Decision*, para. 42; *Ngudjolo Compensation Decision*, paras. 41, 43 (*i.e.*, (i) conviction of an innocent person; (ii) wrong decisions on admissibility of evidence; (iii) demonstrated or substantiated suspicion of corruption; (iv) lack of judicial impartiality; and (v) other examples of gross negligence in the administration of justice); *Blé Goudé Compensation Decision*, para. 30; Nerlich, pp. 2436-2437 (mns. 22-24).

<sup>27</sup> *Ngudjolo Compensation Decision*, para. 45 (using the phrase “wrongful prosecution”); *Bemba Compensation Decision*, para. 42 (“[...] It seems beyond controversy that the provision is not limited to the notion of *mala fides*, since this was explicitly excluded during article 85(3)’s drafting history.”); Brady and Jennings, pp. 303-304; D. Dreyse, “Article 85: Compensation to an arrested or convicted person”, in J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire Article par Article*, Vol. II, 2nd Ed (Editions Pedone: Paris, 2019), pp. 2142-2144.

<sup>28</sup> *Bemba Compensation Decision*, para. 41, citing *Ngudjolo Compensation Decision*, paras. 15, 45 (emphasis added).

wrongful prosecution requires substantially more than the withdrawal of charges on the basis of the Prosecution's internal assessment of the prevailing circumstances.<sup>29</sup> The threshold of article 85(3) is therefore not met absent concrete evidence that an alleged wrongful prosecution amounted to a violation so serious that it compromised the proper administration of justice. The applicant bears the burden of proof.

8. Compensation is therefore only available under article 85(3) where the applicant establishes: (i) the existence of 'exceptional circumstances'; and (ii) 'conclusive facts' showing a 'grave and manifest miscarriage of justice'.<sup>30</sup> Furthermore, even if these requirements are met, compensation does not ensue as of right. Rather, the Chamber has discretion to decide whether to grant compensation: "[w]hile the first two paragraphs [85 (1) and (2)] are centred on the person entitled to compensation, the focus of article 85(3) shifts to the Court itself, therefore signalling that the concerned person is not entitled to a right to compensation."<sup>31</sup>

9. As shown below, Maxime Mokom has not met the stringent requirements of article 85(3) and as such, his Request insofar as the claims against the Prosecution, should be rejected.

#### IV. THERE WAS NO MISCARRIAGE OF JUSTICE

10. Maxime Mokom incorrectly contends that his arrest and detention were unlawful, amounting to a grave and manifest miscarriage of justice.<sup>32</sup> Contrary to his arguments, the Prosecution did not "mis[lead] the Pre-Trial Chamber, wilfully or recklessly"<sup>33</sup> to obtain the Arrest Warrant issued against him. Nor did the Prosecution

<sup>29</sup> "[E]ven when [...] the prosecutor, following the presentation of evidence and/or legal arguments, requests an acquittal from the bench. It follows that a 'failed' prosecution does not necessarily mean that the prosecution was 'wrongful', irrespective of whether the accused spent time in detention" (*Blé Goudé Compensation Decision*, para. 29).

<sup>30</sup> *Bemba Compensation Decision*, para. 39.

<sup>31</sup> *Bemba Compensation Decision*, para. 40.

<sup>32</sup> *Request*, paras. 9-22. Irrespective of the heading of Section IV.1.a ("Unlawful arrest and detention"), Maxime Mokom does not submit that his arrest and detention were "unlawful" within the meaning of article 85(1), at least in relation to his submissions on alleged prosecutorial misconduct. To establish this, Maxime Mokom would have needed to show that his arrest and detention violated specific provisions of the Statute (such as article 55(1)(d)) or the Rules, as required under article 85(1), which he has not; *see Nerlich*, p. 2431 (mn. 9).

