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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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public Redacted Version of the “Yekatom Defence Consolidated Response to Prosecution’s Fourth and Fifth Submissions of Rule 68(2) Applications (ICC-01/14-01/18-794-Conf and ICC-01/14-01/18-795-Conf)”, 15 January 2021, ICC-01/14-01/18-823-Conf

Source: Defence for Mr. Alfred Rombhot Yekatom

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 Mr. Yekatom

Me Mylène Dimitri

Mr. Thomas Hannis

Me Justine Bernatchez

Mr. Gyo Suzuki

Counsel for Mr. Ngaïssona

Me Geert-Jan Alexander Knoops

Me Richard Omissé-Namkeamai

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)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Me Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION

1. Counsel representing Mr. Alfred Rombhot Yekatom (the 'Defence') respectfully submit this consolidated response to the *Prosecution's Fourth Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)*¹ and the *Prosecution's Fifth Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)*² (respectively, 'Fourth Request' and 'Fifth Request').
2. The Defence does not oppose the formal submission of the prior recorded testimony of P-0460, P-0461, P-1143, P-2472 and P-1172 as well as the associated exhibits. Likewise, the Defence does not oppose the submission of the prior submitted testimony of P-0520, P-0589, P-1676, P-1865, and P-2377 and associated exhibits.
3. The Defence does not oppose the formal submission of the prior recorded testimony of P-1721 and P-1584 on the understanding that specified paragraphs are excluded from their tendered witness statements in accordance with the Fourth Request and Fifth Request. The Defence does not oppose the formal submission of the prior recorded testimony of P-0473 on the condition that paragraphs 70 and 71 be included.
4. The Defence opposes the formal submission of the prior recorded testimony of P-2698, P-0974 and P-1990 and their associated exhibits, as it would infringe Mr. Yekatom's fair trial rights and the fairness of these proceedings.

PROCEDURAL BACKGROUND

5. On 8 April 2020, the Defence informed the Chamber that it will address Rule 68 issues on a case-by-case basis; and further, that it "wishes to interview

¹ [ICC-01/14-01/18-794-Conf.](#)

² [ICC-01/14-01/18-795-Conf.](#)

all witnesses whose evidence is sought to be admitted under Rule 68(2)(b) so that it can supplement the Prosecution's statement with additional relevant information beneficial to the Defence".³

6. On 22 May 2020, the Trial Chamber ordered the Prosecution to file a Preliminary Witness List by 15 June 2020.⁴ The Prosecution complied.⁵
7. The Trial Chamber held a status conference on 9 July 2020.⁶ On 16 July 2020, the Trial Chamber ordered the Prosecution to submit a Provisional Witness List indicating, *inter alia*, the intended mode of testimony,⁷ and to file its Final Witness List and List of Evidence by 9 November 2020.⁸ The same decision scheduled the evidence presentation to start in March 2021.⁹
8. On 26 August 2020, the Trial Chamber ordered the Prosecution to submit applications under Rule 68(2) and (3) as soon as possible, latest by 9 November 2020.¹⁰ Furthermore, the Trial Chamber has allowed the Prosecution 400 hours to conduct the examination of its witnesses and 200 hours to each Defence team to do the cross-examinations.¹¹
9. On 31 August 2020, the Prosecution filed its Provisional Witness List, indicating its intention to call 44 witnesses through Rule 68(2) and 77 witnesses through Rule 68(3).¹²
10. In its *Request pursuant to Regulation 35 to vary the Time Limit for the Submission of Applications pursuant to Rule 68*, in regard to the Rule 68(2) applications, the Prosecution requested a change of the time limit for it to be on a rolling basis

³ [ICC-01/14-01/18-472](#), para. 12.

⁴ [ICC-01/14-01/18-528](#).

⁵ [ICC-01/14-01/18-553](#).

⁶ [ICC-01/14-01/18-T-012-ENG](#).

⁷ [ICC-01/14-01/18-589](#), para. 4.

⁸ [ICC-01/14-01/18-589](#), para. 16.

⁹ [ICC-01/14-01/18-589](#), para. 25.

¹⁰ [ICC-01/14-01/18-631](#), para. 33.

¹¹ [ICC-01/14-01/18-631](#), paras. 21 and 24.

