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**International
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Court**

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Date: **11 May 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 *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

**Public
with Confidential Annex A**

Public Redacted Version of “Prosecution’s first request to introduce prior recorded testimony pursuant to rule 68(2)(b)”, ICC-01/14-01/21-289-Conf, dated 29 April 2022

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Prosecution hereby requests that Trial Chamber VI (“Chamber”) introduce into evidence the statements and associated material (“Prior Recorded Testimonies”)¹ of eleven witnesses—P-0100, P-1277, P-1424, P-1427, P-1523, P-1524, P-1563, P-1825, P-1970, P-2042, and P-2087 (“Eleven Witnesses”)—pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“Request”).

2. The Prior Recorded Testimonies are reliable, probative, and relevant to the charges. They do not reflect on the acts and conduct of the Accused Mahamat Said Abdel Kani (“Mr SAID”). Instead, they 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.

3. Introduction of the Prior Recorded Testimonies would be in the interest of justice. The Prosecution estimates that it would save up to 44 hours of direct examination time. Granting the Request would accordingly enhance the expeditiousness of the proceedings and save valuable court time and resources. It would also ensure that the focus of the live testimony at trial remains on the core of the case, namely Mr SAID’s acts and conduct and the events at the OCRB.

4. Introduction of the Prior Recorded Testimonies would not prejudice the rights of the Accused. They are cumulative to and corroborate the evidence of many other witnesses, including witnesses who will testify live at trial about the same topics. Furthermore, while the Prior Recorded Testimonies are relevant and useful to establish the truth, none are so unique or significant as to preclude their introduction through rule 68(2)(b).

¹ Annex A (A1 to A11) lists the prior recorded testimonies of P-0100, P-1277, P-1424, P-1427, P-1523, P-1524, P-1563, P-1825, P-1970, P-2042 and P-2087, which comprise their witness statements (at I) and associated material (at II). Where items are necessary to understand a particular witness’s prior recorded testimony, but the Prosecution does not seek to introduce those items into evidence, those items are also referenced (at III). These materials are all hyperlinked. *See* Directions on the conduct of the proceedings, ICC-01/14-01/21-251, para. 38(i)-(ii).

5. Should the Request be granted, the Prosecution further requests that the Chamber (i) designate the Registry's Senior Legal Adviser ("SLA") or a person delegated by the SLA, as the person authorised to witness the required declarations; and (ii) authorise remote certifications due to the current challenges imposed by the ongoing COVID-19 pandemic.

II. CONFIDENTIALITY

6. Pursuant to regulation 23bis of the Regulations of the Court, the Request and its annexes are filed as confidential because they refer to the identity of Prosecution witnesses and confidential items of evidence. A public redacted version will be filed as soon as practicable.

III. APPLICABLE LAW

7. Rule 68(2)(b) of the Rules provides that the Chamber may allow the introduction of the prior recorded testimony of a witness where the testimony goes to proof of a matter other than the acts and conduct of the accused, provided that the introduction is not prejudicial to or inconsistent with the rights of the accused.² As recently observed by Trial Chamber I, "[t]he purpose of Rule 68(2)(b) of the Rules is to streamline the presentation of evidence and thus expedite the proceedings, in accordance with the criterion of good trial management."³

8. The "prior recorded testimony" that may be introduced under rule 68 of the Rules includes audio- or video-taped testimony, transcripts of a testimony of a

² See, e.g., *Gicheru*, Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(b), ICC-01/09-01/20-250-Red, 16 Dec. 2021 ("*Gicheru* Rule 68(2)(b) decision"), para. 5.