<sup>33</sup> *Contra Request*, para. 20.

mislead the Chamber about the strength of the evidence against Maxime Mokom<sup>34</sup> or, fail to acknowledge the existence of “crucial exculpatory information which cast significant doubt on its own case.”<sup>35</sup>

11. Maxime Mokom refers to 406 items which the Prosecution classified as potentially exonerating (“PEXO”) or in which it identified information possibly falling within article 67(2) of the Statute, following the Pre-Trial Chamber’s order of 5 June 2023.<sup>36</sup> In Annex D to his Request, Maxime Mokom provides a table with 390 exemplary items from the pool overall disclosed with article 67(2) information. These exemplary items are not a uniform set of PEXO materials. Rather they consist of documents properly classified in accordance with the applicable Court-wide eCourt Protocol as: (i) ‘PEXO’; and (ii) ‘INCRIM’ or ‘Rule 77’, with possible article 67(2) portions identified in additional metadata, as required by the Pre-Trial Chamber. The vast majority of these 390 items, namely 247 items, fall in the latter category (ii). As shown below, except for 14 items (10 of which are mentioned in the list of exemplary items), all items had been made available and disclosed to Maxime Mokom by February 2023.<sup>37</sup>

*A. The Prosecution did not mislead the Chamber*

12. The Prosecution did not mislead the Chamber by misrepresenting the evidence underpinning the Arrest Warrant Application. In fact, the application referred to 817 discrete evidentiary items,<sup>38</sup> including the full statements of many of the witnesses on whose evidence Maxime Mokom selectively and substantially bases his claim. After reviewing the Application and the underlying evidence, the Pre-Trial Chamber issued

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<sup>34</sup> *Contra Request*, para. 21.

<sup>35</sup> *Request*, para. 22.

<sup>36</sup> *Request*, para. 14.

<sup>37</sup> See Annex A. See also below describing the ‘migration’ process, which was completed by 26 January 2023 and the Prosecution’s disclosure process occurring through February 2023, see para. 20 below.

<sup>38</sup> ICC-01/14-18-US-Exp, Arrest Warrant Application.



the Arrest Warrant,<sup>39</sup> following the procedure provided by the Statute. The arrest and subsequent detention were therefore lawful.

13. *First*, the Prosecution is not required to rely upon (and communicate to a Pre-Trial Chamber) *all* of the evidence in its (relevant) evidence collection in support of an arrest warrant application. Instead, 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 has committed the alleged crime (and that the arrest of the person appears necessary).<sup>40</sup> Maxime Mokom's suggestion that, in this process, the Prosecution withheld an "extreme" amount of potentially exculpatory material to mislead the Pre-Trial Chamber and thereby obtain the Arrest Warrant in violation of the Statute is speculative and factually wrong.<sup>41</sup>

14. As noted, and shown in the Annex A, following the Pre-Trial Chamber's order of 5 June 2023, the Prosecution further identified and communicated possible article 67(2) information within items.

15. The Prosecution completed this exercise by 21 June 2023, with the results shown further below.<sup>42</sup>

16. When the Prosecution filed its Arrest Warrant Application in October 2018, 156 of the items set out in Annex D of Maxime Mokom's Request were in its possession, of which 65 items were included in the Arrest Warrant Application. As these 65 items were before the Pre-Trial Chamber, it would necessarily have considered and reviewed them in determining that reasonable grounds existed to believe that Maxime

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<sup>39</sup> [Arrest Warrant](#).

<sup>40</sup> Article 58(2)(d); ICC-01/04-01/07-572 ("[Judgment on Ngudjolo's Interim Release Appeal](#)"), para. 18; ICC-02/05-01/09-73 ("[Judgment on Al Bashir Arrest Warrant Appeal](#)"), para. 30. *See also Prosecutor v. Mbarushimana*, Judgment on the confirmation of charges, [ICC-01/04-01/10-514](#), OA4, 30 May 2012, para. 47. The same must also apply at the article 58 stage.

<sup>41</sup> [Request](#), para. 14.

<sup>42</sup> See para. 20.

