

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No.: ICC-01/14-01/21**

**Date: 21 October 2022**

**TRIAL CHAMBER VI**

**Before:**

**Judge Miatta Maria Samba, Presiding Judge  
Judge María del Socorro Flores Liera  
Judge Sergio Gerardo Ugalde Godínez**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II  
IN THE CASE OF  
*THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

**Public Redacted Version of**

**Decision on the Prosecution's First, Second and Fourth Requests Pursuant to  
Rule 68(2)(b) of the Rules, filed on 20 October 2022 (ICC-01/14-01/21-507-Conf)**

Decision 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  
Ms Molo Makwaia

**Counsel for the Defence**

Ms Jennifer Naouri  
Mr Dov Jacobs

**Legal Representatives of Victims**

Ms Sarah Pellet

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
for Participation/Reparations**

**The Office of Public Counsel  
for Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

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**TRIAL CHAMBER VI** of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to articles 67 and 69(2) of the Rome Statute (the ‘Statute’) and rule 68 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules’.

## **I. PROCEDURAL HISTORY**

1. On 21 February 2022, the Chamber issued the ‘Decision Setting the Commencement Date of the Trial and Related Deadlines’ setting deadlines for the filing of applications pursuant to rule 68 of the Rules by the Office of the Prosecutor (the ‘Prosecution’).<sup>1</sup>

2. On 29 April 2022, the Prosecution filed its first request to introduce prior recorded testimony pursuant to rule 68(2)(b) (the ‘First Request’).<sup>2</sup> In the First Request, the Prosecution seeks the introduction of the prior recorded testimony and associated material of 11 witnesses, which the Prosecution avers ‘pertain to the events in the Boy Rabe neighbourhood of Bangui in 2013, [...] relie[d] upon as proof of the chapeau elements of war crimes and crimes against humanity.’<sup>3</sup>

3. On 13 May 2022, the Prosecution filed its second request to introduce prior recorded testimony pursuant to rule 68(2)(b) (the ‘Second Request’).<sup>4</sup> In the Second Request, the Prosecution seeks the introduction of the prior recorded testimony and associated material of seven witnesses, which the Prosecution avers ‘pertain to certain

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<sup>1</sup> Decision Setting the Commencement Date of the Trial and Related Deadlines, 21 February 2022, [ICC-01/14-01/21-243](#), para. 28.

<sup>2</sup> Prosecution’s first request to introduce prior recorded testimony pursuant to rule 68(2)(b), 29 April 2022, ICC-01/14-01/21-289-Conf with Confidential Annex A. A public redacted version was filed on 11 May 2022 ([ICC-01/14-01/21-289-Red](#)) (the ‘First Request’).

<sup>3</sup> [First Request](#), para 2.

<sup>4</sup> Prosecution’s second request to introduce prior recorded testimony pursuant to rule 68(2)(b), 13 May 2022, ICC-01/14-01/21-307-Conf with Confidential Annex A. A public redacted version was notified on 24 May 2022 ([ICC-01/14-01/21-307-Red](#)).

events the Prosecution relies upon to prove the chapeau elements of war crimes and crimes against humanity.’<sup>5</sup>

4. On 19 May 2022, the Prosecution filed its fourth request to introduce prior recorded testimony pursuant to rule 68(2)(b) (the ‘Fourth Request’).<sup>6</sup> In the Fourth Request, the Prosecution seeks the introduction of the prior recorded testimony and associated material of one witness, who the Prosecution avers is relevant to ‘the chapeau elements of article 8 of the Rome Statute [...], namely, the existence of an armed conflict not of an international character.’<sup>7</sup>

5. On 12 and 15 May 2022, the Common Legal Representative of Victims (the ‘CLRv’) filed a response to the First Request<sup>8</sup> and Second Request<sup>9</sup> (the ‘First Victims’ Response’ and ‘Second Victims’ Response’ respectively).<sup>10</sup> Therein she supported the Prosecution’s submissions, noting, *inter alia*, that introduction of the prior recorded testimony of these witnesses would ‘expedite the proceedings’,<sup>11</sup> and that the testimony in question does ‘not concern the acts and conduct of the Accused’<sup>12</sup> and is ‘limited to [...] the contextual elements for war crimes and crimes against humanity’.<sup>13</sup> On 2 June 2022, the CLRv notified the Chamber that she would not respond to the Fourth Request.<sup>14</sup>

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<sup>5</sup> [Second Request](#), para. 2.

<sup>6</sup> Prosecution’s fourth request to introduce prior recorded testimony pursuant to rule 68(2)(b), 19 May 2022, ICC-01/14-01/21-319-Conf with Confidential Annex A. A public redacted version was notified on 2 June 2022 ([ICC-01/14-01/21-319-Red](#)).

<sup>7</sup> [Fourth Request](#), para. 2.

<sup>8</sup> This response comprises a consolidated response to both the Request and the Prosecution’s request to submit prior recorded testimony pursuant to rule 68(2)(c) of the Rules.

<sup>9</sup> This response comprises a consolidated response to both the Request and the Prosecution’s third request to introduce prior recorded testimony pursuant to rule 68(2)(b) of the Rules.

<sup>10</sup> Victims’ consolidated response to the Prosecution’s Requests to introduce prior recorded testimony under rule 68(2)(b) and (c) (ICC-01/14-01/21-289-Red and ICC-01/14-01/21-290-Red), 12 May 2022, [ICC-01/14-01/21-306](#) (the ‘First Victims’ Response’); Victims’ consolidated response to the Prosecution’s 2<sup>nd</sup> and 3<sup>rd</sup> Requests to introduce prior recorded testimony pursuant to rule 68(2)(b) (ICC-01/14-01/21-307-Red and ICC-01/14-01/21-308-Red), 25 May 2022, [ICC-01/14-01/21-330](#) (the ‘Second Victims’ Response’).

<sup>11</sup> [First Victims’ Response](#), para. 2 ; [Second Victims’ Response](#), para. 3.

<sup>12</sup> [First Victims’ Response](#), para. 2.

<sup>13</sup> [First Victims’ Response](#), para. 2; [Second Victims’ Response](#), para. 3.

<sup>14</sup> Email from the CLRv to the Chamber dated 2 June 2022 at 15:48.

6. On 9 June 2022, the Defence filed its response to the First Request (the ‘First Response’).<sup>15</sup> The Defence opposes the First Request and requests that the Chamber reject the introduction of the prior recorded testimony of all 11 witnesses.<sup>16</sup> In the alternative, the Defence requests that, if the Chamber is minded to grant the First Request, it reject the introduction of several items of the associated material relating to P-1277, P-1523, P-1970 and P-2087.<sup>17</sup>

7. On 23 June 2022, the Defence filed its response to the Second Request (the ‘Second Response’).<sup>18</sup> The Defence opposes the Second Request and requests that the Chamber reject the introduction of the prior recorded testimony of all 7 witnesses.<sup>19</sup> In the alternative, the Defence requests that, if the Chamber is minded to grant the Second Request, it reject the introduction of several items of associated material relating to P-0510.<sup>20</sup>

8. On 8 July 2022, the Defence filed its response to the Fourth Request (the ‘Fourth Response’).<sup>21</sup> The Defence opposes the Fourth Request and requests the Chamber to reject the prior recorded testimony of P-0966.<sup>22</sup>

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<sup>15</sup> Réponse de la Défense à la « Prosecution first request to introduce prior recorded testimony pursuant to Rule 68(2)(b) » (ICC-01/14-01/21-289-Conf) déposée le 29 avril 2022., 9 June 2022, ICC-01/14-01/21-349-Conf. A public redacted version was notified on 15 June 2022 ([ICC-01/14-01/21-349-Red](#)) (the ‘First Response’).

<sup>16</sup> [First Response](#), p. 27. *See also* para. 91.

<sup>17</sup> [First Response](#), paras 93-97.

<sup>18</sup> Réponse de la Défense à la « Prosecution second request to introduce prior recorded testimony pursuant to Rule 68(2)(b) » (ICC-01/14-01/21-307-Conf) déposée le 13 mai 2022., 23 June 2022, ICC-01/14-01/21-372-Conf. A public redacted version was notified on 1 July 2022 ([ICC-01/14-01/21-372-Red](#)).

<sup>19</sup> [Second Response](#), p. 24. *See also* para. 87.

<sup>20</sup> [Second Response](#), paras 90-94.

<sup>21</sup> Réponse de la Défense à la « Prosecution fourth request to introduce prior recorded testimony pursuant to Rule 68(2)(b) » (ICC-01/14-01/21-319-Conf) déposée le 19 mai 2022., 8 July 2022, ICC-01/14-01/21-397-Conf. A public redacted version was notified on 18 July 2022 ([ICC-01/14-01/21-397-Red](#)) (the ‘Fourth Response’).

<sup>22</sup> *See* [Fourth Response](#), para. 63.

## II. APPLICABLE LAW

### A. General Criteria

9. Rule 68 of the Rules is one exception to the general rule set out in article 69(2) of the Statute, which provides that the testimony of a witness shall be given in person.<sup>23</sup>

10. Rule 68(1) of the Rules requires that the introduction of a prior recorded testimony is not prejudicial to or inconsistent with the right of the accused and that the requirements of one of the sub-rules of rule 68 are met.

11. Rule 68(2)(b) of the Rules allows for the introduction of the prior recorded testimony of a witness who is not present before the Chamber when the following requirements are satisfied:

- i. '[t]he prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused'<sup>24</sup>; and
- ii. 'is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief.'<sup>25</sup>

12. In addition to the above requirements, rule 68(2)(b)(i) of the Rules provides that in determining whether to allow the introduction of prior recorded testimony pursuant

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<sup>23</sup> Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al Rahman ('Ali Kushayb')*, Public redacted version of the First Decision on the Prosecution's request to introduce prior recorded testimonies under Rule 68(3), 20 January 2022, [ICC-02/05-01/20-559-Red](#), (the '*Abd-Al Rahman* Rule 68(3) Decision'), para. 10. *See also* Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaïssona Defence Motion to Limit the Scope of P-2926's Evidence, 10 March 2021, [ICC-01/14-01/18-907-Red](#), para. 8. *See further* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, [ICC-01/05-01/08-1386 OA5 OA6](#), para. 77 (the '*Bemba* OA5 OA6 Judgment'); Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February 2016, [ICC-01/09-01/11-2024 OA10](#), (the '*Ruto & Sang* OA10 Judgment'), para. 84.

<sup>24</sup> Rule 68(2)(b) of the Rules.

<sup>25</sup> Rule 68(2)(b)(ii) of the Rules.

to rule 68(2)(b), the Chamber ‘shall consider, *inter alia*, whether the prior recorded testimony in question’:

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

13. As recently confirmed by the Appeals Chamber, the purpose of considering these factors, as well as others that may be relevant under the circumstances, is to make sure that the introduction of the prior recorded testimony would not be prejudicial to or inconsistent with the rights of the accused.<sup>26</sup> Indeed, the introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules directly affects one of the fundamental fair trial guarantees, namely the accused’s right to confront adverse witnesses.<sup>27</sup> Although this right is not absolute, any restriction thereof requires a careful balancing of all relevant factors and a chamber may decide to reject the introduction of prior recorded testimony even if it meets all the criteria of rule 68(2)(b) of the Rules.<sup>28</sup> Indeed, as the Appeals Chamber has held: ‘[r]ule 68 of the Rules must be treated as an exception to the principle of orality in article 69(2) of the Statute, and a trial chamber should take into account the exceptional nature of that rule as a whole in the interpretation and application of the individual criteria in rule 68 of the Rules’.<sup>29</sup>

14. At the same time, the Chamber also notes that one of the purposes of rule 68(2)(b) of the Rules is to streamline the presentation of evidence and thus expedite the

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<sup>26</sup> Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Judgment on the appeal of the Prosecution against Trial Chamber X’s “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules”, 13 May 2022, [ICC-01/12-01/18-2222](#), (the ‘*Al Hassan* OA 4 Judgment’), para. 48, fn. 88.

<sup>27</sup> See Article 67(1)(e) of the Statute; [Al Hassan OA 4 Judgment](#), paras 75, 78.

<sup>28</sup> [Al Hassan OA 4 Judgment](#), paras 79-83.

<sup>29</sup> [Al Hassan OA 4 Judgment](#), paras 1, 80.

proceedings.<sup>30</sup> As also noted by the Appeals Chamber, the expeditious conduct of proceedings in one form or another constitutes an attribute of a fair trial.<sup>31</sup>

15. The Chamber will set out its interpretation of a number<sup>32</sup> of the aforementioned factors and address any specific submissions from the parties regarding the legal requirements of rule 68(2)(b) of the Rules below.

## **B. Availability of Witnesses**

16. The Chamber notes that the Defence submits that the Prosecution has not explained why it is impossible for the witnesses to not attend in person - noting that the Prosecution must do so in order to introduce their prior recorded testimony pursuant to rule 68(2)(b) of the Rules.<sup>33</sup> The Chamber finds these submissions to be inaccurate in respect of the application of rule 68(2)(b) of the Rules. Although article 69(2) of the Statute provides that rule 68 is an exception to the principle of orality, nowhere in rule 68(2)(b) of the Rules is it required that the requesting party demonstrate why a witness cannot attend. In this regard, the Defence seeks to impose an additional requirement into rule 68(2)(b) of the Rules which has no legal foundation in the Rules.

## **C. ‘Acts and Conduct of the Accused’**

17. In respect of the parameters of the requirement that prior recorded testimony not relate to the ‘acts and conduct of the accused’ the Defence avers that the Chamber

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<sup>30</sup> Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, 16 October 2020, [ICC-01/12-01/18-1111-Red](#), para. 7, referring to Trial Chamber IX, *The Prosecutor v. Dominic 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. 5 (the ‘Ongwen Rule 68(2)(b) Decision’). See also Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, 1 November 2016, [ICC-02/11-01/15-744 OA8](#), para. 59 (the ‘Gbagbo and Blé Goudé OA 8 Judgment’).

<sup>31</sup> [Gbagbo and Blé Goudé OA 8 Judgment](#), para. 59, referring to Appeals Chamber, *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168 OA3](#), para. 11.

<sup>32</sup> In particular, the Chamber does not consider it necessary to address in this part of the decision the factor of whether the prior recorded testimony ‘relates to background information’. This factor, in the Chamber’s view, is self-explanatory.

<sup>33</sup> [First Response](#), para. 27; [Second Response](#), paras 14-15; [Fourth Response](#), paras 14-15.



should adopt the position that is ‘consistent with the nature and reality of the accusations against Mr Said’ and that ‘every allegation which goes to proving one of the essential elements of the charges must be tested by the Defence’.<sup>34</sup>

18. The Chamber observes that the Defence made similar submissions in its response to the Prosecution’s request to admit prior recorded testimony under rule 68(2)(c) of the Rules,<sup>35</sup> which the Chamber rejected.<sup>36</sup>

19. Specifically, as previously recalled, the Chamber finds that the phrase ‘acts and conduct of the accused’ is not strictly limited to what the accused is alleged to have done and may include the acts and conduct of other persons where this is relied upon to prove the acts and conduct of the accused. In the view of the Chamber, the mere fact that the acts and conduct of other persons may be attributed to the accused on the basis of the charged mode of criminal responsibility is not sufficient to bring them within this definition. Nevertheless, the centrality or importance of the testimony to the case against the accused may be a relevant consideration to the assessment of prejudice within the meaning of rule 68(1) of the Rules.

#### **D. ‘Issues that are not materially in dispute’**

20. The first consideration which is provided for in rule 68(2)(b)(i) of the Rules is whether the testimony ‘relates to issues that are not materially in dispute’. The Defence submits that, in order for a statement to be introduced under rule 68(2)(b) of the Rules, it must not relate to contested facts, which, according to the Defence, is not the case for the prior recorded testimony sought to be admitted in this instance.<sup>37</sup>

21. The Chamber rejects the Defence’s submissions on this point. First, the Chamber notes that this limb of rule 68(2)(b) is merely a factor to be considered and not a bar to introduction of prior recorded testimony. Second, as noted by other trial chambers,<sup>38</sup>

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<sup>34</sup> [First Response](#), para. 28; [Second Response](#), para. 16; [Fourth Response](#), para. 16.

<sup>35</sup> See [Defence Response to the Rule 68\(2\)\(c\) Request](#), paras 45-47, 69.

<sup>36</sup> Decision on the Prosecution’s Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses, 20 October 2022, ICC-01/14-01/21-506-Conf, paras 17-21.

<sup>37</sup> [First Response](#), para. 30.