¹² [ICC-01/14-01/18-642-Conf-AnxA](#); [ICC-01/14-01/18-652](#), para. 7.

up until 60 days after the scheduled start of evidence.¹³ The Defence responded that the applications should not be submitted later than 11 January 2021.¹⁴

11. On 16 October 2020, the Trial Chamber in its *Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules* ('Decision') noted that:

In light of the specific circumstances of this case, and noting the overall number of anticipated applications under Rule 68 of the Rules, namely for 121 out of 145 witnesses (44 of which pursuant to Rule 68(2) of the Rules and 77 pursuant to Rule 68(3) of the Rules), the Chamber considers that the Prosecution's projected use of Rule 68 of the Rules appears, prima facie, disproportionate in light of the principles of orality and publicity and potentially prejudicial to the rights of the accused.¹⁵

12. The Trial Chamber, in the Decision, partly granted the Prosecution's Request, by allowing the Prosecution to 'file its Rule 68(2) Applications on a rolling basis, latest by 11 January 2021, and its Rule 68(3) Applications not less than 45 days before the scheduled start of the witness's testimony'.¹⁶
13. On 10 November 2020, the Prosecution filed its Final Witness List, indicating its intention to call 55 witnesses through Rule 68(2) and 69 witnesses through Rule 68(3).¹⁷
14. On 22 December 2020, the Prosecution filed the Fourth Request, seeking the formal submission of the prior recorded testimony of ten witnesses,¹⁸ mentioning that "[t]hey are limited to evidence of the crime base forming a part of the contextual elements for war crimes and crimes against humanity".¹⁹

¹³ [ICC-01/14-01/18-652](#).

¹⁴ [ICC-01/14-01/18-663](#).

¹⁵ [ICC-01/14-01/18-685](#), para. 32.

¹⁶ [ICC-01/14-01/18-685](#).

¹⁷ [ICC-01/14-01/18-724-Conf-AnxA](#).

¹⁸ Specifically, P-0460, P-0461, P-1143, P-1721, P-2472, P-2698, P-1172, P-0974, P-0473 and P-1990.

¹⁹ [ICC-01/14-01/18-794-Conf](#), para. 4.

15. On 21 December 2020, the Prosecution filed the Fifth Request, seeking the formal submission of prior recorded testimony of a further six witnesses.²⁰

RELEVANT PROVISIONS

Rule 68 (2)(b)(i) – Prior recorded testimony

2 If the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instances:

(b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused. In such a case:

(i) In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question:

- relates to issues that are not materially in dispute;
- is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
- relates to background information;
- is such that the interests of justice are best served by its introduction; and
- has sufficient indicia of reliability.

PRELIMINARY ISSUES

16. As stated above, the Defence does not oppose the submission of the prior recorded testimony of P-1721 on the understanding that paragraphs 39-41 and 45 are excluded from his tendered witness statement, as stated in Annex A to the Fourth Request.²¹
17. Similarly, the Defence does not oppose the formal submission of the prior recorded testimony of P-1584 on the understanding that paragraphs 130-131 and part of paragraph 132 are excluded from his tendered statement, in

²⁰ Specifically, P-0520, P-0589, P-1584, P-1676, P-1865, and P-2377.

²¹ [ICC-01/14-01/18-794-Conf-AnxA](#), p. 4.

accordance with Annex A to the Fifth Request.²² In the event that the Trial Chamber is not minded to exclude these paragraphs in accordance with the Fourth and Fifth Request, the Defence respectfully reserves its right to be heard on these specific matters.

18. Further, the Defence's non-opposition to the formal submission of 13 witnesses²³ should in no way be understood as a concession as to the reliability or probative value of their evidence, nor as to the veracity of any Prosecution allegations based thereon. The Defence's position as regards the Rule 68(2) applications for the 13 witnesses is based solely on the interests of expediting these proceedings, in accordance with Mr. Yekatom's fair trial rights.
19. The Defence intends to challenge the evidence of a number of these witnesses and/or the relevant Prosecution allegations at a later stage, *inter alia* on the basis of their manifest lack of probative value.²⁴ For instance, in relation to P-2472, the Defence highlights the uncorroborated nature of paragraph 38 of the tendered statement of P-2472, and the fact that his evidence in paragraph 25 is directly contradicted by the Prosecution's own evidence.²⁵ A witness such as P-2472 who downplays Seleka crimes might be seen to be biased when recounting Anti-Balaka crimes. Likewise, the Defence contests the evidence of P-1721, especially in relation to paragraphs 43, 46 and 51.²⁶
20. Lastly, the Defence does not oppose the formal submission of the tendered

²² [ICC-01/14-01/18-795-Conf-AnxA](#), p. 5; the Defence notes in regard to para. 132 that the Prosecution only excludes a specific sentence.

²³ Supra paras 2-4; the Defence emphasises the caveats contained therein.