Mokom was responsible for crimes committed by the Anti-Balaka under various modes of liability, in accordance with article 58(1).<sup>43</sup> Maxime Mokom himself concedes that the Chamber cited to 31 of these items in support of its Arrest Warrant decision.<sup>44</sup>

17. In his compensation request, Maxime Mokom cannot now challenge whether the Pre-Trial Chamber properly assessed these 65 items when deciding to issue the Arrest Warrant. He has no basis to do so, and it would be procedurally irregular. His suggestion that the Pre-Trial Chamber might not have issued the Arrest Warrant had it seen the remaining items which had been in the Prosecution's possession at the time (i.e. the remaining 91 of the 156 items listed in Annex D to the Request),<sup>45</sup> is speculative. Maxime Mokom does not meet his burden of establishing "conclusive facts" of a grave and manifest miscarriage of justice as required under article 85(3).

***B. The Prosecution did not withhold material from the Defence***

18. The Prosecution conducted diligent and objective investigations pursuant to article 54(1).<sup>46</sup> In claiming that the Prosecution violated its disclosure obligations, Maxime Mokom does not assert that the Prosecution did not give him access to or disclose PEXO items or other items containing possible article 67(2) information in portions thereof earlier than June 2023. Rather, he asserts he had a fundamental right to have all article 67(2) information identified for him in any portion of items classified and disclosed as INCRIM, Rule 77, or PEXO. Significantly, except for 14 items, the items on which the Request is based<sup>47</sup> had been made available and disclosed to him throughout 2022 and by 23 February 2023.

19. *First*, there is no fundamental right to have article 67(2) information identified in all disclosed items. Rather, the eCourt Protocol requires only the legal classification of a disclosed item *as a whole*, pursuant to a limited "pick list" of options, namely

<sup>43</sup> [Arrest Warrant](#), paras. 18-19 and 22 *et seq.*

<sup>44</sup> [Request](#), para. 17 and Annex E, citing to 31 documents.

<sup>45</sup> [Request](#), paras. 15-16, 20.

<sup>46</sup> *Contra Request*, paras. 13-14, 22, 24-28.

<sup>47</sup> [Request](#), paras. 14-16.

“INCRIM; PEXO; Rule 77”.<sup>48</sup> Moreover, as shown by the email communications between the Prosecution and permanent counsel, annexed to the Request,<sup>49</sup> counsel was able to digest and analyse material disclosed in accordance with his responsibilities,<sup>50</sup> without the additional metadata later directed by the Pre-Trial Chamber.

20. *Second*, rather than withholding items, the Prosecution took multiple steps to facilitate Maxime Mokom’s preparation as expeditiously as possible, following his transfer to the Court on 14 March 2022 and his initial appearance on 22 March 2022. In particular, it promptly took steps to advance the disclosure of all relevant material to Maxime Mokom. These actions belie the Request’s characterisation of the Prosecution’s actions as “reckless” or “wilfully or negligently blind.” Quite the contrary; for example:

- On 31 March 2022—one week after his initial appearance—the Prosecution requested the Pre-Trial Chamber to adopt the same disclosure protocols which had been issued by the Pre-Trial Chamber in the related *Yekatom and Ngaïssona* case (i.e., the standardised eCourt Protocol and Redaction Protocol). It noted that this would: (i) ensure a uniform practice between the two cases, given their substantial overlap; (ii) facilitate the immediate disclosure of materials already assessed and disclosed by the Prosecution during the pre-trial phase of the *Yekatom and Ngaïssona* case; and (iii) assist the Prosecution to meet its disclosure obligations in a timely manner and streamline the preconfirmation procedure

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<sup>48</sup> For the applicable version of eCourt protocol at the time, see Unified Technical protocol for the provision of evidence, witness and victims information in electronic form, [ICC-01/14-01/18-64-Anx](#), at p. 14, annexed to ICC-01/14-01/18-64-Red (“[Yekatom Decision on Disclosure and Related Matters](#)”), cited also at ICC-01/14-01/22-62 (“[Order on the Conduct of Proceedings](#)”), para. 21.

<sup>49</sup> Request, Annex C.