<sup>38</sup> See, for example [Ongwen Rule 68\(2\)\(b\) Decision](#), para. 15. See further Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of ‘Decision on admission of prior recorded

while this factor is significant in terms of how the Chamber exercises its discretion, it must be stressed that this ‘cannot be understood as providing either party with a veto power over the introduction of the prior recorded testimony’ simply by indicating that issues addressed in the prior recorded testimony are ‘materially in dispute’.<sup>39</sup> Rather, it is for the Chamber to determine the materiality of any dispute raised.<sup>40</sup>

22. In making this determination, the Chamber shall consider whether the prior recorded testimony relates to matters which are crucial, or of at least sufficient significance for the Chamber’s eventual determination of the charges against the accused in its judgment pursuant to article 74 of the Statute.<sup>41</sup>

#### **E. ‘Interests of justice are best served by its introduction’**

23. The Chamber observes that the concept of ‘interests of justice’ cannot be defined in the abstract. However, for the purposes of rule 68(2)(b)(i) of the Rules, the Chamber considers that the ‘interests of justice’ are best served by the introduction of prior recorded testimony when such introduction allows, *inter alia*: (i) the safeguarding of the expeditiousness of the proceedings; (ii) the streamlining of the presentation of evidence; (iii) the focusing of the live testimony on those topics of greater relevance to the proceedings; (iv) the minimisation of cumulative in-court testimony on aspects which are expected to be addressed by other witnesses; and (v) the avoidance of the potential re-traumatisation of vulnerable witnesses.<sup>42</sup>

24. The above notwithstanding, the Chamber stresses that the rights of the accused must always be at the forefront when considering this factor and prior recorded

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testimony of Witness P-0773 under Rule 68’, 2 December 2016, ICC-01/04-02/06-1667-Conf, 27 February 2017, [ICC-01/04-02/06-1667-Red](#), para. 8.

<sup>39</sup> [Ongwen Rule 68\(2\)\(b\) Decision](#), para. 15.

<sup>40</sup> [Ongwen Rule 68\(2\)\(b\) Decision](#), para. 15.

<sup>41</sup> [Ongwen Rule 68\(2\)\(b\) Decision](#), para. 15.

<sup>42</sup> [Ongwen Rule 68\(2\)\(b\) Decision](#), para. 16. See also [Abd-Al Rahman Rule 68\(3\) Decision](#), para. 15. The Chamber also finds support in its understanding of the notion of ‘interests of justice’ within the meaning of Rule 68(2)(b) also in the drafting history of this provision and the declared purposes of its adoption. The Working Group on Amendments established by the Assembly of State Parties explained in its report concerning the proposed amendment to Rule 68 of the Rules, that ‘[t]he proposed new Rule 68 of the Rules of Procedure and Evidence would allow the judges of the Court to reduce the length of Court proceedings and streamline evidence presentation’ (Report of the Working Group on Amendments, ICC-ASP/12/44, para 8). Similarly, the relevant report of the Working Group on Lessons Learnt states: ‘[t]he addition of this provision [*i.e.* Rule 68(2)(b) of the Rules] is primarily intended to expedite

testimony cannot be introduced when this is prejudicial to the fairness of the proceedings and, more specifically, the rights of the accused.<sup>43</sup> In this regard, the Chamber is of the view that the aforementioned considerations<sup>44</sup> must be balanced against the fact that rule 68 is an exception to the principle of orality and the accused has the right to examine witnesses against him. While this right is not absolute,<sup>45</sup> the Chamber must ensure that rule 68 of the Rules is not resorted to in a manner that would be prejudicial to the accused or undermine the principle of orality more generally. Accordingly, in determining whether it is in the ‘interests of justice’ to introduce prior recorded testimony pursuant to rule 68(2)(b) the Chamber will consider whether further oral evidence should be heard in relation to particular aspects of the Prosecution’s case.

#### **F. ‘Sufficient indicia of reliability’**

25. The Chamber considers that the assessment of reliability is preliminary at this stage of the proceedings.<sup>46</sup> The Chamber recalls the jurisprudence of the Appeals Chamber which provides that, in their assessment of indicia of reliability, ‘Trial Chambers are not obliged to consider factors beyond formal requirements’ but ‘are not precluded from looking beyond formal requirements if they consider it to be appropriate in a particular case.’<sup>47</sup>

26. In determining what constitutes formal aspects of reliability, the Chamber recalls the Court’s relevant case-law where such aspects have been understood to comprise whether the prior recorded testimony was: (i) obtained by the Prosecution in the ordinary course of its investigations; (ii) signed by the witness and the investigator(s)

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proceedings by allowing the introduction of a limited class of evidence without the need to arrange for a witness to travel in order to appear in Court. Allowing such testimony to be admitted in the witness’ absence, provided that certain procedural steps are met, would expedite proceedings and have additional budgetary benefits.’ (Working Group of Lessons Learnt: Second report of the Court to the Assembly of States Parties, ICC-ASP/12/37/Add.1, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), Annex II.A, para. 18).

<sup>43</sup> See rule 68(1) of the Rules. See also [Ongwen Rule 68\(2\)\(b\) Decision](#), para. 16; [Gbagbo and Ble Goude OA 8 Judgment](#), para. 62; [Bemba OA5 OA6 Judgment](#), para. 78.

<sup>44</sup> See paragraph 23 above.

<sup>45</sup> Decision on the Prosecution’s Requests under Rule 68(3) to Introduce the Prior Recorded Testimony of P-3108, P-2400, P-2240, P-2478, P-0787, 11 October 2022, ICC-01/14-01/21-499-Red, para. 27 and references therein.

<sup>46</sup> [Gbagbo and Ble Goude OA 8 Judgment](#), paras 3, 72, 104.

<sup>47</sup> [Gbagbo and Ble Goude OA 8 Judgment](#), para. 104.

conducting the interview; (iii) given voluntarily; (iv) if applicable, obtained in the presence of a qualified interpreter; (v) declared to be accurate by the witness at the time of giving it and includes information that the witness was given an explanation of the procedure and was informed of the significance of providing the statement.<sup>48</sup>

27. Thus, the Chamber will limit its assessment of reliability to the formal requirements unless it identifies manifest issues as to the reliability of the information provided by the witness or the Defence raises specific objections. In such instances, the Chamber will assess the nature and degree of the issues for the purposes of informing its determination as to whether the prior recorded testimony should be introduced pursuant to rule 68(2)(b) of the Rules. In any event, the substantive credibility and reliability of any prior recorded testimony introduced under rule 68(2)(b) of the Rules and the evidentiary weight to be accorded to such testimony will be considered during the Chamber's deliberation for the purposes of its judgment in light of the evidence as a whole.

**G. Cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts**

28. The Defence argues that in order for prior recorded testimony to be introduced under rule 68(2)(b) of Rules, it must relate only to elements that corroborate other elements that may be tested.<sup>49</sup> The Chamber rejects this narrow interpretation. First, the Chamber notes that rule 68(2)(b) of the Rules refers not only to corroborative evidence but also to evidence of a cumulative nature. Accordingly, it is incorrect to suggest that corroboration is a requirement for the introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules.

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<sup>48</sup> See, for example Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, [ICC-01/09-01/11-1938-Corr-Red2](#), paras 65-66; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence', 12 November 2015, [ICC-01/05-01/13-1481-Red](#), para. 20; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, 11 March 2016, [ICC-01/04-02/06-1205](#), para. 16; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles 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. 22.

<sup>49</sup> [First Response](#), para. 32; [Second Response](#), para. 20; [Fourth Response](#), para. 20.

29. Second, the Chamber is of the view that not every single event or fact described in the prior recorded testimony needs to be cumulative of other oral evidence regarding the same events or facts. Rather, based on the wording of the rule it is sufficient that the prior recorded testimony is cumulative of oral evidence of *similar* facts.

30. Furthermore, at this stage of the proceedings, the Chamber considers that the assessment under this limb is possible only at a general level in relation to broad themes discussed by the witness. Nevertheless, if the Chamber considers that the prior recorded testimony contains material information that has no equivalent in other evidence on the record, this may be a factor militating against introducing the testimony via rule 68(2)(b) of the Rules.

31. The Chamber further underlines that a finding that the prior recorded testimony is cumulative to or corroborative of other evidence does not predetermine or inform the manner in which this evidence may subsequently be weighed and used for the purposes of its decision under article 74 of the Statute.

#### **H. Requirements under rule 68(2)(b)(ii) and (iii) of the Rules**

32. As regards the requirement under Rule 68(2)(b)(ii) and (iii) of the Rules, the Chamber notes that it is established practice to appoint the Registry's Senior Legal Adviser (the 'SLA') or a person delegated by the SLA, to witness declarations made pursuant to this provision.<sup>50</sup> Furthermore, the Chamber notes that it is within the SLA's competence to delegate this function to other persons, including staff in country offices.<sup>51</sup> Similarly, the Chamber observes that it is within the purview of the Registry, specifically the SLA, to obtain such declarations remotely or digitally, as long as the

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<sup>50</sup> Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(b), 15 December 2021, [ICC-01/09-01/20-250-Red](#), (the 'Gicheru Rule 68(2)(b) Decision'), para. 31; Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice Edouard Ngaissona*, Decision on the Prosecution's Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence, 6 May 2020, [ICC-01/14-01/18-508](#), (the 'Yekatom & Ngaissona 68(2)(b) Decision'), para. 6; Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al Rahman ('Ali Kushayb')*, First Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), 2 March 2022, [ICC-02/05-01/20-612-Red](#), (the 'Abd-Al Rahman Rule 68(2)(b) Decision'), paras 17-18.

<sup>51</sup> [Abd-Al Rahman Rule 68\(2\)\(b\) Decision](#), para. 18.

requirements under rule 68(2)(b)(ii) and (iii) are met.<sup>52</sup> The Chamber sees no reason to depart from this established practice and authorises it for the present proceedings.

33. That notwithstanding, any decision of the Chamber authorising the introduction of a prior recorded testimony under rule 68(2)(b) is a preliminary ruling, subject to the filing on the case record of the aforesaid signed declarations accompanying the statements.<sup>53</sup>

### III. GENERAL OBJECTIONS BY THE DEFENCE

34. Before analysing the prior recorded testimony sought to be introduced in light of the specific requirements of rule 68(2)(b) of the Rules, the Chamber will address general objections raised by the Defence regarding the use of rule 68(2)(b) in this case.

35. At the outset, the Chamber notes that the Defence makes general submissions regarding the principle of orality, making reference to the percentage of witness testimony sought to be introduced via rule 68 of the Rules.<sup>54</sup> The Defence also makes submissions as to the format and recording of prior recorded statements more generally, arguing that accepting such statements in such a format, in essence, risks an infringement of the adversarial principle and the principle of transparency of the judicial process.<sup>55</sup>

36. The Chamber is mindful that the Prosecution seeks introduction of 42 witnesses pursuant to rule 68(2) of the Rules and that, if granted, these witnesses will not appear before the Chamber.<sup>56</sup> However, the Chamber also notes that the remaining 43 prospective witnesses will appear before the Chamber and be subject to cross examination by the Defence. In this regard, the Chamber finds, at the outset, that the

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<sup>52</sup> [Abd-Al Rahman Rule 68\(2\)\(b\) Decision](#), para. 18; [Yekatom & Ngaissona 68\(2\)\(b\) Decision](#), para. 7.

<sup>53</sup> [Abd-Al Rahman Rule 68\(2\)\(b\) Decision](#), para. 19; [Gicheru Rule 68\(2\)\(b\) Decision](#), para. 6.

<sup>54</sup> [First Response](#), para. 21, referring to its earlier submissions in the Réponse de la Défense à la «Prosecution request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses» (ICC-01/14-01/21-290-Conf) déposée le 29 avril 2022, 1 June 2022, ICC-01/14-01/21-340-Conf. A public redacted version was notified on 7 June 2022 ([ICC-01/14-01/21-340-Red](#)) (the 'Defence Response to the Rule 68(2)(c) Request'), paras 48-66; [Second Response](#), para. 9; [Fourth Response](#), para. 9.

<sup>55</sup> [First Response](#), paras 22-24; [Second Response](#), paras 11-12; [Fourth Response](#), paras 11-12.

<sup>56</sup> See List of Prosecution Witnesses, 10 June 2022, ICC-01/14-01/21-354-Conf-AnxA; Revised Order of Appearance of Prosecution Witnesses, 5 September 2022, ICC-01/14-01/21-470-Conf-AnxA.

Defence's submissions to the effect that 84% of the Prosecution witness are not 'true witnesses' because they will not be subject to a full hearing<sup>57</sup> are misleading - the Defence will have a full opportunity to cross examine witnesses subject to rule 68(3) of the Rules, as well as the full *viva voce* witnesses.

37. The Chamber is of the view that in determining whether the principle of orality is respected in a particular case it must undertake a qualitative rather than purely a quantitative assessment and rejects the Defence's submissions to the contrary. In undertaking such an assessment the Chamber is cognisant that it should take into account a number of considerations.

38. First, as noted by the Appeals Chamber, in the context of the application of rule 68 of the Rules, the legal framework requires that a balance be struck between the right of the accused to confront the witnesses against him or her and the need to ensure that proceedings are streamlined and efficient.<sup>58</sup>

39. Second, the Appeals Chamber, as reflected in international human rights law, has held that 'a conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial'.<sup>59</sup> Therefore, in determining whether the principle of orality is respected in this case, the Chamber will have regard to, *inter alia*, the nature of oral evidence that the Prosecution intends to lead in relation to the particular aspects of the case to which the prior recorded testimony sought to be introduced relates. The Chamber observes that this assessment is also somewhat envisaged by the requirements of rule 68(2)(b) itself in that a chamber shall, *inter alia*, consider whether the prior recorded testimony sought to be introduced is of a cumulative or corroborative nature in that witnesses will give or have given oral testimony of similar facts.

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<sup>57</sup> [First Response](#), para. 21.

<sup>58</sup> [Al Hassan OA 4 Judgment](#), para. 78.

<sup>59</sup> Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, [ICC-01/04-02/06-2666-Red](#), (the '*Ntaganda* Appeals Judgment'), para. 629.



40. Last, the Chamber considers that in some instances a single oral witness may be sufficient to establish certain elements of the Prosecution's case. The fact that this may also be supported by prior recorded testimony from several other witnesses would not violate the principle of orality in such circumstances. However, the Chamber is cognisant of the principle of orality and, as noted above,<sup>60</sup> in its assessment of the prior recorded testimony sought to be introduced pursuant to rule 68(2)(b) of the Rules, will consider whether it is in the interests of justice to hear more oral evidence in relation to particular aspects of the Prosecution's case.

41. In addition, the Chamber further emphasises that, given the information available regarding the evidence at this stage of proceedings, its assessment in this respect will be preliminary and may be subject to change as the evidence unfolds. In this regard, the Chamber notes that it retains the discretion to request the attendance and testimony of witnesses and has the power to request the submission of all evidence that it considers necessary for the determination of the truth.<sup>61</sup> Thus, the Chamber may determine that it is necessary to call one or more witnesses whose statements have been introduced under rule 68(2)(b) to testify in person at a later stage.

42. Turning to the Defence's submissions regarding the format of written statements, the Chamber notes that although statements are prepared by investigators this is not a reason in and of itself, and without more, to undermine their use.<sup>62</sup> The Chamber notes that such statements: (i) are based on the interview with the witness; (ii) are read back to the witness; (iii) initialled on each page by every person present during the interview; and (iv) signed at the end by the witness with a declaration providing that the contents of the statement is true to the best of the knowledge and recollection of the witness and may be used as evidence in proceedings before the Court. Similarly, the Chamber notes that rule 68 of the Rules does not require that prior recorded testimony sought to be

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<sup>60</sup> See paragraph 24 above.

<sup>61</sup> See articles 64(6)(b) and 69(3) of the Statute.

<sup>62</sup> Indeed in respect of the Prosecution, the Chamber observes that members of the Prosecution are subject to a comprehensive code of conduct which regulates investigations and mandates, *inter alia*, impartial conduct in the course of such investigations – See Office of the Prosecutor, [Code of Conduct for the Office of the Prosecutor](#), 5 September 2013, Chapter 2, Section 6.



introduced be in the form of a verbatim transcript.<sup>63</sup> As such, the Chamber finds no reason to reject prior recorded testimony on that basis alone.<sup>64</sup>

#### IV. ANALYSIS OF THE FIRST REQUEST

43. In the First Request, the Prosecution seeks the introduction of the prior recorded testimony and associated material of P-0100, P-1277, P-1424, P-1427, P-1523, P-1524, P-1563, P-1825, P-1970, P-2042 and P-2087.<sup>65</sup> The Chamber notes the Prosecution's submissions that these witnesses 'pertain to events in the Boy Rabe neighbourhood of Bangui in 2013, which the Prosecution relies upon as proof of the chapeau elements of war crimes and crimes against humanity.'<sup>66</sup>

44. The Chamber will first provide a brief overview of the prior recorded testimonies to be submitted, as well as any specific objections on the part of the Defence (Section A). The Chamber will then analyse the criteria set out in rule 68(2)(b) of the Rules (Section B).

