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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public Redacted Version of “Prosecution’s Request the Formal Submission of Prior
Recorded Testimony pursuant to Rule 68(2)(b)” 3 November 2020,
(ICC-01/14-01/18-710-Conf)**

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Landry Omissé-Namkeamaï
Marie-Hélène Proulx

Legal Representatives of Victims

Mr Dmytro Suprun
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verril

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests the formal submission of the prior recorded testimony of nine Prosecution Witnesses¹, pursuant to rule 68(2)(b) of the Rules of Evidence and Procedure (“Rules”).

2. The prior recorded testimony of the Nine Witnesses comprises their Witness Statements and associated exhibits.² It provides evidence concerning the nature and extent of the widespread Anti-Balaka attack carried out between September 2013 and December 2014 in the western Central African Republic (“CAR”), as set out in the Pre-Trial Chamber’s Decision on Confirmation of Charges.³ The proposed evidence is relevant, probative, reliable, and suitable for formal submission in written form.

3. The formal submission of the Nine Witnesses’ prior statements pursuant to rule 68(2)(b) will expedite the proceedings, obviate the witnesses’ unnecessary appearance, save valuable court time, and would not unfairly prejudice the Accused. The Prosecution has taken note of the Chamber’s guidance, and carefully assessed the prior statements tendered, to provide the Chamber with the necessary information to conduct a case-by-case assessment of each application.⁴ Further, in doing so, it has sought to narrowly identify the portions of the statements on which it intends to rely where appropriate, in order to reduce the overall volume of material.

¹ These comprise witnesses P-2324, P-2326, P-2325, P-1773, P-1864, P-1871, P-0289, P-2132 and P-2393 (“Nine Witnesses”).

² See ICC-01/05-01/08-1386, OA5 OA6, paras. 79-81, confirming that written witness statements can be introduced as “previously recorded testimony”. See also ICC-01/09-01/11-1938-Red-Corr, paras. 30-33, analysing the term “previously recorded testimony” in light of the Rules’ *travaux préparatoires*, the Court’s prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08-2012-Red, para.136; ICC-01/05-01/08-886, para. 6; ICC-01/04-01/06-1603, para. 18; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362.

³ See ICC-01/14-01/18-403-Conf-Corr, paras. 64, 70, *et seq*, and pp. 111, 107.

⁴ ICC-01/14-01/18-685.

4. As submitted, the proposed prior statements do not concern the acts or conduct of the Accused. They are limited to evidence of the crime base forming a part of the contextual elements for war crimes and crimes against humanity; in particular, the Anti-Balaka's engagement in an armed conflict throughout the relevant period and the group's course of conduct involving the multiple commission of crimes and acts against the Muslim civilian population of western CAR, including the pattern and intensity of their mistreatment, pursuant to a criminal organizational policy.⁵

5. The relevance and probative value of each of the Nine Witnesses' proposed evidence is explained below. For each, a brief summary of the salient issues in their statement is set out, along with the associated exhibits or documents, and the source of other evidence which corroborates the witness's account. *Confidential* Annex A (a Summary Chart) lists the relevant statement(s), the paragraphs on which the Prosecution does not rely, and the corresponding associated exhibits. It also identifies the relevant paragraphs of the Confirmation Decision to which each witness's evidence relates and, where applicable, any charged incidents the witness discusses. *Confidential* Annex B contains the statements and transcript excerpts being tendered. The associated exhibits are available to the Defence and the Trial Chamber in e-Court.

II. CONFIDENTIALITY

6. Pursuant to regulation 23bis(1) of the Regulations of the Court ("RoC"), this Request and its annexes are filed as "Confidential", as they contain information

⁵ See ICC-01/14-01/18-703-Conf, para. 45, 48 (observing that "several non-confirmed incidents fall within the 'facts and circumstances' of the case", and that the facts concerning crimes allegedly committed by the Anti-Balaka in Yaloké, Gaga, Zawa, Bossemtélé, Boda, Carnot, Berbérati and Guen "pertain to the contextual elements of the charged crimes and form part of the 'facts and circumstances' of the case"); see also article 7(2); ICC-01/04-02/06-309, para. 23; See ICC-01/14-01/18-403-Conf-Corr, paras. 64,70, *et seq.*, and pp. 111, 107; see para. 164 (noting that the perpetrator groups committing acts and crimes as part of the article 7(1) attack lasting from September 2013 to December 2014 "were formally and politically under the umbrella of the National Coordination").

concerning witnesses which should not be made public. A “Public Redacted” version of the Request will be filed as soon as practicable.

III. SUBMISSIONS

A. Applicable Law

i. Previously recorded testimony

7. Rule 68(2)(b) allows for the introduction of a witness’s previously recorded testimony that goes to proof of a matter other than the acts and conduct of the accused.

8. The term “previously recorded testimony” includes statements and transcripts of interviews taken pursuant to rules 111 and 112, respectively, together with any associated exhibits or documents.⁶

9. The Court’s jurisprudence has construed the expression “acts and conduct” as “refer[ring] to the personal actions and omissions of the accused, which are described in the charges against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged”.⁷ This understanding is also consistent with the construction accorded in other international tribunals, which likewise hold that the term refers plainly to the “deeds and behaviour of the *accused*”,⁸ such that they seek to establish the accused’s

⁶ See ICC-01/05-01/08-1386, OA5 OA6, paras. 79-81, confirming that written witness statements can be introduced as “previously recorded testimony”. See also ICC-01/09-01/11-1938-Red-Corr, paras. 30-33, analysing the term “previously recorded testimony” in light of the Rules’ *travaux préparatoires*, the Court’s prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08-2012-Red, para. 136; ICC-01/05-01/08-886, para. 6; ICC-01/04-01/06-1603, para. 18; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362.

