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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of “Prosecution’s Ninth Application for the Submission of Evidence from the Bar Table and request for reconsideration of the Decision on the submission of CAR-OTP-2053-0576”,
ICC-01/14-01/18-1947-Conf, 27 June 2023**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) hereby submits 66 items of evidence from the bar table, in accordance with articles 64(9)(a), 69(3) and 69(4), rule 63(2) of the Rules of Procedure and Evidence (“Rules”), and the procedure established in Trial Chamber V’s (“Chamber”) Initial Directions on the Conduct of Proceedings.¹ These 66 items comprise: (i) 61 reports, internal mission notes, and press statements from United Nations (“UN”) agencies; and (ii) five local and international media articles (“Submitted Items”).

2. The Submitted Items are *prima facie* relevant to and probative of material issues at trial, including determining the contextual elements of crimes against humanity and war crimes committed by the Anti-Balaka, and, more specifically, to the prevalence of Anti-Balaka attacks on the Muslim civilian population in the Central African Republic (“CAR”) prior to, and during the Relevant Period.² They are mutually corroborative and bear sufficient indicia of reliability and authenticity to be recognised as formally submitted by the Chamber. Recognising their formal submission causes no prejudice to the Defence. To the contrary, it would assist in the Chamber’s determination of the truth, and would ensure an expeditious trial.

3. Annex lists for each of the Submitted Items: (i) the evidence registration number (“ERN”); (ii) the date; (iii) the title; (iv) the source identity; (v) the disclosure date; (vi) the basis of relevance and probative value with a short-hand statement of relevance in the first sentence, followed by a description of the individual document and – as appropriate – its most salient parts; and (vii) the Defence’s positions,³ which this filing will address in detail.

4. Further, the Prosecution requests reconsideration of the Decision on the submission of CAR-OTP-2053-0576,⁴ as necessary to prevent an injustice.

¹ ICC-01/14-01/18-631, paras. 61-62.

² As defined in the Prosecution’s Trial Brief, from September 2013 through December 2014: ICC-01/14-01/18-723-Red para. 5.

³ Email from the Ngaissona Defence, 28 April 2023, at 15:02 (available upon request). See ICC-01/14-01/18-631, para. 62.

⁴ Decision on Submitted Materials for [REDACTED], Email from the Chamber, 1 June 2023, at 10:28.

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), this filing and its Annex are filed as “Confidential”, because they refer to sources and materials of the same classification.

III. SUBMISSIONS

A. The Submitted Items can be submitted from the ‘bar table’

i. Preliminary remarks

6. The NGAISSONA Defence objects to 20 of the Submitted Items.⁵ They concern ten documents from the UN High Commissioner for Human Rights (“UN OHCHR”) International Commission of Inquiry for the Central African Republic (“UN OHCHR COI”);⁶ one document describing the Anti-Balaka structure in BODA (provided by [REDACTED]);⁷ eight documents describing various attacks (provided by the [REDACTED]);⁸ and one report on Anti-Balaka leaders (provided by the [REDACTED]).⁹ The YEKATOM Defence objects to the submission of 36 Submitted Items,¹⁰ including 19 Submitted Items that the NGAISSONA Defence opposes, and five additional UN OHCHR COI documents.¹¹ As explained below, the arguments advanced by the Defence opposing the formal submission of the items fail:

⁵ Items 22 (CAR-OTP-2045-0559), 23 (CAR-OTP-2045-0561), 24 (CAR-OTP-2045-0563), 25 (CAR-OTP-2045-0569), 26 (CAR-OTP-2045-0581), 27 (CAR-OTP-2048-0109), 28 (CAR-OTP-2048-0129), 32 (CAR-OTP-2053-0546), 33 (CAR-OTP-2053-0567), 34 (CAR-OTP-2053-0645), 38 (CAR-OTP-2088-1179), 39 (CAR-OTP-2088-1198), 40 (CAR-OTP-2088-1230), 41 (CAR-OTP-2088-1375), 42 (CAR-OTP-2088-1423), 43 (CAR-OTP-2088-1437), 44 (CAR-OTP-2088-1473), 45 (CAR-OTP-2088-1485), 46 (CAR-OTP-2088-1493), 50 (CAR-OTP-2101-0340).

⁶ Items 22 to 28, 33, 34 and 50.

⁷ Item 32 (CAR-OTP-2053-0546).

⁸ Items 39 to 46.

⁹ Item 38 (CAR-OTP-2088-1179).

¹⁰ Letter ARY-2023-0264 from Mylène Dimitri to Kweku Vanderpuye, 1 June 2023 (available upon request), pp. 2-3; opposition to the submission of Items 5 (CAR-OTP-2001-0310), 6 (CAR-OTP-2001-0363), 8 (CAR-OTP-2001-0409), 9 (CAR-OTP-2001-0446), 14 (CAR-OTP-2001-1075), 16 (CAR-OTP-2020-0019), 17 (CAR-OTP-2045-0287), 18 (CAR-OTP-2045-0300), 19 (CAR-OTP-2045-0452), 20 (CAR-OTP-2045-0525), 21 (CAR-OTP-2045-0536), 29 (CAR-OTP-2051-0479), 30 (CAR-OTP-2051-0743), 31 (CAR-OTP-2053-0538), 35 (CAR-OTP-2077-0486), 37 (CAR-OTP-2084-0305), 54 (CAR-OTP-2110-0963), as well as items 22 to 28, 33 to 34, 38 to 46 and 50 (for the same reasons as the NGAISSONA Defence, arguing they are testimonial in nature, apart for item 38 where the argumentation is different).