<sup>50</sup> See [ICC-01/05-01/13-177](#), para. 10 (observing that “[w]hilst the Prosecutor is under a strict obligation to provide the Defence with the entirety of the materials it considers relevant, thereby making the Defence fully aware of the nature, cause and content of the charges, the Defence cannot abdicate its duty and responsibility to examine such materials, which examination is necessary for it to be in a position to decide whether to challenge the evidence or its reading by the Prosecutor, as well as to identify portions which it deems relevant for the purposes of the Chamber’s determinations under article 61(7) of the Statute”).

by avoiding unnecessary or duplicative processes, particularly *vis-à-vis* redactions implemented in *Yekatom and Ngaïssona*, and their categorisation.<sup>51</sup>

- On 8 April 2022—one week thereafter—on behalf of Maxime Mokom, the Prosecution requested Trial Chamber V (seized of the *Yekatom and Ngaïssona* case), to grant him access to all relevant material arising in the *Yekatom and Ngaïssona* proceedings, namely: (i) all confidential, excluding *ex parte*, submissions of the Parties and Participants; (ii) all transcripts of testimonies, including private sessions; (iii) all confidential, excluding *ex parte*, decisions issued by the Chamber; (iv) all confidential exhibits deemed formally submitted into evidence; and (v) all witness statements, with the existing redactions applied'.<sup>52</sup> The matter remained pending before Trial Chamber V until it was ultimately rejected on 23 August 2022.<sup>53</sup> Notably, in that period and thereafter, no intervention was made by Maxime Mokom's counsel. In this context, the Pre-Trial Chamber acknowledged that "contrary to previously adjudicated requests for access to information and material in another case before the Court and other international criminal tribunals, the Access Request was submitted by the Prosecution, rather than the Defence".<sup>54</sup>
- Given the pending litigation at the time (and throughout 2022) on the assignment of permanent counsel for Maxime Mokom and the Pre-Trial Chamber's conditioning of disclosure on such assignment, the Prosecution persisted in its efforts to provide Maxime Mokom with access to material evidence. In particular, it sought and obtained the Pre-Trial Chamber's authorisation to "migrate" material in eCourt that was disclosed in the *Yekatom*

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<sup>51</sup> ICC-01/14-01/22-31 ("[Prosecution's Observations on the Modalities and Procedure for Evidence Disclosure](#)"), paras. 2-6.

<sup>52</sup> ICC-01/14-01/18-1353 ("[Yekatom and Ngaïssona Prosecution's Request to grant Mokom access to the record of the case record](#)").

<sup>53</sup> See ICC-01/14-01/18-1552 ("[Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the Yekatom and Ngaïssona Case](#)").

<sup>54</sup> ICC-01/14-01/22-147 ("[Decision regarding the Prosecution's submission on material in the Yekatom and Ngaïssona case](#)"), para. 10.

*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.<sup>55</sup> This process was undertaken in stages, beginning in August 2022 and completed by 26 January 2023.<sup>56</sup> 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.

- On 27 June 2022, the Pre-Trial Chamber instructed the Prosecution to “indicate for evidence disclosed as potentially exonerating the corresponding page and paragraph numbers of the relevant sections of documents, statements and transcripts in a dedicated metadata field [... and] provide the relevant information using the code PEXO”.<sup>57</sup>
- By 23 February 2023, the Prosecution had disclosed 116 items as PEXO.
- Following the Pre-Trial Chamber’s decision on 5 June 2023, and in line with the Chamber’s instructions, the Prosecution then conducted a further review of its collection including the previously disclosed items for the purpose of indicating possible article 67(2) information in portions thereof. Between 9 and 21 June 2023, the Prosecution disclosed metadata updates for 359 items, portions of which included possible article 67(2) information. These 359 items included 195 items previously disclosed and properly classified as INCRIM. In addition, of the items previously classified as PEXO (116 items since November 2022), 99 documents remained classified as PEXO, with 80 documents receiving

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<sup>55</sup> “Migration” meant that documents disclosed in *Yekatom and Ngaïssona* were transferred to a specific eCourt database for the *Mokom* case.

