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**International
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Court**

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Date: **13 January 2022**

TRIAL CHAMBER V

Before:

Judge Bertrand 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 AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC

Public Redacted Version of the “Defence response to ‘Prosecution's Request the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)’”, 16 November 2020

Source: Defence of Patrice-Edouard Ngaïssona

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

Mr Karim A.A. Khan QC
 Mr James Stewart
 Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

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

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri
 Mr Thomas Hannis
 Ms Anta Guissé

Legal Representatives of the Victims

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

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims****The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr Peter Lewis

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. Introduction

1. The Defence opposes the Prosecution's request for the admission of 9 witnesses statements under Rule 68 (2) (b) ("the Request")¹ for the following reasons: they relate to the alleged acts and conducts of the accused; they relate to issues that are materially in dispute;² they are not of a cumulative or corroborative nature; they do not merely relate to background information; and, the interest of justice is not best served by their introduction. In the event that the Chamber decides to allow the introduction of the proposed statements, the Defence argues that the exhibits, where applicable, are not inseparable and indispensable parts of the proposed statements and therefore should not be introduced via Rule 68 (2) (b).
2. In addition, the Defence is mindful the Decision of the Trial Chamber to the effect that several non-confirmed incidents fall within the facts and the circumstances of the case.³ The Defence also notes that all the witness statements sought to be introduced under Rule 68 (2) (b) in the Request relate to the non-confirmed incidents namely Berberati, Boda and Carnot. The Prosecution intends to use these witness statements to prove the contextual elements of war crimes and crimes against humanity "in particular, the Anti-Balaka's engagement in an armed conflict throughout the relevant period and the group's course of conduct involving the multiple commission of crimes and acts against the Muslim civilian population of western CAR, including the pattern and intensity of their mistreatment, pursuant to a criminal organizational policy."⁴ The Defence submits that all these issues are materially in dispute and, therefore, witness statements aimed at proving any of these issues should not be introduced under Rule 68 (2) (b) which excludes cross-examination.⁵
3. While the present response relates specifically to the nine witnesses of the Prosecution's request, the Defence notes with concern that the Prosecution has not taken heed of the Chamber's guidance with respect to Rule 68.

¹ The Request, ICC-01/14-01/18-710-Conf.

² The Defence refers to its previous submissions of matters materially in dispute as expressed in ICC-01/14-01/18-382-Conf-Corr

³ ICC-01/14-01/18-703-Conf, para. 45.

⁴ The Request, ICC-01/14-01/18-710-Conf, para. 4.

⁵ See also ICC-01/14-01/18-573-Conf, para 41 where the Defence argued that: "questions as to the contextual elements of the crimes relate to core issues materially in dispute and for which cross-examination is essential."

4. In its "Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules," the Chamber found "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."⁶ The Chamber did not limit in the abstract the number of rule 68 applications and decided to "trust the Prosecution to take [its] guidance into account".⁷ Rather than taking this guidance into account, the Defence notes that the Prosecution has decided to increase its number of Rule 68 (2)(b) witnesses from 44 to 55 witnesses. Therefore, the Prosecution's projected use of Rule 68 is prima facie disproportionate and potentially prejudicial to Mr Ngaïssona.

II. Applicable Law

5. Rule 68 (2) (b) provides that a statement may be introduced under the Rule if it does not relate to the alleged acts and conducts of the accused. In determining whether to introduce a witness statement under Rule 68 (2) (b) the Trial Chamber shall determine whether it: 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.
6. According to the jurisprudence of the Court, "the expression 'alleged acts and conducts of the accused' within the meaning of Rule 68(2)(b) of the Rules must be 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 his or her criminal responsibility for the crimes charged".⁸ A party's intended reliance on a witness statement may aid the Chamber in determining whether the witness statement relates to the alleged acts and conducts of the accused.⁹

⁶ ICC-01/14-01/18-685 para 32.

⁷ ICC-01/14-01/18-685 para 32.

⁸ ICC-02/04-01/15-596-Red, para. 11.

⁹ ICC-02/04-01/15-596-Red, para. 13.