²⁴ In conformity with the Chamber's adoption of the 'Submission Approach' and the two-step approach to Rule 68 applications outlined in the Chamber's 'Initial Directions on the Conduct of Proceedings'; See [ICC-01/14-01/18-631](#), paras. 53, 56.

²⁵ [CAR-OTP-2110-0355-R01](#); see e.g. [CAR-OTP-2045-0300](#); [CAR-OTP-2045-0394-R01](#); [CAR-OTP-2045-0394-R01](#) ; [CAR-OTP-2045-0622](#); [CAR-OTP-2053-0604-R01](#); [CAR-OTP-2053-0601-R01](#); [CAR-OTP-2050-0487-R01](#); [CAR-OTP-2045-0377-R01](#); [CAR-OTP-2042-5124](#); [CAR-OTP-2022-2414-R01](#); [CAR-OTP-2002-2770-R01](#); [CAR-OTP-2002-4165-R01](#); [CAR-OTP-2008-1468-R01](#); [CAR-OTP-2009-1959-R01](#); [CAR-OTP-2009-2237-R01](#).

²⁶ [CAR-OTP-2061-0044-R01](#).

statement of P-0473 on the condition that paragraphs 70 and 71 be included.²⁷

The paragraphs in question relate to a 2015 meeting during which, according to P-0473, Mr. Yekatom spoke publicly in favour of peace and reconciliation, and implored that the fighting should stop.²⁸

21. This evidence does not comprise acts and conduct of Mr. Yekatom as described in the charges brought against him and therefore are not appropriate for exclusion under Rule 68(2)(b).²⁹ More broadly, the 'acts and conduct' exception in that rule relates principally to an Accused's fair trial rights and therefore should not be relied upon to justify the exclusion of evidence beneficial to an accused.³⁰
22. In addition, it would be contrary to the interest of judicial economy, and an unnecessary strain on Defence resources, for the Defence to have to resort to supplementing P-0473's evidence with information that had already been included therein.³¹
23. To the extent that the statement as tendered unjustifiably and unfairly severs paragraphs beneficial to Mr. Yekatom, and therefore does not serve the interests of justice, it is inappropriate for submission under Rule 68(2)(b)(i).³² In this regard, the Defence respectfully recalls that Article 69 empowers the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth.

ARGUMENT

²⁷ [ICC-01/14-01/18-794-Conf-AnxA](#), pp. 9-10.

²⁸ [CAR-OTP-2124-0224-R01](#), paras. 70-71.

²⁹ *Infra*, para. 26.

³⁰ *Prosecutor v. Ntaganda*, [Public redacted version of 'Decision on certain requests related to the admission of the prior recorded testimony of Witness D-0080'](#), ICC-01/04-02/06-2242-Red, 22 February 2018, para. 54.

³¹ See also, *Prosecutor v. Ongwen*, [Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), ICC-02/04-01/15-596-Red, 18 November 2016, para. 48.

³² See also, *infra*, para. 24.

24. In *Ongwen*, Trial Chamber IX underlined that “under no circumstances can prior recorded testimonies be introduced when this is prejudicial to the fairness of the proceedings and, more specifically, the rights of the accused”.³³
25. Trial Chamber IX added that for prior recorded testimony to be admitted under Rule 68(2)(b) it should not relate ‘to matters which are soundly and conceivably disputed between the parties, and are crucial, or of at least sufficient significance for the Chamber’s eventual determination of the charges against the accused in its judgment under Article 74 of the Statute;’³⁴ and that the potential impacts that those prior recorded statements would have on material matters actually contested should be objectively assessed.³⁵
26. Trial Chamber IX reiterated that prior recorded testimony under Rule 68(2)(b) must not relate to acts and conducts of the accused: ‘[t]he expression ‘acts and conduct of the accused’ is understood as referring exclusively to those actions of the accused which are described in the charges brought against him or her or which are otherwise relied upon to establish the accused’s criminal responsibility for the crimes charged’.³⁶
27. The jurisprudence of the Court is consistent in regard to prior recorded statements related to a core issue of the Prosecution’s charges. The Court has ruled on multiple occasions that Rule 68(2)(b) applications must be denied where they relate to information of central significance to a case.³⁷

³³ *Prosecutor v. Ongwen*, [Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), 18 November 2016, ICC-02/04-01/15-596-Red, para. 16.

³⁴ *Ibid*, para. 15.

³⁵ *Ibid*, para. 15.

³⁶ *Prosecutor v. Ongwen*, [Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68\(2\)\(b\) of the Rules of Procedure and Evidence](#), 2 July 2018, ICC-02/04-01/15-1294, para. 4.