<sup>56</sup> Note that the Prosecution began the process of migration in anticipation of the Pre-Trial Chamber’s approval thereof. In fact, the Pre-Trial Chamber only “authorised” the proposed migration on 30 November 2022 (*see ICC-01/14-01/22-116*, para. 9).

<sup>57</sup> *Order on the Conduct of Proceedings*, para. 30. In the related *Yekatom and Ngaïssona* case, the Pre-Trial Chamber had expressly rejected a Defence request to require additional designations of potential alternative characterisations of information contained *within* items that were otherwise properly disclosed in accordance with the existing eCourt Protocol; ICC-01/14-01/18-163 (“*Yekatom and Ngaïssona Second Decision on Disclosure and Related Matters*”), paras. 23-24.

additional indications of possible article 67(2) information in the disclosure notes. 17 were reclassified as Rule 77, having been previously erroneously disclosed as PEXO. The Prosecution identified and disclosed 14 previously undisclosed items as PEXO or with indications of possible article 67(2) information in the disclosure notes. The total number of items disclosed with a PEXO legal classification as of June 2023 was 196.

21. Maxime Mokom claims that the amount of possible article 67(2) information indicated in the Prosecution's disclosure only in June 2023 was so "extreme" as to reveal its prior wilful, reckless or "negligently blind" assessment of the case.<sup>58</sup> This claim ignores that of the relevant items, the vast majority had been made available and disclosed by 23 February 2023. Only 14 items, legally classified as PEXO or which included article 67(2) information identified there in, had not been disclosed prior to June 2023.

22. Of these 14 items:

- four were newly available material identified by the Prosecution (in transcripts from the *Yekatom and Ngaiissona* case);
- the remaining ten items consisted of: one publicly available media article; one publicly available mapping report; four Prosecution witness statements, two investigator's notes, a Prosecution witness screening note and a non-ICC statement.<sup>59</sup> In these documents, the disclosure notes point to limited article 67(2) information and nothing specific to Maxime Mokom himself. Significantly, the type of information identified in the notes for these items had also already been made available to the Defence through disclosure of other materials.

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<sup>58</sup> [Request](#), paras. 12-14.

<sup>59</sup> Annex A to this filing.

23. Maxime Mokom also incorrectly asserts that the Prosecution failed in its duties under article 54(1) by relying on “manufactured” and “demonstrably false allegations.”<sup>60</sup> For instance, he asserts that the evidence of an eye witness who attests to Maxime Mokom’s communication with a senior Anti-Balaka commander is false because the contact does not appear in a certain call data records.<sup>61</sup> However, this argument incorrectly presumes that the Prosecution had obtained all call data records for all of Maxime Mokom’s personal phones and those he otherwise used in coordinating Anti-Balaka comzones in military operations.<sup>62</sup> The absence of a call data for an unknown device cannot reasonably dispel clear evidence of a witness who was present when the call occurred,<sup>63</sup> especially an insider who was in a position to know. It also ignores its consistency with the fact that call data which the Prosecution has obtained reflects Maxime Mokom’s consistent contact with Anti-Balaka leaders and comzones, including in the lead up to and throughout the charged incidents.

24. In sum, Maxime Mokom has not met his burden of establishing “conclusive facts” that the Prosecution’s conduct violated any fundamental right amounting to a grave and manifest miscarriage of justice.<sup>64</sup> His arrest was lawfully sought by the Prosecution, and properly ordered by the Pre-Trial Chamber. He has not established that the Prosecution failed to carry out a diligent and objective investigation in accordance with article 54(1). Nor has he shown that the Prosecution wilfully or

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<sup>60</sup> [Request](#), para. 26.

<sup>61</sup> [Request](#), para. 26, citing CAR-OTP-00001168 rows 76-77.

<sup>62</sup> See e.g., CAR-OTP-2100-2569-R01, at 2572-2575, para. 19 (noting that “[f]rom ZONGO, MOKOM coordinated all the attacks in the provinces and later on in BANGUI”).