⁷ See ICC-01/04-02/06-1667-Red, 11 (citing ICC-02/04-01/15-596-Red, paras. 11-12).

⁸ See *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted under Rule 92 bis, 21 March 2002, para.22 (“*Milošević Decision*”) (noting “The phrase ‘acts and conduct of the accused’ in Rule 92bis is a plain expression and should be given its ordinary meaning: deeds and behaviour of the *accused*. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to

responsibility under any applicable mode of liability.⁹ Accordingly, peripheral references to the accused “cannot be considered as going to [their] acts and conduct”.¹⁰ Finally, the acts and conduct of the accused must be distinguished from those of others who commit crimes for which the accused is alleged to be responsible.¹¹ Thus, proof of the latter may be formally submitted under rule 68(2)(b).

10. The Chamber is vested with discretion in determining whether to admit of prior statements on satisfaction of the requirements of rule 68(2)(b).¹² In exercising its discretion, rule 68(2)(b)(i) sets out a *non-exhaustive* list of factors that the Chamber must consider in respect of each application on a case-by-case basis, including whether the prior recorded testimony: (i) relates to issues that are not materially in dispute; (ii) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (iii) relates to background information; (iv) is such that the interests of justice are best served by its introduction; and (v) has sufficient indicia of reliability.¹³

ii. Associated Exhibits

11. The Court’s jurisprudence establishes that exhibits associated with prior testimony are “admissible so long as the witness uses or explains them in the prior

extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so”) (emphasis added); *see also Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on the Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis (Witnesses for Sarajevo Municipality), 15 October 2009, para. 5 (“*Karadžić Decision*”); *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 bis and Prosecution Motion to Admit GH-139’s Evidence Pursuant to Rule 92 bis, 24 January 2013, para. 15 (“*Hadžić Decision*”).

⁹ *Karadžić Decision*, para. 5; *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, para. 10 (“*Galić Decision*”); *Hadžić Decision*, para. 15; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis, 22 August 2008, para. 17 (“*Lukić Decision*”).

¹⁰ ICC-01/04-02/06-1667-Red, para. 12.

¹¹ *Karadžić Decision*, para. 5; *Galić Decision*, para. 9; *Hadžić Decision*, para. 15; *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Prosecution Rule 92 bis Motion, 4 July 2006, para. 6; *Lukić Decision*, para. 17; *Milošević Decision*, para. 22.

¹² *See e.g.*, ICC-02/04-01/15-596-Red, para. 6; ICC-01/05-01/13-1478-Red-Corr, para. 95

¹³ Rule 68(2)(b)(i).

recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced".¹⁴ As such, all that is required is that the document is "used or explained by the witness, and which, as such, forms an integral part of the testimony itself."¹⁵ This construction also accords with the understanding of the term "associated exhibits" similarly ascribed by the *ad hoc* tribunals, namely that such "documents can be admitted if they form an inseparable and indispensable part of the witness's written testimony [which] means that the witness needs to have discussed the exhibits in his testimony and that without them the transcript or the witness's written statement would be incomprehensible or of lesser probative value".¹⁶

iii. Procedural safeguards

12. By its terms, rule 68(2)(b) does not *per se* unfairly prejudice the Defence in permitting the introduction of uncross-examined evidence unrelated to the acts and conduct of an accused.¹⁷ On the contrary, although rule 68 is an exception to the principle of orality¹⁸ and publicity,¹⁹ its application "is *per se* generally considered compatible with the rights of the accused"²⁰ and indeed all statutory rights because it is express in the Court's procedural framework. Additionally, the Chamber's appropriate exercise of discretion in determining the evaluative criteria as defined in the Rules, among others, serves as a sufficient procedural safeguard against potential prejudice. Similarly, the fact that the Parties can avail themselves of the provision further underscores its inherent neutrality.²¹ Thus, any claim of prejudice should

¹⁴ ICC-01/09-01/11-1938-Corr-Red2, para. 33; *see also* ICC-02/04-01/15-1288, para. 9 (*citing* ICC-02/04-01/15-596-Red, paras. 9-10).

¹⁵ ICC-02/04-01/15-1288, para. 10.

¹⁶ *See e.g. Karadžić* Decision, para. 11; *Prosecutor v. Milošević*, Case No.IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92ter, 22 February 2007, p. 3; *Prosecutor v. Perišić*, Case No.IT-04-81-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92bis, 2 October 2008, para. 16.

¹⁷ *See* ICC-01/05-01/13-1478-Red-Corr, paras. 38-39.

¹⁸ ICC-01/05-01/08-1386, para. 78.

¹⁹ ICC-01/14-01/18-685, para. 25 (referencing articles 64(7) and 67(1)).

²⁰ ICC-01/14-01/18-685, para. 26 (*citing*, ICC-02/11-01/15-744, para. 74) (*emphasis added*).

