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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 for the Formal Submission of the
Prior Recorded Testimony of P-1962 pursuant to Rule 68(3)”,
4 December 2020, (ICC-01/14-01/18-750-Conf)**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests the formal submission of the prior recorded testimony of witness P-1962, in accordance with rule 68(3) of the Rules of Procedure and Evidence (“Rules”) and the “Initial Directions on the conduct of the proceedings” (“Directions”).¹ P-1962’s prior recorded testimony comprises two Witness Statements (“Prior Statements”), dated 30 January 2018 and 23 February 2018 (respectively “First Statement” and “Second Statement”) and their associated exhibits.² Should the Chamber deem the Prior Statements formally submitted, the Prosecution further requests leave to conduct a limited examination-in-chief elaborating specific issues raised therein, and other matters highly relevant to the case.³

2. P-1962 provides evidence concerning crimes committed in BODA as part 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 11 December 2019 Decision on Confirmation of Charges.⁴ [REDACTED]. The Prior Statements are *prima facie* relevant to and probative of material issues at trial.

3. Granting the Request would reduce the presentation of the Prosecution’s examination-in-chief and help to streamline the proceedings. Moreover, it would not

¹ ICC-01/14-01/18-631, para. 58.

² See ICC-01/05-01/08-1386, paras.79-81 (“*Bemba Appeals Decision*”), 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 Note that the estimated time for the proposed limited examination-in -chief may differ from that provided in the Prosecution’s Final List of Witnesses ICC-01/14-01/18-724-Conf-AnxA.

⁴ See ICC-01/14-01/18-403-Conf-Corr, paras. 64, 70, *et seq*, and pp. 111, 107.

unfairly prejudice the Defence, as the witness will be fully available for cross-examination and any inquiry by the Chamber itself.⁵

4. Having taken note of the Chamber's guidance, the Prosecution has carefully assessed the Prior Statements to provide the Chamber with the information necessary to conduct the required case-by-case assessment.⁶ Additionally, mindful of the concerns regarding the amount of written evidence to be tendered,⁷ the Prosecution has sought narrowly to identify the portions of the Prior Statements on which it intends to rely, in order to reduce (as much as possible) the overall volume of such material in the case as a whole.

5. As submitted, the Prior Statements are limited and directed toward the salient issues in controversy. They cover 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 between September 2013 and December 2014 ("Relevant Period"), the group's course of conduct involving the multiple commission of crimes and acts against the Muslim civilian population in western CAR, including the pattern and intensity of their protracted mistreatment in various localities, pursuant to a criminal organizational policy.⁸ [REDACTED].

6. The relevance and probative value of the Prior Statements is set out in a brief summary of the salient issues, along with the associated exhibits or documents, and

⁵ See Rule 68(3); *see also* ICC-01/14-01/18-685, para. 29 (noting that, other than the specific requirements of the witness's presence and absent objection to the introduction of the prior statement, "[n]o further restrictions are imposed with regard to the instances under which Rule 68(3) of the Rules may be used").

⁶ ICC-01/14-01/18-685, para. 34; *See* ICC-02/11-01/15-744, para. 69 ("*Gbagbo and Blé Goudé Appeals Decision*").

⁷ *See* ICC-01/14-01/18-685, para. 31, 32.

⁸ *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, Bossemptélé, 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").

the sources of other corroborative evidence. *Confidential* Annex A (a Summary Chart) lists the relevant statement, 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 the witness's evidence relates and, where applicable, any charged incidents the witness discusses. *Confidential* Annex B contains the Prior Statements themselves. The associated exhibits are available to the Defence and the Trial Chamber in e-Court.

II. CONFIDENTIALITY

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

8. The Prosecution incorporates by reference its summary of the applicable law as set out in paragraphs 4 to 8 of its observations on its intended approach to rule 68(3) in the presentation of its case.⁹

9. As noted, rule 68(1) requires that the introduction of prior recorded testimony may not be prejudicial to or inconsistent with the rights of the accused or the fairness

⁹ ICC-01/14-01/18-655 ("Rule 68(3) Observations"); *see also*, ICC-01/14-01/18-710-Conf, para. 8 (identifying the relevant jurisprudence on the nature of 'prior recorded testimony').

of the trial generally.¹⁰ This does not attenuate the primary purpose of its introduction — namely, to expedite proceedings and avoid unnecessary litigation in Court¹¹ — but rather complements it within this context.¹² As the Chamber has recognised, rule 68(3) is *per se* compatible with the statutory framework, subject to the express conditions of its application.¹³