##### A. Overview of the prior recorded testimony to be submitted pursuant to rule 68(2)(b) of the Rules

###### 1. P-0100

45. According to the Prosecution, P-0100 was [REDACTED] of Boy Rabe.<sup>67</sup> The Prosecution seeks introduction of his witness statement and 11 associated items.<sup>68</sup> The Chamber notes that his statement describes, *inter alia*, the background, history and layout of the Boy Rabe neighbourhood,<sup>69</sup> the arrival of the Seleka in March 2013,

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<sup>63</sup> See Decision on the Prosecution's Requests under Rule 68(3) to Introduce the Prior Recorded Testimony of P-3108, P-2400, P-2240, P-2478 and P-0787, 11 October 2022, ICC-01/14-01/21-499-Red, para. 23.

<sup>64</sup> The Chamber recalls that it has already dismissed similar arguments by the Defence in its decision on the Prosecution's requests pursuant to rule 68(2)(c) of the Rules. See Decision on the Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses, 20 October 2022, ICC-01/14-01/21-506-Conf, para. 35.

<sup>65</sup> [First Request](#), para. 1.

<sup>66</sup> [First Request](#), para. 2.

<sup>67</sup> [First Request](#), para. 14.

<sup>68</sup> [First Request](#), para. 14; Annex A to the [First Request](#), p. 2.

<sup>69</sup> CAR-OTP-2027-2535-R01, at 2537-2539, paras 14-23.

various attacks by the Seleka between April and August 2013,<sup>70</sup> and counter attacks by opposing forces,<sup>71</sup> which the witness either personally witnessed or heard about from others. In this regard, the Prosecution submits that P-0100's prior recorded testimony 'provides information relevant to the Seleka's policy to attack a civilian population', 'details relevant to the Seleka armed group's level of organisation', and 'details relevant to the continuation of the armed conflict'.<sup>72</sup>

46. The Defence does not individually address the limbs of rule 68(2)(b) with respect to P-0100 specifically. However, it notes that his prior recorded testimony contradicts that of P-1563 regarding the [REDACTED] and argues that it does not have sufficient indicia of reliability because it consists of hearsay.<sup>73</sup> The Chamber is of the view, however, that the level of hearsay contained in P-0100's prior recorded testimony and the contradiction identified by the Defence are not of such a nature or degree that they should preclude the introduction of P-0100's statement pursuant to rule 68(2)(b) at this stage. As already noted, the evidentiary weight of the prior recorded testimony will be assessed at a later stage of the proceedings, when the Chamber evaluates all the evidence for the purposes of its judgment pursuant to article 74 of the Statute.

## 2. P-1277

47. According to the Prosecution, P-1277 [REDACTED], and was [REDACTED] in 2013.<sup>74</sup> The Prosecution seeks introduction of P-1277's witness statement and 7 annexes which comprise, *inter alia*, relevant pages from an [REDACTED].<sup>75</sup> In his witness statement, P-1277 discusses, *inter alia*, events in Boy Rabe in April and August 2013.<sup>76</sup> Specifically, P-1277 discussed the firing of a shell from Boy Rabe in August 2013 towards the *Palais Presidentiel* during President Djotodia's inauguration,<sup>77</sup> the abduction of P-0662<sup>78</sup> and the shelling of a church in the 4<sup>th</sup> arrondissement on 14 April

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<sup>70</sup> CAR-OTP-2027-2535-R01, at 2539-2558, paras 25-138.

<sup>71</sup> CAR-OTP-2027-2535-R01, at 2541-2542, paras 38-39; at 2558-2559, paras 139-143.

<sup>72</sup> [First Request](#), paras 15-16.

<sup>73</sup> [First Response](#), paras 36, 82.

<sup>74</sup> [First Request](#), para. 17.

<sup>75</sup> [First Request](#), para. 19; Annex A to the [First Request](#), p. 3.

<sup>76</sup> CAR-OTP-2051-0966-R01, at 0970-0972, paras 20-26.

<sup>77</sup> CAR-OTP-2051-0966-R01, at 0970-0971, paras 20-21.

<sup>78</sup> CAR-OTP-2051-0966-R01, at 0972, paras 27-29.

2013.<sup>79</sup> In respect of this latter incident it appears that P-1277 was a [REDACTED],<sup>80</sup> however, in respect of other incidents noted in his statement it is unclear to what extent he was a [REDACTED] or [REDACTED].<sup>81</sup>

48. The Defence submits that P-1277's evidence regarding the alleged abduction of P-0662 is not corroborated since it is hearsay evidence and the source of P-1277's information is P-0662 himself, that none of the alleged witnesses to this incident will be testifying live before the Chamber,<sup>82</sup> and that P-1277's account is inconsistent with that of P-0662 regarding the duration of the alleged detention ([REDACTED]).<sup>83</sup> In addition, the Defence points to an inconsistency between P-1277's prior recorded testimony and an earlier screening note in respect of the date of the shelling of the Cite Jean XXIII church and the number of victims of this event,<sup>84</sup> and questions why certain other witnesses who may have also been present with P-1277 do not explicitly mention him being present.<sup>85</sup> Last, the Defence submits that, if the Chamber is minded to introduce P-1277's prior recorded testimony, it should reject the admission of the associated material, namely P-1277's [REDACTED], due to concerns regarding, *inter alia*, the lack of information regarding the manner in which [REDACTED] and thus its authenticity.<sup>86</sup>

49. The Chamber is of the view that the deficiencies identified by the Defence above in respect of P-1277's prior recorded testimony and associated material are not of such a nature or degree that the introduction of his prior recorded testimony and associated material should be precluded at this stage. Specifically, the Chamber notes that any inconsistencies between P-1277's prior recorded testimony and the information provided in the screening note or by P-0662 are limited. Similarly, the Chamber is of the view that the fact that there will be no oral evidence in respect of the alleged abduction of P-0662 is not unduly prejudicial to the Defence as: (i) the accused is not

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<sup>79</sup> CAR-OTP-2051-0966-R01, at 0971-0972, paras 24-28; at 0974, para. 38.

<sup>80</sup> CAR-OTP-2051-0966-R01, at 0974, para. 38.

<sup>81</sup> See CAR-OTP-2051-0966-R01, at 0974, para. 38.

<sup>82</sup> [First Response](#), para. 60.

<sup>83</sup> [First Response](#), paras 61-63, 83.

<sup>84</sup> [First Response](#), para. 77.

<sup>85</sup> [First Response](#), para. 78.

<sup>86</sup> [First Response](#), para. 94.

specifically charged with the abduction of P-0662; and, (ii) in any event, the Defence will be able to question other witnesses about the events at the *Comité Extraordinaire pour la Défense des Acquis Démocratiques* (CEDAD) in 2013, for example P-0664, on whose testimony the Prosecution seeks to rely for the purposes of establishing the chapeau elements of crimes against humanity in this case.<sup>87</sup> In respect of the Defence's objections regarding the [REDACTED], the Chamber notes that the witness indicated that [REDACTED] has [REDACTED] and that he provided a copy [REDACTED] to the investigators.<sup>88</sup> He further signed the six pages from [REDACTED] that were annexed to his statement.<sup>89</sup> The Chamber is of the view that the Defence arguments regarding the process of creation of the [REDACTED] pertain more to the weight to be attached to this item of evidence, which the Chamber will take into consideration for the purposes of its judgment under article 74 of the Statute, and should not preclude its introduction at this stage.

### 3. P-1424

50. According to the Prosecution, P-1424 was a resident of Boy Rabe who gives evidence about the 'August Boy Rabe attack'.<sup>90</sup> The Prosecution seeks introduction of P-1424's witness statement and an annex which is a diagram drawn by the witness of his neighbourhood.<sup>91</sup> In his statement, P-1424 describes an attack by the Seleka in Boy Rabe in August 2013, specifically noting an incident where he describes P-1427 being shot.<sup>92</sup>

51. The Defence does not individually address the limbs of rule 68(2)(b) with respect to P-1424 specifically, but notes that he was not a direct witness of the shooting of P-1427.<sup>93</sup>

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<sup>87</sup> See Prosecution's Trial Brief, 13 June 2022, ICC-01/14-01/21-359-Conf. A public redacted version was notified on 28 July 2022 ([ICC-01/14-01/21-359-Red](#)) (the 'Prosecution Trial Brief'), para. 74; See also Annex A to the Prosecution's Notification of an Updated Order of Appearance, 5 September 2022, ICC-01/14-01/21-470-Conf-AnxA, p. 2.

<sup>88</sup> CAR-OTP-2051-0966-R01, at 0970, para. 19; at 0987, para. 122.

<sup>89</sup> CAR-OTP-2051-0966-R01, at 0987.

<sup>90</sup> [First Request](#), para. 20.

<sup>91</sup> [First Request](#), para. 20; Annex A to the [First Request](#), p. 4.

<sup>92</sup> CAR-OTP-2049-0198-R01, at 0201-0203, paras 13-31.

<sup>93</sup> [First Response](#), para. 56.

52. The Chamber finds the Defence's submissions to the effect that the fact that P-1424 was not a direct witness of P-1427's shooting inaccurate. Specifically, the Chamber notes from P-1424's statement that he: [REDACTED].<sup>94</sup> In any event, the Chamber is of the view that any deficiencies in this respect are not of such a nature or degree as to preclude the introduction of P-1424's prior recorded testimony at this stage.

#### 4. P-1427

53. According to the Prosecution, P-1427 describes 'being shot and almost killed by the Seleka during the August 2013 Boy Rabe operation', the incident that is also described by P-1424.<sup>95</sup> The Prosecution seeks introduction of P-1427's witness statement and two annexes.<sup>96</sup>

54. The Defence does not address each individual limb of rule 68(2)(b) of the Rules in respect of P-1427's prior recorded testimony but makes submissions as to a lack of corroboration regarding the alleged events described by P-1427 and that if the Chamber allows introduction of this prior recorded testimony then the Defence will not be able to test the evidence regarding the alleged shooting of P-1427.<sup>97</sup>

55. The Chamber notes the Defence's submissions, but finds that this in and of itself should not preclude the introduction of P-1427's prior recorded testimony. As set out above, corroboration is not a requirement for the introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules and such statements may also be cumulative of other similar acts.<sup>98</sup> In relation to P-1427's testimony, the Chamber notes that the Prosecution seeks to rely on P-1427's shooting in order to establish the contextual elements of the case and that the accused is not specifically charged with the shooting of P-1427. In this regard, the Chamber considers that the Defence will be able to explore similar events in Boy Rabe in August 2013 with oral witnesses. The Chamber

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<sup>94</sup> CAR-OTP-2049-0198-R01, at 0201-0202, paras 17-24.

<sup>95</sup> [First Request](#), para. 21.

<sup>96</sup> [First Request](#), para 21; Annex A to the [First Request](#), p. 5.

<sup>97</sup> [First Response](#), paras 54-57.

<sup>98</sup> The Chamber notes that there are a number of witnesses who will testify orally who are alleged to be directly victimised by the Seleka in Boy Rabe, such as P-0834, P-1263, P-1264.

further notes that P-1424 and P-2087 provide testimony that to a greater or lesser extent corroborate P-1427's version of events.

##### 5. P-1523

56. According to the Prosecution, P-1523 'provides information relevant to the Seleka's policy to attack the civilian population in Bangui perceived to be pro-BOZIZE, as she explains that the Seleka targeted Boy Rabe since they considered it as the quartier of the same ethnicity of BOZIZE (Gbaya).'<sup>99</sup> In her statement, P-1523 describes the Seleka's actions in Boy Rabe<sup>100</sup> and how her husband was shot by the Seleka on 20 August 2013.<sup>101</sup>

57. The Prosecution seeks the introduction of her witness statement and associated material.<sup>102</sup> Specifically, the Chamber notes that one exhibit (CAR-OTP-2005-3227-R01), which forms part of the associated material comprises, *inter alia*, a complaint filed with the *Commission Mixte d'Enquetes* about the Seleka's alleged killing of her husband, two procès-verbaux taken by the Commission,<sup>103</sup> a death certificate<sup>104</sup> and pictures of her husband in the morgue.<sup>105</sup> In this regard, the Chamber notes that this exhibit appears to be a compilation of a number of documents and other items.

58. The Defence makes several submissions in respect of P-1523's prior recorded testimony, noting that it is composed of anonymous hearsay<sup>106</sup> and that the Chamber should reject the introduction of the associated material, in particular CAR-OTP-2005-3227-R01 as she only authenticates two out of the 10 pages.<sup>107</sup>

59. In respect of the Defence's objection that P-1523's statement contains anonymous hearsay, the Chamber notes that the anonymous hearsay in P-1523's

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<sup>99</sup> [First Request](#), para. 22.

<sup>100</sup> CAR-OTP-2134-2637-R01, at 2639-2640, paras 11-22.

<sup>101</sup> CAR-OTP-2134-2637-R01, at 2640-2643, paras 23-41.

<sup>102</sup> [First Request](#), para. 23; Annex A to the [First Request](#), p. 6.

<sup>103</sup> CAR-OTP-2005-3227-R01, at 3228-3231.

<sup>104</sup> CAR-OTP-2005-3227-R01, at 3233-3234.

<sup>105</sup> CAR-OTP-2005-3227-R01, at 3235-3236.

<sup>106</sup> [First Response](#), para. 84.

<sup>107</sup> [First Response](#), para. 95.

statement is limited and accordingly is not of such a nature or degree so as to preclude the introduction of P-1523's prior recorded testimony at this stage.

60. Regarding CAR-OTP-2005-3227-R01, the Chamber notes that the witness appears to have only been shown two out of the 10 pages of this exhibit.<sup>108</sup> Similarly, the Chamber notes that the chain of custody of this exhibit originates from the *Commission Mixte d'Enquete* and not the witness herself.<sup>109</sup> Furthermore, the Chamber notes that pages nine and 10 of this exhibit are duplicate photographs of CAR-OTP-2045-1016, CAR-OTP-2045-1017 and CAR-OTP-2045-1018 which the witness comments on in her statement and the Prosecution seeks separate introduction of as associated material.<sup>110</sup>

61. The Chamber finds that it is necessary, at this juncture, to rule on the Defence's objection regarding CAR-OTP-2005-3227-R01. The Chamber recalls that, in accordance with the jurisprudence of the Court, any annex to a witness's statement, or document otherwise associated with it, that is used or explained by the witness and as such is necessary to understand it may be also introduced under rule 68 of the Rules.<sup>111</sup> Accordingly, the Chamber finds that only the two pages that have been mentioned by the witness in her statement, along with the final two pages which contain the duplicate photographs, can be introduced as associated material pursuant to rule 68(2)(b) of the Rules; the remaining pages, which contain a *procès-verbal d'audition* of another person, a procedural document, and a death certificate of P-1523's husband, cannot.<sup>112</sup> However, pursuant to its powers under article 69(3) of the Statute, the Chamber recognises the entire item of evidence as formally submitted.

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<sup>108</sup> See CAR-OTP-2134-2637-R01, at 2642, para. 33.

<sup>109</sup> See the metadata of CAR-OTP-2005-3227-R01 which notes that the chain of custody originates from the 'Commission Mixte d'Enquete'.

<sup>110</sup> CAR-OTP-2134-2637-R01 at 2642, paras 34-38; Annex A to the [First Request](#), p. 6.

<sup>111</sup> Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence, 19 June 2018, [ICC-02/04-01/15-1288](#), (the 'Ongwen Rule 68(2)(c) Decision'), paras. 10.

<sup>112</sup> This concerns CAR-OTP-2005-3227-R01 with the exception of pages 3230, 3231, 3235 and 3236.

## 6. P-1524

62. According to the Prosecution, P-1524 is [REDACTED] in Boy Rabe.<sup>113</sup> In his statement, P-1524 broadly describes the history and ethnic composition of Boy Rabe<sup>114</sup> and recalls various events involving the Seleka in April and August 2013.<sup>115</sup> In this regard, the Prosecution notes that he describes the Seleka's policy of targeting Boy Rabe and provides 'detailed eyewitness information about both the April and August Boy Rabe attacks, including the involvement of senior Seleka commanders.'<sup>116</sup> Furthermore, the Prosecution submits that P-1524's prior recorded testimony corroborates: (i) [REDACTED] of P-1264 in that [REDACTED];<sup>117</sup> and (ii) 'P-1825's account of being forced at gunpoint to help the Seleka carry looted goods during a Seleka operation in Boy Rabe'.<sup>118</sup> The Prosecution seeks introduction of P-1524's witness statement and 5 annexes.<sup>119</sup>

63. The Defence submits that P-1524's prior recorded testimony cannot corroborate [REDACTED] of P-1264, averring, *inter alia*, that it is unclear how P-1524's [REDACTED] was created and how [REDACTED].<sup>120</sup> Furthermore, the Defence argues that P-1524's prior recorded testimony also cannot corroborate P-1825's account as there is nothing in his statement which would allow the Chamber to determine whether indeed P-1524 was a direct witness.<sup>121</sup> In addition, the Defence argues that it must cross examine P-1524 in order to clarify how he understands his role and his knowledge of the ethnic and historical composition of Boy Rabe.<sup>122</sup> Similarly, the Defence notes that P-1524 admits that he has issues with dates which, in its submission, renders his prior recorded testimony unreliable.<sup>123</sup>

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<sup>113</sup> [First Request](#), para. 24.