²¹ *See* ICC-01/09-01/11-1938-Red-Corr, para. 25.

only be entertained in light of the particular circumstances of the specific witness, their evidence, and the case — not presumptively, nor in the abstract.

B. The Prior Recorded Testimony Fulfils all Requirements of Rule 68(2)(b)

13. The proposed evidence of the Nine Witnesses may be formally submitted under rule 68(2)(b). The evidence primarily goes to proof of the crime-base, particularly the nature and extent of the widespread attack carried out by the Anti-Balaka against the Muslim civilian population between September 2013 and December 2014, as a part of the contextual elements of Crimes against Humanity and War Crimes, under articles 7 and 8, respectively. Specifically, the evidence of the Nine Witnesses concerns the campaign of retributive violence committed by the Anti-Balaka against Muslim civilians in specific towns and villages in western CAR, pursuant to a criminal organisational policy, as confirmed.²²

C. Formal Submission of the Nine Witnesses' Evidence is Warranted

i. The tendered evidence is reliable and does not relate to the acts or conduct of the Accused

14. *First*, the tendered evidence bears sufficient indicia of reliability and is relevant to and probative of matters at issue in the case. The statement of each of the Nine Witnesses was obtained by the Prosecution in the ordinary course of its investigation.²³ The witnesses' factual accounts were signed in accordance with rule 111, having had their statements interpreted in a language which they fully understood, as necessary. Each statement further contains an express acknowledgement attesting to its voluntariness and the truth of its contents, to the

²² See ICC-01/14-01/18-403-Conf-Corr, paras. 64, *see further* at pp. 107, 111 (referencing paragraphs 90-114 of the Document Containing the Charges - ICC-01/14-01/18-286-Conf-AnxB1).

²³ See ICC-01/09-01/11-1938-Red-Corr, para. 66.

best of the witness's knowledge. Further, the statements are internally consistent, and sufficiently corroborated by other evidence in the case.

15. *Second*, the proposed statements do not relate to the acts or conduct of the Accused. The evidence does not establish that the accused participated in, or shared the intent of the perpetrator or perpetrator group concerning the charged crimes. It does not suggest or imply any action of the Accused going to any mode of liability under article 25, or to their participation in the charged crimes. Moreover, the proposed statements do not concern matters that are materially in dispute. Instead, the Nine Witnesses' statements provide quintessentially "crime-base" evidence going broadly to the contextual elements — exactly the type of evidence for which rule 68(2)(b) was primarily intended to address.

ii. The associated exhibits are integral to the witnesses' evidence and should be admitted

16. Each of the associated exhibits for which the Prosecution seeks formal submission was discussed in each proposed witness statement. The associated exhibits identified are an inseparable and indispensable part of the proposed statements. Their exclusion would render this written evidence either less comprehensible, or of less probative value. As tendered, the associated exhibits avoid flooding the Parties, Participants, and the Chamber with material that is superfluous or tangential to the import of the witness's testimony, while assisting the Chamber in its assessment of the relevant evidence in its article 74 decision.

D. Analysis of the Nine Witnesses' Prior Recorded Testimony

a) BERBERATI

i. P-2324 – Contextual Elements – Article 7 and Article 8

17. The Prosecution tenders for formal submission P-2324's statement of 30 January 2019, totalling approximately 32 pages. There are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on P-2324's statement.

18. The witness's proposed testimony establishes the following:

- P-2324 was [REDACTED] in the town of BERBERATI in the relevant period.
- He recounts the arrival of the Anti-Balaka in BERBERATI on 7 February 2014.
- P-2324 [REDACTED] the Anti-Balaka leadership in BERBERATI, and its connection and contacts with the Anti-Balaka National leadership in BANGUI including the visit in BERBERATI of an Anti-Balaka delegation from BANGUI on or around July 2014.
- P-2324 provides evidence of the control of BERBERATI by the Anti-Balaka group [REDACTED] on 10 February 2014.
- The witness further describes the Anti-Balaka's targeting of the Muslim population, its properties and community, and its commission of acts and crimes comprising killings, pillaging, destruction of property, including mosques in BERBERATI. He witnessed the Anti-Balaka's forced displacement of the town's Muslim civilians, the circumstances regarding the creation and perpetuation of their enclaving, and their continued subjection to maltreatment by the Anti-Balaka over a protracted period.
- Finally, the witness provides further evidence on the Anti-Balaka's commission of similar crimes in other towns in western CAR, including CARNOT, BODA, and YALoke.

19. P-2324's proposed evidence is cumulative to, and corroborated by, *inter alia*, the proposed rule 68 evidence of other residents of BERBERATI, namely, P-2326,²⁴ [REDACTED], and P-2325,²⁵ [REDACTED], in relation to: (i) the Anti-Balaka attack on BERBERATI; (ii) the Anti-Balaka's commission of crimes in BERBERATI against Muslim civilians, including [REDACTED]; and (iii) the circumstances regarding the creation and perpetuation of their enclaving. His evidence regarding the Anti-Balaka leadership in BERBERATI is corroborated by and cumulative to: (i) a video [REDACTED];²⁶ (ii) [REDACTED]²⁷ that [REDACTED]²⁸ and (iii) the proposed rule 68(3) testimony of P-1077,²⁹ Anti-Balaka [REDACTED].³⁰

20. Finally, the Prosecution tenders five associated exhibits, as set out at Confidential Annex A. These comprise: (1) a sketch of the IDP site of the local Bishop's compound where the displaced Muslims in BERBERATI were enclaved; (2) photographs taken by [REDACTED] at the IDP site of the Bishop's compound [REDACTED].

ii. P-2326 – Contextual Elements – Article 7 and Article 8

21. The Prosecution tenders for formal submission P-2326's statement of 23 January 2019, totalling approximately 30 pages. There are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on P-2326's witness statement.