10. Notably, the presence of the witness for examination by the Parties, Participants, and the Chamber, and their adoption of the prior written evidence without objection are the *only* limiting conditions.¹⁴ Thus, rule 68(3) does not preclude the introduction of prior recorded testimony even if it relates to issues materially in dispute, issues that are central to core matters in the case, or that are uncorroborated.¹⁵ Further, the mode is fully consistent with the Statute’s notional default, as interpreted by the Appeals Chamber, “that witnesses must appear before the Trial Chamber in person and give their evidence orally ... [which gives] effect to the principle of orality”¹⁶ and presumably, that of publicity.

¹⁰ See *Bemba Appeals Decision*, para. 78. See also ICC-02/11-01/15-870, para. 7 (Trial Chamber I “*Gbagbo and Blé Goudé Decision*”); ICC-01/04-02/06-1640-Red, para. 7 (Trial Chamber VI “*Ntaganda Decision*”); ICC-02/04-01/15-621, para. 6 (Trial Chamber IX “*Ongwen Decision*”).

¹¹ See ICC-01/14-01/18-685, para. 26. See also *Gbagbo and Blé Goudé Decision*, para. 15; *Bemba Appeals Decision*, para. 55 (“[w]hile expeditiousness is an important component of a fair trial, it cannot justify a deviation from statutory requirements”); see also Report of the Working Group on Lessons Learnt, Annex II.A, Executive Summary, para. 8 at p. 21 (noting expressly that the rule was “intended to reduce the length of ICC proceedings and to streamline evidence presentation” and “reflects practice in international criminal tribunals”).

¹² See e.g., article 67(1)(c) (noting the right “to be tried without undue delay”).

¹³ See ICC-01/14-01/18-685, para. 26 citing *Gbagbo and Blé Goudé Appeals Decision*, para. 74.

¹⁴ *Gbagbo and Blé Goudé Appeals Decision*, para. 68 (“the Appeals Chamber notes that no significant amendment was made to rule 68 (3) of the Rules, while the [three factors - three factors (i) whether the evidence related to issues that are not materially in dispute; (ii) whether that evidence was not central to core issues in the case and (iii) whether the evidence is corroborative of other evidence] referred to in the Bemba OA 5 OA 6 Judgment [*Bemba Appeals Decision*, para. 78] were specifically inserted into the new rule 68 (2) (b) of the Rules”) (*emphasis added*).

¹⁵ *Gbagbo and Blé Goudé Appeals Decision*, paras. 2, 67, 69; see also *Ongwen Decision*, para. 7.

¹⁶ *Gbagbo and Blé Goudé Appeals Decision*, para. 65, citing *Bemba Appeals Decision*, para. 76; see also ICC-01/14-01/18-685, para. 25.

ii. *Associated Exhibits*

11. As previously noted in its first request for the formal submission of prior recorded statements pursuant to rule 68(2)(b) and incorporated herein,¹⁷ the Court's jurisprudence establishes that exhibits/documents associated with prior testimony are "admissible so long as the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced".¹⁸

12. There is no inherent limitation on the Chamber's authority to "assess freely *all evidence* submitted to determine its relevance",¹⁹ including under rule 68(3) — as distinguished from any other statutory mechanism for the submission or admission of evidence, such as article 69 (particularly subdivisions (2)-(4) and (6)), other subdivisions of rule 68(2), or with rule 69. This is moreover, fully consonant with "the drafters of the Statute framework hav[ing] clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited - at the outset - the ability of the Chamber to assess evidence 'freely'".²⁰

B. The Prior Recorded Testimony fulfils all Requirements of Rule 68(3)

13. The Prior Statements may be deemed formally submitted under rule 68(3). P-1962 will attest to their accuracy; he will be present in court; and will be available for examination by the Defence, Participants, and the Chamber.

14. As described below, the Prior Statements are highly relevant and probative. They go to proof of the nature and extent of the widespread attack carried out by the

¹⁷ ICC-01/14-01/18-710-Conf, para.11.

¹⁸ 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); *see also* ICC-02/04-01/15-1288, para. 10.

¹⁹ *See* rule 63(2) (emphasis added).

²⁰ ICC-01/04-01/06-1399, para. 24; *see also* ICC-01/04-02/06-1770, para. 15 (following the *Lubanga* case and noting 'Chamber "enjoys a significant degree of discretion in considering all types of evidence" internal citation omitted).