³⁷ i.e. *Prosecutor v. Ongwen*, [Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), 18 November 2016, ICC-02/04-01/15-596-Red, para. 13; *Prosecutor v. Ongwen*, [Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68\(2\)\(b\) of the Rules of Procedure and Evidence](#), 2 July 2018, ICC-02/04-01/15-1294, para. 5; *Prosecutor v. Katanga*, [Decision on Prosecutor’s request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219](#), 3 September 2010, ICC-01/04-01/07-2362, para. 15; *Prosecutor v. Bemba*, [Decision on the “Prosecution Application for Leave to Submit in Writing Prior- Recorded Testimonies by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP-WWWW-0108”](#), 16 September 2020, ICC-

28. Finally, if the witness statement could have an influence on the credibility of another witness, the Defence should have the right to challenge the credibility in cross-examination.³⁸
29. The admission of prior testimony of P-2698, P-0974 and P-1990 under Rule 68(2)(b) would be prejudicial to the fairness of these proceedings as they go to the acts and conducts of the accused, are material to core issues of the Prosecution case and can be used to challenge the credibility of other witnesses.

I. P-2698

30. In addition to the usual criteria of Rule 68(2), the *Ongwen* Trial Chamber held that in the case of crucial evidence, the witness can be brought to the Court to testify on the evidence collection and explanation.³⁹
31. P-2698 is [REDACTED].⁴⁰ He is in a unique position to discuss the state of the bodies, their exact location, the approximate moment of death, their ethnic or religious origin, etc. The Defence should be afforded the opportunity to explore several highly prejudicial allegations made by Prosecution witnesses with P-2698 – [REDACTED] – that are not addressed in his proposed evidence. For instance, P-2233 claims that some individuals were cut in to pieces by Mr. Yekatom and his elements and buried at the YAMWARA premises.⁴¹ P-2233 also claims that several people were buried there and that some of them had their genitals cut off⁴² before being slaughtered.⁴³

01/05-01/08-886, para. 3; *Prosecutor v. Gbagbo & Blé Goudé*, [Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)](#), 9 June 2016, ICC-02/11-01/15-573-Red, para. 11.

³⁸ *Prosecutor v. Ongwen*, [Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), 18 November 2016, ICC-02/04-01/15-596-Red, paras. 53-54.

³⁹ *Ibid*, paras. 208 and 212.

⁴⁰ [CAR-OTP-2126-0254-R02](#), paras. 34-53.

⁴¹ [CAR-OTP-2118-5817-R01](#) at 5821.

⁴² [CAR-OTP-2118-5817-R01](#) at 5822.

⁴³ [CAR-OTP-2118-5817-R01](#) at 5823.

32. Further, an 8 October 2020 Defence request to interview *inter alia* P-2698 remains pending.⁴⁴ The fact that the Defence has not been provided the opportunity to supplement P-2698's statement with additional relevant information beneficial to the Defence further militates against the formal submission of his evidence under Rule 68(2).

i) Acts and Conduct of the Accused

33. The prior recorded testimony of P-2698 also concerns Mr. Yekatom's acts and conduct. P-2698 describes various alleged attacks by Mr. Yekatom and his group. He claims that after 5 December 2013, he saw Mr. Yekatom stationed at a roundabout in Boeing and that from that day onwards anyone in the street could be a target of Mr. Yekatom and his group.⁴⁵

34. P-2698 further adds that around 20 December 2013 there was an attack by Mr. Yekatom and his elements upon Quartier Foulbe rue Boulata where [REDACTED], was hit by three bullets and killed. The son of the latter was also shot but survived.⁴⁶ While the witness was not close enough to recognize individual elements, this evidence concerns Mr. Yekatom's acts and conduct. P-2698 also claims that Mr. Yekatom's group was able to travel along the main road to Boeing and PK5 and conduct many attacks in those areas.⁴⁷

35. In fairness to Mr. Yekatom's right to challenge the Prosecution's evidence, the Defence should be allowed to cross-examine P-2698 to test the reliability of the identification evidence provided therein.

ii) Core of the Disputed issues

36. P-2698's prior recorded testimony concerns issues which are in themselves

⁴⁴ Letter sent by the Defence to the Prosecution on 8 October 2020 available upon request by the Chamber.

⁴⁵ [CAR-OTP-2126-0254-R02](#), at 0260, para. 26

⁴⁶ [CAR-OTP-2126-0254-R02](#), at 0260, para. 27.