<sup>114</sup> CAR-OTP-2062-0468-R01, at 0470-0472, paras 15-23.

<sup>115</sup> CAR-OTP-2062-0468-R01, at 0472-0489, paras 24-106.

<sup>116</sup> [First Request](#), para. 24.

<sup>117</sup> [First Request](#), para. 25.

<sup>118</sup> [First Request](#), para. 24.

<sup>119</sup> [First Request](#), para. 24; Annex A to the [First Request](#), p. 7.

<sup>120</sup> [First Response](#), paras 49-51.

<sup>121</sup> [First Response](#), para. 35.

<sup>122</sup> [First Response](#), para. 71.

<sup>123</sup> [First Response](#), para. 75.



64. The Chamber finds that the issues relating to reliability, corroboration and consistency as raised by the Defence are not of such a nature or degree that they should preclude the introduction of P-1524's prior recorded testimony and associated material. Nevertheless, for the reasons explained below,<sup>124</sup> the Chamber considers it appropriate to authorise the introduction of P-1524's prior recorded testimony under rule 68(3) of the Rules instead of rule 68(2)(b) of the Rules.

## 7. P-1563

65. The Prosecution submits that P-1563 was a '[REDACTED]' at a secondary school in Boy Rabe called *Lycée Boganda*'.<sup>125</sup> Specifically, the Prosecution notes that '[h]e provides information about a large-scale Seleka operation in Boy Rabe', with his evidence being 'pertinent to the Seleka's policy to attack a civilian population'.<sup>126</sup> In his statement, P-1563 describes events at the *Lycée Boganda* following the arrival of the Seleka<sup>127</sup> and he recalls conversations he had with [REDACTED] regarding Boy Rabe.<sup>128</sup> The Prosecution seeks introduction of P-1563's witness statement and two annexes.<sup>129</sup>

66. The Defence submits that P-1563's account regarding [REDACTED] is contradicted by other witnesses, including P-0100,<sup>130</sup> and that the Defence should be allowed to cross examine P-1563 in order to understand the complexity of incidents at the *Lycée Boganda* and apparent disagreements between various Seleka members, as well as the witness's role there.<sup>131</sup>

67. The Chamber notes that the witness indicates that he was a [REDACTED] at the *Lycée Boganda* and [REDACTED].<sup>132</sup> He states that the Seleka [REDACTED].<sup>133</sup> He also states that [REDACTED] and that he once told him that there were different views

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<sup>124</sup> See paragraphs 94-95 below.

<sup>125</sup> [First Request](#), para. 26.

<sup>126</sup> [First Request](#), para. 26.

<sup>127</sup> CAR-OTP-2087-9352-R01, at 9355-9357, paras 12-27; at 9358-9359, paras 29-37.

<sup>128</sup> CAR-OTP-2087-9352-R01, at 9357, para. 28.

<sup>129</sup> [First Request](#), para. 27; Annex A to the [First Request](#), p. 8.

<sup>130</sup> [First Response](#), para. 36.

<sup>131</sup> [First Response](#), para. 72.

<sup>132</sup> CAR-OTP-2087-9352-R01, at 9355, paras 11-12.

<sup>133</sup> CAR-OTP-2087-9352-R01, at 9356-9359, paras 20-37.

amongst the Seleka regarding Boy Rabe – that some wished to flatten it, but others disagreed because ‘[REDACTED]’.<sup>134</sup> The witness also recalls an occasion immediately prior to a big operation in Boy Rabe, two weeks after the arrival of the Seleka, when [REDACTED] met with [REDACTED] and the [REDACTED] and subsequently told the men, in the presence of [REDACTED], that ‘[REDACTED]’.<sup>135</sup>

68. The Chamber considers that this witness provides important information regarding the alleged Seleka policy and their treatment of the civilian population and notes that these issues are materially in dispute in the present case. The Chamber further considers that it is unclear from P-1563’s statement in what capacity he [REDACTED] and the access he would have had to the activities of the Seleka [REDACTED], particularly in terms of whether he personally witnessed the events he described. The Chamber further notes that P-1563’s statement that [REDACTED] appears to be contradicted by numerous witnesses who stated that [REDACTED].<sup>136</sup> Given the significance of the information provided by P-1563 in relation to issues that are materially in dispute, and the questions raised regarding the reliability of the information contained in his statement, the Chamber considers that it would be prejudicial to the Defence to allow introduction of the prior recorded testimony of this witness pursuant to rule 68(2)(b) of the Rules. Therefore, the request to allow the introduction of P-1563’s prior recorded testimony is rejected and, should the Prosecution wish to rely on the testimony of this witness, he must be called to testify as a full *viva voce* witness before the Chamber.

#### 8. P-1825

69. The Prosecution states that P-1825 was a ‘[REDACTED]’ who was ‘forced by the Seleka during the April Boy Rabe attack to assist the Seleka in their widespread pillaging activities’, describes pillaging, ‘killings, rapes and beatings committed by the Seleka and identifies a number of Seleka commanders who were present.’<sup>137</sup>

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<sup>134</sup> CAR-OTP-2087-9352-R01, at 9357, para. 28.

<sup>135</sup> CAR-OTP-2087-9352-R01, at 9358, para. 30.

<sup>136</sup> **P-0100**: CAR-OTP-2027-2535-R01, at 2554, para. 114; **P-1432**: CAR-OTP-2073-0744-R01, at 0746, para. 16; **P-2042**: CAR-OTP-2074-0002-R01, at 0007, para. 25; **P-1297**: CAR-OTP-2039-0167-R01, at 0171, para. 31.

<sup>137</sup> [First Request](#), para. 28.

Furthermore, the Prosecution submits that P-1825 ‘provides information relevant to the Seleka’s policy to attack a civilian population’.<sup>138</sup> In his statement, P-1825 notes his interactions with the Seleka and avers that he was made to go out and help the Seleka who were looting in Boy Rabe.<sup>139</sup> The Prosecution seeks introduction of P-1825’s witness statement and six items of associated material.<sup>140</sup>

70. The Defence in the First Response submits that P-1825’s evidence should be treated with extreme caution as [REDACTED].<sup>141</sup> In addition, the Defence also submits that P-1825’s account where he mentions incidents of rape is no more than hearsay.<sup>142</sup>

71. The Chamber notes that the Defence’s submissions here relate primarily to the weight to be attached to P-1825’s evidence, which will not be assessed until its deliberation for the purposes of the judgment pursuant to article 74 of the Statute. In any event, the Chamber is of the view that any concerns with regard to the reliability of P-1825’s account are not of such a nature or degree that they should preclude the introduction of his prior recorded testimony under rule 68(2)(b) of the Rules.

#### 9. P-1970

72. Per the Prosecution’s submissions, P-1970 is a ‘[REDACTED]’ who provides information ‘relevant to the Seleka’s policy to attack a civilian population’.<sup>143</sup> In particular, the Prosecution submits that P-1970 is ‘an eyewitness of [REDACTED] during the August Boy Rabe attack’ and was present when he said “[REDACTED]”<sup>144</sup> The Prosecution seeks introduction of P-1970’s witness statement and a photograph which the Prosecution avers he provided.<sup>145</sup>

73. The Defence submits that P-1970 should be cross examined because his testimony could be relevant to the Defence in respect of exploring [REDACTED]

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<sup>138</sup> [First Request](#), para. 28.

<sup>139</sup> CAR-OTP-2079-0315-R01, at 0317-0324, paras 12-49.

<sup>140</sup> [First Request](#), para. 29; Annex A to the [First Request](#), p. 9.

<sup>141</sup> [First Response](#), para. 35.

<sup>142</sup> [First Response](#), para. 86.

<sup>143</sup> [First Request](#), para. 30.

<sup>144</sup> [First Request](#), para. 30; CAR-OTP-2087-9396-R01 at 9404, para. 34.

<sup>145</sup> [First Request](#), para. 30; Annex A to the [First Request](#), p. 10.

during the charged period.<sup>146</sup> In addition, the Defence also points to an inconsistency between P-1970's statement and an earlier screening note regarding the date of [REDACTED] death and whether his body was found or not.<sup>147</sup> Similarly, the Defence submits that P-1970's statement contains (anonymous) hearsay and therefore lacks sufficient indicia of reliability.<sup>148</sup>

74. The Defence also makes specific submissions regarding the associated exhibit sought to be introduced with P-1970's prior recorded testimony, namely a photograph alleged to depict [REDACTED].<sup>149</sup> The Defence notes that this photograph is not mentioned by P-1970 in his witness statement,<sup>150</sup> albeit that P-1970 notes [REDACTED].<sup>151</sup> The Defence further notes that, although the chain of custody for this photograph indicates that it originates from P-1970, the witness apparently gave it to the Prosecution four months after he provided his statement.<sup>152</sup> The Defence submits that the photograph should not be introduced pursuant to rule 68(2)(b) of the Rules given that it was not discussed by the witness in his statement and the Prosecution has not indicated that it intends to rely on [REDACTED].<sup>153</sup>

75. The Chamber recalls that, in accordance with the jurisprudence of the Court, any annex to a witness's statement, or document otherwise associated with it, that is used or explained by the witness and as such is necessary to understand it may be also introduced under rule 68 of the Rules.<sup>154</sup> Indeed this photograph is not mentioned by the witness in his prior recorded testimony, and therefore cannot form 'associated material' for the purposes of rule 68(2)(b) of the Rules. Accordingly, the Chamber rejects the introduction of CAR-OTP-2083-0199 under rule 68(2)(b) of the Rules.

76. In respect of the Defence's submissions regarding inconsistencies and an alleged lack of reliability in P-1970's prior recorded testimony, the Chamber finds that any concerns with respect to P-1970's prior recorded testimony are not of such a nature or

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<sup>146</sup> [First Response](#), para. 73.

<sup>147</sup> [First Response](#), para. 80.

<sup>148</sup> [First Response](#), para. 88.

<sup>149</sup> [First Response](#), para. 96; CAR-OTP-2083-0199.

<sup>150</sup> [First Response](#), para. 96.

<sup>151</sup> CAR-OTP-2087-9396-R01 at 9406, para. 43.

<sup>152</sup> [First Response](#), para. 96.

<sup>153</sup> [First Response](#), para. 96.

<sup>154</sup> [Ongwen Rule 68\(2\)\(c\) Decision](#), paras. 10.

degree that they should preclude the introduction of his prior recorded testimony. Specifically, the Chamber notes that the inconsistencies and hearsay identified in P-1970's evidence are limited.

#### *10. P-2042*

77. The Prosecution submits that P-2042 is a '[REDACTED]'.<sup>155</sup> The Prosecution avers that P-2042's prior recorded testimony 'is relevant to the Seleka's policy to attack a civilian population', describing events he witnessed in his neighbourhood in 2013 such as 'ADAM and other Seleka commanders visit[ing] the home of [REDACTED]' and hearing '[REDACTED]'.<sup>156</sup> In addition, the Chamber notes that in his statement, P-2042 describes various other alleged crimes by the Seleka, including the looting of his own house as well as the rape of a woman.<sup>157</sup> The Prosecution seeks to introduce P-2042's witness statement as well as 3 associated items.<sup>158</sup>

78. The Defence submits that several of the events mentioned by P-2042 are based solely on hearsay, noting a specific example which relates to the murder of an individual named [REDACTED].<sup>159</sup>

79. The Chamber finds that the fact that P-2042's prior recorded testimony contains instances of hearsay should not, in and of itself, preclude introduction of his prior recorded testimony pursuant to rule 68(2)(b) of the Rules.

#### *11. P-2087*

80. According to the Prosecution, P-2087 is a '[REDACTED]' who 'provides information on the April and August Boy Rabe attacks'.<sup>160</sup> In particular, the Prosecution

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<sup>155</sup> [First Request](#), para. 31. The Chamber notes that this information appears to have been redacted out in his statement (CAR-OTP-2074-0002-R01, at 0004, para. 12). The Chamber notes, as per the redaction protocol, that this information has been redacted on the basis that it falls under category B.1. However, given that the Prosecution has referenced this information in the Request the Chamber is of the view that this redaction is no longer necessary *vis-à-vis* the Defence and Legal Representative of Victims. Accordingly, the Prosecution is ordered to review the relevant redaction in CAR-OTP-2074-0002-R01, at 0004, para. 12.

<sup>156</sup> [First Request](#), para. 31; CAR-OTP-2074-0002-R01, at 0004-0005, para. 15.

<sup>157</sup> CAR-OTP-2074-0002-R01, at 0008-0010, paras 29-36.

<sup>158</sup> [First Request](#), para. 32; Annex A to the [First Request](#), p. 11.

<sup>159</sup> [First Response](#), para. 87.

<sup>160</sup> [First Request](#), para. 33.

submits that ‘his evidence on the August Boy Rabe attack is relevant to the existence of a non-international armed conflict’.<sup>161</sup> In addition, the Prosecution submits that P-2087 provides information ‘relevant to chapeau elements of crimes against humanity as he provides corroborative evidence on the Seleka’s attempted murder of P-1424 and murder of his three friends’, the ‘arbitrary detention of P-0662 and another Boy Rabe resident’, and words uttered by a Seleka commander to the effect that civilians in Boy Rabe could be attacked.<sup>162</sup> The Prosecution seeks to introduce P-2087’s witness statement and 3 photographs.<sup>163</sup>

81. As already highlighted above,<sup>164</sup> the Defence contests the Prosecution’s submission that P-2087’s prior recorded testimony corroborates the attempted murder of P-1424, submitting that it was P-1427 who was the victim of the attempted murder and not P-1424.<sup>165</sup> Similarly, the Defence argues that P-2087 did not see this alleged incident and that his testimony therefore constitutes hearsay.<sup>166</sup> Furthermore, in respect of the incident relating to P-0662, the Defence notes that this incident corresponds with an incident contained in [REDACTED] relating to the detention of P-0662 and [REDACTED].<sup>167</sup> The Defence submits, *inter alia*, that all the witnesses in respect of this incident are the subject of rule 68(2)(b) requests, that P-2087 did not directly witness any incident involving P-0662 and that his account is based on hearsay.<sup>168</sup> Furthermore, the Defence notes that P-2087’s prior recorded testimony, and indeed the prior recorded testimony of other witnesses, are all inconsistent with each other in respect of the circumstances regarding P-0662 and [REDACTED] alleged detention.<sup>169</sup>

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<sup>161</sup> [First Request](#), para. 33.

<sup>162</sup> [First Request](#), para. 34.

<sup>163</sup> [First Request](#), para. 34; Annex A to the [First Request](#), p. 12.

<sup>164</sup> See discussion at paragraphs 51, 54-55 above.

<sup>165</sup> [First Response](#), para. 53.

<sup>166</sup> [First Response](#), para. 55.

<sup>167</sup> [First Response](#), para. 60.

<sup>168</sup> [First Response](#), paras 61-62.

<sup>169</sup> [First Response](#), paras 63-64.

82. The Defence also submits that P-2087 contradicts his own testimony with regard to the dates of the first alleged Seleka attack and that several aspects of his testimony contain hearsay.<sup>170</sup>

83. Last, the Defence opposes the introduction of the photographs sought to be introduced as associated material.<sup>171</sup> These photographs are alleged to depict injuries to P-2087 ‘caused by the Seleka’s attack in or around the beginning of December 2013’.<sup>172</sup> In particular, the Defence submits that it is unclear whether the Prosecution intends to rely on this aspect of his testimony, as it is not referenced in the First Request.<sup>173</sup> Furthermore, although the Defence concedes that these photographs are authenticated by the witness in his statement, it is unable to determine their usefulness and opposes their submission.<sup>174</sup>

84. On this latter objection relating to the associated material, the Chamber notes that the Defence’s submissions pertain largely to relevance which relates to the standard evidentiary criteria and therefore the Chamber will defer consideration of this objection till the deliberation of the judgment. In terms of whether these photographs can be introduced as associated material, as they have been authenticated by the witness there is no procedural bar to them being introduced as associated material pursuant to rule 68(2)(b) of the Rules at this stage.

85. In respect of the Defence’s objections regarding corroboration, inconsistencies and hearsay, the Chamber is of the view that any deficiencies in this regard are not of such a nature or degree that the introduction of his prior recorded testimony pursuant to rule 68(2)(b) of the Rules should be precluded. In particular, the Chamber observes that the level of hearsay in P-2087’s statement is limited and any inconsistencies are discrete. In respect of the Defence’s arguments in relation to the detention of P-0662, as will be discussed below,<sup>175</sup> the Chamber is of the view that P-0662 should appear

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<sup>170</sup> [First Response](#), paras 79, 89.