¹¹ Both the NGAISSONA and YEKATOM Defence teams oppose the ten UN OHCHR COI Items, i.e. Items 22 to 28, 33, 34 and 50; the eight documents describing various attacks, i.e. Items 39 to 46; and the report on Anti-Balaka leaders, i.e. Item 38. The YEKATOM Defence additionally opposes Items 17 to 21 (CAR-OTP-2045-0287, CAR-OTP-2045-0300, CAR-OTP-2045-0452, CAR-OTP-2045-0525, CAR-OTP-2045-0536).

- (i) Contrary to the NGAISSONA Defence's assertion,¹² the Chamber's prospective reliance on a [REDACTED] on Anti-Balaka leaders ("Item 38") provided [REDACTED]¹³ would not "completely usurp the Trial Chamber's fact-finding function";
- (ii) The YEKATOM Defence's contention that 13 Submitted Items, including Item 38 mentioned above, have a source that "cannot be verified or tested" or that their probative value is "too low and offers insufficient reliability"¹⁴ is unfounded;
- (iii) Both Defence teams' arguments as to the testimonial nature of a total of 24 Submitted Items misinterpret the Court's procedural framework and case law. As detailed below, notwithstanding the Chamber's recent ruling concerning a similar document,¹⁵ the 24 Submitted Items are not subject to rule 68 of the Rules insofar as they are not unequivocally testimonial. In that respect, there is no impediment to their recognition as formally submitted under article 69.

7. As with all relevant and probative evidence, the Chamber will assess the weight of the Submitted Items holistically when deliberating its judgement pursuant to article 74(2).¹⁶

ii. Submission of Item 38 cannot usurp the Trial Chamber's functions

8. Item 38 of the Submitted Items is an 18-page [REDACTED]. It describes the roles and activities of Anti-Balaka leaders, including the Accused.¹⁷ Page CAR-OTP-2088-1194 concerns NGAISSONA's role and activities whereas page CAR-OTP-2088-1196 concerns YEKATOM. The YEKATOM Defence considers that the source of the document is not verifiable, or that it is of low probative value and unreliable.¹⁸ The NGAISSONA Defence's contention that the submission of this singular page¹⁹ "completely usurp[s] the Chamber's fact-finding function"²⁰ because it entails "factual allegations against Mr NGAISSONA and legal

¹² Email from the Ngaissona Defence, 28 April 2023, at 15:02 (available upon request).

¹³ CAR-OTP-2088-1179.

¹⁴ Letter ARY-2023-0264 from Mylène Dimitri to Kweku Vanderpuye, 1 June 2023 (available upon request), p. 2.

¹⁵ i.e., CAR-OTP-2053-0576, *see* email from the Chamber, 1 June 2023, at 10:28.

¹⁶ *See* ICC-01/14-01/18-631, para. 53.

¹⁷ Item 38 (CAR-OTP-2088-1179)

¹⁸ Letter ARY-2023-0264 from Mylène Dimitri to Kweku Vanderpuye, 1 June 2023 (available upon request), p. 2.

¹⁹ Referencing CAR-OTP-2088-1179, at 1194.

²⁰ Email from the Ngaissona Defence, 28 April 2023, at 15:02 (available upon request), fourth paragraph.

characterizations of those facts, including alleged criminal responsibility”,²¹ is misguided. These arguments fail for two principle reasons.

9. *First*, with regard to the YEKATOM Defence’s opposition, recognition of the formal submission of evidence through the ‘bar table’ neither determines whether, or in what way, the Chamber may rely on it when assessing it in light of all the evidence presented. The Defence’s assertion places the cart before the horse. While the Defence’s position addresses the standard evidentiary criteria to be considered by the Chamber at the article 74 phase of the case,²² it has no determinative impact on the sole question before the Chamber, namely, whether Item 38 may be tendered from the bar table.²³

10. *Second*, as regards the NGAISSONA Defence’s argument in particular, the Prosecution recalls that the Chamber is the trier of fact and arbiter of law. Actually, the concept of “usurpation” of a Trial Chamber’s fact-finding functions in the Court’s case law arises in relation to expert evidence,²⁴ not generally. Item 38 is neither expert evidence, nor does the Defence allege that it is. Its submission cannot reasonably be characterised as *usurping* the Chamber’s fact-finding function based on the totality of the evidence submitted. The Defence’s disagreements with the contents of one page of Item 38 does not preclude its legal *submission*. Absent an exclusionary rule precluding its submission, Item 38 can be tendered from the ‘bar table’.

²¹ Email from the Ngaissona Defence, 28 April 2023, at 15:02 (available upon request), fourth paragraph, specifically referring to CAR-OTP-2088-1179, page 1194.

²² ICC-01/14-01/18-631, paras. 53-54, 62; *see also* ICC-01/14-01/18-1428, para. 5 and ICC-01/14-01/18-1359, para. 11, according to which the Chamber “defers its consideration [of the participants’ arguments on the relevance and probative value of the items] until its deliberation of the judgement”; *see also* ICC-01/15-01/13-2275-Red, para. 581 *in fine*.