⁴⁷ [CAR-OTP-2126-0254-R02](#), at 0260, para. 28.

materially disputed between the parties and of central importance in the present case. P-2698 alleges that a Muslim by the name of [REDACTED] was *“taken prisoner in August or September 2013 and taken to Yekatom’s base in Kapou located on the way to Mbaiki and approximately 25 km from Bangui. At that time, Yekatom was trying to arrest Muslim people. We learned this from prisoners who sometimes escaped. [...] [REDACTED] he had witnessed people being detained and tortured and eventually killed by Yekatom’s elements. He further mentioned [REDACTED] he had witnessed people being cut with machetes like vegetables or fruits, either being chopped or sliced or even having their scalps removed from their heads. [...] [REDACTED] ”.*⁴⁸

37. It is of utmost importance to examine P-2698 about this evidence, which is directly relevant to the Chamber’s determination of Counts 24-25.

iii) Credibility of Another Witness

38. An entire section of P-2698’s statement is devoted to the killings of an individual called Aliou Youssoufa and his brother. P-2698 claims to have heard about what happened during conversations among various people.⁴⁹ Aliou was allegedly taken to YAMWARA school, forced to dig his own grave, attacked by Anti-Balaka elements with machetes and beheaded, and buried in the hole he had dug.⁵⁰ [REDACTED].⁵¹
39. This aspect of his evidence concerns Mr. Yekatom’s alleged policy with regard to persecution of Muslim civilians and is of crucial importance in the present case. In addition, the fact that P-2675, a former Prosecution witness, [REDACTED] contradict P-2698’s account. [REDACTED] was produced by [REDACTED]. Therefore further questioning during cross examination

⁴⁸ [CAR-OTP-2126-0254-R02](#), paras. 23-24.

⁴⁹ [CAR-OTP-2126-0254-R02](#), paras. 30-33.

⁵⁰ [CAR-OTP-2126-0254-R02](#), para. 32.

⁵¹ [CAR-OTP-2126-0254-R02](#), para. 33.

[REDACTED] would be warranted.⁵²

40. The Prosecution evidence is inconsistent in this regard. P-2698's testimony is contradicted by previously disclosed, or relied upon, Prosecution witnesses.⁵³ While no longer part of the Prosecution's case, they complicate the account proffered by P-2698, which is now solely relied upon by the Prosecution as [REDACTED] at Yanwara School. This information goes directly to the credibility and reliability of P-2698's account. There is conflicting information about: [REDACTED];⁵⁴ [REDACTED];⁵⁵ [REDACTED];⁵⁶ [REDACTED].⁵⁷ Critically, P-2698 [REDACTED].⁵⁸ Further, those apparently first-hand portions of his account are contradicted by other witnesses.⁵⁹ Given the gravity of the allegations against Mr. Yekatom and the singular nature of P-2698's testimony, these contradictions must be put to P-2698 in cross-examination.

II. P-0974

41. While the Prosecution submits that P-0974's prior recorded testimony is cumulative to, and corroborated by, *inter alia*, witnesses who will testify at trial regarding the 5 December 2013 attack on BANGUI, displacement of Muslims to MBAIKI, formation of Anti-Balaka in the provinces and the roles of Anti-Balaka members such as ANDJILO, KOKATE, KONATE, and 12 PUISSANCES,⁶⁰ P-0974 has nevertheless a unique view on many issues.
42. In *Ongwen*, the Trial Chamber held that when dealing with witnesses with privileged information on important matters, *viva voce* testimony is more

⁵² [CAR-OTP-2126-0231-R01](#), para. 27 see [CAR-OTP-2126-0292-R01](#) see line July 2015.

⁵³ Previously relied upon: P-2475, P-1990, P-2675, P-2233; Disclosed and not relied upon: [REDACTED].

⁵⁴ P-1990, [REDACTED], P-2475, P-2233, P-2675.

⁵⁵ [REDACTED], P-2475, P-1990, P-2675.

⁵⁶ [REDACTED], P-2675, P-1990.

⁵⁷ [REDACTED], P-2675, P-1990.

⁵⁸ [CAR-OTP-2126-0254-R02](#), para. 51.