<sup>63</sup> See CAR-OTP-2090-0561, para. 90 (stating that “*This [NDJO] operation was a success because it was conducted the way MOKOM had ordered it. I know all this, [REDACTED] was with MOKOM. [REDACTED], when he made the calls to DEDANE*”); CAR-OTP-2122-7962, at 7977-7980 (stating that MOKOM was leading the Anti-Balaka from NDJO, BOSSEMBELE, BOSSANGO, BOKANGOLO, DAMARA, and YALOKÉ, to BANGUI).

<sup>64</sup> To the extent he suggests in Request (para. 8) that the Pre-Trial Chamber made any such finding of “conclusive facts” of a grave and manifest miscarriage of justice in its Order in relation to the Prosecution’s Notice of Withdrawal, this is unsustainable. The Pre-Trial Chamber simply accepted the Prosecution’s withdrawal under article 61(4), in accordance with the Statute’s express terms.

recklessly misrepresented the evidence or was negligently blind to the strength of the evidence against him when seeking the arrest warrant or confirmation of charges.<sup>65</sup>

*C. The Prosecution's withdrawal of charges does not show wrongful prosecution*

25. The Prosecution's decision to withdraw the charges against Maxime Mokom does not show that he was wrongfully prosecuted resulting in a grave miscarriage of justice.<sup>66</sup> His argument conflates two distinct matters: on the one hand, the evidence upon which Maxime Mokom was arrested and detained, which met the arrest warrant standard, notwithstanding the existence of article 67(2) information; and on the other hand, the reasons for the Prosecution's decision to withdraw the charges. Notably, the Request insufficiently substantiate information to which Maxime Mokom was not privy that could be dispositive of his culpability in respect of the charges or otherwise fatal to the Prosecution's case.<sup>67</sup>

26. His assertion that the Prosecution's withdrawal of the charges is a "concession" that it had pursued a case that it "had no ability to substantiate"<sup>68</sup> is unfounded. In particular, he ignores the reasons stated by the Prosecution for its decision to withdraw the charges against Maxime Mokom in its Notice of Withdrawal.<sup>69</sup> The Prosecution did not state or "concede" that the evidence was insufficient to establish "reasonable grounds to believe", or indeed "substantial grounds to believe", that Maxime Mokom was criminally responsible for the charged crimes.<sup>70</sup> To the contrary, the Prosecution's view remained that the evidence met the article 58 standard under the Statute. Furthermore, as argued at the confirmation hearing, the Prosecution

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<sup>65</sup> In *Yekatom and Ngaïssona*, which arose from the same investigation, the Trial Chamber recently found that the Prosecution did not fail to effectively investigate exonerating circumstances within the meaning of article 54(1), nor could it "discern any 'wilful blindness', ignoring of exonerating evidence, or other similar acts or omissions on the Prosecution's part"; [Yekatom Request Allegedly Fabricated Evidence Exclusion Decision](#), paras. 50-52.

<sup>66</sup> [Contra Request](#), para. 28.

<sup>67</sup> [Contra Request](#), paras. 18-19

<sup>68</sup> [Request](#), para. 28; *see also* para. 33.

<sup>69</sup> *See* [Notice of Withdrawal](#), paras. 3-5.

<sup>70</sup> [Contra Request](#), para. 28 where Maxime Mokom argues that the allegation that the Prosecution ignored exculpatory evidence and misled the Chamber "is nowhere better demonstrated than through its ultimate concession that the case was not strong enough to proceed".



considered that the evidence also met the article 61. Accordingly, the arrest and continued detention and prosecution of Maxime Mokom were legally sound.

27. The Prosecution's decision to withdraw the charges was therefore not based on the view that the evidence was insufficient to sustain an arrest or to confirm the charges against Maxime Mokom. Rather, in accordance with the Office of the Prosecutor's policy and practice, the Prosecution continually assesses the viability and strength of its cases in the prevailing circumstances on the standard of a "reasonable prospect of conviction".<sup>71</sup> It did so in this case.

