



Original: **English**

No.: **ICC-01/14-01/18**

Date: **31 March 2021**

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 Second Request for the Formal
Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)”,
(ICC-01/14-01/18-744-Conf), 27 November 2020**

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 five Prosecution Witnesses¹, pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”).

2. The prior recorded testimony of the Five 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 Five 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.

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

¹ These comprise witnesses P-2486, P-2546, P-2422, P-2416, and P-1779 (“Five 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.

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 organisational policy.⁵

5. The relevance and probative value of each of the Five 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 concerning witnesses which should not be made public. A "Public Redacted" version of the Request will be filed as soon as practicable.

⁵ See ICC-01/14-01/18-703-Conf, paras. 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, Bossempaté, 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").

III. SUBMISSIONS

A. Applicable Law

7. The Prosecution incorporates by reference its prior submissions on recorded testimony, associated exhibits, and the relevant procedural safeguards relative to the use of rule 68(2), set out at paragraphs 7 to 12 of its previous request for the formal submission of prior recorded testimony.⁶

8. As previously noted, the Chamber is vested with discretion in determining whether to admit prior statements and dispense with the witness's appearance at trial upon satisfaction of the requirements of rule 68(2)(b).⁷ Thus, in exercising its discretion, rule 68(2)(b)(i) sets out a *non-exhaustive* list of factors to be considered 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.⁸

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

9. The proposed evidence of the Five 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

⁶ See ICC-01/14-01/18-710-Conf ("First Rule 68(2) Request").

⁷ See *e.g.*, ICC-02/04-01/15-596-Red, paras. 6, 20 (noting that the enumerated factors "all respond, from different angles, to the same consideration, namely to identify situations in which the prior recorded testimony provided by a witness is – also in light of its relative importance in the system of evidence expected to be presented at trial – of such nature that it is unnecessary that the witness be called to testify live, and examination by the parties may rather be dispensed of without prejudicing the rights of the accused"); ICC-01/05-01/13-1478-Red-Corr, para. 95.

⁸ Rule 68(2)(b)(i).

7 and 8, respectively. Specifically, the evidence of the Five 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.⁹

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

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

10. *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 Five Witnesses was obtained by the Prosecution in the ordinary course of its investigation.¹⁰ 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 best of the witness's knowledge. Further, the statements are internally consistent, and sufficiently corroborated by other evidence in the case.

11. *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 Five Witnesses' statements provide quintessentially "crime-base" evidence going

⁹ See ICC-01/14-01/18-403-Conf-Corr, para. 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).

¹⁰ See ICC-01/09-01/11-1938-Red-Corr, para. 66.

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*

12. The associated exhibits for which the Prosecution seeks formal submission were discussed in, and are an inseparable and indispensable part of, each proposed witness statement. 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 Five Witnesses' Prior Recorded Testimony

- i. P-2486 – Contextual Elements – Article 7 and Article 8*

13. The Prosecution tenders for formal submission P-2486's statement of 1 September 2019, 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-2486's statement.

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

- P-2486 is [REDACTED] who was living near BODA during the relevant period.
- [REDACTED].
- She provides evidence of the Anti-Balaka's commission of acts and crimes, comprising killings of Mbororo civilians and looting of their cattle.

- P-2486 further describes fleeing with her group to GAGA where they encountered an Anti-Balaka group from GAGA. She describes the Anti-Balaka capturing them, and the looting of their remaining cattle.
- The witness provides evidence of being transferred from GAGA to a compound in YALoke by the Anti-Balaka, and the dire conditions in the compound.
- P-2486 describes being transferred along with others held at the compound to the Town Hall in YALoke about a month later by MISCA forces. She describes the circumstances regarding the creation and perpetuation of their enslaving, and their continued subjection to maltreatment by the Anti-Balaka over a protracted period. She recounts the dire living conditions of [REDACTED] in the enclave and their protection by MISCA from the Anti-Balaka, who wanted to kill them because they were Muslims[REDACTED]
- The witness was forced to remain in the enclave for about two years before being able to take refuge in [REDACTED].