²³ *See* ICC-01/14-01/18-1359, para. 12 (the Chamber will “only consider the admissibility of items in the context of the statutory exclusionary rules, including procedural bars, obstacles and preconditions”); *see also* ICC-02/04-01/15-615, para. 11 (noting that, “[u]ndue prejudice determinations at the point of submission can only be done reliably for items where it is immediately apparent that they cannot be fairly relied upon for any purpose”).

²⁴ *See* ICC-01/14-01/18-881, para. 9; *see also* ICC-01/12-01/18-989-Red, 14, *see also* ICC-01/04-02-06-1159, para. 7; ICC-01/09-01/11-844, paras. 11-13, referring to ICTY, *Prosecutor v. Vujadin Popović et al.*, Decision on Joint Defence Interlocutory Appeal Concerning Status of Richard Butler as an Expert Witness, 30 January 2008, IT-05-88-AR73.2, para. 27; ICTY, *Prosecutor v. Ratko Mladić*, Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports, 19 October 2012, IT-09-92-T, para. 8; ICTR, *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Appeals Chamber, Judgement, 28 November 2007, para. 212.

iii. The 24 Submitted Items are not ‘testimonial’

11. The NGAISSONA Defence argues that 19 of the Submitted Items “are testimonial in nature and cannot be submitted via bar table.”²⁵ Of these, the YEKATOM Defence opposes 18 Submitted Items for the same reason.²⁶ The YEKATOM Defence also contends that five additional Submitted Items are testimonial in nature.²⁷ As noted, the Prosecution is mindful of the Chamber’s previous determination that an item similar to some of the 24 tendered here was subject to rule 68 as ‘testimonial’.²⁸ However, the Defence contention is incorrect. And, for the reasons below, to the extent that the Submitted Items are not definitively ‘testimonial’, their submission is governed by article 69(3) and (4).

a. The Court’s procedural architecture favours the admission of all relevant evidence

12. Article 69(3) allows the Parties to “submit evidence relevant to the case, in accordance with article 64.”²⁹ The provision favours the admission of any relevant evidence deemed to have probative value, analogous to Rule 89(C) of the ICTY Rules of Procedure and Evidence. Similarly, the probative value and weight of such evidence is assessed in the context of the entire record. Thus, under the Court’s regulatory framework “the established admissibility threshold *favours admission of all prima facie relevant evidence* subject to the Chamber’s discretion.”³⁰ Given this statutory bias toward receiving all evidence toward establishing the truth, in particular under the ‘Submission Approach’, it is only when evidence *definitively* falls into a limiting category that its admission or submission under article 69 may otherwise be appropriately curtailed.

²⁵ Email from the Ngaissona Defence, 28 April 2023, at 15:02 (available upon request), third paragraph.

²⁶ Items 22 to 28, 33 to 34, 39 to 46 and 50, but *not* item 32 (CAR-OTP-2053-0546) which the NGAISSONA Defence opposes. *See* Letter ARY-2023-0264 from Mylène Dimitri to Kweku Vanderpuye, 1 June 2023 (available upon request), p. 3.

²⁷ Items 17 to 21 (CAR-OTP-2045-0287, CAR-OTP-2045-0300, CAR-OTP-2045-0452, CAR-OTP-2045-0525, CAR-OTP-2045-0536). *See* Letter ARY-2023-0264 from Mylène Dimitri to Kweku Vanderpuye, 1 June 2023 (available upon request), p. 3; the NGAISSONA Defence does not oppose these items.

²⁸ Email from Trial Chamber V Communications to OTP CAR IIB on 1 June 2023, 10:28 (concerning CAR-OTP-2053-0576).

²⁹ Article 69(3) of the Statute (emphasis added).

³⁰ ICC-01/09-01/11-1353, para. 15 (emphasis added).

b. Rule 68 is a *lex specialis* rule of evidence

13. As regards the submission of prior testimony, rule 68 is *lex specialis* in respect of article 69's general admissibility provisions. Unlike article 69(7), it concerns the *procedural mode* of tendering prior testimony – and not the propriety of using such evidence. The rule thus provides for specific conditions to be fulfilled in respect of submitting such material – chief among them, that a purported statement comprises ‘testimony’, within the meaning of rule 68.

14. As the Appeals Chamber has therefore held:

“[e]vidence which is testimonial in nature is [...] inadmissible [...] when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court’s applicable law are not met.”³¹

15. Conversely, where the *testimonial* status of an item is ambiguous, it cannot be said to fall squarely within the parameters of rule 68,³² to the exclusion of statutory provisions that otherwise permit its admission/submission.

16. Applying the well-established criteria for determining whether a prior statement is ‘testimonial’, readily demonstrates that the 24 Submitted Items do not unequivocally qualify as prior recorded testimony within the meaning of rule 68 of the Rules. Their submission is not governed by that provision, but instead by article 69. The ‘bar table’ is thus an appropriate procedural mechanism for their submission.

1. Rule 68 applies only where a prior statement amounts to ‘testimony’

17. Neither every information or communication provided by a person, nor every conversation a person has, qualifies as prior recorded testimony.³³ Rather, statements (in the broad sense) are considered prior recorded testimony (in the strict sense) under specific circumstances, to be assessed particularly.

18. Certain criteria are indicative (or even potentially dispositive) of whether a prior statement is ‘testimonial’. Critically, these include whether the persons providing the

³¹ ICC-01/05-01/13-2275-Red, para. 581, referenced in ICC-01/14-01/18-631, para. 56.