7. The Defence also refers to the jurisprudence of the Court in relation to exclusion of parts of a statement which concern the alleged acts and conducts of the accused. In this regard the Chamber held that: “that ‘statements cannot be submitted piecemeal’ as this approach ‘would lead to an artificial exercise’ and possibly ‘absurdity and re-litigation of the Rule 68 admission’....the Chamber must conduct its determination of whether a prior recorded testimony can be introduced under Rule 68(2)(b) of the Rules upon consideration of the whole testimony and, in turn, the whole testimony would be introduced under that provision.”¹⁰
8. In determining whether an issue is materially in dispute, the Chamber shall “consider whether the prior recorded testimony relates 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.”¹¹
9. In deciding whether the interests of justice are best served by the introduction of a statement under Rule 68 (2) (b) the Chamber must ensure that such admission is not prejudicial to or inconsistent with the rights of the accused.¹²

III. Confidentiality

10. Pursuant to regulation 23 *bis* of the Rules of the Court, this filing is classified as confidential because it is a response to a confidential request by the Prosecution.

IV. Submissions

A. Berberati

i. P-2324

The statement relates to the alleged acts and conducts of Mr Ngaïssona

11. In paragraph 85 of the witness statement the witness speaks about linkage between Mr Ngaïssona and the Anti-Balaka in Berberati; therefore the statement relates to the

¹⁰ ICC-02/04-01/15-596-Red, para.13.

¹¹ ICC-01/04-02/06-1667-Red, para. 15.

¹² ICC-01/04-02/06-1667-Red, para. 16.

alleged acts and conducts of Mr Ngaïssona.¹³ The Defence acknowledges that the Prosecution has specifically excluded this paragraph from the scope of the Request.¹⁴ However, the Defence notes that the paragraphs directly before and after paragraph 85 are not excluded from the scope of the Request and are directly related to the information in excluded paragraph 85. According to the jurisprudence of the Court, a statement cannot be introduced piecemeal under Rule 68 (2) (b). Therefore in determining whether a statement relates to the alleged acts and conducts of the accused, the Chamber has to consider and admit the entire statement.¹⁵ The Defence submits that paragraph 85 provides context for the paragraphs directly above and below it. Therefore, the entire statement should not be introduced under Rule 68 (2) (b) because it relates to the alleged acts and conducts of the accused.

The statement relates to issues that are materially in dispute

12. P-2324's statement relates to matters materially in dispute for example the alleged relationship and communication between the Anti-Balaka National Coordination in Bangui and the Anti-Balaka elements in Berberati. For instance, P-2324 mentions that [REDACTED].¹⁶ The issue of the existence of communication between the National Coordination in Bangui and Anti-Balaka in other parts of the country including Berberati goes to the core of the case and, therefore, is materially in dispute. For that reason, the statement should not be introduced under Rule 68 (2) (b) and the Defence should be availed the opportunity to cross-examine this witness.

The statement does not merely relate to background information

13. The question of whether the Anti-Balaka conducted a widespread and systematic attack, including in Berberati, is part of the contextual elements of crimes against humanity and war crimes. Therefore evidence aimed at proving the presence of widespread and systematic attack cannot be merely considered as "background information", rather, it is at the core of the trial.

¹³ P-2324 statement, CAR-OTP-2100-2002-R01, para. 88.

¹⁴ Annex A to the Request, ICC-01/14-01/18-710-Conf-AnxA, page 2.

¹⁵ See para 5 above.

¹⁶ P-2324 statement, CAR-OTP-2100-2002-R01, para. 88.

14. For this reason, the Defence submits that the evidence provided by P-2324 does not merely relate to background information. For instance: P-2324 provides information about the presence and Anti-Balaka leadership in Berberati linking it to the coordination in Bangui; he also provides information about Anti-Balaka presence in other towns; as well as the structure and organization of Anti-Balaka groups in Berberati.¹⁷ This evidence goes to the question whether the Anti-Balaka was an “organisation” for the purpose of commission of war crimes and crimes against humanity; and therefore is not merely background information.

The introduction of the statement does not serve the interests of justice

15. The Defence submits that the admission of P-2324’s statement through Rule 68 (2) (b) is against the interests of justice for at least two reasons. The first is the presence of excessive redactions in the statement: several names of key sources for P-2324’s information are redacted, preventing the Defence from verifying the credibility and accuracy of the information.¹⁸ This is prejudicial and inconsistent with the rights of the accused. Secondly, the witness does not state the source of his evidence for the most part¹⁹ and sometimes cannot identify the perpetrators of the alleged crimes as members of the Anti-Balaka.²⁰ The interest of justice would be better served if the Defence is availed the opportunity to question P-2324 in order to establish the sources of his anticipated evidence and the identity of the perpetrators of the alleged crimes he is expected to testify to.