28. Contrary to Maxime Mokom's assertions,<sup>72</sup> as stated in the Prosecution's Notice of Withdrawal, its decision to withdraw the charges was based on the unavailability of several critical witnesses, including insider witnesses who provided critical information regarding the charges against Maxime Mokom, and its assessment that further investigative efforts by the Prosecution to supplement this evidence had been exhausted.<sup>73</sup> It formed the view that there was no longer a reasonable prospect of conviction against him.

29. In sum, Maxime Mokom has failed to show that the Prosecution's decision to withdraw the charges against him confirms that he was wrongfully prosecuted.

## V. THE CHAMBER SHOULD NOT AWARD COMPENSATION

30. Maxime Mokom has failed to demonstrate conclusive facts showing that he suffered a grave and manifest miscarriage of justice resulting from the Prosecution's actions, much less, that he should be awarded compensation. Accordingly, his request for compensation insofar as the Prosecution should be rejected.

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<sup>71</sup> Notice of Withdrawal, para. 5; ICC-OTP, Policy Paper on Case Selection and Prioritisation, paras. 23, 53; ICC-OTP, Policy on Situation Completion, para. 35. See e.g. ICC-02/05-254-Red ("Public Redacted Version of Prosecution's Response to Order for clarification as to the Prosecutor's statements before the United Nations Security Council") para. 13; ICC-01/14-01/21-155-RED3 ("Said Pre-Confirmation Brief"), fn. 733; ICC-01/09-02/11-687 ("Muthaura Notice of Withdrawal"), para. 1. The standard may also be expressed as a "realistic prospect of conviction".

<sup>72</sup> Contra Request, paras. 3, 8, 11, 28.

<sup>73</sup> Notice of Withdrawal, paras. 3-5.

31. In any event, his request to join his wife and children to his claim under article 85<sup>74</sup> is legally flawed. Only the person who was unlawfully arrested/detained (article 85(1)), wrongfully convicted (article 85(2)) or whose acquittal or termination of proceeding resulted from a grave and manifest miscarriage of justice (article 85(3)) can seek compensation.<sup>75</sup>

32. *First*, the ordinary meaning of the terms in article 85 excludes any other person who might have suffered indirect consequences from bringing a claim under article 85. The heading of article 85 restricts compensation to “an arrested or convicted person”, and each sub-paragraph reiterates that only the person who directly suffered the consequences can seek compensation.<sup>76</sup>

33. *Second*, a contextual reading of article 85 confirms that the drafters intended to exclude standing for family members. For example, unlike article 85, article 84 expressly grants immediate family members standing to bring a request for revision of a conviction or sentence. Additionally, rule 175 provides that when assessing the amount of compensation, a chamber should consider the “consequences of the grave and manifest miscarriage of justice on the [...] family [...] situation of the person filing the request”.<sup>77</sup> Thus, while an award for compensation under article 85 could consider the impact on an applicant arising from his family situation, a family member of the applicant does not have standing to file a claim in their own right related to harm they allegedly may have suffered.

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<sup>74</sup> [Request](#), paras. 62-63.

<sup>75</sup> Bitti, p. 626.

<sup>76</sup> Article 85(1): “Anyone who has been victim of unlawful arrest or detention [...]”. Article 85(2): “[...] the person who has suffered punishment as a result of such conviction shall be compensated [...]”. Article 85(3): “In exceptional circumstances, [the Court] may in its discretion award compensation [...] to a person who has been released from detention [...]”.

<sup>77</sup> Rule 175, emphasis added.

**VI. RELIEF SOUGHT**

34. For the reasons set out above, the Prosecution respectfully requests that Maxime Mokom's request for compensation and corresponding orders, insofar as related to the alleged conduct of the Prosecution, be rejected. The Prosecution takes no position on whether an oral hearing should be held.



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**Karim A. A. Khan KC, Prosecutor**

Dated this 30<sup>th</sup> day of April 2024  
At The Hague, the Netherlands