Anti-Balaka against the Muslim civilian population during the Relevant Period as a part of the contextual elements of Crimes against Humanity and War Crimes, under articles 7 and 8, respectively. They provide evidence of the campaign of retributive violence committed by the Anti-Balaka against Muslim civilians in towns and villages in western CAR pursuant to a criminal organisational policy,²¹ particularly in BODA. [REDACTED].

Analysis

15. P-1962's Prior Statements of 30 January 2018 and 23 February 2018 comprise approximately 31 of 33 pages and 14 of 18 pages, respectively. 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 Prior Statements.

16. The witness's Prior Testimony establishes the following:

- [REDACTED].
- He describes the clashes between the Seleka and Anti-Balaka in BODA on 29 January 2014 and following, [REDACTED];
- [REDACTED].
- [REDACTED].
- P-1962 also describes [REDACTED], and the crimes committed by the Anti-Balaka in the town during the Relevant Period, including the establishment of the Muslim enclave, which remained in place throughout.
- The witness provides evidence bearing on areas under YEKATOM's responsibility, including the PK9 – MBAIKI axis and part of the MBAIKI – BODA axis, including BOUBOUA, as well as checkpoints under YEKATOM's control.
- [REDACTED].

²¹ See ICC-01/14-01/18-403-Conf-Corr, paras. 64, *see further* pp. 107, 111 (referencing paragraphs 90-114 of the Document Containing the Charges - ICC-01/14-01/18-286-Conf-AnxB1).

- [REDACTED].
- [REDACTED].
- [REDACTED].

17. P-1962's proposed evidence is corroborated by, *inter alia*, the evidence of P-0458,²² P-1074,²³ P-1577,²⁴ P-1786,²⁵ P-2353,²⁶ P-2389,²⁷ and P-2476²⁸, who will testify at trial, the proposed rule 68(2)(b) evidence of P-1576,²⁹ P-1773,³⁰ P-2138,³¹ and P-2432,³² as well as by documentary evidence included in the Prosecution's List of Evidence,³³ in relation to (i) the Anti-Balaka attack of BODA; (ii) [REDACTED] (iii) the Anti-Balaka's commission of crimes in BODA against the Muslim civilian population; and (iv) the circumstances regarding the creation and perpetuation of their enslaving — which comprised a significant part of the Anti-Balaka's continuing widespread attack on Muslim civilians.

18. P-1962's proposed evidence [REDACTED], is corroborated by, *inter alia*, the evidence of [REDACTED],³⁴ [REDACTED],³⁵ [REDACTED],³⁶ [REDACTED],³⁷ [REDACTED],³⁸ [REDACTED],³⁹ and [REDACTED],⁴⁰ who will testify at trial, as well

²² CAR-OTP-2118-5154, at 5173-5174, 1.632-657, at 5175-5176, 1.693-724, at 5177-5178, 1.755-784.

²³ CAR-OTP-2094-0228, at 0244-0247, paras.91-93, 100, 103, 108, 115.

²⁴ CAR-OTP-2081-0769, at 0810-0812, at 0817, para.60.

²⁵ CAR-OTP-2058-0200, at 0209, paras.49-50.

²⁶ CAR-OTP-2100-0226, at 0236, para.56.

²⁷ CAR-OTP-2104-0033, at 0044, para.61.

²⁸ CAR-OTP-2114-0149, at 0155, paras.37-38

²⁹ CAR-OTP-2060-0280, at 0285-0286, paras.35-36.

³⁰ CAR-OTP-2064-0063, at 0070, paras.37-38, 40-42, at 0073-0076, paras.55-65, 68-75

³¹ CAR-OTP-2092-4004, at 4006-4008, 1.68-117, at 4009-4011, 1.184-262, at 4012-4013, 1.301-316, at 4015-4016, 1.411-419, CAR-OTP-2092-4143, at 4158-4161, 1.544-673, at 4163-4165, 1.744-795, CAR-OTP-2092-4340, at 4343, 1.79-118.

³² CAR-OTP-2117-0645, at 0655-0656, para.58.

³³ CAR-OTP-2001-2769, at 2791; CAR-OTP-2001-0835, at 0954-0955, CAR-OTP-2064-1013, at 1013-1014; CAR-OTP-2001-2308, at 2343; CAR-OTP-2001-0463, at 0463; CAR-OTP-2001-5386, at 5566.