15. P-2486's proposed evidence regarding the creation and perpetuation of the [REDACTED] enslaving is corroborated by and cumulative to evidence of witnesses who will testify live before the Chamber, including: (i) P-0884, a member of the Anti-Balaka [REDACTED]¹¹; (ii) P-2328, [REDACTED] who will provide details of the Anti-Balaka attacks [REDACTED] in YALoke¹²; and (iii) P-1577, [REDACTED] who witnessed the [REDACTED] enclave in YALoke¹³. It is further corroborated by the proposed rule 68(2)(b) evidence of P-2416,¹⁴ a YALoke resident.

ii. P-2546 – Contextual Elements – Article 7 and Article 8

¹¹ CAR-OTP-2072-1881, at 1908, l.935-961.

¹² CAR-OTP-2099-0165, at 0199, para. 184.

¹³ CAR-OTP-2081-0769, at 0823.

¹⁴ See below para. 27.

16. The Prosecution tenders for formal submission P-2546's statement of 25 July 2019, totalling approximately 40 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-2546's witness statement.

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

- P-2546 is [REDACTED] who lived in YALoke in the relevant period.
- He describes visiting BANGUI [REDACTED]. He further describes the civilians not being allowed to travel in and out of BANGUI after he heard about the 5 December 2013 attack in the news.
- P-2546 describes returning to YALoke in February 2014 and finding that the Seleka had already departed and the Anti-Balaka were in control of the town.
- The witness provides evidence of the Anti-Balaka leadership in YALoke, and in particular the roles of Anti-Balaka commanders 'Le Bleu' (aka Severin NDOGUIA) and 'Colonel Richard' (aka Richard BOZANDO).
- P-2546 describes the Anti-Balaka barracks in YALoke [REDACTED].
- The witness recounts [REDACTED]. He describes [REDACTED] expressing the Anti-Balaka's objective of driving out the Muslims from YALoke.
- P-2546 provides evidence of the evacuation of Muslim civilians from YALoke to CAMEROON and those remaining being confined in the area of YALoke's Central Mosque and Central Market.

- [REDACTED].
- P-2546 provides evidence of the Anti-Balaka's transfer of Peuhls from the bush to a compound outside [REDACTED] in YALOKÉ. [REDACTED] P-2546 describes the subsequent evacuation of the Peuhls from the compound to the administrative buildings in YALOKÉ by MISCA forces.
- Finally, he describes the Peuhls being transferred from the administrative buildings to a camp located near the Catholic Church and the hospital in 2015. P-2546 describes the Peuhls in this camp going without food for one to two months and many of them leaving to a refugee camp in CAMEROON.

18. P-2546's proposed evidence is cumulative to, and corroborated by, *inter alia*, witnesses who will testify at trial regarding the Anti-Balaka leadership in YALOKÉ, namely: (i) P-2232, an Anti-Balaka member who identifies Le Bleu and Richard as the ComZones of YALOKÉ¹⁵; and (ii) P-1847, [REDACTED]¹⁶ who describes the role of Le Bleu. It is further corroborated by [REDACTED]¹⁷ [REDACTED].¹⁸ His evidence regarding the displacement of the Peuhls is corroborated by, and cumulative to the evidence of witnesses who will testify before the Chamber, namely: (i) P-0884, a member of the Anti-Balaka [REDACTED]¹⁹; (ii) P-2328, [REDACTED] who will provide details of the Anti-Balaka attacks on the Peuhls and the Peuhl enclave in YALOKÉ²⁰; and (iii) P-1577, [REDACTED] who witnessed the Peuhl enclave in YALOKÉ.²¹ His evidence regarding YALOKÉ Muslims fleeing to the Central Mosque

¹⁵ CAR-OTP-2100-2569, at 2594, 2578, paras. 48 and 140.