<sup>171</sup> [First Response](#), para. 97.

<sup>172</sup> Annex A to the [First Request](#), p. 12.

<sup>173</sup> [First Response](#), para. 97.

<sup>174</sup> [First Response](#), para. 97.

<sup>175</sup> See paragraphs 138-139 below.

pursuant to rule 68(3) of the Rules instead of rule 68(2)(b). As a result, the Chamber finds it unnecessary to consider the Defence's objections in this regard further.

### **B. Analysis of criteria set out in rule 68(2)(b) of the Rules**

86. The Chamber will now analyse whether the requirements of rule 68(2)(b) of the Rules have been fulfilled for the prior recorded testimony and associated exhibits sought to be introduced. Given that the testimony of all of the witnesses relate to events in Boy Rabe and are relied upon to establish the contextual elements in this case, the Chamber has grouped its analysis of the prior recorded testimony and associated material sought to be introduced under the headings of the various limbs of rule 68(2)(b) of the Rules in order to avoid repetition. Nonetheless, it emphasises that it has conducted an individual assessment of each testimony to determine whether the requirements of rule 68(2)(b) of the Rules have been met for the material sought to be introduced.

87. As the Chamber has already rejected the introduction of the prior recorded testimony and associated material of P-1563, it will not consider it further and the analysis below will deal with the remaining ten witnesses that are the subject of the First Request.

#### *1. Whether the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused*

88. The Chamber notes that none of the prior recorded testimony sought to be introduced mentions the accused nor does it pertain to his acts and conduct.

#### *2. Whether the prior recorded testimony has sufficient indicia of reliability*

89. The Chamber observes that all the prior recorded testimonies sought to be introduced were given: (i) in accordance with rule 111 of the Rules and signed by the witness together with the declaration that the statement was true to the best of his or her knowledge and recollection; (ii) voluntarily on the understanding that it could be used in proceedings before the Court; and (iii) in a language the witness spoke and understood and, where necessary, translated by a qualified translator. Therefore, the



Chamber is satisfied that the prior recorded testimony bear sufficient indicia of reliability for the purposes of introduction pursuant to rule 68(2)(b) of the Rules.

### 3. *Remaining criteria under rule 68(2)(b) of the Rules*

90. In this section, the Chamber will evaluate together whether: (i) the prior recorded testimony is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (ii) the prior recorded testimony relates to background information; (iii) the interests of justice are best served by its introduction; and (iv) the prior recorded testimony relates to issues that are not materially in dispute.

91. In respect of whether the prior recorded testimony is of a cumulative and corroborative nature, the Chamber notes that the Prosecution avers that it intends to rely on the prior recorded testimony sought to be introduced to ‘show the events that occurred in Boy Rabe in 2013, but this evidence is cumulative to or corroborative of other evidence that will be given by *viva voce* witnesses.’<sup>176</sup>

92. In this regard, the Prosecution refers to, *inter alia*, four *viva voce* witnesses,<sup>177</sup> namely P-0342, P-0119, P-1263 and P-1264, noting that these four witnesses ‘have been selected to testify *viva voce* specifically because of their information about the events in Boy Rabe’.<sup>178</sup> In particular, the Prosecution submits that: (i) P-0342 was ‘[REDACTED] who was present during the April Boy Rabe attack’; (ii) P-0119 was a ‘[REDACTED]’; (iii) P-1263 was a ‘victim of the April Boy Rabe attack’; and (iv) P-1264 was a ‘victim of the August Boy Rabe attack’.<sup>179</sup>

93. The Chamber has reviewed the statements of these four *viva voce* witnesses and finds that the prior recorded testimony of the ten witnesses sought to be introduced is of a cumulative nature in that the four *viva voce* witnesses will give evidence on similar facts, namely the alleged attacks in Boy Rabe.

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<sup>176</sup> [First Request](#), para. 39.

<sup>177</sup> The Prosecution also makes reference to 17 other *viva voce* witnesses who it submits will testify about the events in Boy Rabe in 2013 – [First Request](#), para. 41.

<sup>178</sup> [First Request](#), paras 39-40.

<sup>179</sup> [First Request](#), para. 40.

94. The Chamber further notes that the prior recorded testimony sought to be introduced contains some background information, but also contains important information relevant to establishing the contextual elements for war crimes and crimes against humanity in this case. Having considered the arguments presented by the parties in their briefs, the Chamber is of the view that these issues are materially in dispute, in particular the existence of a state or organisational policy in respect of the events in Boy Rabe. In these circumstances, the Chamber considers that it would be in the interests of justice to receive further oral testimony on the events in Boy Rabe, while resorting to rule 68(2)(b) of the Rules as appropriate in order to streamline the presentation of evidence.

95. The Chamber notes that P-1524's prior recorded testimony contains direct evidence of certain events in Boy Rabe. In his statement, P-1524 provides information on the history and background of Boy Rabe<sup>180</sup> and appears to have been [REDACTED].<sup>181</sup> In light of the foregoing, the Chamber considers it appropriate to allow the introduction of P-1524's prior recorded testimony under rule 68(3) rather than rule 68(2)(b) of the Rules, should the Prosecution wish to rely upon his testimony. The Chamber's ruling in this respect is subject to the witness's appearance before the Chamber and his consent to the introduction of his testimony pursuant to this provision. To this end, the Prosecution is to confirm by 31 October 2022 whether P-1524 will testify pursuant to rule 68(3) of the Rules.

96. The Chamber considers it would be in the interests of justice to introduce the statements and associated material<sup>182</sup> of P-0100, P-1277, P-1424, P-1427, P-1523, P-1825, P-1970, P-2042 and P-2087 pursuant to rule 68(2)(b) of the Rules in order to streamline the presentation of evidence and to avoid calling numerous oral witnesses to testify regarding the same or similar events.

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<sup>180</sup> See CAR-OTP-2062-0468-R01, at 0470-0472, paras 15-23.

<sup>181</sup> See CAR-OTP-2062-0468-R01, at 0472-0489, paras 24-106.

<sup>182</sup> With the exception of (i) pages 1-3, 6-8 of CAR-OTP-2005-3227-R01 (which the Chamber recognises submission of pursuant to its powers under article 69(3) of the Statute); and (ii) CAR-OTP-2083-0199 as noted at paragraphs 61 and 75 above.

### **C. Conclusion in respect of the First Request**

97. Taking the above into consideration, the Chamber: (i) allows the introduction of the prior recorded testimony and associated material<sup>183</sup> of P-0100, P-1277, P-1424, P-1427, P-1523, P-1825, P-1970, P-2042 and P-2087 pursuant to rule 68(2)(b); (ii) rejects the introduction of the prior recorded testimony and associated material of P-1563; (iii) and allows the prior recorded testimony and associated material of P-1524 pursuant to rule 68(3) of the Rules.

### **V. ANALYSIS OF THE SECOND REQUEST**

98. In the Second Request, the Prosecution seeks the introduction of the prior recorded testimony and associated material of seven witnesses, which the Prosecution relies upon ‘to prove the chapeau elements of war crimes and crimes against humanity.’<sup>184</sup> Specifically, the Prosecution notes that the prior recorded testimony relates to: (i) ‘the 13 April 2013 attack on the 7<sup>th</sup> arrondissement area of Bangui’ (the ‘7<sup>th</sup> Arrondissement Attack’); (ii) ‘the attack on minibus passengers arbitrarily arrested at a checkpoint in the PK9 area of Bangui, on or around 13 July 2013’ (the ‘PK9 Minibus Incident’); and (iii) ‘the crimes committed at the [CEDAD]’ (the ‘CEDAD Incident’).<sup>185</sup>

99. The Chamber will first provide a brief overview of the prior recorded testimonies to be submitted, as well as any specific objections on the part of the Defence (Section A). The Chamber will then analyse the criteria set out in rule 68(2)(b) of the Rules (Section B).

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<sup>183</sup> With the exception of (i) pages 1-3, 6-8 of CAR-OTP-2005-3227-R01 (which the Chamber recognises submission of pursuant to its powers under article 69(3) of the Statute); and (ii) CAR-OTP-2083-0199 as noted at paragraphs 61 and 75 above.

<sup>184</sup> [Second Request](#), para. 2.

<sup>185</sup> [Second Request](#), para. 8.

**A. Overview of the prior recorded testimony to be submitted pursuant to rule 68(2)(b) of the Rules**

*1. P-0491*

100. According to the Prosecution, P-0491 is [REDACTED] of the ‘minibus passengers who was arbitrarily arrested, tortured, and murdered by the Seleka on or around 13 July 2013 during the PK9 Minibus Incident.’<sup>186</sup> The Prosecution submits that ‘P-0491 was not present when the minibus passengers were arrested by the Seleka, but he relates the contemporaneous information he received about the PK9 Minibus Incident over the radio and from [REDACTED] (P-0529)’.<sup>187</sup> In this respect, the Prosecution avers that P-0491’s account is ‘consistent with that of other witnesses’.<sup>188</sup> The Prosecution seeks the introduction of P-0491’s witness statement and 9 annexes.<sup>189</sup>

101. In his statement, P-0491’s describes how [REDACTED] went missing and how he was concerned as he had heard about bodies being found in the River Oubangi and that there had been an incident with a minibus in PK9.<sup>190</sup> P-0491 notes that he spoke with P-0529 who told him what had happened and that he went to the morgue and identified the body [REDACTED].<sup>191</sup>

102. The Defence objects to the introduction of P-0491’s prior recorded testimony. First, the Defence submits that P-0491 was not a direct witness to the alleged incident involving the minibus at PK9, his account consists largely of hearsay<sup>192</sup> and is based on what he heard from P-0529.<sup>193</sup> Connected with this, the Defence avers that P-0491’s account is not corroborated by P-0529’s account because P-0529’s statement is also based on hearsay.<sup>194</sup> Second, the Defence notes that P-0491’s account contradicts P-0529’s account in several respects, specifically in terms of dates.<sup>195</sup> Third, the Defence

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<sup>186</sup> [Second Request](#), para. 10.

<sup>187</sup> [Second Request](#), para. 12 (footnote omitted).

<sup>188</sup> [Second Request](#), para. 12.

<sup>189</sup> [Second Request](#), para. 13.

<sup>190</sup> CAR-OTP-2013-0678-R01, at 0680-0681, paras 14-15.

<sup>191</sup> CAR-OTP-2013-0678-R01, at 0681, paras 16-21.

<sup>192</sup> [Second Response](#), paras 23-24.

<sup>193</sup> [Second Response](#), para. 65.

<sup>194</sup> [Second Response](#), para. 24.

<sup>195</sup> [Second Response](#), paras 25-28.

submits that P-0491's account is also internally inconsistent, with a number of the annexes to his statement lacking indicia of reliability. Specifically, the Defence submits that: (i) there are irregularities in respect of [REDACTED];<sup>196</sup> (ii) a forensic report (CAR-OTP-2013-0688) [REDACTED];<sup>197</sup> and (iii) CAR-OTP-2013-0702, a document that was given to investigators by the witness when he gave his statement on [REDACTED], appears to be dated [REDACTED].<sup>198</sup> Last, the Defence submits that P-2573, who will appear at trial and is alleged by the Prosecution to have 'witnessed key parts of the PK9 Minibus Incident'<sup>199</sup>, is insufficient because P-2573 is not a direct witness to the incident and cannot assist in understanding the contradictions present in P-0491's prior recorded testimony.<sup>200</sup>

103. The Chamber observes that P-0491's statement does indeed contain hearsay and he was not a direct witness to the PK9 Minibus Incident. Furthermore, in respect of the Defence's submissions regarding the annexes to P-0491's statement, the Chamber takes note of the Defence's concerns and is of the view that P-0491 should be cross examined, in particular in relation to the discrepancies identified by the Defence in relation to the [REDACTED] (CAR-OTP-2013-0686 and CAR-OTP-2013-0687) and the forensic report (CAR-OTP-2013-0688). Taking the above together, the Chamber is of the view that P-0491 should appear before the Chamber and therefore rejects the Prosecution's request to introduce the prior recorded testimony and associated material of P-0491 pursuant to rule 68(2)(b) of the Rules and instead allows the introduction pursuant to rule 68(3) of the Rules – should the Prosecution wish to rely on him.

## 2. P-0510

104. The Prosecution submits that P-0510 is a [REDACTED] who was 'managing [REDACTED], [REDACTED]' in 2013.<sup>201</sup> In his statement, P-0510 describes the 'advance of the Seleka' in late 2012 and early 2013, specifically fighting in

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<sup>196</sup> [Second Response](#), paras 51-53.

<sup>197</sup> [Second Response](#), para. 54.

<sup>198</sup> [Second Response](#), para. 55.

<sup>199</sup> [Second Request](#), para. 34.

<sup>200</sup> [Second Response](#), para. 83.

<sup>201</sup> [Second Request](#), para. 14.

[REDACTED], as well as describing interactions with [REDACTED],<sup>202</sup> and other Seleka individuals.<sup>203</sup> In addition, P-0510 describes the Anti-Balaka ‘offensive of 5 December 2013 on Seleka’s government in Bangui’.<sup>204</sup> The Chamber notes that the only potential references to the PK9 Minibus Incident in P-0510’s statement is in his discussion of four photographs of bodies in the Oubangi river in July 2013,<sup>205</sup> which the witness believes ‘were the same people kidnapped and killed few days earlier because a box or a bag of BOZIZE T-shirts were found on the bus they were occupying.’<sup>206</sup> The Prosecution seeks introduction of P-0510’s witness statement along with several annexes which comprise press articles, a google map satellite image and a number of photographs, including those mentioned above.<sup>207</sup> In respect of the [REDACTED] specifically, the Prosecution highlights that they are from the latter part of 2013 and report on ‘allegations that the Seleka were imprisoning and mistreating people at the CEDAD’.

105. The Defence objects to the introduction of P-0510’s prior recorded testimony, noting that it contains hearsay.<sup>208</sup> In addition, the Defence submits that if the Chamber is minded to grant the Second Request and allow the introduction of P-0510’s prior recorded testimony that it should reject the introduction of a number of the annexes.<sup>209</sup> In particular, the Defence avers that the [REDACTED] lack sufficient evidence of reliability and the witness should be called.<sup>210</sup> In respect of the photographs, the Defence notes that P-0510 did not take the photographs himself but they were taken by [REDACTED].<sup>211</sup> Furthermore, the Defence notes that none of the photos are dated and there is no metadata provided.<sup>212</sup> That notwithstanding, the Defence notes that in his statement P-0510 makes reference to the [REDACTED] of one of the photos which the Defence submits it does not have access to and it expresses concerns that P-0510

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<sup>202</sup> CAR-OTP-2017-0835, at 0839-0844, paras 17-33.

<sup>203</sup> CAR-OTP-2017-0835, at 0844-0847, paras 34-44.

<sup>204</sup> CAR-OTP-2017-0835, at 0848-0850, paras 46-53.

<sup>205</sup> CAR-OTP-2017-0835, at 0852-0853, para. 54, exhibits 15-18 (CAR-OTP-2017-0919 to 0922).

<sup>206</sup> CAR-OTP-2017-0835, at 0852, para. 54, exhibit 15.

<sup>207</sup> [Second Request](#), para. 16; Annex A to the [Second Request](#), p. 3.

<sup>208</sup> [Second Response](#), para. 66.

<sup>209</sup> [Second Response](#), paras 90-94.

<sup>210</sup> [Second Response](#), para. 91.

<sup>211</sup> [Second Response](#), para. 92.

<sup>212</sup> [Second Response](#), para. 92.

indicates in his statement that [REDACTED].<sup>213</sup> Accordingly, the Defence submits that the photographs do not have sufficient indicia of reliability, particularly as P-0510 is the only link between the photographs and the PK9 Minibus Incident – a link which cannot be tested because he would not be appearing before the Chamber if his prior recorded testimony is introduced under rule 68(2)(b) of the Rules.<sup>214</sup>

106. The Chamber takes note of the Defence's objections. As highlighted above, the only potential references to the PK9 Minibus Incident in P-0510's statement is in his discussion of four photographs.<sup>215</sup> The Chamber notes that while P-0510's account in this respect is based largely on hearsay, his account and the photographs themselves are consistent with the accounts of other witnesses. That notwithstanding, the Chamber shares the Defence's concerns regarding the [REDACTED]. The Chamber notes from its review of the exhibits that no [REDACTED] has been provided and it is unclear from P-0510's statement what [REDACTED] he is referring to. Furthermore, the Chamber notes from reviewing the statement of P-1808 that Archbishop Nzapalainga may have been present for the removal of bodies from the river on more than one occasion.<sup>216</sup> Accordingly, the Chamber is of the view that P-0510 should appear before the Chamber. It therefore rejects the Prosecution's request to introduce the prior recorded testimony and associated material of P-0510 pursuant to rule 68(2)(b) of the Rules and instead allows introduction pursuant to rule 68(3) of the Rules – should the Prosecution wish to rely on him.