Associated documents are not inseparable and therefore should not be introduced

16. Along with P-2324’s statement, the Request also seeks to admit ten photographs taken by [REDACTED] of IDP site.²¹ The Defence opposes the admission of these photographs because they were not taken by the Witness, but rather, by [REDACTED]. [REDACTED] is redacted under category B.2. which makes the sources of the pictures anonymous. Besides, some of the pictures have a double layer

¹⁷ P-2324, CAR-OTP-2100-2002-R01, para. 73.

¹⁸ See for example redactions in CAR-OTP-2100-2002-R02, para. 89.

¹⁹ See for example P-2324, CAR-OTP-2100-2002-R01, paras 28-31 and 94.

²⁰ P-2324, CAR-OTP-2100-2002-R01, paras 38, 42, 43, 49-51.

²¹ CAR-OTP-2100-2039; CAR-OTP-2100-2045; CAR-OTP-2100-2059; CAR-OTP-2100-2048; CAR-OTP-2100-2049; CAR-OTP-2100-2050; CAR-OTP-2100-2051; CAR-OTP-2100-2053; CAR-OTP-2100-2056; CAR-OTP-2100-2061.

of anonymity²² making their introduction prejudicial to the rights of the Defence. Furthermore, it is noteworthy that the witness provided the Prosecution with pictures which [REDACTED] but the Prosecution does not seek to have them introduced under Rule 68(2)(b). Therefore the Defence submits that these ten photographs should not be introduced.

ii. P-2325

Relates to the alleged acts and conducts of Mr Ngaïssona

17. The Defence submits that the testimony of P-2325's statement relates to the alleged acts and conducts of Mr Ngaïssona. At paragraph 64 of the witness statement, he states that [REDACTED] were allegedly in contact with the Coordination in BANGUI regarding their actions on the field and that decision making was made at that level and the names constantly heard were Mokom, Ngaïssona and Wenezoui.²³ He testified about a delegation sent from Bangui including Wenezoui [REDACTED] and they explained they were sent "to coordinate the actions of the Anti-Balakas".²⁴ Although the Pre-Trial Chamber found that there was insufficient evidence to establish the linkage between Mr Ngaïssona and the coordination in Berbarati, P-2325's statement nonetheless goes to the alleged acts and conducts of Mr Ngaïssona in that it discusses the alleged existence of a coordination of the Anti-Balaka in Berbarati involving Mr Ngaïssona.

The statement relates to issues that are materially in dispute

18. The Defence submits that P-2325's statement relates to matters that are materially in dispute, for example: (i) The Witness states that [REDACTED] were taking orders from the national coordination in Bangui, including Mokom, Ngaïssona and Wenezoui.²⁵ (ii) P-2325 also is expected to testify about Bossangoa being the place where the Anti-Balaka movement was born in response to the Seleka and he says that is where they started to organise. His anticipated testimony states that after Mr Bozizé was overthrown, most of his loyal guards infiltrated the auto-defence groups

²² [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

²³ P-2325, CAR-OTP-2100-2386-R01, para. 64.

²⁴ P-2325, CAR-OTP-2100-2386-R01, para. 65.

²⁵ P-2325, CAR-OTP-2100-2386-R01, para. 64.

to take revenge on the Muslims, and one of his sources' names is redacted.²⁶ The Defence submits that these are matters materially in dispute and therefore the statement should not be introduced under Rule 68 (2) (b).

The introduction of the statement does not serve the interests of justice

19. The Defence submits that the introduction of this witness statement does not serve the interest of justice due to the existence of excessive redactions in that some of the sources of the witness' (hearsay) knowledge are redacted for instance.²⁷

20. Furthermore, the Pre-Trial Chamber relied on the witness statement and held that "the Chamber is not satisfied that the connection and/or flow of information between the Anti-Balaka group on the ground in Berbérati and Ngaïssona is established to the relevant standard."²⁸ For that reason the Defence submits that it would serve the interest of justice for the witness to provide more information especially regarding [REDACTED] which the Prosecution does not seek to introduce in relation to this witness.²⁹

The associated documents are not inseparable from the witness statement and therefore should not be introduced

21. The Defence submits that associated documents are not inseparable parts of the witness statement and therefore should not be introduced. For example [REDACTED]. The Defence submits that it should not be introduced without the main associated document to which this annex is tied. Besides, P-2325 [REDACTED].³⁰ For this reason the Defence submits that this document should not be introduced under Rule 68 (2) (b).