⁵⁹ [REDACTED], P-2675, P-1990

⁶⁰ [ICC-01/14-01/18-794-Conf](#), paras. 58-60.

appropriate.⁶¹

43. P-0974 has privileged information about the organization of the Anti-Balaka, [REDACTED].⁶²
44. In addition, P-0974 is [REDACTED],⁶³ during which the goal and intentions of the group were discussed and decisions were made accordingly.⁶⁴ He therefore offers a different perspective from a unique vantage point about [REDACTED], the various positions held by the participants (including Mr. Yekatom) and their goal and intentions. The Defence should have the opportunity to explore this part of his evidence in court.
45. [REDACTED] P-0952, whom the Prosecution intends to call, held a meeting with a very limited number of individuals shortly after [REDACTED], including P-0974.⁶⁵ P-0974 therefore has privileged information on important matters that should warrant his *viva voce* testimony as the account and recollection of P-0952 might differ.

i) Acts and Conduct of the Accused

46. In paragraph 93 of his tendered statement, P-0974 alleges that Mr. Yekatom “[REDACTED]” and “[REDACTED]” and that P-0487 distanced himself from him as Mr. Yekatom was causing problems.⁶⁶ From the subsequent paragraph – excluded from his statement for the purposes of the Fourth Request – it is apparent that P-0974 is referring to allegations that Mr. Yekatom ‘[REDACTED]’ and ‘[REDACTED]’, including his Aide de Camp.⁶⁷ In other

⁶¹ *Prosecutor v. Ongwen*, [Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), 18 November 2016, ICC-02/04-01/15-596-Red, paras. 214-215.

⁶² [CAR-OTP-2058-0165-R01](#), para. 52.

⁶³ [CAR-OTP-2058-0165-R01](#), paras. 66-67.

⁶⁴ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 309.

⁶⁵ The handwritten list of participants is stamped as [CAR-OTP-2087-9027](#) and attached as Annex 8 [REDACTED] statement.

⁶⁶ [CAR-OTP-2058-0165-R01](#), para. 93.

⁶⁷ [CAR-OTP-2058-0165-R01](#), para. 94.

words, it is evident that paragraphs 93 and 94 are referring to the same conduct and in this respect the mere exclusion of paragraph 94 does not render paragraph 93 admissible under Rule 68(2). On the contrary, these allegations refer to the acts and conduct of Mr. Yekatom and remain highly prejudicial. The Defence should therefore be granted the opportunity to confront them through cross-examination.

ii) Core of the Disputed issues

47. P-0974's statement is directly related to material issues at the core of the charges. The Prosecution in its Trial Brief relied on P-0974's statement for Counts 24 and 25 in relation to the advancement of Mr. Yekatom's group from PK9 to MBAIKI, which allegedly forced Muslim civilians to flee.
48. Moreover, the Prosecution relies on P-0974's statement to support the mode of liability of ordering and the illegal instructions that Mr. Yekatom allegedly gave to his elements.⁶⁸
49. In his statement, P-0974 appears to have relevant information regarding the fleeing of the Muslim population in the MBAIKI area⁶⁹ and alleges that Muslims paid Mr. Yekatom to be evacuated.⁷⁰ Not only does this allegation relate to Mr. Yekatom's acts and conduct as charged, it is also intrinsically linked to Counts 24-25.
50. Further, while the Prosecution submits that P-0974's evidence was corroborated by P-1666, P-1823 and P-1813, none of these witnesses are [REDACTED], contrary to P-0974.⁷¹ The Defence therefore should be granted the opportunity to cross-examine P-0974 so as to be allowed to test [REDACTED] evidence on the forcible transfer and displacement charges.

⁶⁸ [ICC-01/14-01/18-723-Conf](#), pp. 147, 182, 184.

⁶⁹ [CAR-OTP-2058-0165-R01](#), paras. 87-88.

⁷⁰ [CAR-OTP-2058-0165-R01](#), para. 88

⁷¹ [ICC-01/14-01/18-794-Conf](#), para. 58.

iii) Credibility of Another Witness

51. As mentioned above,⁷² P-0974 [REDACTED]. *Viva voce* testimony from P-0974 will enable the Defence to gather privileged information on the substance of [REDACTED] for the purposes of confronting the accounts of P-0487⁷³ or P-0876,⁷⁴ and other witnesses who are alleged to [REDACTED] of P-0974⁷⁵ there.
52. In addition, the evidence disclosed so far by the Prosecution appears to be inconsistent in relation to Mr. Yekatom's alleged position [REDACTED]. While P-1858 alleges that Mr. Yekatom would not have agreed with the majority position [REDACTED] and would have sided [REDACTED],⁷⁶ P-0974 states that [REDACTED] "[REDACTED]".⁷⁷
53. P-0954, [REDACTED],⁷⁸ claims that Mr. Yekatom stated [that] [REDACTED]."⁷⁹ This allegation is so prejudicial to Mr. Yekatom that the Defence should have the opportunity to test it through P-0974.
54. Similarly, P-0884 claims that no conclusion was reached,⁸⁰ while P-0974 claims [REDACTED] on 12 demands in total.⁸¹
55. These varying accounts given by Prosecution witness appear to be sufficiently inconsistent to warrant allowing cross-examination of P-0974, so as to enable the Defence to test the credibility of these witnesses.
56. In addition, other Prosecution witnesses appearing on the Final Witness List

⁷² See para. 44.