### 3. P-0529

107. According to the Prosecution, P-0529 is a 'witness relevant for the PK9 Minibus Incident', specifically noting that he was '[REDACTED] in question, and [REDACTED]'.<sup>217</sup> The Prosecution notes that P-0529 'gathered real-time information about the PK9 Minibus Incident from many sources, ultimately giving him a

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<sup>213</sup> [Second Response](#), para. 92.

<sup>214</sup> [Second Response](#), paras 93-94.

<sup>215</sup> CAR-OTP-2017-0835, at 0850-0853, para. 54, exhibits 15-18. *See specifically*: CAR-OTP-2017-0919; CAR-OTP-2017-0920; CAR-OTP-2017-0921; CAR-OTP-2017-0922.

<sup>216</sup> *See P-1808*: CAR-OTP-2135-2185-R02, at 2188-2189, paras 17-24.

<sup>217</sup> [Second Request](#), para. 17 (footnote omitted).

[REDACTED] perspective on the incident.’<sup>218</sup> The Prosecution seeks introduction of P-0529’s single witness statement.<sup>219</sup>

108. The Chamber notes that P-0529 describes the PK9 Minibus Incident in his statement, however, it observes that the majority of his evidence on this alleged incident is obtained from other individuals alleged to have been present.<sup>220</sup> Indeed, the Prosecution acknowledges in the Second Request that ‘P-0529 was not present during this incident’.<sup>221</sup>

109. The Defence submits that P-0529 was not a direct eyewitness of the alleged incident and his statement merely reports hearsay<sup>222</sup> and, as noted above,<sup>223</sup> contradicts other witnesses in respect of dates.<sup>224</sup> Furthermore, in connection with this, the Defence observes that P-0529 refers to two individuals in his statement, [REDACTED] and [REDACTED], who did witness the ‘PK9 Minibus Incident’.<sup>225</sup> The Defence notes that [REDACTED].<sup>226</sup> The Defence questions why these witnesses, who are alleged by P-0529 to have directly witnessed the alleged incident, are [REDACTED].<sup>227</sup> In this respect the Defence notes that analysis of the statements of [REDACTED] and [REDACTED] raises issues as to the reliability of P-0529’s statement,<sup>228</sup> particularly in respect of the fact that [REDACTED]<sup>229</sup> and that the statements of [REDACTED] and [REDACTED] themselves contain hearsay<sup>230</sup> and contradictions,<sup>231</sup> which in turn undermine P-0529’s account. The Defence also notes that P-2573, who will appear before the Chamber, cannot corroborate P-0529’s account because P-2573 was not a direct witness to the PK9 Minibus Incident and his account is based on hearsay.<sup>232</sup>

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<sup>218</sup> [Second Request](#), para. 18 (footnote omitted).

<sup>219</sup> [Second Request](#), para. 19.

<sup>220</sup> See CAR-OTP-2051-0159, at 0163-0167, paras 24, 27-29, 31-32, 34, 36-37, 43.

<sup>221</sup> [Second Request](#), para. 18, fn. 32.

<sup>222</sup> [Second Response](#), paras 24, 67.

<sup>223</sup> See paragraph 102 above.

<sup>224</sup> [Second Response](#), paras 26-28.

<sup>225</sup> [Second Response](#), para. 57.

<sup>226</sup> [Second Response](#), para. 57.

<sup>227</sup> [Second Response](#), para. 58.

<sup>228</sup> [Second Response](#), para. 59.

<sup>229</sup> [Second Response](#), para. 60.

<sup>230</sup> [Second Response](#), paras 61-62.

<sup>231</sup> [Second Response](#), para. 63.

<sup>232</sup> [Second Response](#), paras 34, 83.



110. The Chamber notes that P-0529's statement is largely comprised of hearsay, notwithstanding the fact that the Prosecution submits that P-0529 'gathered real-time information'.<sup>233</sup> However, the Chamber is of the view that this in itself should not preclude the introduction of P-0529's prior recorded testimony. In this regard, the Chamber notes that P-0529 largely identifies those from whom he received the information regarding the PK9 Minibus Incident.<sup>234</sup> In particular, the Chamber takes note of the statements of [REDACTED] and [REDACTED] which are referenced by the Defence. Although these witnesses [REDACTED], the Chamber observes that they largely appear to be the source of the information provided by P-0529 and are clearly identified in his statement.<sup>235</sup> In this respect, their evidence, in particular [REDACTED], is generally consistent with that of P-0529.<sup>236</sup> To the extent that there are inconsistencies between their evidence and P-0529's, such as those highlighted by the Defence, the Chamber finds that these are not of such a nature or degree whereby the introduction of P-0529's prior recorded testimony should be precluded.

111. In respect of the Defence's submissions regarding the lack of corroboration with P-2573's evidence, the Chamber notes that, contrary to the Defence's submissions, P-2573 does appear to have witnessed parts of the PK9 Minibus Incident and does, in part corroborate P-0529's account.<sup>237</sup> Similarly, to the extent that there are inconsistencies between their evidence, the Chamber recalls that P-2573 is available for cross-examination and can be cross examined by the Defence on any relevant issues.

112. Last, the Chamber notes that calling P-0529 to testify in person will not alter the fact that his testimony is largely hearsay. Indeed the Defence's submissions in this respect pertain more to the weight to be attributed to the evidence, which the Chamber will defer to the deliberation of the judgment.

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<sup>233</sup> [Second Request](#), para. 18.

<sup>234</sup> CAR-OTP-2051-0159, at 0164-0166 paras 28, 31, 34, 36-37, 40.

<sup>235</sup> See CAR-OTP-2051-0159, at 0164-0165, paras 28-29.

<sup>236</sup> See **P-1640**: CAR-OTP-2050-0308-R01, at 0311-0312, paras 20-27; **P-1421**: CAR-OTP-2049-0212, at 0216, paras 20-25.

<sup>237</sup> See **P-2573**: CAR-OTP-2119-0532, at 0547-0549, paras 64-72.

#### 4. P-0662

113. The Prosecution submits that P-0662 ‘is one of a number of victims of the CEDAD Incident.’<sup>238</sup> The Prosecution avers that P-0662 describes: (i) ‘the *modus operandi* of the Seleka’s arrest operation’; (ii) the ‘detention conditions and beatings by the Seleka at the CEDAD’; (iii) ‘the names and identities of his inmates and the estimated number of detainees in the cell’; (iv) ‘the detail of the interrogations by the Seleka, which is pertinent to the Seleka’s policy to attack a civilian population in Bangui perceived to be BOZIZE supporters.’<sup>239</sup> The Prosecution seeks introduction of P-0662’s single witness statement.<sup>240</sup>

114. The Defence notes that there are contradictions between P-0662’s prior recorded testimony and other witnesses. In particular, the Defence submits that [REDACTED]<sup>241</sup> contradicts P-0662 as to the number of persons present during the alleged incident.<sup>242</sup> In addition, the Defence notes that there are contradictions between P-0662’s account and P-1277 and P-2087, who, according to the Defence, contradicts P-0662 on the duration of the alleged detention and whether P-0662 and [REDACTED] were held together or not.<sup>243</sup> Furthermore, the Defence submits that P-0662’s statement lacks sufficient corroboration. In this respect, the Defence disagrees with the Prosecution’s submission that P-2087 and P-1277 corroborate P-0662’s account.<sup>244</sup> The Defence avers that P-2087 and P-1277 cannot corroborate P-0662’s account because P-0662 and [REDACTED] are the source of P-2087 and P-1277’s accounts.<sup>245</sup> In this respect, the Defence notes that these latter two witnesses are currently the subject of requests under rule 68(2)(b) of the Rules.<sup>246</sup>

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<sup>238</sup> [Second Request](#), para. 20.

<sup>239</sup> [Second Request](#), para. 21.

<sup>240</sup> [Second Request](#), para. 22.

<sup>241</sup> The Chamber observes that [REDACTED] currently does not appear on the Prosecution’s List of Witnesses.

<sup>242</sup> [Second Response](#), para. 46.

<sup>243</sup> [Second Response](#), para. 46.

<sup>244</sup> [Second Response](#), para. 46.

<sup>245</sup> [Second Response](#), para. 46.

<sup>246</sup> [Second Response](#), para. 46.

115. In respect of the Defence's objections regarding any contradictions between P-0662's prior recorded testimony and other witnesses, the Chamber is of the view that any deficiencies in this regard are not of such a nature or degree that the introduction of P-0662's prior recorded testimony should be precluded at this stage. Similarly, the Chamber observes that P-0662's account is largely consistent with that of P-0664, who will testify orally and is also alleged to have been held at the CEDAD. In this regard, the Chamber notes that P-0662 mentions P-0664 in his statement.<sup>247</sup> Last, in respect of the Defence's objections that P-0662 and [REDACTED] are the source of P-2087 and P-1277's account, the Chamber notes that this is not a reason to preclude the introduction of P-0662's prior recorded testimony. Indeed the Defence's submissions in this respect pertain more to the weight to be attributed to the evidence, which the Chamber will defer to the deliberation of the judgment.

##### 5. P-0882

116. P-0882 is [REDACTED] in the 7<sup>th</sup> arrondissement of Bangui.<sup>248</sup> The Prosecution submits that P-0882 'describes the Seleka's attack on the 7<sup>th</sup> arrondissement on 13 April 2013.'<sup>249</sup> The Prosecution seeks introduction of P-0882's single witness statement.<sup>250</sup>

117. The Defence submits that P-0882's prior recorded testimony contains hearsay.<sup>251</sup>

118. While the Chamber observes that P-0882's statement does contain some hearsay, the Chamber is of the view that it is not of such a nature or degree which should preclude the introduction of P-0882's prior recorded testimony. Specifically, P-0882 provides direct evidence of killings by the Seleka which he witnessed<sup>252</sup> and his account is generally consistent with the accounts given by other witnesses.<sup>253</sup>

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<sup>247</sup> CAR-OTP-2099-0336, at 0346-0347, paras 37-38; at 0354, para. 67.

<sup>248</sup> [Second Request](#), para. 23.

<sup>249</sup> [Second Request](#), para. 23; Annex A to the [Second Request](#), p. 10.

<sup>250</sup> [Second Request](#), para. 24.

<sup>251</sup> [Second Response](#), para. 69.

<sup>252</sup> **P-0882**: CAR-OTP-2032-0654, at 0661, paras 38-40.

<sup>253</sup> See, for example (1) **P-0882**: CAR-OTP-2032-0654, at 0660, para. 35; **P-0312**: CAR-OTP-2039-0133-R01, at 0139, para. 39; (2) **P-0882**: CAR-OTP-2032-0654, at 0661, paras 38-40; **P-2386**: CAR-OTP-2135-2792, at 2799-2800, paras 42-50.

## 6. P-1808

119. The Prosecution alleges that P-1808 was ‘a civilian resident of [REDACTED] of Bangui, who provides information about the Seleka’s large scale attack on the 7<sup>th</sup> arrondissement in mid-April 2013.’<sup>254</sup> In particular, the Prosecution submits that P-1808 ‘describes generally the *modus operandi* of the attack’.<sup>255</sup> In addition, the Prosecution avers that P-1808’s evidence is ‘also relevant to the PK9 Minibus incident’.<sup>256</sup> The Prosecution seeks introduction of P-1808’s single witness statement.<sup>257</sup>

120. The Defence submits that P-1808’s statement contains anonymous hearsay.<sup>258</sup> Similarly, the Defence submits that P-1808 is also not a direct witness of the PK9 Minibus Incident.<sup>259</sup>

121. The Chamber notes that P-1808 appears to be an eyewitness of a number of specific incidents on 13 April 2013 in [REDACTED],<sup>260</sup> as well as the aftermath of the PK9 Minibus Incident.<sup>261</sup> The Chamber notes that, although P-1808’s statement does contain anonymous hearsay, it is limited and is not of such a nature or degree that would preclude the introduction of P-1808’s prior recorded testimony.

## 7. P-2386

122. The Prosecution submits that P-2386 ‘was [REDACTED] living in Bangui when the Seleka attacked the 7<sup>th</sup> arrondissement of Bangui in 2013.’<sup>262</sup> Specifically, the Prosecution provides that P-2386 ‘details the Seleka’s attack on the 7<sup>th</sup> arrondissement’,

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<sup>254</sup> [Second Request](#), para. 25 (footnote omitted).

<sup>255</sup> [Second Request](#), para. 26.

<sup>256</sup> [Second Request](#), para. 27.

<sup>257</sup> [Second Request](#), para. 28; Annex A to the [Second Request](#), p. 11.

<sup>258</sup> [Second Response](#), para. 70.

<sup>259</sup> [Second Response](#), para. 34.

<sup>260</sup> CAR-OTP-2135-2185-R01, at 2187, para. 15.

<sup>261</sup> CAR-OTP-2135-2185-R01, at 2189, paras 25-32.

<sup>262</sup> [Second Request](#), para. 29.

witnessing the killing of his friend and hearing about the ‘attempt to kill P-0312’.<sup>263</sup> P-2386’s prior recorded testimony is accompanied by four annexes.<sup>264</sup>

123. The Defence submits that P-2386’s statement lacks corroboration; in particular the Defence submits that, contrary to the Prosecution’s assertions, P-2386’s prior recorded testimony cannot corroborate the testimony of P-0312 because P-2386 did not directly witness this alleged incident and his testimony contains (anonymous) hearsay.<sup>265</sup> Furthermore, the Defence avers that P-2386 contradicts himself in relation to the forced or voluntary nature of the Seleka’s [REDACTED], making reference to an earlier screening note.<sup>266</sup> Specifically, the Defence submits that in his screening note P-2386 indicates that the Seleka [REDACTED], however, in his statement he provides that [REDACTED].<sup>267</sup>

124. The Chamber finds that the Defence misrepresents the Prosecution’s submissions regarding corroboration. The Prosecution does not submit that P-2386’s testimony corroborates the testimony of P-0312. Rather, the Prosecution notes that P-2386 ‘heard about the Seleka’s attempt to kill P-0312’.<sup>268</sup> In any event, the Chamber notes that P-2386’s account is consistent with P-0312’s.<sup>269</sup> Furthermore, to the extent that P-2386’s statement contains (anonymous) hearsay, the Chamber finds that this is limited and not of such a nature and degree that would preclude its introduction. Regarding the specific contradiction identified by the Defence pertaining to the [REDACTED], the Chamber observes that from a close review of both the screening note and P-2386’s witness statement there is not strictly speaking a contradiction. Indeed, as identified by the Defence from P-2386’s statement, [REDACTED]. However, the specific wording of his earlier screening note reads that ‘[REDACTED]’ [REDACTED].<sup>270</sup> The Chamber finds that this implies that [REDACTED]. Indeed in his statement (and also in the

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<sup>263</sup> [Second Request](#), para. 29.

<sup>264</sup> [Second Request](#), para. 30; Annex A to the [Second Request](#), p. 12.

<sup>265</sup> [Second Response](#), paras 47, 71.

<sup>266</sup> [Second Response](#), para. 56.

<sup>267</sup> [Second Response](#), para. 56.

<sup>268</sup> [Second Request](#), para. 29.

<sup>269</sup> See **P-2386**: CAR-OTP-2135-2792, at 2801, para. 57; **P-0312**: CAR-OTP-2039-0133-R01, at 0139, paras 39-41.

<sup>270</sup> See CAR-OTP-2105-0831-R01, at 0833 (emphasis added).

screening note<sup>271</sup>), P-2386 mentions [REDACTED] who was taken by the Seleka after the '[REDACTED]' and how '[REDACTED]'.<sup>272</sup> In any event, the Chamber is of the view that any issues in this regard are not of such a nature or degree that would preclude the introduction of P-2386's prior recorded testimony.

## **B. Analysis of criteria set out in rule 68(2)(b) of the Rules**

125. The Chamber will now analyse whether the requirements of rule 68(2)(b) of the Rules have been fulfilled for the prior recorded testimony and associated material sought to be introduced. As highlighted above, the Chamber notes that the prior recorded testimony of the seven witnesses sought to be introduced can be broadly grouped into three incidents, namely the 'PK9 Minibus Incident', the 'CEDAD incident' and the '7<sup>th</sup> Arrondissement Attack'. As a result, the Chamber will group its analysis of the relevant witnesses per these specific incidents in order to avoid repetition. Nonetheless, it emphasises that it has conducted an individual assessment of each testimony to determine whether the requirements of rule 68(2)(b) of the Rules have been met for the material sought to be introduced.

### *1. PK9 Minibus Incident (P-0491, P-0510 & P-0529)*

126. As the Chamber has already rejected the introduction of the prior recorded testimony and associated materials of P-0491 and P-0510 pursuant to rule 68(2)(b) of the Rules, it will not consider these witnesses further. However, as noted above, the Chamber allows the introduction of the prior recorded testimony and associated material of P-0491 and P-0510 pursuant to rule 68(3) of the Rules, should the Prosecution wish to rely upon them. To this end, the Prosecution is to confirm by 31 October 2022 whether P-0491 and P-0510 will testify pursuant to rule 68(3) of the Rules. The Chamber will now turn to an analysis of whether the requirements of rule 68(2)(b) are satisfied for P-0529.