¹⁶ CAR-OTP-2061-1534, at 1569, para. 222.

¹⁷ [REDACTED].

¹⁸ CAR-OTP-2030-0445 at 0446.

¹⁹ CAR-OTP-2072-1881, at 1908, l.935-961.

²⁰ CAR-OTP-2099-0165, at 0199, para. 184.

²¹ CAR-OTP-2081-0769, at 0823.

and the Central Market is corroborated by, and cumulative to: (i) the proposed rule 68(2)(b) evidence of P-2422²² and P-2416²³; (ii) a video from the French Ministry of Defence showing YALoke and the Sangaris meeting with the Anti-Balaka and Muslim representatives in YALoke²⁴; and (iii) the United Nations Commission of Inquiry (“UNCOI”) report dated 19 December 2014, that states that the Muslim community regrouped themselves around the Central Mosque under the protection of Sangaris troops.²⁵

19. Finally, the Prosecution tenders two associated exhibits, as set out at Confidential Annex A. These comprise: (1) a satellite image of YALoke in 2014 marked with the locations referred by P-2546, namely the Anti-Balaka barracks, [REDACTED], the Central Market, the Central Mosque, and the compound opposite [REDACTED] where the Peuhls were initially transferred to (Annex A to P-2546’s Statement); and (2) a satellite image of YALoke, marked with the locations referred by P-2546, namely the administrative buildings and the camp where the Peuhls were transferred to (Annex B to P-2546’s Statement).

iii. P-2422 – Contextual Elements – Article 7 and Article 8

20. The Prosecution tenders for formal submission P-2422’s statement of 7 February 2019, totalling approximately 38 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-2422’s witness statement.

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

²² See below, para. 21.

²³ See below, para.27.

²⁴ CAR-OTP-2023-0376, from [00:10:32] to [00:12:10] and its transcript CAR-OTP-2122-9377, at 9387, l.321-336.

²⁵ CAR-OTP-2001-7017, at 7096.

- P-2422 is a Muslim civilian [REDACTED] in the relevant period.
- The witness describes the arrival of the Seleka in YALoke a few months after Michel DJOTODIA came into power and the Seleka's targeting of Christian civilians in YALoke.
- She describes hearing about young Christian men training in the bush to fight the Seleka.
- P-2422 provides evidence of the first Anti-Balaka attack on GAGA, about a month or so prior to the 5 December attack on BANGUI according to her recollection. She describes the Anti-Balaka being pushed back by the Seleka and seeing about 100 bodies in the aftermath of the attack.
- The witness describes a second Anti-Balaka attack on GAGA around January 2014 and the Muslim civilians fleeing from GAGA to ZAWA and YALoke as a result.
- She recounts the Anti-Balaka attack on ZAWA about two days after their attack on GAGA.
- The witness describes the arrival of the Anti-Balaka in YALoke after their attack on ZAWA. She describes Muslim civilians fleeing to certain compounds in YALoke Centre and to the Central Mosque.
- [REDACTED]. She recounts the Anti-Balaka elements talking about their leaders, namely, Le Bleu (aka Severin NDOGUIA), SIMPLICE, LAMPETY (aka Emmanuel BOUYEMBE), and Colonel Richard (aka Richard BOZANDO). The witness describes in particular, the Anti-Balaka elements referring to Richard and Le Bleu as 'ComZone' when discussing lack of supplies, such as food.
- The witness describes [REDACTED] the Anti-Balaka elements discussing the killings of: (i) Imam DJIBRINE; (ii) Al-Hadj OUSMANE,

a Muslim trader; and (iii) other Muslim civilians. She further describes [REDACTED] the Anti-Balaka discuss the evacuation of Muslims in convoys from YALoke.