²⁶ P-2325, CAR-OTP-2100-2386-R01, para. 70.

²⁷ See for example P-2325, CAR-OTP-2100-2386-R01, para. 70

²⁸ Decision on the confirmation of charges, para. 233. At para 231, the PTC held: "Neither are witness testimonies univocal in pointing to an actual and effective subordination of the Berbérati group to the National Coordination. More than one witness refers to a variety of groups coming and going throughout and beyond the period relevant to the charges. Witness P-2325 refers to a group arriving in Berbérati in May 2014 which 'did not seem very organized', even if they claimed they were, maintains that 'things were happening in Berbérati, not Bangui', and that the local leadership had to assume responsibility." (citing paras 64 and 88 of Witness p-2325's Statement).

²⁹ P-2325, CAR-2100-2386-R01, paras 73-74.

³⁰ P-2325, CAR-OTP-2100-2386-R01, para. 53.

iii. P-2326

The statement relates to the alleged acts and conducts of Mr Ngaïssona

22. In paragraphs 63, 64 and 66 of the statement P-2326 relates to linkage between Mr Ngaïssona and the Anti-Balaka in Berberati, therefore, the statement relates to the alleged acts and conducts of Mr Ngaïssona. In the said paragraphs, P-2326 alleges that Mr Ngaïssona had mandated P-1077 [REDACTED]. He further says that Mr Ngaïssona had decided that the Anti-Balaka were no longer a group of combatants, but became a political association, and during the meeting the Secretary read the document signed by Mr Ngaïssona where he said that they should no longer carry weapons. However, according to the witness nothing really changed after that in that P-1077's [REDACTED] . P-2326 also alleges that after Mr Ngaïssona had become the overall Anti-Balaka leader and got them organized, the in Berberati started following a military training.³¹

23. The Defence acknowledges that the Prosecution has specifically excluded the said paragraphs from the Request. However, the Defence submits that according to the jurisprudence of the Court, a statement is not to be introduced piecemeal but the Chamber ought to consider the entire statement in deciding whether or not to admit it under Rule 68 (2) (b).³² Considered as a whole, the Defence submits that the statement relates to the alleged acts and conducts of Mr Ngaïssona.

The statement relates to issues that are materially in dispute

24. The Defence submits that P-2326's statement should not be introduced under Rule 68 (2) (b) because it relates to issues materially in dispute. P-2326 speaks about regarding the organisation and hierarchy of the Anti-Balaka and its leaders, for instance, about P-1077 [REDACTED]. He further states that [REDACTED]. The witness states that [REDACTED].³³ The Defence submits that the hierarchy and communication structure of the Anti-Balaka in Berberati, and in other parts of the country, are matters materially in dispute and therefore P-2326's statement should not be introduced under Rule 68 (2) (b).

³¹ P-2326, CAR-OT-2100-2178-R01, paras 63-65.

³² See references in para 5 above.

³³ P-2326, CAR-OTP-2100-2178-R01, para. 136.

The introduction of the statement does not serve the interests of justice

25. The Defence submits that the interests of justice will be better served if the Defence is permitted to question this witness. The Defence would, for example, like the witness to provide more information regarding the source of some of the information he provides for example the alleged burning and destruction of a mosque³⁴ as well as the alleged killing of Muslims.³⁵ The Pre-Trial Chamber relied on P-2326's statement to establish lack of linkage between Mr Ngaïssona and the events/Anti-Balaka leaders in Berberati. In this regard, the Pre-Trial Chamber held that: "on the whole, rather than sealing a connection between Ngaïssona and the events in Berbérati suitable to ground his criminal responsibility, the evidence on missions dispatched there on Ngaïssona's initiative or behalf not only indicates that they took place at a considerable distance from the charged events, but also seems to suggest an intent of pacification and remedy on his part."³⁶ The Defence submits that the interests of justice would be best served if the portions of the statement which the PTC relied on to come to this conclusion, and which the Prosecution excludes from the Request,³⁷ would be evidence before the Trial Chamber.

Associated documents should not be introduced under Rule 68 (2) (b)

26. The Defence submits that the associated documents are not inseparable parts of the witness statement and therefore should not be introduced under Rule 68 (2) (b). First, the Defence contests the admission of [REDACTED]³⁸ [REDACTED].³⁹ [REDACTED]. [REDACTED].⁴⁰ Secondly, the Defence opposes the admission of [REDACTED].⁴¹ [REDACTED]. [REDACTED].⁴² A similar situation applies to [REDACTED]. For the foregoing reasons, the Defence submits that these statements should not be introduced under Rule 68 (2) (b).