³² See ICC-01/04-01/07-2635, para. 48 (underscoring that the manner in which a statement is obtained should leave “*no doubt*” that the information might be used in legal proceedings).

³³ ICC-01/05-01/13-1478-Red-Corr, para. 32; see also *e.g.*, ICC-01/14-01/18-1359, paras. 15-16.

statements “are questioned *in their capacity as witnesses* in the context of or in anticipation of any *concrete* legal proceeding.”³⁴ This entails both *objective* and *subjective* factual considerations. In respect of the latter, the person must *understand* that they are providing information which may be *relied upon* in the context of legal proceedings: in this case, the Chamber has held that the fact that an item of evidence contained “a *narrative* of a former child soldier” did not render it “testimonial in nature.”³⁵ A 237-page report provided by the [REDACTED], relating personal stories of individuals with identifying information, also did not qualify as prior recorded ‘testimony’. There, the Chamber held that the report neither showed whether the compiling civil society organisations had a “specific fact-finding mandate”,³⁶ nor did it “show the context in which the individuals concerned outlined their experiences.”³⁷ Accordingly, it could not be unequivocally established that:

“[the individuals] were questioned *in a witness capacity* in the context or anticipation of any *concrete legal proceedings* or, importantly,...[that] the individuals giving their accounts did so *with the understanding* that they were ‘providing information which *may be relied upon* in the context of legal proceedings’.”³⁸

19. As such, the Chamber correctly determined that rule 68 of the Rules was not applicable, even though the document contained “*accounts compiled* by a number of civil society organisations *with a view to documenting* alleged crimes against humanity against people originating from Chad in the CAR.”³⁹

20. In the *Katanga* case, Trial Chamber II similarly acknowledged the importance of a case-by-case analysis in determining whether a prior statement is testimonial. In noting the absence of an “exhaustive definition”⁴⁰ of what qualifies as ‘testimony’, Trial Chamber II emphasised the need for Chambers to assess the “precise circumstances under which the out-of-court statement was given.”⁴¹ In that regard, it noted two “key factors”,⁴² particularly (i) to whom

³⁴ ICC-01/05-01/13-1478-Red-Corr, para. 32 (emphasis added); *See also* ICC-02/04-01/15-795, paras. 18-20; ICC-01/04-01/07-2635, para. 48.

³⁵ ICC-01/14-01/18-1428, para. 18 (emphasis added). The Court applied these criteria in its judgment already in 2010, in the decision of Trial Chamber II in the *Katanga* case, ICC-01/04-01/07-2635, paras. 48, 49.

³⁶ ICC-01/14-01/18-1359, para. 19.

³⁷ ICC-01/14-01/18-1359, para. 19 (emphasis added).

³⁸ ICC-01/14-01/18-1359, para. 19.

³⁹ ICC-01/14-01/18-1359, para. 18 (emphasis added).

⁴⁰ ICC-01/04-01/07-2635, para. 46.

⁴¹ ICC-01/04-01/07-2635, para. 46.

⁴² ICC-01/04-01/07-2635, paras. 46-49.

the information was given and (ii) the intention and understanding of the person providing the information when they did so.⁴³

To whom was the statement made

21. *First*, objective criteria should be considered: “whether the out-of-court statement was given to a person or body authorised to collect evidence for use in judicial proceedings [such as] a representative of the Office of the Prosecutor”⁴⁴ or “to other entities acting at the behest of the Court”, since the Prosecution “may rely on international cooperation in conducting [its] investigations” and receive “[s]tatements given in the context of purely domestic proceedings.”⁴⁵

22. For this reason, “statements given to private persons or entities will not be considered as testimony *unless* there are *exceptional reasons* for doing so.”⁴⁶ Statements given to representatives of intergovernmental organisation with a specific fact-finding mandate may only be considered testimonial “if the manner in which the statement was obtained *left no doubt* that the information might be used in future legal proceedings.”⁴⁷ Similarly, a key factor in determining whether a statement is testimonial is if it “was given to a person or body authorized to collect evidence for use in judicial proceedings.”⁴⁸ These determinations turn on critical and unequivocal findings as to *both* the objective and subjective circumstances regarding the use of the information in prospective legal proceedings. Again, this involves resolving certain mediate factual issues, such as:

- whether the entity receiving/obtaining the statement was *capable of* initiating or carrying out legal proceedings;
- whether the purpose or activity of the entity was forensic — that is solely limited to the collection of evidence for legal proceedings;
- whether there existed a non-forensic purpose for obtaining the information;

⁴³ ICC-01/04-01/07-2635, paras. 46-49.

⁴⁴ ICC-01/04-01/07-2635, para. 47.

⁴⁵ ICC-01/04-01/07-2635, para. 47.

⁴⁶ ICC-01/04-01/07-2635, para. 48 (emphasis added). Developing its argumentation on analytical reports, the Chamber then added: “in this regard, [...] generally speaking, analytical reports based on the personal stories of several individuals are not to be considered as testimony. In the Chamber’s view, even if the factual allegations contained in the report are based exclusively on a combined analysis of statements made by identified individuals, the allegations contained in the report are not those of the individual persons but the conclusions drawn from their statements by the author of the report”.

⁴⁷ ICC-01/04-01/07-2635, para. 48 (emphasis added).

⁴⁸ ICC-01/09-01/11-1130, para. 41.