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

as the proposed rule 68(2)(b) evidence of [REDACTED]⁴¹ and [REDACTED],⁴² and by documentary evidence included in the Prosecution's List of Evidence.⁴³

19. P-1962's proposed evidence regarding YEKATOM's control of the PK9-MBAIKI axis as well as part of the MBAIKI-BODA axis, is also corroborated by, *inter alia*, the evidence of P-0954,⁴⁴ P-1647,⁴⁵ P-1786,⁴⁶ and P-2233,⁴⁷ who will testify at trial.

20. Finally P-1962's proposed evidence regarding [REDACTED] supports other evidence, including documentary included in the Prosecution's List of Evidence.⁴⁸

C. Associated Exhibits

21. The Prosecution tenders seven associated exhibits for formal submission, set out at Confidential Annex A. These comprise: (1) a map of BODA, with indication from P-1962 of the [REDACTED] areas in BODA, the Muslim area, the airstrip, and the "Red Line", separating the Muslim and Christian populations (Annex C to P-1962's First Statement); (2) [REDACTED] (Annex E to P-1962's First Statement); (3) [REDACTED]; (4) a Reuters report on the situation of the Muslim population enclaved in BODA, commented on in P-1962's First Statement; (5) a VOA News report on the situation of the Muslim population enclaved in BODA, commented on in P-1962's First statement; (6) [REDACTED]; and (7) [REDACTED] (Annex C to P-1962's Second Statement).

22. Although each exhibit referenced in the Prior Statements was discussed and may be helpful to contextualise and facilitate their understanding, the limited number tendered with this application are *narrowly* assessed as indispensable to their

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ CAR-OTP-2001-5386, at 5466-5468; CAR-OTP-2053-0546.

⁴⁴ CAR-OTP-2048-0171, at 0184-0185, paras.78-79.

⁴⁵ CAR-OTP-2050-0654, at 0659-0660, paras.37-39.

⁴⁶ CAR-OTP-2058-0200, at 0207-0208, para.42.

⁴⁷ CAR-OTP-2118-5817, at 5839, 1.735-750, CAR-OTP-2118-5956, at 5973-5974, 1.586-599.

⁴⁸ [REDACTED].

comprehension or would otherwise diminish their probative value if excluded. 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. As an integral part of the Prior Statements, each exhibit is directly relevant to and probative of material issues in dispute, and their admission pursuant to rule 68(3) would further be the most efficient and effective way to manage P-1962's evidence.

D. A supplementary examination-in-chief is necessary and appropriate

23. By its terms, rule 68(3) allows the tendering party to examine the witness, whose previously recorded statement it seeks to admit.⁴⁹ The Chambers of this Court have routinely authorised such practice.⁵⁰ Here, although the Prior Statements are comprehensive, a limited and focused supplemental examination-in-chief to clarify and elaborate P-1962's testimony would be beneficial to the proper adjudication of the issues arising from the charges.

24. The Prosecution is mindful of the Chamber's direction concerning the need to "streamline its questioning considerably".⁵¹ Accordingly, it has carefully reviewed its four-hour estimate given for P-1962 in its Provisional List of Witnesses.⁵² The Prosecution considers that it can conduct a limited supplemental examination of P-1962 in about *three* hours and possibly less.⁵³ That said, the Prosecution notes that its

⁴⁹ ICC-01/05-01/08-886, para.10.

⁵⁰ ICC-01/04-01/06-1603, para.25: "[T]he evidence of the two witnesses is to be presented by way of written statements, supplemented by any necessary questioning"; ICC-01/04-01/06-T-205-Red3, p.14, ln.16 - p.19, lns.9; supplementary questioning begins at ln.11. After admitting certain parts of P-0030's and P-0002's prior recorded testimony (for P-0030, see ICC-01/04-01/07-2233-Corr, paras.16-17; for P-0002, see ICC-01/04-01/07-2289-Corr-Red, p.17), Trial Chamber II allowed their supplementary questioning by the Prosecution (for P-0030, see ICC-01/04-01/07-T-176-Red-ENG CT from p.23; for P-0002, see ICC-01/04-01/07-T-184-Red-ENG CT from p.25).

⁵¹ ICC-01/14-01/18-685, para. 36.

⁵² ICC-01/14-01/18-642-Conf-AnxA, p. 10.

⁵³ ICC-01/14-01/18-724, AnxA, p. 23.

estimates take into consideration the *realistic* pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations,⁵⁴ and account for the prospect of appropriate redirect examination.