³⁴ P-2326, CAR-OTP-2100-2178-R01, para. 108.

³⁵ P-2326, CAR-OTP-2100-2178-R01, paras 125-127.

³⁶ Decision on Confirmation of Charges, para. 229.

³⁷ Annex A to the Request, ICC-01/14-01/18-710-Conf-AnxA, page 3.

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ P-2326, CAR-OT-2100-2178-R01, para. 123.

⁴¹ [REDACTED].

⁴² P-2326, CAR-OTP-2100-2178-R01, para. 75.

iv. All the three witness statements are not of a cumulative or corroborative nature

27. A statement can only be introduced under Rule 68 (2) (b) if it is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts (emphasis added). The Defence submits that this is not the case for the witness statements of P-2324, P-2325 and P-2324. First, the Prosecution argues that the three witness statements are corroborated by each other but they are all subject to the Request. Since the Prosecution requests that they all be introduced under Rule 68(2)(b) they cannot be deemed “corroborative” as none of them will be given as oral testimony. In addition, the Prosecution cites P-1077’s testimony as corroborative although the Prosecution seeks to introduce his statement under Rule 68(3)⁴³, thereby making it only partially oral. The Defence therefore submits the statements of P-2324, P-2325, and P-2326 should not be introduced under Rule 68 (2) (b) since no witness will give oral testimony of similar facts.

28. Furthermore, there are several contradictions between the statements of P-2325, P-2324 and P-2326; and for this reason they cannot be deemed “corroborative” in nature. The contradictions relate for example to: the date of arrival of the different Anti-Balaka groups in Berberati and the Anti-Balaka leadership in Berberati.⁴⁴ Thirdly, statements of P-2325, P-2326 and P-2324 are not corroborated by P-1077’s testimony in that there are discrepancies in the four statements.⁴⁵ For that reason, the Defence submits that and having these three witnesses testify live, and affording the Defence the opportunity to question all them, will be crucial to assessing P-1077’s credibility, who is an insider witness.

⁴³ OTP Request, para. 19.

⁴⁴ See P-2326, CAR-OTP-2100-2178-R01, paras 32, 43-47; P-2324, CAR-OTP-2100-2002-R01, paras 35, 44; P-2325, CAR-OTP-2100-2386-R01, paras 23, 29.

⁴⁵ [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. See P-1077: CAR-OTP-2107-3530-R01, at 3552. [REDACTED]; [REDACTED]. [REDACTED]. [REDACTED].

B. Boda

i. P-1773

The statement does not merely relate to background information

29. The Defence submits that P-1773's statement should not be introduced under Rule 68 (2) (b) because it relates to matters other than background information. The Prosecution intends to use the witness statement of P-1773 to prove the existence of a widespread and systematic attack against the civilian population, among them the population in Boda. In this regard, the Prosecution uses this statement to support the allegation that the Anti-Balaka attacked Boda after the withdrawal of the Seleka; that the Muslim Market was burned down, as were hundreds of Muslim houses and businesses; that within weeks Muslim enclave in Boda swelled from 6.000 to at least 14.000 Muslims, that even non-Muslims who provided assistance to Muslim civilians were targeted.⁴⁶ However, P-1773's statement raises fundamental questions concerning the ways in which the Anti-balaka members in Boda were identified; who commenced the attack in Boda (whether it was the Anti-Balaka, Muslims civilians, Christian civilians or the Seleka); whether the civilians in Boda were armed; as well as who created the enclave in Boda.⁴⁷ The witness also refers to other issues which are core to the case, for example, the dressing of the Anti-Balaka and the weapons they carried,⁴⁸ whether or not they attacked the mosques,⁴⁹ and the identity of alleged Anti-Balaka victims⁵⁰ among other things. Clarification on these issues could lead to a challenging of the Prosecution's theory of the case; however, the other witness whose testimony could help clarify these issues, P-1452, has been withdrawn as a witness. The Defence would like to be availed with the opportunity to question P-1773 in order to provide clarification on these issues and others. For that reason, the Defence submits that P-1773's witness statement should not be introduced under Rule 68 (2) (b) because it denies the Defence the opportunity to question the witness.