22. The witness's proposed testimony establishes the following:

²⁴ See para. 22.

²⁵ See para. 21.

²⁶ CAR-OTP-2030-2280, from [00:00:00] to [00:01:05].

²⁷ [REDACTED].

²⁸ CAR-OTP-2030-0445, at 0453.

²⁹ The Prosecution will request the formal submission of the prior recorded testimony of P-1077 pursuant to rule 68(3) in a subsequent application.

³⁰ CAR-OTP-2092-0002, at 0011, para. 106.

- P-2326 [REDACTED] in BERBERATI in the relevant period. He was also [REDACTED].
- He describes the arrival of the Anti-Balaka in BERBERATI on 31 January 2014, the Anti-Balaka's attack of the Muslim community and the group's criminal activities thereafter. He describes [REDACTED] role in the Anti-Balaka group and the activities of the lieutenants [REDACTED]
- P-2326 provides evidence concerning the Anti-Balaka leadership in BERBERATI and its connection with the Anti-Balaka National Coordination in particular, [REDACTED] soon after NGAISSONA became the National Coordinator.
- The witness provides evidence concerning the Anti-Balaka's commission of crimes in BERBERATI, including the violent targeting the Muslim population, its community and property, comprising killings, pillaging, destruction, including destruction of mosques. He witnessed the Anti-Balaka's forced displacement of the town's Muslim civilians, the circumstances regarding the creation and perpetuation of their enslaving, and their continued subjection to maltreatment by the Anti-Balaka over a protracted period.
- Finally, the witness provides further evidence on the Anti-Balaka's commission of similar crimes in other towns in western CAR, including BODA and CARNOT.

23. P-2326's proposed evidence is cumulative to, and corroborated by, *inter alia*, the proposed rule 68 evidence of other BERBERATI residents, namely, P-2325,³¹ [REDACTED],³² in relation to: (i) the Anti-Balaka attack on BERBERATI; (ii) the Anti-

³¹ See para. 21.

³² See para. 18.

Balaka's commission of crimes in BERBERATI; (iii) the crimes committed by [REDACTED]; and (iv) the circumstances regarding the creation and perpetuation of the enslaving. His evidence regarding the Anti-Balaka leadership in BERBERATI is corroborated by and cumulative to: (i) [REDACTED];³³ (ii) [REDACTED]³⁴ in which BERBERATI is located; and (iii) the proposed rule 68(3) testimony of P-1077,³⁵ Anti-Balaka [REDACTED].³⁶

24. Finally, the Prosecution tenders four associated exhibits, as set out at Confidential Annex A. These comprise: (1) [REDACTED]

iii. P-2325 – Contextual Elements – Article 7 and Article 8

20. The Prosecution tenders for formal submission P-2325's statement of 7 February 2019, totalling approximately 21 pages. There are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on the on P-2326's witness statement.

21. The witness's proposed testimony establishes the following:

- P-2325 was [REDACTED] in BERBERATI in the relevant period. [REDACTED].
- He describes the arrival of the Anti-Balaka in BERBERATI on 7 February 2014, identifies [REDACTED] in BERBERATI, the Anti-Balaka's attack of its Muslim community, and the group's criminal activities thereafter. In particular, he describes the crimes committed by [REDACTED].
- P-2325 [REDACTED].

³³ CAR-OTP-2030-2280, from [00:00:00] to [00:01:05].

³⁴ CAR-OTP-2030-0445, at 0453.

³⁵ The Prosecution will request the formal submission of the prior recorded testimony of P-1077 pursuant to rule 68(3) in a subsequent application.

³⁶ CAR-OTP-2092-0002, at 0011, para. 106.

- The witness provides evidence concerning the Anti-Balaka's commission of crimes in BERBERATI and their violent targeting of the Muslim population, its community and property, comprising killings, pillaging, destruction, including destruction of mosques. He witnessed the Anti-Balaka's forced displacement of the town's Muslim civilians, the circumstances regarding the creation and perpetuation of their enclaving, and their continued subjection to maltreatment by the Anti-Balaka over a protracted period.
- Finally, the witness provides evidence on the Anti-Balaka's commission of similar crimes in other towns in western CAR, including BANIA-NOLA, CARNOT, GUEN, YALOKÉ, and BOSSANGO.

25. P-2325's proposed evidence is cumulative to, and corroborated by, *inter alia*, the proposed rule 68 evidence of other BERBERATI residents, namely, [REDACTED] P-2326,³⁷ and the [REDACTED] P-2324,³⁸ in relation to: (i) the Anti-Balaka attack on BERBERATI; (ii) the Anti-Balaka's commission of crimes in BERBERATI against Muslim civilians; (iii) the crimes committed by [REDACTED]; and (iv) the circumstances regarding the creation and perpetuation of the enclaving of Muslims. His evidence regarding the Anti-Balaka leadership in BERBERATI is corroborated by and cumulative to: (i) [REDACTED]³⁹; (ii) [REDACTED]⁴⁰; and (iii) the proposed rule 68(3) testimony of P-1077,⁴¹ Anti-Balaka [REDACTED].⁴²

26. Finally, the Prosecution tenders two associated exhibits, as set out at Confidential Annex A. These comprise: [REDACTED] and [REDACTED]

³⁷ See para. 22

³⁸ See para. 18.