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

22. P-2422's proposed evidence in relation to the Anti-Balaka attack on GAGA is cumulative to, and corroborated by: (i) the proposed rule 68(2)(b) evidence of P-2416,²⁶ a Muslim resident in YALoke; and (ii) the 19 December 2014 UNCOI report,²⁷ which states that the Anti-Balaka carried out their first attack on GAGA in October 2013. Her evidence in relation to the Anti-Balaka attack on ZAWA is cumulative to, and corroborated by the 19 December 2014 UNCOI report, that states that the Anti-Balaka attacked ZAWA on 20 January 2014.²⁸

23. Her evidence regarding the YALoke Muslims fleeing to the Central Mosque and the Central Market in YALoke is corroborated by, and cumulative to: (i) the proposed rule 68(2)(b) evidence of P-2546²⁹ and P-2416³⁰; (ii) a video from the French Ministry of Defence showing YALoke and the Sangaris meeting with the Anti-Balaka and Muslim representatives in YALoke³¹; and (iii) the UNCOI report, that states that the Muslim community regrouped themselves around the Central Mosque under the protection of Sangaris troops.³² Her evidence regarding the Anti-Balaka leadership in YALoke is cumulative to, and corroborated by witnesses who will testify at trial, namely: (i) P-2232, an Anti-Balaka member who identifies Le Bleu and Richard as the

²⁶ See below, para. 27.

²⁷ CAR-OTP-2053-0645, at 0645.

²⁸ CAR-OTP-2001-7017, at 7093.

²⁹ See above, para. 17.

³⁰ See below, para. 27.

³¹ CAR-OTP-2023-0376, from [00:10:32] to [00:12:10] and its transcript CAR-OTP-2122-9377, at 9387, l.321-336.

³² CAR-OTP-2001-7017, at 7096.

ComZones of YALoke³³; and (ii) P-1847, [REDACTED],³⁴ who describes the role of Le Bleu. It is further corroborated by [REDACTED].³⁵

24. The interests of justice are also served by the introduction of P-2422's prior recorded testimony as [REDACTED]. This also in line with the Chambers' duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses, according to article 68(1).

25. Finally, the Prosecution tenders four associated exhibits, as set out at Confidential Annex A. These comprise: (1) a satellite image of YALoke indicating the locations of [REDACTED], the Central Market, and the Central Mosque (Annex 1 to P-2422's Statement); (2) [REDACTED] (Annex 2 to P-2422's Statement); (3) a satellite image indicating the locations of YALoke and [REDACTED] (Annex 3 to P-2422's Statement); (4) [REDACTED] (Annex 4 to P-2422's Statement).

iv. P-2416 – Contextual Elements – Article 7 and Article 8

26. The Prosecution tenders for formal submission P-2416's statement of 12 April 2019, totalling approximately 58 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-2416's statement.

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

- P-2416 is a Muslim civilian who lived in YALoke in the relevant period.

³³ CAR-OTP-2100-2569, at 2594, 2578, paras. 48 and 140.

³⁴ CAR-OTP-2061-1534, at 1569, para. 222.

³⁵ CAR-OTP-2030-0445, at 0446.

- The witness describes hearing about the first Anti-Balaka attack on GAGA in October 2013.
- The witness provides evidence of the Anti-Balaka leadership in YALoke, in particular, the roles of Richard (aka Richard BOZANDO) and Le Bleu (aka Severin NDOGUIA). He also describes having heard about LAMPETY (aka Emmanuel BOUYEMBE).
- P-2416 describes the Sangaris forces organising reconciliation meetings with representatives of the Muslim community and the Anti-Balaka around 21 January 2014.
- The witness describes two major Anti-Balaka attacks on YALoke in late January 2014, the targeting of the Muslim population, and the commission of acts and crimes during its course comprising killings and pillaging in YALoke.
- P-2416 describes the Anti-Balaka erecting roadblocks throughout YALoke and preventing the Muslim civilians from leaving. He describes Muslim civilians fleeing and seeking refuge in safe areas, such as the Central Mosque or [REDACTED] during the Anti-Balaka attack.
- P-2416 provides evidence of the evacuation of the Muslim population from YALoke to CAMEROON and CHAD in several convoys in February 2014.
- P-2416 [REDACTED]. He further provides evidence of [REDACTED] last group of Muslims being evacuated from YALoke on 22 February 2014. [REDACTED].
- Finally, the witness provides evidence of the capture and enclaving of the Peuhls in YALoke.