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<sup>271</sup> See CAR-OTP-2105-0831-R01, at 0833-0834.

<sup>272</sup> CAR-OTP-2135-2792-R01, at 2797, para. 31.

- i. *Whether the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused*

127. The Chamber notes that the prior recorded testimony of P-0529 does not mention the accused and does not pertain to his acts and conduct.

- ii. *Whether the prior recorded testimony has sufficient indicia of reliability*

128. The Chamber notes that P-0529's prior recorded testimony was given: (i) in accordance with rule 111 of the Rules and signed by the witness together with the declaration that the statement was true to the best of his knowledge and recollection; (ii) voluntarily on the understanding that it could be used in proceedings before the Court; and (iii) in a language the witness spoke and understood and, where necessary, translated by a qualified translator. Therefore, the Chamber is satisfied that the prior recorded testimony bears sufficient indicia of reliability for the purposes of introduction pursuant to rule 68(2)(b) of the Rules.

- iii. *Remaining criteria under rule 68(2)(b) of the Rules*

129. In this section, the Chamber will evaluate together whether: (i) the prior recorded testimony is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (ii) the prior recorded testimony relates to background information; (iii) the interests of justice are best served by its introduction; and (iv) the prior recorded testimony relates to issues that are materially in dispute.

130. In respect of whether the prior recorded testimony is of a cumulative or corroborative nature, the Chamber notes that the Prosecution avers that it intends to rely on the P-0529's prior recorded testimony to prove the chapeau elements of war crimes and crimes against humanity, and that this witness in particular relates to the PK9 Minibus Incident, that exemplifies, according to the Prosecution, 'a larger attack on the civilian population in Bangui perceived to support BOZIZE.'<sup>273</sup> The Prosecution submits that the prior recorded testimony is 'cumulative to or corroborative of other evidence that will be given by witnesses who will testify live and can be cross examined

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<sup>273</sup> [Second Request](#), para. 8.

by the Defence.’<sup>274</sup> In particular, the Prosecution makes reference to P-2573 who the Prosecution alleges ‘witnessed key parts of the PK9 Minibus Incident’.<sup>275</sup>

131. The Chamber has reviewed the statement of P-2573 and finds that the prior recorded testimony of P-0529 is of a cumulative nature to P-2573’s evidence, in that he will give evidence on similar facts. That notwithstanding, the Chamber notes that there are inconsistencies between P-2573’s evidence and the prior recorded testimony of P-0529 and other witnesses, specifically in respect of whether the alleged victims of the PK9 Minibus Incident were [REDACTED]. However, the Chamber finds that this should not preclude the introduction of the prior recorded testimony of P-0529. P-2573, who is the source of the contradiction, will be available to be cross examined by the Defence and it will be able to explore this inconsistency with the witness. In any event, the Chamber stresses that the introduction of the prior recorded testimony of P-0529 in no way predetermines the weight that will be accorded to his evidence, which the Chamber will consider in its deliberations for the purposes of the judgment.

132. The Chamber further notes that the prior recorded testimony sought to be introduced contains some background information, but also contains information relevant to establishing the contextual elements in this case. Having considered the arguments presented by the parties in their briefs, the Chamber is of the view that these issues are materially in dispute. However, the Chamber finds that it would be in the interests of justice to introduce the prior recorded testimony of P-0529 pursuant to rule 68(2)(b) of the Rules in order to streamline the presentation of evidence and to avoid calling numerous oral witnesses to testify regarding the same or similar events. In this regard, the Chamber notes that it has already allowed the introduction of the prior recorded testimony of P-0491 and P-0510 under rule 68(3) of the Rules and that pursuant to this provision, these witnesses will testify orally before the Chamber should the Prosecution wish to rely upon them.

133. Accordingly, the Chamber allows the introduction of P-0529’s prior recorded testimony pursuant to rule 68(2)(b) of the Rules.

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<sup>274</sup> [Second Request](#), para. 34.

<sup>275</sup> [Second Request](#), para. 34.



## 2. *The CEDAD Incident (P-0662)*

### *i. Whether the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused*

134. The Chamber notes that P-0662's prior recorded testimony does not mention the accused nor does it pertain to his acts and conduct.

### *ii. Whether the prior recorded testimony has sufficient indicia of reliability*

135. The Chamber observes that P-0662's prior recorded testimony was given: (i) in accordance with rule 111 of the Rules and signed by the witness together with the declaration that the statement was true to the best of his knowledge and recollection; (ii) voluntarily on the understanding that it could be used in proceedings before the Court; and (iii) in a language the witness spoke and understood and, where necessary, translated by a qualified translator. Therefore, the Chamber is satisfied that the prior recorded testimony bears sufficient indicia of reliability for the purposes of introduction pursuant to rule 68(2)(b) of the Rules.

### *iii. Remaining criteria under rule 68(2)(b) of the Rules*

136. In this section, the Chamber will evaluate together whether: (i) the prior recorded testimony is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (ii) the prior recorded testimony relates to background information; (iii) the interests of justice are best served by its introduction; and (iv) the prior recorded testimony relates to issues that are materially in dispute.

137. In respect of whether P-0662's prior recorded testimony is of a cumulative or corroborative nature, the Chamber notes that the Prosecution avers that it intends to rely on the prior recorded testimony sought to be introduced to prove the chapeau elements of war crimes and crimes against humanity, and this witness in particular relates to the CEDAD Incident, that exemplifies, according to the Prosecution, 'a larger attack on the civilian population in Bangui perceived to support BOZIZE.'<sup>276</sup> In particular, P-0662 gives evidence regarding his detention at the CEDAD in [REDACTED]. The Chamber

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<sup>276</sup> [Second Request](#), para. 8.

notes that the Prosecution intends to call P-0664, who is also alleged to have been detained at the CEDAD in 2013, to testify orally. The Chamber has reviewed the statement of P-0664 and finds that the prior recorded testimony of P-0662 is of a cumulative and corroborative nature in that P-0664 will give evidence on similar facts, namely detention at the CEDAD.

138. The Chamber further notes that the prior recorded testimony sought to be introduced contains some background information, but also contains information relevant to establishing the contextual elements in this case. Having considered the arguments presented by the parties in their briefs, the Chamber is of the view that these issues are materially in dispute, particularly the events at the CEDAD. In these circumstances, the Chamber considers that it would be in the interests of justice to receive further oral testimony on events at the CEDAD.

139. Accordingly, the Chamber considers it appropriate to allow the introduction of P-0662's prior recorded testimony under rule 68(3) rather than rule 68(2)(b) of the Rules, should the Prosecution wish to rely upon his testimony. The Chamber's ruling in this respect is subject to the witness's appearance before the Chamber and his consent to the introduction of his testimony pursuant to this provision. To this end, the Prosecution is to confirm by 31 October 2022 whether P-0662 will testify pursuant to rule 68(3) of the Rules.

### *3. 7<sup>th</sup> Arrondissement Attack (P-0882, P-1808, and P-2386)*

#### *i. Whether the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused*

140. The Chamber notes that the prior recorded testimonies of P-0882, P-1808 and P-2386 do not mention the accused and do not pertain to his acts and conduct.

#### *ii. Whether the prior recorded testimony has sufficient indicia of reliability*

141. The Chamber observes that all the prior recorded testimony sought to be introduced were given: (i) in accordance with rule 111 of the Rules and signed by the witness together with the declaration that the statement was true to the best of his knowledge and recollection; (ii) voluntarily on the understanding that it could be used

in proceedings before the Court; and (iii) in a language the witness spoke and understood and translated by a qualified translator. Therefore, the Chamber is satisfied that the prior recorded testimony bear sufficient indicia of reliability for the purposes of introduction pursuant to rule 68(2)(b) of the Rules.

*iii. Remaining criteria under rule 68(2)(b) of the Rules*

142. In this section, the Chamber will evaluate together whether: (i) the prior recorded testimony is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (ii) the prior recorded testimony relates to background information; (iii) the interests of justice are best served by its introduction; and (iv) the prior recorded testimony relates to issues that are materially in dispute.

143. In respect of whether the prior recorded testimony is of a cumulative or corroborative nature, the Chamber notes that the Prosecution avers that it intends to rely on the prior recorded testimony sought to be introduced to prove the chapeau elements of war crimes and crimes against humanity, and these witnesses in particular relate to the alleged ‘7<sup>th</sup> Arrondissement Attack’, that, according to the Prosecution, exemplifies ‘a larger attack on the civilian population in Bangui perceived to support BOZIZE.’<sup>277</sup> The Prosecution submits that the prior recorded testimony is ‘cumulative to or corroborative of other evidence that will be given by witnesses who will testify live and can be cross-examined by the Defence.’ In particular, the Prosecution makes reference to P-0312 who the Prosecution alleges was ‘[REDACTED] and an attempted murder victim during the 7<sup>th</sup> Arrondissement Attack’.<sup>278</sup>

144. The Chamber has reviewed the statement of this witness and finds that the prior recorded testimony sought to be introduced is of a cumulative nature, in that P-0312 will give evidence on similar facts, namely events that took place during the attack on the 7<sup>th</sup> arrondissement in July 2013.

145. The Chamber further notes that the prior recorded testimony sought to be introduced contains some background information, but also contains information

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<sup>277</sup> [Second Request](#), para. 8.

<sup>278</sup> [Second Request](#), para. 34.

relevant to establishing the contextual elements in this case. Having considered the arguments presented by the parties in their briefs, the Chamber is of the view that these issues are materially in dispute. In these circumstances, the Chamber considers that it would be in the interests of justice to receive further oral testimony on the alleged 7<sup>th</sup> Arrondissement Attack, while resorting to rule 68(2)(b) of the Rules as appropriate in order to streamline the presentation of evidence.

146. The Chamber notes that P-1808's prior recorded testimony contains direct evidence of the 7<sup>th</sup> Arrondissement Attack. Similarly, he also provides evidence relevant to the PK9 Minibus Incident. In light of the foregoing, the Chamber considers it appropriate to allow the introduction of P-1808's prior recorded testimony under rule 68(3) rather than rule 68(2)(b) of the Rules, should the Prosecution wish to rely upon his testimony. The Chamber's ruling in this respect is subject to the witness's appearance before the Chamber and his consent to the introduction of his testimony pursuant to this provision. To this end, the Prosecution is to confirm by 31 October 2022 whether P-1808 will testify pursuant to rule 68(3) of the Rules.

147. The Chamber considers that it would be in the interests of justice to introduce the statements and associated material of P-0882 and P-2386 pursuant to rule 68(2)(b) of the Rules in order to streamline the presentation of evidence and to avoid calling numerous oral witnesses to testify regarding the same or similar events.

### **C. Conclusion in respect of the Second Request**

148. Taking the above into consideration, the Chamber allows the introduction of the prior recorded testimony and associated material of P-0882, P-2386 and P-0529 pursuant to rule 68(2)(b) and the prior recorded testimony of P-0491, P-0510, P-0662, P-1808 and pursuant to rule 68(3) of the Rules.

## **VI. ANALYSIS OF THE FOURTH REQUEST**

149. In the Fourth Request, the Prosecution seeks the introduction of the prior recorded testimony and associated material of one witness, P-0966. The Chamber will first provide a brief overview of the prior recorded testimony sought to be introduced, as

well as any specific objections on the part of the Defence (Section A). The Chamber will then analyse the criteria set out in rule 68(2)(b) of the Rules (Section B).

### **A. Overview of the prior recorded testimony to be submitted pursuant to rule 68(2)(b) of the Rules**

#### *1. P-0966*

150. The Prosecution seeks to rely on P-0966 in order to establish the chapeau elements of article 8 of the Statute, namely ‘the existence of an armed conflict not of an international character.’<sup>279</sup> Specifically, the Prosecution avers that P-0966 ‘is an insider of one party to that conflict, the pro-BOZIZE forces, which later became known as the Anti-Balaka’.<sup>280</sup> The Prosecution submits that P-0966 ‘provides relevant information about the organisation and activities of this group over the course of 2013, including their attacks against the Seleka in and around Bossangoa in September 2013 and their large scale attacks against the Seleka on 5 December 2013.’<sup>281</sup>

151. The Prosecution seeks the introduction of P-0966’s witness statement, corrections made to his statement in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (the ‘*Yekatom and Ngaïssona Case*’), as well as hearing transcripts from the witness’s testimony in the *Yekatom and Ngaïssona Case*.<sup>282</sup> Furthermore, the Prosecution seeks the introduction of 2 annexes from P-0966’s statement, as well as three exhibits used and commented on by the witness during his testimony in the *Yekatom and Ngaïssona Case*.<sup>283</sup>

152. The Chamber notes that in his statement P-0966 describes, *inter alia*: (i) the creation of the Anti-Balaka in the west of the CAR;<sup>284</sup> (ii) the organisation and activities of the Anti-Balaka in Gobre;<sup>285</sup> (iii) the structure of the Anti-Balaka and the witness’s

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<sup>279</sup> [Fourth Request](#), para. 2.

<sup>280</sup> [Fourth Request](#), para. 2.

<sup>281</sup> [Fourth Request](#), para. 2.

<sup>282</sup> See [Fourth Request](#), Annex A.

<sup>283</sup> See [Fourth Request](#), Annex A.

<sup>284</sup> CAR-OTP-2031-0241, at 0244-0246, paras 22-27.

<sup>285</sup> CAR-OTP-2031-0241, at 0246-0247, paras 28-32.

role;<sup>286</sup> (iv) the Anti-Balaka attacks prior to December 2013,<sup>287</sup> in particular attacks on Benzambe<sup>288</sup> and Bossangoa;<sup>289</sup> (v) the Anti-Balaka's arrival in Bangui in 2014;<sup>290</sup> (vi) the Anti-Balaka's coordination in Bangui;<sup>291</sup> and (vii) the split of the Anti-Balaka.<sup>292</sup>

153. Furthermore, in respect of his oral testimony in the *Yekatom and Ngaïssona* Case, the Chamber notes that P-0966 testified over a period of four days.<sup>293</sup> During the course of his testimony, P-0966 was examined by the Prosecution as well as the Defence for the accused persons. P-0966 testified subject to rule 68(3) of the Rules in the *Yekatom and Ngaïssona* Case<sup>294</sup> and during his examination in chief the witness confirmed that the statement he had given was true and correct.<sup>295</sup> In addition, the witness was asked a number of questions about his statement and provided a number of further clarifications.<sup>296</sup> P-0966 was cross examined for a period of three days by both the Defence for Mr Ngaïssona<sup>297</sup> and Mr Yekatom.<sup>298</sup> The Chamber observes that the (cross) examination of P-0966 covered a broad spectrum of issues, in particular a number of issues and events over the course of 2013, such as the weapons,

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<sup>286</sup> CAR-OTP-2031-0241, at 0247-0248, paras 33-39.

<sup>287</sup> CAR-OTP-2031-0241, at 0248-0249, paras 40-48.

<sup>288</sup> CAR-OTP-2031-0241, at 0250, paras 49-53.

<sup>289</sup> CAR-OTP-2031-0241, at 0250-0252, paras 54-55; 59-67.

<sup>290</sup> CAR-OTP-2031-0241, at 0253, paras 70-71.

<sup>291</sup> CAR-OTP-2031-0241, at 0254-0257, paras 72-94.

<sup>292</sup> CAR-OTP-2031-0241, at 0258-0260, paras 95-107.

<sup>293</sup> P-0966 testified from 4-7 April 2022.

<sup>294</sup> See Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Eleventh Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0954, P-18111 and P-0966, 18 March 2022, ICC-01/14-01/18-1317-Conf; Transcript of hearing, 4 April 2022, ICC-01/14-01/18-T-116-CONF-ENG, p. 6, line 9 to p. 7, line 12.

<sup>295</sup> Transcript of hearing, 4 April 2022, ICC-01/14-01/18-T-116-CONF-ENG, p. 7, lines 1-10. The Chamber notes that the witness made a number of corrections to his statement, which he acknowledged during the course of his testimony. The Chamber further observes that the Prosecution also seeks to introduce the corrected version of the statement pursuant to rule 68(2)(b) of the Rules in the present case.

<sup>296</sup> See Transcript of hearing, 4 April 2022, ICC-01/14-01/18-T-116-CONF-ENG, p. 8, line 1 to p. 72, line 13.

<sup>297</sup> See Transcript of hearing, 5 April 2022, ICC-01/14-01/18-T-117-ENG, p. 3, line 21 to Transcript of hearing, 6 April 2022, ICC-01/14-01/18-T-118-CONF-ENG, p. 52, line 2.