25. A lesser amount of time would not provide the Prosecution with a reasonable opportunity to develop, explain, or clarify, limited facets of P-1962's evidence through the use of a minimal number of associated exhibits, other documents, or as concerns other relevant evidence — for instance, acquired *after* the Prior Statements were made. The limited examination requested is necessary not only to fully understand and contextualise the Prior Statements, [REDACTED], but also to advance the Chamber's fundamental truth-seeking function.

26. Alternatively, in the absence of the formal submission of the Prior Statements under rule 68(3), the Prosecution estimates that the witness's testimony on direct examination would require at least 6 hours to present – around twice as long.

E. Balance of interests

27. The Prosecution incorporates its previous submissions concerning the balance of interests set out at paragraphs 47 to 49 in its First Rule 68(2)(b) Request⁵⁵ and its Second Request for the Formal Submission of Prior Testimony pursuant to Rule 68(2)(b).⁵⁶

28. In addition, as rule 68(3) requires the appearance and availability of the witness to be examined by the Parties, Participants, and the Chamber, the formal submission of the Prior Statements occasions no prejudice, while substantially advancing the expeditious conduct of the proceedings. They ensure that the Accused are tried

⁵⁴ See e.g., ICC-01/14-01/18-T-1-ENG ET, p.6 ln.18-25.

⁵⁵ ICC-01/14-01/18-710-Conf.

⁵⁶ *Gbagbo and Blé Goudé* Appeals Decision, paras. 37-40.

without undue delay,⁵⁷ and advance the Prosecution's countervailing statutory obligation to establish the truth,⁵⁸ as well as serve the Chamber's corresponding duty to determine it.

29. As this Chamber has recognised, "[the rule] is widely acknowledged as a useful tool to expedite and streamline the proceedings and its use therefore encouraged".⁵⁹ Moreover, as other Trial Chambers have acknowledged:

"the fact that in-court-testimony of a witness can be considerably shortened through the admission of prior recorded testimony *can be, in itself, a sufficient reason for granting a Rule 68(3) request* as long as the witness does not object to the submission of the prior recorded testimony and the additional requirements of Rule 68(3) are met and bearing in mind the additional factors provided by the Appeals Chamber in its application"⁶⁰

30. Here, the projected shortening of the witness's in-court-testimony by around 50% is "considerable". Moreover, as other Chambers have similarly observed, the use of rule 68(3) "typically carries a low risk of interfering with the fair trial rights of the accused, because the witness still appears before the Chamber and is available for examination, including by the Defence".⁶¹

31. While the Chamber may consider, *inter alia*, whether: (i) the evidence relates to issues that are not materially in dispute; (ii) the evidence is not central to core issues in the case, but instead provides relevant background information; (iii) the evidence is corroborative of other evidence; (iv) the introduction of the evidence promotes good trial management, particularly streamlining of the presentation of evidence and the expeditiousness of proceedings; and (v) the introduction of the evidence may prevent

⁵⁷ ICC-01/09-01/11-1938-Red-Corr, para. 60.

⁵⁸ See article 54(1).

⁵⁹ 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

⁶⁰ ICC-01/05-01/13-1478-Red-Corr, para. 48 (emphasis added), citing *Bemba* Appeals Decision, para. 78.

⁶¹ *Gbagbo and Blé Goudé* Decision, ICC-02/11-01/15-870, para. 7.

potential re-traumatisation of vulnerable witnesses,⁶² no one factor is necessarily dispositive, given the case-by-case analysis of the relevant factors to be undertaken in the Chamber's discretion.⁶³ Thus, the prior written evidence comprising an accused's direct participation, indeed, perpetration of the charged crimes *may be* introduced pursuant to rule 68(3).⁶⁴ For instance, in the *Bemba et al* case, Trial Chamber VII admitted the prior recorded testimony of witnesses with whom the Accused was charged with interfering in violation of article 70, where their evidence comprised:

- interference and "contacts with [the accused] and money transfers by several of the accused to P-20 and his wife"⁶⁵;
- interference and "contacts with [the accused] and money transfers by one of the accused and persons associated to one of the accused with P-243's daughter"⁶⁶;
- "transfers of money [the witness] allegedly undertook on behalf of one of the accused. Some of these payments were destined for defence witnesses in the Main Case or their family members"⁶⁷;
- interference, and "[the witness] being asked to lie about his motivation to sign a letter that was sent in relationship to facts concerning the Main Case, telephone contacts with two of the accused, the fact that he received money from one of the accused for traveling purposes, P-214 lying during his testimony in the Main Case about having received any money and about prior contacts with the Bemba Defence upon the instruction of one of the accused"⁶⁸