- whether the entity was able to provide the information collected to a legal process directly *proprio motu*, without qualification, specific authorisation, consent, etc.

23. Without engaging in conjecture, the circumstances in this case concerning this criteria militate against any finding that the information provided to the UN OHCHR COI is objectively ‘testimonial’.

Who made the statement and under what circumstances

24. *Second*, the Chamber must equally evaluate the *subjective* factors — that is, the knowledge and intention of the person making the factual assertions. In particular, that they were aware that they may be used for the purpose of legal proceedings, and intended as much in making them, *when* they were making them. That much, should be clear and unequivocal.⁴⁹ Accordingly, it must be determined that:

“the person making the statement *understands, when making* the statement, that he or she is providing information which may be relied upon in the context of legal proceedings [...] It is *important* [...] that the statement is formalised in some manner and *that the person making the statement asserts that it is truthful and based on personal knowledge.*”⁵⁰

25. The above entails an assessment of mediate factual questions with particularity, such as:
- whether the interviewee was informed that the information may be used for legal proceedings;
 - whether the information provided admits of a purely forensic purpose;
 - whether information in the declaration responds to any non-forensic objective;
 - whether the circumstances under which the information was provided were such that a *reasonable person* would know and/or understand that it would be used in a legal process (such as for instance, having been made formally to a law enforcement agency, officer, judicial entity, or officer); or
 - whether the information provided is signed by the purported declarant or otherwise acknowledged or adopted by them in the capacity of a witness.

⁴⁹ ICC-01/04-01/07-2635, para. 49.

⁵⁰ ICC-01/04-01/07-2635, para. 49 (emphasis added).

26. Here, the attendant circumstances shown by the relevant forms or otherwise established do not make out the basic subjective factors concerning the interviewees regarding the 24 Submitted Items, as detailed below.

The application of the relevant subjective and objective factors in prior case law

27. In the *Ongwen* case, Trial Chamber IX held that the statements of alleged LRA victims fit the definition of prior recorded testimony because they were taken by the Ugandan police during their investigation into a specific LRA attack, transcribed by a police officer, and acknowledged by the alleged victims (signed and/or thumb-printed).⁵¹

28. By contrast, Trial Chamber III found that victims' participation forms did not constitute prior recorded testimony in the *Bemba* case, but considering them merely administrative, established within the context of a trust relationship with the Registry, and often filled out by third parties. Trial Chamber III also noted that the information did not comprise 'statements' under rules 111 and 112 of the Rules. Significantly, it was not shown that the participating victims were ever informed that their information may be used as evidence – or relied upon – in the proceedings. Moreover, nothing indicated that they provided the information as 'witnesses' or that they were ready to act as such.⁵²

29. In the *Naletilić* and *Martinović* case, the ICTY Appeals Chamber examined whether a diary recounting specific events constituted a written statement under ICTY Rule 92bis (the analogue to Rule 68(2)).⁵³ Recalling its decision in the *Galić* case⁵⁴ finding that Rule 92bis "only govern[ed] the admission of 'written statements prepared for the purposes of legal proceedings'",⁵⁵ the Appeals Chamber found that rule was not implicated, and that a Trial Chamber was "free to rely on"⁵⁶ hearsay evidence of probative value. Specifically, the Appeals Chamber noted that the first-person accounts in the diary were "'made in the ordinary course'

⁵¹ ICC-02/04-01/15-795, para. 20.

⁵² ICC-01/05-01/08-2012-Red, paras. 97, 100-101.

⁵³ ICTY, IT-98-34-A, A3811-A3562, p. 3811ss, Appeals Chamber, Judgement of 3 May 2006, paras. 213, 223.

⁵⁴ ICTY, IT-98-29-AR73.2, Appeals Chamber, Decision on interlocutory appeal concerning Rule 92bis(c), June 2002, para. 28 and para. 31, which makes clear that the criteria is whether the document was prepared for the purposes of legal proceedings.

⁵⁵ ICTY, IT-98-34-A, A3811-A3562, p. 3811ss, Appeals Chamber, Judgement of 3 May 2006, para. 223.

⁵⁶ ICTY, IT-98-34-A, A3811-A3562, p. 3811ss, Appeals Chamber, Judgement of 3 May 2006, para. 217.

of events by a person with ‘no interest other than to record as accurately as possible’ the matters described therein’.”⁵⁷

2. *In the case at hand*

30. The 24 Submitted Items are either reports or the unsigned notes of UN OHCHR personnel, even if some contain information “heavily based on factual descriptions provided by the witness during [their] interview[s], some of which [they] reportedly witnessed personally.”⁵⁸ They *objectively* comprise third-party accounts of information gathered in the framework of the organisations’ mission and mandate in CAR.⁵⁹

31. The 24 Submitted Items, however, do not reflect the manner in which the underlying information was obtained, so as to establish that the interviewees *unequivocally* understood, *as they were* communicating [REDACTED], that they were acting in the capacity of a witness in relation to a future *legal proceeding*, or were providing the information for such purposes. Silence as to the manner in which the information was obtained cannot be presumed to affirmatively meet the criteria for the application of rule 68, to the exclusion of the Court’s general policy favouring admissibility/submission enshrined in article 69.