⁴⁶ See footnotes 437,442,445,449 of the Trial Brief, ICC-01/14-01/18-723-Con, pages 73-74.

⁴⁷ See for example CAR-OTP-2064-0063-R01, paras 38, 54, 58, 80.

⁴⁸ CAR-OTP-2064-0063, para 38.

⁴⁹ CAR-OTP-2064-0063, Para 48.

⁵⁰ See for example CAR-OTP-2064-0063-R01, paras 59, 60, 61

ii. P-1864

The statement relates to issues that are materially in dispute:

The Defence submits that P-1864's statement should not be introduced under Rule 68 (2) (b) because it relates to matters which are materially in dispute. For example, the witness refers to the attack in Bangui on 5 December 2013 and the alleged retaliation of civilian Muslims.⁵¹ She also expected to testify about the Anti-Balaka leadership and their training,⁵² the type of weapons they were armed with⁵³ as well as what types of clothes they wore,⁵⁴ all of which are materially in dispute.

iii. P-1871

The statement does not merely relate to Background information

30. The Defence submits that the witness statement should not be introduced under Rule 68 (2) (b) because it does not merely relate to background information. The witness refers to a roadblock allegedly erected and manned by the Anti-Balaka [REDACTED].⁵⁵ It is noteworthy that one of the allegations against Mr Ngaïssona is that he gave orders for creating disturbances and erecting of roadblocks.⁵⁶ Therefore, the Defence would like to question the witness about the roadblocks she allegedly saw. For that reason the Defence submits that the witness statement should not be introduced under Rule 68 (2) (b) under which cross-examination is not permitted.

iv. All three witness statements are not cumulative or corroborative in nature

31. A statement can only be introduced under Rule 68 (2) (b) if it is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts. The Defence submits that that is not the case for the witness statements of P-1773 of P-1864 and P-1871. First, the Prosecution argues that the three statements are corroborated by each other but they are all subject to the Request. Since their admission is sought under Rule 68(2)(b) they cannot be deemed "corroborative" as they are not oral testimony. In relation to P-1773 the Prosecution

⁵¹ CAR-OTP-2064-0860, para 16.

⁵² CAR-OTP-2064-0860, para 22.

⁵³ CAR-OTP-2064-0860, para. 32.

⁵⁴ CAR-OTP-2064-0860, para. 50.

⁵⁵ CAR-OTP-2064-0884, paras 31-32.

⁵⁶ Trial Brief, ICC-01/14-01/18-723-Conf, para. 129.

argues that the witness statement will be corroborated by other documentary evidence.⁵⁷ This is contrary to Rule 68 (2) (b) (i) which requires that the corroboration should be done by a witness who will testify orally. Furthermore, only witnesses P-1871 and P-1864 testify about [REDACTED] crimes in Boda and both are subject to the Request. Therefore the Defence submits that corroboration, within the meaning of Rule 68 (2) (b) (i) does not exist for the Boda witnesses.

C. Carnot

i. P-0289

The statement does not merely relate to background information

32. The Prosecution wishes to introduce this testimony to show that the Anti-Balaka led a widespread and systematic attack against the Muslim population of CAR in the relevant period. However, this witness – and the other Rule 68(2) witnesses for this locality – does not provide a clear description of the Anti-Balaka leadership in Carnot. This casts doubt on whether the Anti-Balaka can be considered an “organisation” capable of acting pursuant to a shared common plan.⁵⁸ The Defence should therefore be availed the opportunity to cross examine this witness in order to challenge the above aspects of the statement.

Its introduction does not serve the interests of justice

33. The Defence submits that the interests of justice would be best served if the Defence would be availed the opportunity to question P-0289 because [REDACTED].⁵⁹ [REDACTED].⁶⁰ Given that such a large amount of evidence is based on P-0289’s account of events, it is necessary to cross examine him. Moreover, the Prosecution was provided with [REDACTED].⁶¹ [REDACTED].

⁵⁷ The Request, ICC-01/14-01/18-710-Conf, paras 29-30.

⁵⁸ [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].

⁵⁹ For example: CAR-OTP-2012-0463, CAR-OTP-2012-0469, CAR-OTP-2001-4402.

⁶⁰ CAR-OTP-2001-2247.