⁷³ [CAR-OTP-2076-0374-R03](#) at 0390-3094; [CAR-OTP-2076-0130-R01](#) at 0138-0143; [CAR-OTP-2076-0516-R03](#) at 0544-0547.

⁷⁴ [CAR-OTP-2046-0249-R01](#) at 0262; [CAR-OTP-2046-0267-R01](#) at 0291-0293; [CAR-OTP-2046-0407-R01](#) at 0422-0423.

⁷⁵ [CAR-OTP-2046-0500-R01](#) at 0516.

⁷⁶ [CAR-OTP-2063-0050-R01](#), para. 57.

⁷⁷ [CAR-OTP-2058-0165-R01](#), para. 69.

⁷⁸ [CAR-OTP-2048-0171-R02](#), paras. 41-42.

⁷⁹ [CAR-OTP-2048-0171-R02](#), para. 42.

⁸⁰ [CAR-OTP-2072-1654-R01](#), pp. 1675-1677.

⁸¹ [CAR-OTP-2058-0165-R01](#), para. 69.

mention P-0974 in their statements. For example, P-0487⁸² and P-0954⁸³ both state that Mr. Yekatom and his elements [REDACTED]. While P-0487 claims [REDACTED],⁸⁴ P-0974 does not address this incident in his statement despite extracts devoted to Mr. Yekatom's conduct. Cross-examination of P-0974 would enable the Defence to test the various allegations included in P-0487's and P-0954's statements in relation to this event. Not giving the Defence such an opportunity would be highly prejudicial to Mr. Yekatom.

57. Cross-examination of P-0974 would also enable the Defence to test the credibility of other Prosecution witnesses who seem to downplay their role during the events related to the charges. For instance, P-0974 describes P-0487 as being [REDACTED],⁸⁵ [REDACTED]⁸⁶. He further states that while Mr. Yekatom and [REDACTED] had their own troops, they were working under [REDACTED]⁸⁷ who would assign men to Mr. Yekatom or [REDACTED] to [REDACTED] with [REDACTED].⁸⁸ P-0974 also states that P-0487 [REDACTED].⁸⁹ [REDACTED].⁹⁰ [REDACTED].⁹¹ The differences in the accounts of P-0487 and P-0974 [REDACTED] warrant the cross-examination of P-0974 for credibility purposes.

58. Additionally, P-1666 states that P-0974 [REDACTED] during the disarmament of Mr. Yekatom's elements in MBAÏKI. He mentioned that P-0974 [REDACTED].⁹² Yet P-0974 claims to [REDACTED] and appears to downplay his role, given that his statement does not refer to [REDACTED].⁹³ Again, the

⁸² [CAR-OTP-2076-0441-R01](#) at 0452 and [CAR-OTP-2048-0171-R02](#), para. 90.

⁸³ [CAR-OTP-2048-0171-R01](#), para. 90.

⁸⁴ [CAR-OTP-2076-0441-R01](#) at 0452 and [CAR-OTP-2048-0171-R02](#), para. 90.

⁸⁵ [CAR-OTP-2058-0165-R01](#), para. 73.

⁸⁶ [CAR-OTP-2058-0165-R01](#), para. 76.

⁸⁷ [CAR-OTP-2058-0165-R01](#), para. 91 : this is a paragraph OTP wants to exclude.

⁸⁸ [CAR-OTP-2058-0165-R01](#), para. 92.

⁸⁹ [CAR-OTP-2058-0165-R01](#), para. 68.

⁹⁰ [CAR-OTP-2076-0575-R01](#), at 0577.

⁹¹ [CAR-OTP-2076-0331-R01](#), at 0344.

⁹² [CAR-OTP-2059-0361-R03](#), paras. 40-42.

⁹³ [CAR-OTP-2058-0165-R01](#), paras. 87-88.

credibility of Prosecution witnesses, more particularly P-0974's own credibility, warrants his *viva voce* testimony.