The application of the above criteria to the UN OHCHR COI Items in particular

32. 15 of the 24 Submitted Items are documents issued by the UN OHCHR COI.⁶⁰ Some are similar to a document for which the Chamber recently denied formal recognition.⁶¹ Like CAR-OTP-2053-0576, 13 of the 15 UN OHCHR COI Items contain “Notes of the Interview”⁶² and purport to have been taken by a UN OHCHR COI agent, recounting information provided by an interviewee.

⁵⁷ ICTY, IT-98-34-A, A3811-A3562, p. 3811ss, Appeals Chamber, Judgement of 3 May 2006, para. 223.

⁵⁸ Email from Trial Chamber V Communications to OTP CAR IIB on 1 June 2023, 10:28.

⁵⁹ See for instance the Final Report of the International Commission of Inquiry on the Central African Republic, 22 December 2014, CAR-OTP-2001-7017, at 7022. This item of evidence was formally recognized as submitted by ICC-01/14-01/18-1359, para. 17 (noting the organisation’s mandate to report to the Security Council human rights and humanitarian laws violations and abuses in CAR by all the parties involved in the armed conflict since 1 January 2013).

⁶⁰ Items 17 to 28, 33, 34, 50.

⁶¹ Email from Trial Chamber V Communications to OTP CAR IIB on 1 June 2023, 10:28 (concerning CAR-OTP-2053-0576).

⁶² Items 17, 20, 21 (submission opposed by the YEKATOM Defence), 22 to 28, 33, 34, 50 (submission opposed by the NGAISSONA and the YEKATOM Defence).

33. As regards these 13 UN OHCHR COI Items, the UN (human rights) agents concerned were not vested with any executive powers to conduct legal investigations in anticipation of concrete legal proceedings, nor were their mandates linked to law enforcement authorities' work in CAR or in any other jurisdiction. No member of police participated in or was even present during any of the conversations had with the individuals who provided their personal accounts. Importantly, the information provided by the relevant individuals was not formally gathered at the behest of the ICC further to a request for cooperation, or as far as can be determined, by any other judicial or law enforcement body.

34. Although the UN OHCHR COI's mandate entailed fact-finding and the documenting of human rights violations, this does not necessarily mean that every individual account that it received was "testimonial".⁶³ The necessary finding that the statement was made in circumstances leaving no doubt (on a subjective and objective bases) that the information might be used in future legal proceedings,⁶⁴ cannot be simply presumed. Instead, it must emerge from concrete facts.

35. As the Chamber found with respect to CAR-OTP-2053-0576, the UN OHCHR COI Items are "not the statement of the interviewee."⁶⁵ That they may be "heavily based on factual descriptions provided by the witness during his interview", does not change their *character* and particularly, that it is not *attributable* in the way that a formal statement or declaration must be. Although this may affect its weight, that is a separate legal issue. Significantly, this Chamber has found in other circumstances that:

"statements made by [...] witnesses' within the meaning of Rule 76(1) of the Rules are made only when those witnesses are questioned about their knowledge of the case in the course of an investigation, and only once they accept or adopt it as their own knowledge."⁶⁶

Until such adoption has occurred as is necessary for a formal statement,⁶⁷ the Chamber has held that:

⁶³ ICC-01/04-01/07-2635, para. 48.

⁶⁴ ICC-01/04-01/07-2635, para. 48.

⁶⁵ Email from Trial Chamber V Communications to OTP CAR IIB on 1 June 2023, 10:28 (concerning CAR-OTP-2053-0576).

⁶⁶ ICC-01/14-01/18-539, para. 18.

⁶⁷ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-1330, 20 May 2016, para. 16 (confirming ICC-01/04-02/06-840-Red, para. 53); Trial Chamber VII, *The Prosecutor v. Bemba et al.*, ICC-01/05-

“it is impossible (and certainly unfair to the witness) to assume that the content of a statement has been accepted by the witness as being true, accurate and, most importantly, as his or her own.”⁶⁸

36. Where the application of rule 68 is predicated on an individual’s ostensible prior statement, the same logic applies – that is, to be considered their ‘testimony’, the statement should at least reflect the person’s adoption or acceptance of the declaration as their own.

37. Importantly, none of the 13 UN OHCHR COI Items indicates that the person providing the information was expressly made aware of their potential involvement in a *legal* process as a witness, the existence of any such process, or of the likelihood that there would ever be one. Such information is conspicuously absent from the four corners of the Notes of the Interview. Although the Chamber has concluded that a checkbox appearing in the Notes of the Interview regarding CAR-OTP-2053-0576 shows the interviewee “explicitly gave his informed consent that the information may be shared with international and regional courts, including the Court”,⁶⁹ such an inference is equivocal – even taken at its highest. This is because the purported ‘informed consent’ here is neither express or signed by the interviewee, nor apparently acknowledged in any objective way. No signature, attestation, adoption or *similia* appears in the document whatsoever. The same holds true for the UN OHCHR COI Items now tendered. As noted, the absence of any adoption of the content of a statement by its purported maker is fatal to finding that it constitutes their prior statement under rule 76(1).⁷⁰ The same analysis applies in determining whether such a statement is unequivocally testimonial under rule 68.