28. P-2416's proposed evidence in relation to the Anti-Balaka attack on GAGA is cumulative to, and corroborated by: (i) the proposed rule 68(2)(b) evidence of P-2422³⁶, a Muslim resident in YALoke; and (ii) the 20 September 2014 UNCOI report,³⁷ that states that the Anti-Balaka carried out their first attack on GAGA in October 2013. His evidence regarding the Anti-Balaka leadership in YALoke is cumulative to, and corroborated by witnesses who will testify at trial, namely: (i) P-2232, an Anti-Balaka member who will identify Le Bleu and Richard as the ComZones of YALoke³⁸; and (ii) P-1847, [REDACTED]³⁹ who will describe the role of [REDACTED]. It is further corroborated [REDACTED]⁴⁰. His evidence of the Anti-Balaka's commission of acts and crimes in YALoke is corroborated by, and cumulative to the evidence of witnesses who will testify before the Chamber, namely: (i) P-1074, [REDACTED], who will testify about the crimes committed by the Anti-Balaka in various areas including YALoke⁴¹; and (ii) P-2027, [REDACTED] who will testify about the Anti-Balaka attack in various regions including YALoke.⁴²

29. His evidence regarding the creation and perpetuation of the enslaving is corroborated by, and cumulative to evidence of witnesses who will testify before the Chamber, namely: (i) P-0884, a member of the Anti-Balaka [REDACTED] who will provide evidence of the Peuhls fleeing BODA due to the Anti-Balaka attacks⁴³; (ii) P-2328, [REDACTED] who will provide details of the Anti-Balaka attacks on the Peuhls and the Peuhl enclave in YALoke⁴⁴; and (iii) P-1577, [REDACTED] who witnessed the Peuhl enclave in YALoke. It is further corroborated by the proposed rule 68(2)(b) evidence of P-2486,⁴⁵ a YALoke resident. His evidence regarding the evacuation of

³⁶ See above, para.21.

³⁷ CAR-OTP-2053-0645, at 0645.

³⁸ CAR-OTP-2100-2569, at 2594, 2578, paras. 48 and 140.

³⁹ CAR-OTP-2061-1534, at 1569, para. 222.

⁴⁰ CAR-OTP-2030-0445, at 0446.

⁴¹ CAR-OTP-2094-0228, at 0250, paras. 123-128.

⁴² CAR-OTP-2078-0059, at 0077, para. 105.

⁴³ CAR-OTP-2072-1881, at 1908, l.935-961.

⁴⁴ CAR-OTP-2099-0165, at 0199, para. 184.

⁴⁵ See para. 14.

the Muslim population from YALoke to CAMEROON and CHAD in several convoys is corroborated by and cumulative to a Human Rights Watch Report which reports that Chadian Special Forces evacuated more than 2,000 remaining Muslim citizens from YALoke to CHAD.⁴⁶

30. His evidence regarding the YALoke Muslims fleeing to the Central Mosque and the Central Market in YALoke is corroborated by, and cumulative to: the proposed rule 68(2)(b) evidence of P-2546⁴⁷ and P-2422⁴⁸; (ii) a video from the French Ministry of Defence showing YALoke and the Sangaris meeting with the Anti-Balaka and Muslim representatives in YALoke⁴⁹; and (iii) the 19 December 2014 UNCOI report, that states that the Muslim community regrouped themselves around the Central Mosque under the protection of Sangaris troops.⁵⁰