³⁹ CAR-OTP-2030-2280, from [00:00:00] to [00:01:05].

⁴⁰ CAR-OTP-2030-0445, at 0453.

⁴¹ The Prosecution will request the formal submission of the prior recorded testimony of P-1077 pursuant to rule 68(3) in a subsequent application.

⁴² CAR-OTP-2092-0002, at 0011, para. 106.

b) BODA

iv. P-1773 – Contextual Elements – Article 7 and Article 8

27. The Prosecution tenders for formal submission P-1773's statement of 28 October 2017, totalling approximately 19 pages. There are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on P-1773's statement.

28. The witness's proposed testimony establishes the following:

- P-1773 is a [REDACTED] who was a resident of BODA in the relevant period.
- He provides evidence of the forced displacement of Peuhls to BODA in December 2013, due to the killings and violence by the Anti-Balaka in the bush.
- He describes the departure of the Seleka from BODA, the arrival of the Anti-Balaka in BODA on or around 29 January 2014, its attack on BODA, and the Anti-Balaka's objective to cleanse BODA of any Muslim presence.
- The witness provides evidence of the Anti-Balaka leadership in BODA in particular, the role of their leader Gilbert WILITE (aka "8", "8-8", "huit", or "WITTE").
- P-1773 provides evidence of the forced displacement of Muslims, including [REDACTED].
- He describes the systematic targeting of Muslims by the Anti-Balaka in BODA from January 2014 onwards, comprising pillaging, violence, rape, and murder.

- P-1773 witnessed the arrival of Muslim refugees in BODA from surrounding areas from January 2014 onwards, due to their targeting by the Anti-Balaka. He describes the circumstances regarding the creation and perpetuation of their enclaving, the size of the enclave, and their continued subjection to maltreatment by the Anti-Balaka over a protracted period.
- He describes the arrival of the SANGARIS in BODA in February 2014, and the subsequent separation of Muslim and Christian areas in BODA.
- Finally, the witness provides evidence of the evacuation of Muslims from BODA by the MISCA, starting in June 2014.

29. P-1773's proposed evidence is cumulative to, and corroborated by, *inter alia*, the proposed rule 68 evidence of other residents of BODA, namely, P-1871⁴³ and P-1864,⁴⁴ in relation to: (i) the gathering of displaced Muslim civilians in the Central Mosque in the ALI neighbourhood; and (ii) the forced displacement of Muslims from BODA. His evidence regarding the Anti-Balaka attack and its objective to cleanse BODA of any Muslim presence is also corroborated by: (i) a Human Rights Watch Report which reports that the Anti-Balaka attack took place almost immediately after Seleka forces left BODA on 28 January and the Anti-Balaka elements in BODA had expressed anti-Muslim animus;⁴⁵ and (ii) rule 68(3) testimony of P-1962,⁴⁶ [REDACTED] who describes the clashes starting on 29 January⁴⁷ and the Anti-Balaka's objective to chase away the Muslims from BODA.⁴⁸

30. His evidence regarding the systematic targeting of Muslims and, the size of the enclave is also corroborated by: (i) media articles describing the increase in the

⁴³ See para. 35.

⁴⁴ See para. 32.

⁴⁵ CAR-OTP-2001-2308, at 2343.

⁴⁶ The Prosecution will request the formal submission of the prior recorded testimony of P-1962 pursuant to rule 68(3) in a subsequent application.

⁴⁷ CAR-OTP-2068-0037 at 0042-0043, paras. 19-21.

⁴⁸ CAR-OTP-2068-0037, at 0043, para. 25.

number of displaced Muslims to 11,000 between March and April 2014,⁴⁹ and (ii) the proposed rule 68 evidence of P-1576⁵⁰ who describes 11,000 displaced Muslim civilians being trapped in the enclave by the Anti-Balaka.⁵¹ His evidence on the Anti-Balaka leadership in BODA is corroborated by and cumulative to: (i) the proposed rule 68(3) testimony of P-1962,⁵² [REDACTED] who describes the BODA Anti-Balaka group being led by WITTE,⁵³ (ii) [REDACTED],⁵⁴ and (iii) the testimony of P-2232, an Anti-Balaka element [REDACTED].⁵⁵

v. P-1864 – Contextual Elements – Article 7 and Article 8

31. The Prosecution tenders for formal submission P-1864's statement of 8 November 2017, totalling approximately 12 pages. There are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on the on P-1864's statement.

32. The witness's proposed testimony establishes the following:

- P-1864 is a Muslim civilian who lived in BODA in the relevant period.
- She describes the 5 December 2013 attack on BANGUI leading to the displacement of civilians to BODA.
- The witness provides evidence concerning the Anti-Balaka's commission of crimes in BODA comprising murder, pillaging and destruction of property belonging to the Muslims.