⁶² *Ongwen* Decision, ICC-02/04-01/15-621, para. 7; *See also Gbagbo and Blé Goudé* Appeals Decision, paras. 1, 2, 59, 61, 71; *Bemba* Appeals Decision, para. 78; *Ntaganda* Decision, ICC-01/04-02/06-1640-Red, para. 9; Trial Chamber VI, *The Prosecutor v Bosco Ntaganda*, Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-00100, 6 November 2015, ICC-01/04-02/06-988, para. 13.

⁶³ ICC-01/05-01/13-1478-Red-Corr, para. 50.

⁶⁴ ICC-01/05-01/13-1478-Red-Corr, para. 62.

⁶⁵ ICC-01/05-01/13-1478-Red-Corr, para. 62.

⁶⁶ ICC-01/05-01/13-1478-Red-Corr, para. 79.

⁶⁷ ICC-01/05-01/13-1478-Red-Corr, para. 84.

⁶⁸ ICC-01/05-01/13-1478-Red-Corr, para. 91.

32. The above is consistent with applications of the rule at the *ad hoc* Tribunals in certain circumstances. For instance, in the *Popović, et al* case, the Chamber itself called a witness pursuant to ICTY Rule 92*ter* whose prior recorded testimony comprised a statement of facts directly implicating the accused Popović and others in the murder operation underlying the genocide charges in the indictment,⁶⁹ providing *inter alia*:

- “In the morning of 12 July, prior to the above-mentioned meeting, I met with Lt. Colonel Vujadin Popović, Chief of Security, Drina Corps, and Lt. Colonel Kosorić, Chief of Intelligence, Drina Corps, outside the Hotel Fontana. At that time Lt. Colonel Popović told me that the thousands of Muslim women and children in Potočari would be transported out of Potočari toward Muslim-held territory near Kladanj and that the able-bodied Muslim men within the crowd of Muslim civilians would be separated from the crowd, detained temporarily in Bratunac, and killed shortly thereafter”.⁷⁰

33. The above examples are merely indicative of the broad discretion afforded Chamber’s in making rule 68(3)-type determinations, within the framework of the particular circumstances of the individual witness, and of the case.

34. Here, the Prosecution considers on balance that the introduction of P-1962’s Prior Statements under rule 68(3) is appropriate. The Chamber’s and the Parties’ interests in advancing this large and complex case efficiently, good trial management, the expeditious conduct of the proceedings, and that the Prior Statements are supported and corroborated by other evidence to be tested at trial, warrants their formal submission in the fair exercise of the Chamber’s broad discretion.

⁶⁹ See *Prosecutor v. Popović et al*, Case No.IT-05-88, Order to Summon Momir Nikolic, 10 March 2009, pp. 1-2.

⁷⁰ See *Prosecutor v. Blagojević et al*, Case No. IT-02-60-PT, "Statement of Facts and Acceptance of Responsibility", Tab A to Annex A to the "Joint Motion for Consideration of Plea Agreement between Momir Nikolić and the Office of the Prosecutor", 6 May 2003

IV. CONCLUSION

35. For the foregoing reasons, the Prosecution requests the Chamber to deem formally submitted the Prior Statements of P-1962 together with their associated exhibits as set out at Annex A, subject to the fulfilment of the further conditions of rule 68(3). Should the Chamber do so, it should further grant the Prosecution leave to conduct a limited examination-in-chief of these witnesses as indicated above.

36. The Prosecution further requests, given the number of rule 68(3) applications to follow, that the Chamber extend the applicable page limits pursuant to regulation 37(2) of the RoC, allowing for the consolidation of *up to* 10 witnesses for such applications.⁷¹ Given that the Prosecution expects to submit the prior statements of 66 additional witnesses and four experts,⁷² consolidated applications would avoid overburdening the Chamber and the Parties with multiple single applications, and thus promote judicial economy and efficiency.



James Stewart, Deputy Prosecutor

Dated this 22nd day of February 2021
At The Hague, The Netherlands

⁷¹ The Chamber granted a similar request from the Prosecution for its submission of rule 68(2)(b) applications. See ICC-01/14-01/18-697, para.8. The reasons advanced therein apply equally here.

⁷² See ICC-01/14-01/18-724; ICC-01/14-01/18-724-Conf-AnxA.