31. Finally, the Prosecution tenders 12 associated exhibits, as set out at Confidential Annex A. These comprise: (1) a satellite image of YALoke indicating the locations of the Central Market, the Central Mosque, [REDACTED] (Annex 2 to P-2416's Statement); (2) [REDACTED]; (3) a screenshot of a video showing a Muslim civilian stating that everyone is forced to leave his place (Annex 11 to P-2416's Statement); (4) a screenshot of a video showing the evacuation of Muslims from YALoke (Annex 14 to P-2416's Statement); (5) a screenshot of a video showing the Sangaris forces standing between the convoy and a group of Anti-Balaka and people from the Christian community (Annex 18 to P-2416's Statement); (6) a screenshot of a video showing a man threatening to take over their homes (Annex 21 to P-2416's Statement); (7) a screenshot of a video showing the last convoy of Muslims leaving YALoke (Annex 25 to the P-2416's Statement); (8) a screenshot of a video showing of Raymond

⁴⁶ CAR-OTP-2001-2308, at 2339.

⁴⁷ *See above*, para.17.

⁴⁸ *See above*, para. 21.

⁴⁹ CAR-OTP-2023-0376, from [00:10:32] to [00:12:10] and its transcript CAR-OTP-2122-9377, at 9387, l.321-336.

⁵⁰ CAR-OTP-2001-7017, at 7096.

MANGALA, a coordinator of the local Anti-Balaka (Annex 35 to P-2416's Statement); (9) a screenshot of a video showing the Sangaris in *Quarter Sous-Manguie* (Annex 39 to the P-2416's Statement); (10) a screenshot of a video showing the Anti-Balaka elements wearing *gris-gris* (Annex 40 to P-2416's Statement); (11) a photograph of the result of pillaging by the Anti-Balaka after the evacuation of the Muslim civilians to CHAD (Annex 48 to P-2416's Statement); and (12) a photograph of the result of the Anti-Balaka's looting, pillaging, and burning of houses after the evacuation of the Muslim civilians in a convoy to CHAD (Annex 49 to P-2416's Statement).

v. P-1779 – Contextual Elements – Article 7 and Article 8

32. The Prosecution tenders for formal submission P-1779's statement of 4 August 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 P-1779's statement.

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

- P-1779 was [REDACTED] in GAGA, in the relevant period.
- P-1779 recounts the arrival of the Seleka in YALoke and GAGA.
- The witness describes the Anti-Balaka from GAGA gathering in the bush.
- The witness identifies the leaders of the Anti-Balaka in GAGA, namely BEDANI, Le Bleu, DOMINIQUE, MBOUDE and BEFIO.
- P-1779 describes the two Anti-Balaka attacks on GAGA. He describes the Anti-Balaka's commission of crimes in GAGA comprising killings, in particular [REDACTED], pillaging, and the destruction of property, including the destruction of mosques.

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

34. P-1779's proposed evidence in relation to the Anti-Balaka attack on GAGA is cumulative to, and corroborated by: (i) the proposed rule 68(2)(b) evidence of P-2422,⁵¹ a Muslim resident in YALoke; and (ii) the 20 September 2014 UNCOI report,⁵² that states that the Anti-Balaka carried out their first attack on GAGA in October 2013. His evidence regarding the Anti-Balaka leadership in GAGA is cumulative to, and corroborated by witnesses who will testify at trial, namely: (i) P-2232, an Anti-Balaka member who will identify Le Bleu and Richard as the ComZones of YALoke⁵³; and (ii) P-1847, [REDACTED]⁵⁴ who will describe the role of Le Bleu. It is further corroborated by [REDACTED].⁵⁵

35. Finally, the Prosecution tenders two associated exhibits, as set out at Confidential Annex A. These comprise: (1) a satellite image of GAGA indicating the locations of the Seleka base and market (Annex A to P-1779's Statement); and (2) [REDACTED] (Annex B to P-1779's Statement).