<sup>298</sup> See Transcript of hearing, 6 April 2022, ICC-01/14-01/18-T-118-CONF-ENG, p. 53, line 17 to Transcript of hearing, 7 April 2022, ICC-01/14-01/18-T-119-ENG, p. 12, line 1.

ammunition<sup>299</sup> and methods of communication used by the Anti-Balaka in Gobere,<sup>300</sup> the [REDACTED] of soldiers to the Anti-Balaka in Gobere,<sup>301</sup> and various attacks carried out and the strategy employed, including attacks on Bossangoa and Benzembe.<sup>302</sup> Furthermore, the Chamber notes that the Presiding Judge in Trial Chamber V also asked the witness a number of questions.<sup>303</sup>

154. The Defence objects to the introduction of P-0966's prior recorded testimony and associated material.<sup>304</sup> First, the Defence submits that P-0966's prior recorded testimony lacks corroboration.<sup>305</sup> Specifically, the Defence avers that, although the Prosecution identifies a number of oral witnesses (P-2232, P-2251, P-1339 and P-0884) who, in its submission, will give cumulative or corroborating evidence on similar facts, it fails to specifically identify which portions of the testimony of the oral witnesses are cumulative or corroborative in nature.<sup>306</sup> That notwithstanding, the Defence argues that there is a lack of corroboration between the prior recorded testimony of P-0966 and these witnesses, as well as three further oral witnesses also identified by the Prosecution, namely P-0342, P-2328 and P-0291.<sup>307</sup> Specifically, the Defence argues, *inter alia*, that: (i) P-0966 and P-2232 report different events regarding [REDACTED] and [REDACTED];<sup>308</sup> (ii) P-0966's statement cannot corroborate P-2251, P-1339 and

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<sup>299</sup> See, for example Transcript of hearing, 4 April 2022, ICC-01/14-01/18-T-116-CONF-ENG, p. 36, line 3 to p. 38, line 8; Transcript of hearing, 5 April 2022, ICC-01/14-01/18-T-117-ENG, p. 4, line 8 to p. 9, line 19; p. 14, line 16 to p. 15, line 24; p. 53, line 20 to p. 55, line 2.

<sup>300</sup> See, for example Transcript of hearing, 4 April 2022, ICC-01/14-01/18-T-116-CONF-ENG, p. 40, line 16 to p. 41, line 8; Transcript of hearing, 5 April 2022, ICC-01/14-01/18-T-117-ENG, p. 15, line 25 to p. 16, line 8; p. 38, line 20 to p. 39, line 2; p. 50, lines 10-19.

<sup>301</sup> See, for example Transcript of hearing, 4 April 2022, ICC-01/14-01/18-T-116-CONF-ENG, p. 15, lines 4-13; Transcript of hearing, 5 April 2022, ICC-01/14-01/18-T-117-ENG, p. 16, line 9 to p. 22, line 2.

<sup>302</sup> See, for example Transcript of hearing, 4 April 2022, ICC-01/14-01/18-T-116-CONF-ENG, p. 18, lines 11-25; p. 41, line 11 to p. 45, line 19; p. 47, line 23 to p. 55, line 3; Transcript of hearing, 5 April 2022, ICC-01/14-01/18-T-117-ENG, p. 17, lines 1-13; p. 27, line 21 to p. 28, line 12; p. 32, lines 14-22; p. 39, line 3 to p. 40, line 23; p. 43, line 9 to p. 48, line 22; p. 52, line 21 to p. 54, line 7; p. 55, line 3 to p. 67, line 3. Transcript of hearing, 6 April 2022, ICC-01/14-01/18-T-118-CONF-ENG, p. 3, line 25 to p. 8, line 16; p. 13, lines 3-25; p. 62, lines 3-21.

<sup>303</sup> See, for example Transcript of hearing, 4 April 2022, ICC-01/14-01/18-T-116-CONF-ENG, p. 42, line 25 to p. 43, line 2; p. 45, lines 20-23; p. 48, line 17-22; Transcript of hearing, 5 April 2022, ICC-01/14-01/18-T-117-ENG, p. 9, lines 5-13; p. 20, lines 17-21; p. 31, lines 2-13.

<sup>304</sup> [Fourth Response](#), para. 63.

<sup>305</sup> [Fourth Response](#), paras 23-31.

<sup>306</sup> [Fourth Response](#), paras 23-25.

<sup>307</sup> [Fourth Response](#), paras 26-31.

<sup>308</sup> [Fourth Response](#), para. 26.

P-0884's testimonies in respect of the 5 December 2013 attack on Bangui because P-0966 was not present for this attack;<sup>309</sup> and (iii) P-0966 and P-2251 are inconsistent in respect of who was [REDACTED] of the Anti-Balaka in Gobere, with P-0966 stating that it was [REDACTED] and P-2251 indicating it was [REDACTED].<sup>310</sup>

155. Second, the Defence argues that P-0966's prior recorded testimony is unreliable, noting that his previous statement and oral testimony in the *Yekatom and Ngaïssona* Case contains a number of contradictions, as well as instances of hearsay.<sup>311</sup>

156. Last, the Defence avers that it must cross examine P-0966, making reference to the fact that P-0966 gives evidence about the organisation of the Anti-Balaka.<sup>312</sup> The Defence further submits that the fact that it will be able to cross examine other witnesses does not solve any issues with P-0966's evidence and that not all witnesses are interchangeable as the Prosecution suggests.<sup>313</sup> In this regard, the Defence argues that confrontation is essential to bring factual substance to the record which the Chamber will be relying upon.<sup>314</sup> In addition, the Defence argues that the accused in the *Yekatom and Ngaïssona* Case were given three days for cross examination of P-0966 and that it would be discriminatory for Mr Said to not also be able to cross examine him.<sup>315</sup> The Defence also argues that it will adopt a different defence strategy from that employed in the *Yekatom and Ngaïssona* Case, in particular it will look at the existence of an armed conflict before the dates discussed in the *Yekatom and Ngaïssona* Case.<sup>316</sup>

157. In respect of the Defence's objections, the Chamber finds the following. Regarding the Defence's submissions on corroboration, the Chamber notes that the Defence's submissions are largely premised on the position that: (i) corroboration is a requirement for introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules and; (ii) the Prosecution submits that P-2232, P-2251, P-1339 and P-0884's

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<sup>309</sup> [Fourth Response](#), paras 27-29. The Chamber observes that the Defence makes similar submissions in respect of P-0342, P-2328 and P-0291 – See [Fourth Response](#), paras 30-31.

<sup>310</sup> [Fourth Response](#), para. 27.

<sup>311</sup> [Fourth Response](#), paras 34-42.

<sup>312</sup> [Fourth Response](#), paras 51-53.

<sup>313</sup> [Fourth Response](#), paras 54-56.

<sup>314</sup> [Fourth Response](#), paras 56-57.

<sup>315</sup> [Fourth Response](#), para. 58.

<sup>316</sup> [Fourth Response](#), paras 59-60.



oral testimony will corroborate P-0996's account. First, as noted above,<sup>317</sup> the Chamber recalls that the relevant wording of rule 68(2)(b) provides that a chamber shall consider whether the prior recorded testimony sought to be introduced is cumulative to or corroborative of oral evidence of similar facts. In this regard, the prior recorded testimony sought to be introduced shall either be cumulative *or* corroborative (or both). Accordingly, corroboration, in and of itself, is not a requirement for introduction pursuant to rule 68(2)(b) of the Rules. Second, contrary to the Defence's assertions, the Prosecution does not argue that the oral testimony of P-2232, P-2251, P-1339 and P-0884 corroborates the prior recorded testimony of P-0996, but rather it generally submits that the testimony of P-0966 is cumulative to or corroborative of oral evidence of similar facts from these witnesses.<sup>318</sup>

158. That notwithstanding, the Chamber finds that any apparent lack of corroboration should not preclude the introduction of P-0966's prior recorded testimony. In particular, the Chamber finds it unproblematic that several of the oral witnesses provide evidence regarding the Anti-Balaka's attack on Bangui on 5 December 2013 and P-0966 merely mentions that he heard such an attack happened. In this regard, the Chamber notes that the Prosecution does not suggest that P-0966 can corroborate the 5 December 2013 attack and indeed makes no submissions in this regard.

159. Furthermore, in respect of the alleged inconsistencies between P-0966 and P-2232 regarding [REDACTED] and [REDACTED], the Chamber finds that a number of the alleged inconsistencies are not per se inconsistencies<sup>319</sup> and, to the extent that they are, the Chamber finds that they are minor and not of such a nature or degree which would preclude the introduction of P-0966's prior recorded testimony. In addition, in respect of the alleged inconsistency regarding who was [REDACTED] of the Anti-Balaka in Gobere, the Chamber notes that there is not an inconsistency per se between P-2251 and P-0966 because, contrary to the Defence's submissions, P-2251 does not

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<sup>317</sup> See paragraph 28 above.

<sup>318</sup> See [Fourth Request](#), para. 17.

<sup>319</sup> For example, the Defence submits that P-2232 mentions that [REDACTED] was involved in Anti-Balaka [REDACTED] but P-0996 makes no mention of this – see [Fourth Response](#), para. 26. The Chamber notes that the fact that one witness comments on something and another witness does not does not in and of itself mean that the witnesses are inconsistent.

categorically state that [REDACTED] was [REDACTED] of the Anti-Balaka at Gobre.<sup>320</sup>

160. In respect of any internal contradictions in P-0966's prior recorded testimony, the Chamber is of the view that any such contradictions as identified by the Defence are not of such a nature or degree which would preclude its introduction. Similarly, in respect to instances of hearsay, the Chamber notes that instances of hearsay are relatively contained and the witness clearly specified when he directly witnessed events and when he received information from others.<sup>321</sup> In short, the Chamber is of the view that, to the extent that P-0966's prior recorded testimony contains some hearsay, this should not in and of itself preclude its introduction.

161. Last, in respect of the Defence's submissions regarding cross examination, the Chamber finds that simply because P-0966 was cross examined by the Defence in another case is not a reason in and of itself to call P-0966 to testify orally in this case, nor does not calling P-0966 to testify constitute discrimination against Mr Said. In this regard, the Chamber observes that P-0966 gave evidence regarding the acts and conduct of one of the accused in the *Yekatom and Ngaïssona* Case,<sup>322</sup> thus rendering him ineligible for rule 68(2)(b) in those proceedings. P-0966 gives no evidence regarding the acts and conduct of Mr Said.

162. Furthermore, the fact that the Defence would have employed a different strategy during cross examination is also not a reason to call P-0966. In this regard, the Chamber takes note of the Defence's submissions that it wants to explore the existence of an armed conflict before the dates discussed in the *Yekatom and Ngaïssona* Case. However, the Defence does not specify which particular time period it wishes to question P-0966 on and indeed the Chamber observes that P-0966 has given extensive evidence both orally and in writing about his experience with the Anti-Balaka and there

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<sup>320</sup> Indeed the Chamber notes P-2251 merely states that [REDACTED] 'could give orders to all the other chiefs' and that he does 'not know if [REDACTED] [...] had another chief above [him]' - see CAR-OTP-2093-0045, at 0051, para 36; at 0055, para. 63. Similarly, nowhere in his statement does he state that [REDACTED] was above [REDACTED]. Rather, P-2251 notes that at [REDACTED] they 'all stood in [REDACTED] such as [...] [REDACTED]'. The Chamber notes that P-2251 does not include [REDACTED] in this list of individuals - see CAR-OTP-2093-0045, at 0077-0078, para. 213.

<sup>321</sup> See, for example CAR-OTP-2031-0241, at 0247, para. 34; at 0256, para. 85; Transcript of hearing, 5 April 2022, ICC-01/14-01/18-T-117-ENG, p. 33, line 15 to p. 34, line 1.

<sup>322</sup> See, for example CAR-OTP-2031-0241, at 0256-0257, paras 88-94; at 0258-0259, para 99.

is no indication that he has any further evidence about any other time period. Indeed the substance of his evidence largely pertains to events from April 2013 through to early 2014. Accordingly, the Defence's submissions in this respect are rejected.

## **B. Analysis of criteria set out in rule 68(2)(b) of the Rules**

### *1. Whether the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused*

163. The Chamber notes that the prior recorded testimony of P-0966 does not mention the accused and do not pertain to his acts and conduct.

### *2. Whether the prior recorded testimony has sufficient indicia of reliability*

164. The Chamber observes that P-0966's witness statement is composed of a statement given to ICC investigators as well as transcripts of his oral testimony in the *Yekatom and Ngaïssona* Case. In relation to the former, the Chamber notes that the statement sought to be introduced was given: (i) in accordance with rule 111 of the Rules and signed by the witness together with the declaration that the statement was true to the best of his knowledge and recollection; (ii) voluntarily on the understanding that it could be used in proceedings before the Court; and (iii) in a language the witness spoke and understood and translated by a qualified translator. In relation to the latter, the Chamber notes that the transcripts are verbatim transcripts produced by the Registry of P-0966's oral testimony given under oath before Trial Chamber V.<sup>323</sup> Therefore, the Chamber is satisfied that the prior recorded testimony bears sufficient indicia of reliability for the purposes of introduction pursuant to rule 68(2)(b) of the Rules.

### *3. Remaining criteria under rule 68(2)(b) of the Rules*

165. In this section, the Chamber will evaluate together whether: (i) the prior recorded testimony is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (ii) the prior recorded testimony relates to

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<sup>323</sup> See Transcript of hearing, 4 April 2022, ICC-01/14-01/18-T-116-CONF-ENG, p. 4, lines 5-6.

background information; (iii) the interests of justice are best served by its introduction; and (iv) the prior recorded testimony relates to issues that are materially in dispute.

166. In respect of whether the prior recorded testimony is of a cumulative or corroborative nature, the Chamber notes that the Prosecution avers that it intends to rely on the prior recorded testimony sought to be introduced to prove the chapeau elements of war crimes, in particular the existence of an armed conflict not of an international character. The Prosecution submits P-0966's prior recorded testimony 'is cumulative to or corroborative of other evidence, including the evidence of witnesses whom the Prosecution will call to testify live', specifically witnesses P-2232, P-2251, P-1339, P-0884, P-0342, P-2328 and P-0291.<sup>324</sup> The Chamber has reviewed the statements of these witnesses and finds that the prior recorded testimony sought to be introduced is of a cumulative nature, in that the aforementioned witnesses will give evidence on similar facts, namely the organisation and activities of the Anti-Balaka.

167. The Chamber further notes that the prior recorded testimony sought to be introduced contains background information, as well as information relevant to establishing the contextual elements for war crimes. Having considered the arguments presented by the parties in their briefs, the Chamber is of the view that these issues are materially in dispute. However, the Chamber considers that it would be in the interests of justice to introduce the prior recorded testimony and associated material of P-0966 pursuant to rule 68(2)(b) of the Rules in order to streamline the presentation of evidence and to avoid calling numerous oral witnesses to testify regarding the same or similar events.

### **C. Conclusion in respect of the Fourth Request**

168. Taking the above into consideration, the Chamber allows the introduction of the prior recorded testimony and associated material of P-0966 pursuant to rule 68(2)(b) of the Rules.

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<sup>324</sup> [Fourth Request](#), paras 17-18.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**GRANTS** the First, Second and Fourth Requests in part;

**ALLOWS** the introduction of the prior recorded testimony and associated material (with the exception of pages 1-3, 6-8 of CAR-OTP-2005-3227-R01, which the Chamber recognises submission of pursuant to its powers under article 69(3) of the Statute, and CAR-OTP-2083-0199) of witnesses P-0100, P-1277, P-1424, P-1427, P-1523, P-1825, P-1970, P-2042, P-2087, P-0529, P-0882, P-2386 and P-0966. The Chamber's preliminary ruling is subject to the receipt of the declarations discussed above;

**ALLOWS** the introduction of the prior recorded testimony and associated material of P-1524, P-0491, P-0510, P-0662 and P-1808 pursuant to rule 68(3) of the Rules;

**REJECTS** the introduction of the prior recorded testimony and associated material of P-1563;

**DESIGNATES** the Senior Legal Advisor of the Registry Legal Office, or any other appropriate person delegated by him, to be the person authorised to witness declarations made pursuant to rule 68(2)(b)(iii) of the Rules for the purposes of this case; and

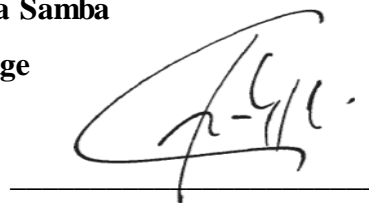
**ORDERS** the Registry, upon filing of the aforesaid declarations, to reflect in the eCourt metadata the introduction of the prior recorded testimony as identified in the present decision.



**Judge Miatta Maria Samba**  
**Presiding Judge**



**Judge María del Socorro Flores Liera**



**Judge Sergio Gerardo Ugalde Godínez**

Done in both English and French, the English version being authoritative.

Dated 21 October 2022

At The Hague, The Netherlands