⁴⁹ CAR-OTP-2001-4429, CAR-OTP-2060-0801, at 0801 and CAR-OTP-2067-1289, at 1289.

⁵⁰ The Prosecution will request the formal submission of the prior recorded testimony of P-1576 pursuant to rule 68(2) in a subsequent application.

⁵¹ CAR-OTP-2060-0280, at 0285, para. 35.

⁵² The Prosecution will request the formal submission of the prior recorded testimony of P-1962 pursuant to rule 68(3) in a subsequent application.

⁵³ CAR-OTP-2068-0037 at 0048, para. 49.

⁵⁴ CAR-OTP-2053-0546, at 0547.

⁵⁵ CAR-OTP-2100-2569, at 2591.

- P-1864 describes fleeing to the Central Mosque in BODA as a result of the Anti-Balaka attack. She describes their living conditions there in particular their reliance on external sources for food, the Anti-Balaka elements threats to Christian merchants to prevent their selling food to Muslims, and the Anti-Balaka's targeting of Muslim civilians who had tried to leave the Central Mosque in search of food or firewood.
- P-1864 provides evidence [REDACTED].
- P-1864 provides evidence of fleeing BODA and passing through Anti-Balaka checkpoints [REDACTED].
- [REDACTED].
- Finally, the witness describes her living conditions [REDACTED] in BANGUI.

33. P-1864's proposed evidence is cumulative to, and corroborated by, *inter alia*, the proposed rule 68 evidence of other residents of BODA, namely, P-1773⁵⁶ and P-1871,⁵⁷ in relation to: (i) the gathering of displaced Muslim civilians in the Central Mosque in the ALI neighbourhood; and (ii) the forced displacement of Muslims from BODA. Her evidence regarding the Anti-Balaka's targeting of Muslims who were out gathering food is corroborated by the proposed rule 68(3) testimony of P-1962,⁵⁸ [REDACTED].⁵⁹

vi. P-1871 – Contextual Elements – Article 7 and Article 8

34. The Prosecution tenders for formal submission P-1871's statement of 11 November 2017, totalling approximately 11 pages. There are no agreements as to

⁵⁶ See para. 28.

⁵⁷ See para. 35.

⁵⁸ The Prosecution will request the formal submission of the prior recorded testimony of P-1962 pursuant to rule 68(3) in a subsequent application.

⁵⁹ CAR-OTP-2068-0037, at 0053, para. 76.

facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on the on P-1871's statement.

35. The witness's proposed testimony establishes the following:

- P-1871 was a civilian Muslim [REDACTED] in BODA in the relevant period.
- The witness provides evidence of the Anti-Balaka attack on BODA in late January 2014.
- P-1871 describes fleeing to the Central Mosque in the ALI neighbourhood in BODA and seeing dead bodies on the way. She describes the number of displaced Muslim civilians who were seeking refuge there.
- P-1871 provides evidence of fleeing from the Central Mosque in the ALI neighbourhood [REDACTED].
- Finally, the witness describes her arrival at the [REDACTED]

36. P-1871's proposed evidence is cumulative to, and corroborated by, *inter alia*, the proposed rule 68 evidence of other residents of BODA, namely, P-1773⁶⁰ and P-1864,⁶¹ in relation to: (i) the gathering of displaced Muslim civilians in the Central Mosque in the ALI neighbourhood; and (ii) the forced displacement of Muslims from BODA. Her evidence in relation to the Anti-Balaka attack beginning in late January 2014 is also corroborated by the proposed evidence of P-1773⁶² and media articles which describe fighting breaking out right after the departure of the Seleka on 28 or 29 January 2014.⁶³

⁶⁰ See para. 28.

⁶¹ See para. 32.

⁶² See para. 28.

⁶³ CAR-OTP-2001-0835, at 0954 and CAR-OTP-2064-1013, at 1013.

c) CARNOT

vii. P-0289 – Contextual *Elements – Article 7 and Article 8*

37. The Prosecution tenders for formal submission P-0289's statement of 15 March 2016, totalling approximately 19 pages. There are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on the on P-1871's statement.

38. The witness's proposed testimony establishes the following:

- P-0289 was [REDACTED] in CARNOT in the relevant period.
- He describes the arrival of the Anti-Balaka in CARNOT on 2 February 2014.
- The witness provides evidence of the Anti-Balaka leadership in CARNOT and in particular the roles of Aimé Blaise ZAOROYANGA ("ZAOROYANGA") and Babbe, *alias* "B13".
- He describes the commission of crimes by the Anti-Balaka in CARNOT and their systematic targeting of Muslims and their properties.
- P-0289 describes the Muslims from the surrounding villages, such as YALOKÉ, BOSSEMPELE, BOZOUM, BAORO and BOSSEMPTELE [REDACTED].
- P-0289 describes the CARNOT enclave and in particular the living conditions of the displaced Muslim civilians.
- P-0289 provides evidence of around 500 Muslim civilians remaining confined in the CARNOT enclave until early 2016.

- Finally, the witness describes the forcible displacement of the Muslim population from CARNOT.