⁶¹ see investigation report CAR-OTP-2110-0290-R01.

ii. P-2132

The statement does not merely relate to background information

34. The Defence opposes the introduction of P-2132's statement under Rule 68 (2) (b) because it does not merely relate to background information. P-2132's statement raises questions such as which group committed the alleged crimes in Carnot? In this regard the witness mentions the fact that, a few days after the Anti-Balaka's arrival in Carnot, another group of Anti-Balaka arrived from elsewhere. The previous group did not know the new arrivals, whom were not Carnot locals.⁶² This raises the question whether the alleged crimes can be attributed to "the Anti-Balaka group of Carnot"; and whether the Anti-Balaka leadership in Carnot was clearly identifiable. A clarification of these issues would challenge Prosecution's narrative that the Anti-Balaka elements were an "organisation" which had the common purpose of committing exactions against Muslims.⁶³ The Defence should therefore be allowed to cross-examine this witness in order to seek clarification on these issues.

iii. P-2393

Relates to the alleged acts and conducts of Mr Ngaïssona;

35. The Defence submits that P-2393's statement should not be introduced under Rule 68 (2) (b) because a portion of it relates to the alleged acts and conducts of Mr Ngaïssona. The witness states that [REDACTED]. P-2393 further states that [REDACTED].⁶⁴ The witness further states that a brother of Mr Ngaïssona travelled to Carnot and was associated with Mr Bozize's supporters".⁶⁵

36. The Defence acknowledges that the Prosecution has specifically excluded paragraphs 73 and 77 from the scope of the Request.⁶⁶ However, the Defence notes that the paragraphs directly before the excluded paragraphs are not excluded from the scope of the Request and are directly related to the information in the excluded portion. According to the jurisprudence of the Court, a statement cannot be introduced piecemeal under Rule 68 (2) (b); therefore, in determining whether a statement

⁶² CAR-OTP-2080-0884-R01, at 0894, para. 55

⁶³ For example P-2132 speaks of [REDACTED] and who created a lot of problems. This element did not stay long in Carnot (CAR-OTP-2080-0884-R01, at 0896, para 66).

⁶⁴ CAR-OTP-2108-0140-R02, at 0153-0154, paras 73-74, 77.

⁶⁵ CAR-OTP-2108-0140-R02, at 0159-0160, para 99.

⁶⁶ Annex A to the Request, ICC-01/14-01/18-710-Conf-AnxA, page 8

relates to the alleged acts and conducts of the accused, the Chamber has to consider the entire statement.⁶⁷ For that reason, the Defence submits that excluded paragraphs provide context for the other paragraphs directly above and below, therefore the entire statement should not be introduced under Rule 68 (2) (b) because it relates to the alleged acts and conducts of the accused.

It relates to issues that are materially in dispute

37. The Defence submits that the witness statement relates to issues materially in dispute for example because the witness states that the Anti-Balaka members in Carnot wore badges which were manufactured in Bangui.⁶⁸ It is noteworthy that the Prosecution alleges that Mr Ngaïssona validated the actions in the provinces by issuing badges and inviting the representatives to meetings in Bangui⁶⁹ and that the issuance of IDs confirms Mr Ngaïssona's leadership and position.⁷⁰ The Defence submits that the question of whether the Anti-Balaka wore badges and where they were manufactured in Bangui is an issue which is materially in dispute; therefore the statement should not be introduced under Rule 68 (2) (b).

iv. The three witness statements are not corroborative and cumulative in nature

38. A statement can only be introduced under Rule 68 (2) (b) if it is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts. The Defence submits that that is not the case for the witness statements of P-0289, P-2132 and P-2393. First, the Prosecution argues that these statements are corroborated by each other but they are all subject to the request. Since their admission is sought under Rule 68(2)(b) they cannot be deemed "corroborative" as they are not oral testimony. The other witnesses deemed corroborative, P-1042 and P-2556, will be subject to Rule 68 (3) applications, which are also not corroborative because their testimony will only be partially oral.

V. RELIEF SOUGHT

⁶⁷ See para 5 above.

⁶⁸ CAR-OTP-2108-0140, at 0160, para. 100.

⁶⁹ Trial Brief, ICC-01/14-01/18-723-Conf, para. 180.

⁷⁰ Trial Brief, ICC-01/14-01/18-723-Conf, para. 260

For the forgoing reasons the Defence requests the Chamber to reject the request to admit the witness statements of all nine witnesses under Rule 68 (2) (b).

Respectfully submitted,



Mr Geert-Jan Alexander Knoops

**Lead Counsel for Mr. Patrice-Edouard
Ngaïssona**