E. Balance of interests

36. The Prosecution incorporates its previous submissions concerning the balance of interests as set out at paragraphs 47 to 49 in its First Rule 68 Request.⁵⁶

37. Dispensing with the Five Witnesses' live testimony would appropriately expedite these proceedings. Their evidence is manifestly relevant to the proper

⁵¹ See above, para. 21.

⁵² CAR-OTP-2053-0645, at 0645.

⁵³ CAR-OTP-2100-2569, at 2594, 2578, paras. 48 and 140.

⁵⁴ CAR-OTP-2061-1534, at 1569, para.222.

⁵⁵ CAR-OTP-2030-0445, at 0446.

⁵⁶ ICC-01/14-01/18-710-Conf.

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.⁵⁷

38. As previously noted, an assessment of fairness in the application of the rule 68 cannot be presumed on the basis of the number of prospective witnesses alone, nor respond to any preconceived ‘proportionality’ between written and oral testimony, as the Chamber has noted.⁵⁸ Rather, a case by case assessment is crucial, particularly insofar as the balance of interests must account for the prevailing and present circumstances regarding the specific case – not merely procedurally, but also in regard to the specific situation under which it is conducted. As well, it must account for 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.

39. Further to this, a cursory review of several cases with similarly high numbers of witnesses, most tried through final appeal before tribunals applying similar rules, suggests a broad degree of variance in their fair application. In terms of ‘proportionality’, these cases reveal ratios of anywhere from 70 through more than 90 percent of witnesses whose evidence was tendered in whole or part under the equivalent of rule 68.⁵⁹

⁵⁷ ICC-01/09-01/11-1938-Red-Corr, para. 27.

⁵⁸ ICC-01/14-01/18-685, para. 27, citing *Gbagbo and Blé Goudé* OA8 Appeals Judgment, ICC-02/11-01/15-744, para. 78.

⁵⁹ See e.g., *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgement, 24 March 2016, paras. 6136, 6137, 6145, 6146 (318 out of the 337 Prosecution witnesses, i.e. 94% of the evidence was tendered in whole or part under the equivalent of rule 68); *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgement, 12 December 2012, para. 22 (148 out of the 183 Prosecution witnesses, i.e. 80% of the evidence was tendered in whole or part under the equivalent of rule 68); and *Prosecutor v. Haradinaj, et al.*, Case No. ICTR-04-84bis-T, Judgement, 29 November 2012, para. 701 (50 out of the 56 Prosecution witnesses i.e. 89% of the evidence was tendered in whole or part under the equivalent of rule 68); *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgement, 22 November 2017, Vol. IV, Annex B, paras. 5251, 5252, 5255 (544 out of the 592 witnesses, i.e. 92% of the evidence was tendered in whole or part under the equivalent of rule 68); *Prosecutor v. Karemera, et al.*, Case No. ICTR-98-44-T, Judgement, 2 February 2012, para. 38 (114 out of the 153 witnesses, i.e. 74% of the evidence was tendered in whole or part under the equivalent of rule 68); *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Judgement, 23

40. 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

41. For the above reasons, the Prosecution requests that the Chamber deem the proposed prior recorded testimony of the Five Witnesses *in lieu* of their *viva voce* testimony formally submitted, as set out at Annex A.



James Stewart, Deputy Prosecutor

Dated this 31st day of March 2021
At The Hague, The Netherlands

February 2011, paras. 2251, 2252 (92 out of the 115 Prosecution witnesses, i.e. 80% of the evidence was tendered in whole or part under the equivalent of rule 68); *contra* ICC-01/14-01/18-685, paras. 21, 32. Note that the Prosecution has not included the relative ‘proportions’ regarding the use of rule 68 with witnesses called during the presentation of defence cases. However, these involve the same concerns with regard to the other Parties, particularly where antithetical defences may arise among more than one Accused.