III. P-1990

59. P-1990 was [REDACTED] during the temporal scope of the charges.⁹⁴ He has privileged information regarding events allegedly occurring in YAMWARA. [REDACTED].⁹⁵

i) Acts and Conduct of the Accused

60. P-1990's statement explicitly mentions Mr. YEKATOM's acts and conduct during the temporal scope of the indictment. He states that he knew Mr. Yekatom, and that Mr. Yekatom had a bad reputation because he was encouraging his elements to attack PK5.⁹⁶ These allegations are directly relevant to the charges of directing attacks against the civilian population and persecution for the severe deprivation of the fundamental rights of persons in Bangui. Therefore the Defence should be given the opportunity to cross-examine the witness on these allegations.

ii) Core of the Disputed issues

61. P-1990's statement is directly related to material issues at the core of the Prosecution's charges. The Prosecution in its Trial Brief relied on P-1990's statement for Count 4 and Count 5 in regard to the 5 December 2013 attack in BOEING and CATTIN.⁹⁷

62. P-1990 mentions a significant number of events and alleged crimes committed by the Anti-Balaka at YAMWARA during December 2013.⁹⁸ His statement refers to checkpoints around YAMWARA school where mobile phones were

⁹⁴ [CAR-OTP-2124-0247-R01](#), para. 14.

⁹⁵ [CAR-OTP-2124-0247-R01](#), paras. 25-45.

⁹⁶ [CAR-OTP-2124-0247-R01](#), para. 28.

⁹⁷ [ICC-01/14-01/18-723-Conf](#), p. 159.

⁹⁸ [CAR-OTP-2124-0247-R01](#), paras. 25-44.

checked for Muslim names registered in contact lists and if such were found the person would be detained,⁹⁹ or attacked and even killed.¹⁰⁰ P-1990's proposed evidence is also to the effect that '[REDACTED]'¹⁰¹; [REDACTED].¹⁰²

63. These allegations are highly prejudicial to Mr. Yekatom and are relevant to charges in relation to the YAMWARA school – for instance, Count 8. Of themselves, these allegations warrant a cross-examination of the witness not only to test his credibility, but the reliability of his second-hand account.

iii) Credibility of Another Witness

64. P-1990's expected evidence relates to [REDACTED].¹⁰³
65. P-1990 claims that there [REDACTED]; that he would have seen obvious disturbances on the ground;¹⁰⁴ and that eventually [REDACTED].¹⁰⁵ His expected evidence is contested and prejudicial to Mr. Yekatom as he states that "[REDACTED]".¹⁰⁶
66. The Defence objects to the introduction of Witness P-1990's prior recorded testimony on essentially the same grounds as in its objections to the introduction of the written statement of Witness P-2698.
67. P-1990's statement regarding [REDACTED] at Yanwara school is contradicted by other evidence, including the already-tendered statement of P-2698. P-1990's evidence is contrary to other witnesses regarding the [REDACTED]¹⁰⁷; [REDACTED]¹⁰⁸; [REDACTED].¹⁰⁹ Such is the weight of P-1990's allegations

⁹⁹ [CAR-OTP-2124-0247-R01](#), para. 32.

¹⁰⁰ [CAR-OTP-2124-0247-R01](#), para. 35.

¹⁰¹ [CAR-OTP-2124-0247-R01](#), para. 32.

¹⁰² [CAR-OTP-2124-0247-R01](#), para. 35.

¹⁰³ [CAR-OTP-2124-0247-R01](#), paras. 38-46.

¹⁰⁴ [CAR-OTP-2124-0247-R01](#), para. 38.

¹⁰⁵ [CAR-OTP-2124-0247-R01](#), para. 42.

¹⁰⁶ [CAR-OTP-2124-0247-R01](#), para. 38.

¹⁰⁷ P-2968, P-1704.

¹⁰⁸ P-2968, P-2675.

¹⁰⁹ P-2968, P-2475, P-2675.

against Mr. Yekatom that these matters should be clarified via cross-examination, thus assisting the Trial Chamber in assessing the credibility of P-1990's statement. The Defence would also highlight that P-1990, unlike P-2698, [REDACTED].¹¹⁰

CONFIDENTIALITY

68. This response is filed confidentially because it responds to a motion that has been filed confidentially and for which no public redacted version has yet been filed. The Chamber is respectfully requested to issue a public redacted version of its decision and order the parties to file public redacted versions of its submissions.

RELIEF SOUGHT

69. In light of the above observations, the Defence respectfully requests the Trial Chamber to:

REJECT the Prosecution's formal submission of the Prior Statements of P-2698, P-0974 and P-1990 together with their associated exhibits as set out at Annex A;

INCLUDE paragraphs 70 and 71 in the tendering of CAR-OTP-2124-0224-R01.

RESPECTFULLY SUBMITTED ON THIS 1ST DAY OF APRIL 2021



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom



Mr. Thomas Hannis
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

¹¹⁰ [CAR-OTP-2124-0247-R01](#), para. 41.