39. P-0289's proposed evidence is cumulative to, and corroborated by, *inter alia*, the proposed rule 68 evidence of other residents of CARNOT, namely, [REDACTED] P-2132⁶⁴ and a Muslim civilian P-2393,⁶⁵ in relation to: (i) the arrival of the Anti-Balaka in CARNOT; (ii) the creation of the CARNOT enclave; (iii) the crimes committed by the Anti-Balaka in CARNOT; and (iv) the forced displacement of the Muslim population from CARNOT. His evidence in relation to the Anti-Balaka's arrival in CARNOT is also corroborated by: (i) media articles from *Médecins Sans Frontières* ("MSF") which describe the Anti-Balaka's control of CARNOT in early February;⁶⁶ and (ii) the United Nations Mapping Report which describes the Anti-Balaka's arrival in CARNOT in February.⁶⁷ His evidence regarding the Anti-Balaka crimes in CARNOT is also corroborated by: (i) [REDACTED];⁶⁸ and (ii) the proposed rule 68(3) testimony of P-1042,⁶⁹ [REDACTED].⁷⁰ His evidence regarding the Anti-Balaka leadership in CARNOT is also corroborated by and cumulative to: (i) [REDACTED]⁷¹ and (ii) the proposed rule 68(3) testimony of P-2556,⁷² an Anti-Balaka element [REDACTED].⁷³

40. Finally, the Prosecution tenders one associated exhibit, as set out at Confidential Annex A. This comprises [REDACTED].

viii. P-2132 – Contextual Elements – Article 7 and Article 8

⁶⁴ See, para. 42.

⁶⁵ See, para. 45.

⁶⁶ CAR-OTP-2073-0889, CAR-OTP-2001-2247, and CAR-OTP-2001-2306.

⁶⁷ CAR-OTP-2055-1987, at 2166.

⁶⁸ CAR-OTP-2000-0218, at 0223.

⁶⁹ The Prosecution will request the formal submission of the prior recorded testimony of P-1042 pursuant to rule 68(3) in a subsequent application.

⁷⁰ CAR-OTP-2107-0202, at 0232-0234, ln.1017-1022.

⁷¹ CAR-OTP-2030-0445 at 0453

⁷² The Prosecution will requests the formal submission of the prior recorded testimony of P-2556 pursuant to rule 68(3) in a subsequent application.

⁷³ CAR-OTP-2112-1300, at 1306-1308, paras. 41, 46-48, 51, 61.

41. The Prosecution tenders for formal submission P-2132's statement of 19 June 2018, totalling approximately 22 pages. There are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on the on P-1871's statement.

42. The witness's proposed testimony establishes the following:

- P-2132 was the [REDACTED].
- He describes the arrival of the Anti-Balaka in CARNOT on 3 February 2014.
- The witness provides evidence of the Anti-Balaka leadership in CARNOT and in particular the roles of Anti-Balaka commanders ZAOROYANGA and NAMSENMO. [REDACTED].
- P-2132 describes the commission of crimes by the Anti-Balaka in CARNOT and their systematic targeting of Muslims and their properties.
- Finally, he describes the forcible displacement of the Muslim population from CARNOT, and the CARNOT enclave.

43. P-2132's proposed evidence is cumulative to, and corroborated by, *inter alia*, the proposed rule 68 evidence of other residents of CARNOT, namely, a Muslim civilian P-2393⁷⁴ and [REDACTED] P-0289,⁷⁵ in relation to: (i) the arrival of the Anti-Balaka in CARNOT; (ii) the creation of the CARNOT enclave; (iii) the crimes committed by the Anti-Balaka in CARNOT; (iv) [REDACTED]; and (v) the forced displacement of the Muslim population from CARNOT. His evidence regarding the Anti-Balaka's arrival in CARNOT is also corroborated by: (i) media articles from MSF which describe the Anti-Balaka's control of CARNOT in early February;⁷⁶ and (ii) the United Nations Mapping Report which describes the Anti-Balaka's arrival in CARNOT in February

⁷⁴ See, para. 45.

⁷⁵ See, para. 38.

⁷⁶ CAR-OTP-2073-0889, CAR-OTP-2001-2247, and CAR-OTP-2001-2306.

2014.⁷⁷ His evidence regarding the Anti-Balaka crimes in CARNOT is also corroborated by: (i) [REDACTED];⁷⁸ and (ii) the proposed rule 68(3) testimony of P-1042,⁷⁹ who was the [REDACTED].⁸⁰ His evidence regarding the Anti-Balaka leadership in CARNOT is also corroborated by and cumulative to: (i) [REDACTED];⁸¹ and (ii) the proposed rule 68 testimony of P-2556⁸² [REDACTED]⁸³

ix. P-2393 – Contextual *Elements – Article 7 and Article 8*

44. The Prosecution tenders for formal submission P-2393's statement of 8 April 2019, totalling approximately 33 pages. There are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on P-1871's statement.

45. The witness's proposed testimony establishes the following:

- P-2393 was a Muslim resident of CARNOT in the relevant period.
- The witness describes Muslims fleeing from BAORO to CARNOT starting from December 2013 due to the Anti-Balaka attacks.
- He describes the arrival of the Anti-Balaka in CARNOT on 5 February 2014.
- P-2393 provides evidence of the Anti-Balaka in CARNOT wearing Anti-Balaka badges that had been manufactured in BANGUI.
- [REDACTED].

⁷⁷ CAR-OTP-2055-1987, at 2166.

⁷⁸ CAR-OTP-2000-0218, at 0223.

⁷⁹ The Prosecution will request the formal submission of the prior recorded testimony of P-1042 pursuant to rule 68(3) in a subsequent application.