38. In addition, that the UN OHCHR COI consistently addressed the issue of informed consent to share information with national or international authorities does not hold, since the

01/13-1227, 9 September 2015, para. 9 where the Single Judge held: “‘prior statements’ within the meaning of Rule 76 are made only *when witnesses are questioned about their knowledge of the case in the course of its investigation*. On this definition, statements provided by witnesses to entities other than the Prosecution (for example, domestic judicial authorities and certain international organisations) may still qualify as Rule 76 statements, provided such statements involved questioning witnesses ‘about their knowledge of the case in the course of its investigation.’” (emphasis added); *See also The Prosecutor v. Ruto and Sang*, ICC-01/0901/11-1938-Corr-Red2, paras. 32-33; *The Prosecutor v. Yekatom and Ngaissona*, ICC-01/14-01/18-539, paras. 17, 18; ICTY, Appeals Chamber, *The Prosecutor v. Tihomir Blaskić*, 26 September 2000, IT-95-14-A, para. 15 (‘the usual meaning of a witness statement in trial proceedings is an account of a person’s knowledge of a crime, *which is recorded through due procedure in the course of an investigation into the crime*’ (emphasis added)).

⁶⁸ ICC-01/14-01/18-539, para. 17.

⁶⁹ Email from Trial Chamber V Communications to OTP CAR IIB on 1 June 2023, 10:28 (concerning CAR-OTP-2053-0576).

⁷⁰ *See* ICC-01/14-01/18-539, paras. 17, 18.

relevant field of the form is not consistently populated. For instance, nine of the 13 UN OHCHR COI Submitted Items⁷¹ refer to the sharing of information, including with the ICC, whereas two forms do not record such consent in the relevant field, indicating instead that the information may be “shared with all the authorities” in the *note* or *summary section*.⁷² Another two contain no reference to authorities, or to the ICC at all.⁷³

39. Secondly, regardless of what the forms purport, the issue here is (i) what was *actually* communicated to the persons providing the information, (ii) if so, when; and (iii) what would a reasonable person in the circumstances have understood and how would they have responded. While it may be natural to assume that interviewees should have been informed of the purpose of collecting information – particularly, if it involves a legal process, it is not a foregone conclusion that its collection for these purposes was *in fact* or adequately communicated. Nor, can it be simply assumed that a reasonable person in the position of the interviewee would *necessarily* know or understand this to be the case. Such an inference cannot ignore the prevalent facts on the ground, specifically the extensive number of international and national organisations and UN agencies in the region conducting various surveys and interviews of individuals in the context of broadly divergent mandates.⁷⁴

40. That a judicial institution may be among the ultimate recipients of information provided by interviewees is also not dispositive. It does not establish a key issue, that is: whether *when* providing information, interviewees did so understanding or intending that, they be regarded as witnesses in a prospective legal proceeding. The mere fact that their consent would be required to transmit information further suggests the opposite: (i) that the UN OHCHR COI had no capacity or ability to initiate a legal proceeding, unlike a law enforcement or judicial authority or entity; and (ii) it had no capacity to share information with the same or participate in legal proceedings directly. Those two factors alone strongly militate against a determination that in cooperating with the UN OHCHR COI, a reasonable person would be “left [with] *no doubt* that the information might be used in future legal proceedings”.⁷⁵

⁷¹ Items 17, 20, 22, 24, 25, 26, 33, 50.

⁷² CAR-OTP-2045-0561; CAR-OTP-2048-0109.

⁷³ CAR-OTP-2048-0129; CAR-OTP-2053-0645.

⁷⁴ *Inter alia* Panel of Experts on the Central African Republic, BINUCA, MINUSCA, MISCA, UNOCHA, UNICEF, IOM, UNDP, UNHCR, not to mention FIDH, HRW, Amnesty International, as well as national NGOs.

⁷⁵ ICC-01/04-01/07-2635, para. 48 (emphasis added).

41. All things considered, that the UN OHCHR COI's mandate refers to the ICC, as do the "Notes of the Interview", cannot result in the Chamber not even receiving, as *merely submitted*, relevant and probative evidence. Applying an exclusionary rule to such documents generates a nonsensical situation where the Chambers would not be able to consider such evidence for what it is: reports of human rights UN agents, *based on* information provided to them under conditions *too informal* to qualify as 'testimony' in criminal proceedings.

The 11 other Submitted Items

42. The 11 other Submitted Items contested as 'testimonial' provide accounts of attacks on BANGUI, looting and destruction of property in CAR, attacks on convoys, attacks on YALOKÉ, BAORO, BOHONG, BOYALI, and BOSSEMPTELE.⁷⁶ One document provides information on the Anti-Balaka structure in BODA, which was related to the UN OHCHR by a member of [REDACTED].⁷⁷ Two other UN OHCHR COI documents are reports of specific incidents.⁷⁸

43. The arguments above in relation to the 13 UN OHCHR COI Items are *a fortiori* applicable to the 11 other Submitted Items: neither of the 11 Submitted Items contain first-person accounts, actual statements by the persons who provided the information, or acknowledged and signed declarations. Additionally, although such documents were also issued by the UN OHCHR (most of them not being formally related to the UN OHCHR COI), the mandate for gathering this information cannot be determined. In that sense, the circumstance is directly analogous to the accounts compiled by civil society organisations for the 237-page report by the [REDACTED].⁷⁹

44. Thus, the items are not testimonial. Specifically, Items 18 and 19, although related to the UN OHCHR COI, rather qualify as "analytical reports based on the personal stories of several individuals" which are "not to be considered as testimony."⁸⁰

⁷⁶ Items 39 to 46.

⁷⁷ Item 32, which only the NGAISSONA Defence opposes.

⁷⁸ Items 18 (CAR-OTP-2045-0300), 19 (CAR-OTP-2045-0452).

⁷⁹ ICC-01/14-01/18-1359, paras. 18-19.

⁸⁰ See ICC-01/04-01/07-2635, para. 48.

45. As none of the 24 Submitted Items are testimonial, they should be recognised as formally submitted.

B. The Submitted Items are *prima facie* relevant, reliable, and authentic, outweighing any prejudicial effect

46. Contrary to the YEKATOM Defence's assertions, the Submitted Items meet the criteria for the recognition of their formal submission, in accordance with the Chamber's "Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence)".⁸¹ The Submitted Items are relevant to the issues at trial, have sufficient probative value, and their submission does not unfairly prejudice the Accused.

i. *Prima facie* relevance of the Submitted Items

47. The Submitted Items are *prima facie* relevant to material issues at trial. They show that BOZIZE and his inner circle, including members of his political party, the National Convergence *Kwa Na Kwa*, used fear and hate speech to ingrain anti-Muslim sentiment in the (Christian) population, and especially in the Youth, already prior to the Relevant Period. They also show that an armed conflict, not of an international nature, took place in CAR between the Anti-Balaka and the Seleka before and during the Relevant Period, resulting in the commission of crimes against humanity and war crimes by Anti-Balaka against the Muslim population. In particular, they demonstrate how deliberate and targeted violence on the Muslim civilian population by the Anti-Balaka spread throughout western CAR during the Relevant Period. Finally, they provide a summary of the roles and involvement of various Anti-Balaka leaders in Anti-Balaka activities.

ii. *Prima facie* reliability and authenticity of the Submitted Items

48. The Submitted Items were drafted either contemporaneously, or close in time to the events, and before any arrest warrants had been issued in this case. Thus, at the time of their collection/publication, the sources of these reports had no interest in the present proceedings. The documents were directly downloaded from the relevant UN Agencies' websites and/or are publicly available, or were [REDACTED]. In respect of the media articles, the items were

⁸¹ ICC-01/14-01/18-1359, paras. 10-12 (referring to ICC-01/14-01/18-631, paras. 53-54, 62).

produced by international or local media outlets, and directly downloaded from the relevant publishers' websites and/or are publicly available.

49. The *prima facie* reliability and authenticity of these documents is further corroborated by, *inter alia*, their content, general appearance, date, and/or the apparent logo/letterhead of the publisher generating the documents. Finally, these items are mutually corroborative, as well as corroborative of other documentary and testimonial evidence. In any instance, their probative value will be assessed by the Chamber when it deliberates its judgment under article 74, not at this point in time.

iii. Absence of prejudice to the Defence

50. Recognising these items as formally submitted would not prejudice the Defence. Any prejudice would be marginal and far outweighed by the documents' probative value. The items: (i) are relevant to the charges and will assist the Chamber in the determination of the truth as explained in detail in the present filing and its Annex; (ii) bear sufficient indicia of reliability; (iii) were mostly directly collected from the source who created, generated and/or published the items; and (iv) have been included in the Prosecution's List of Evidence, informing the Defence as such of the Prosecution's intention to rely on these items. Furthermore, their reliability, veracity, and weight are independently corroborated by each other, and by other evidence that the Prosecution has or will introduce in the case.

51. For the reasons above, all of the Submitted Items tendered may properly be received in evidence, as they are not unequivocally testimonial.

C. Reconsideration of Email Decision

52. For the reasons set out above, the Chamber's Decision in respect of CAR-OTP-2053-0576 merits reconsideration.⁸² Applying the objective and subjective factors in assessing the 'testimonial' character of a prior statement as elaborated above, the Prosecution considers that,

⁸² Reconsideration is appropriate in a number of circumstances under the Court's jurisprudence. See ICC-01/04-01/07-3833, para 25; ICC-02/04-01/15-1547, para 7; ICC-02/04-01/15-711, para 4; ICC-02/04-01/15-468, para.4 (when necessary to prevent an injustice); *see* ICC-01/04-01/06-2705, paras 13-18; ICC-02/04-01/05-50, para. 18; ICC-01/04-01/06-772 OA4, paras 36-39 (when the consequences of a decision are manifestly unsatisfactory) ; and *see* ICC-01/04-01/07-3833, para 25; ICC-01/09-01/11-1813, para 19; ICC-01/09-02/11-863, para 11; ICC-02/04-01/15-1210, para 6; ICC-02/04-01/15-1259, para 12; and ICC-01/12-01/18-734, para. 11 (when new facts and arguments arise).

absent reconsideration, the resultant exclusion of the document from evidence will unjustly impact the proceedings.

53. [REDACTED] clarified and expanded on topics [REDACTED] referenced in the document, in particular the acts of violence committed by YEKATOM's elements. Thus, not only is CAR-OTP-2053-0576 *not* testimonial but, its contents having been discussed and used during the examination of [REDACTED], mean that its exclusion would adversely and unnecessarily affect the Chamber's truth-finding function.

IV. RELIEF SOUGHT

54. The Prosecution respectfully requests the Chamber:

- to recognise the 66 Submitted Items listed in the Annex as formally submitted;
- to reconsider its Decision regarding CAR-OTP-2053-0576.



Karim A. A. Khan KC, Prosecutor

Dated this 7th day of November 2023
At The Hague, The Netherlands