⁸⁰ CAR-OTP-2107-0202, at 0232-0234, l.1017-1022.

⁸¹ CAR-OTP-2030-0445, at 0453.

⁸² The Prosecution will request the formal submission of the prior recorded testimony of P-2556 pursuant to rule 68(3) in a subsequent application.

⁸³ CAR-OTP-2112-1300, at 1306-1308, paras. 41, 46-48, 51, 61.

- P-2393 describes the Muslim civilians in CARNOT seeking refuge in the parish after the arrival of the Anti-Balaka.
- The witness describes the creation of the CARNOT enclave.
- P-2393 describes the commission of crimes by the Anti-Balaka in CARNOT and their systematic targeting of Muslims and their properties.
- He describes the Anti-Balaka leadership in CARNOT and in particular the roles of SINAKOLO, NAMSENMO and ZAOROYANGA.
- Finally, the witness provides evidence of the forcible displacement of the Muslim population from CARNOT.

46. P-2393's proposed evidence is cumulative to, and corroborated by, *inter alia*, the proposed rule 68 evidence of other residents of CARNOT, namely [REDACTED] P-2132⁸⁴ and [REDACTED] P-0289,⁸⁵ in relation to: (i) the arrival of the Anti-Balaka in CARNOT; (ii) the creation of the CARNOT enclave; (iii) the crimes committed by the Anti-Balaka in CARNOT; (iv) [REDACTED]; and (v) the forced displacement of the Muslim population from CARNOT. His evidence regarding the Anti-Balaka crimes in CARNOT is also corroborated by [REDACTED]⁸⁶ and the proposed rule 68(3) testimony of P-1042,⁸⁷ [REDACTED].⁸⁸ His evidence in relation to the Anti-Balaka's arrival in CARNOT is also corroborated by: (i) media articles from MSF which describe the Anti-Balaka's control of CARNOT in early February;⁸⁹ and (ii) the United Nations Mapping Report which describes the Anti-Balaka's arrival in CARNOT in February.⁹⁰ His evidence regarding the Anti-Balaka leadership in

⁸⁴ See, para. 42.

⁸⁵ See, para. 38.

⁸⁶ CAR-OTP-2000-0218, at 0223.

⁸⁷ The Prosecution will request the formal submission of the prior recorded testimony of P-1042 pursuant to rule 68(3) in a subsequent application.

⁸⁸ CAR-OTP-2107-0202, at 0232-0234, ln.1017-1022.

⁸⁹ CAR-OTP-2073-0889, CAR-OTP-2001-2247, and CAR-OTP-2001-2306.

⁹⁰ CAR-OTP-2055-1987, at 2166.

CARNOT is also corroborated by and cumulative to [REDACTED]⁹¹ and the proposed rule 68 testimony of P-2556,⁹² an Anti-Balaka element [REDACTED].⁹³

E. Balance of interests

47. Granting the Request advances the interests of justice. Rule 68 is designed to ensure that the accused are tried without undue delay.⁹⁴ Moreover, as the Chamber has recognised, “[the rule] is widely acknowledged as a useful tool to expedite and streamline the proceedings and its use therefore encouraged”.⁹⁵ Dispensing with the Nine Witnesses’ live testimony would appropriately expedite these proceedings.

48. Their evidence is manifestly relevant to the proper adjudication of salient issues in this case, and their formal submission does not occasion any unfair prejudice to the Accused either in respect of the nature of rule 68(2) itself, or as applied in these circumstances.⁹⁶ Significantly, and as the Chamber has acknowledged, a careful case-by-case assessment must be made of each witness’s proposed evidence. Given that the application of the rule is by its terms compatible with the statutory framework, prejudice may not be assumed neither for the specific witness, nor the case. An assessment of fairness cannot therefore be presumed on the basis of the number of prospective witnesses alone, but must account for the prevailing and present circumstances in addition to the nature and quality of the witness’s evidence, its volume, its significance in terms of the contested issues in the case, and of course, the overriding obligation of the Court to search for and to establish the truth as concerns the charges.

⁹¹ CAR-OTP-2030-0445, at 0453.

⁹² The Prosecution will request the formal submission of the prior recorded testimony of P-2556 pursuant to rule 68(3) in a subsequent application.

⁹³ CAR-OTP-2112-1300, at 1306-1308, paras. 41, 46-48, 51, 61.

⁹⁴ ICC-01/09-01/11-1938-Red-Corr, para. 60.

⁹⁵ ICC-01/14-01/18-685, para. 26 (citing Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020, para. 553, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IERFinal-Report-ENG.pdf

⁹⁶ ICC-01/09-01/11-1938-Red-Corr, para. 27.

49. Even assuming *arguendo* that the formal submission of any of the proposed statements occasions some prejudice — and it would not — this would be marginal, vastly outweighed by the probative value of the evidence, would not in any way undermine the overall fairness of the trial, and would advance the substantial countervailing interest of judicial economy and the expeditious conduct of the proceedings.

IV. CONCLUSION

50. For the above reasons, the Prosecution requests that the Chamber admit the proposed prior recorded testimony of the Nine Witnesses *in lieu* of their *viva voce* testimony, as set out at Annex A.



Fatou Bensouda, Prosecutor

Dated this 25th day of May 2021
At The Hague, The Netherlands