³ *Abd-al-Rahman*, First Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), ICC-02/05-01/20-612-Red, 2 Mar. 2022 ("*Abd-al-Rahman* First Rule 68(2)(b) decision"), para. 13; see also *Bemba et al.*, Decision on Prosecution Rule 68(2) and (3) Requests, ICC-01/05-01/13-1478-Red-Corr, 12 Nov. 2015, para. 106; *Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red, 18 Nov. 2016 ("*Ongwen* Rule 68(2)(b) decision"), para. 7.

witness, and written statements taken under rules 111 and 112 of the Rules.⁴ It also includes, in accordance with the jurisprudence of this Court, “any annex to the witness’s statement, or document otherwise associated with it, that is used or explained by the witness and which, as such, is an integral part of the testimony itself.”⁵

9. In exercising its discretion whether to allow introduction of prior recorded testimony pursuant to rule 68(2)(b), the Chamber must consider at least the factors mentioned expressly in the rule, namely “whether the prior recorded testimony relates to issues that are not materially in dispute, is cumulative or corroborative in nature, relates to background information, has sufficient indicia of reliability and whether the interests of justice are best served by its introduction.”⁶

10. In relation to the factor of “interests of justice,” the Trial Chamber in *Ongwen* considered factors such as “when such introduction allows, *inter alia*, to safeguard the expeditiousness of the proceedings [...], streamline the presentation of evidence, focus live testimony on those topics of greatest relevance to the proceedings, minimise cumulative in-court testimony on aspects which are expected to also be addressed by other witnesses, save resources of the institution which may rather be utilised for other purposes and/or avoid witnesses having to travel to appear in court.”⁷

⁴ *Ongwen* Rule 68(2)(b) decision, para. 10.

⁵ *Ongwen* Rule 68(2)(b) decision, para. 10 (citing jurisprudence).

⁶ *Gicheru* Rule 68(2)(b) decision, para. 5.

⁷ *Ongwen* Rule 68(2)(b) decision, para. 16.

IV. SUBMISSIONS

A. The Prior Recorded Testimonies Go to Proof of Matters Other than the Acts and Conduct of the Accused

11. None of the Prior Recorded Testimonies mention Mr SAID or anything about his acts and conduct. Instead, as described below, the Prior Recorded Testimonies are relevant to the chapeau elements of the charges in this case.⁸

B. The Prior Recorded Testimonies are Relevant and Probative

12. All the Prior Recorded Testimonies relate to events that occurred in the Boy Rabe area of Bangui between March and December 2013.⁹ They are relevant to the chapeau elements of war crimes because the armed clashes and other incidents that took place in Boy Rabe during this time period, and the degree of organisation exhibited by the Seleka and pro-BOZIZE forces, provide evidence of the continuation of the internal armed conflict throughout 2013.¹⁰ They are also relevant to the chapeau elements of crimes against humanity because the crimes committed at the OCRB were part of a larger attack on the civilian population in Bangui perceived to support BOZIZE,¹¹ one that encompassed the Boy Rabe neighbourhood.¹² This larger attack included the multiple commission of article 7(1) acts during numerous incidents in Bangui between at least April 2013 to at least November 2013. Two of the most notorious incidents were the attack on Boy Rabe on or around 14-16 April 2013 (“April Boy Rabe attack”)

⁸ A few of the Eleven Witnesses mention Nouredine ADAM, an alleged member of the OCRB common plan, who was also Mr SAID’s superior at the time. *See* Decision on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21-218-Red, 9 Dec. 2021 (“Confirmation Decision”), pp. 58, 70. However, such references—even if they related to the OCRB common plan, which they do not—do not fall under the “acts and conduct of the accused” limitation of rule 68(2)(b), which is narrowly construed to the personal acts and omissions of the Accused. As the *Ongwen* Trial Chamber put it, the “acts and conduct of the accused” limitation of rule 68(2)(b) has the purpose of “ensuring the accused’s right to confront and examine in court a person making *direct allegations* against him or her” and does not bar evidence relating to “the acts and conduct of other persons, *whether alleged co-perpetrators, subordinates or otherwise*, which are attributed to the accused in the charges by reason of the mode of liability alleged.” *Ongwen* Rule 68(2)(b) decision, para. 12 (emphasis added).

⁹ *See* Confirmation Decision, para. 60.

¹⁰ *See* Confirmation Decision, para. 56.

¹¹ Confirmation Decision, para. 61.

¹² Confirmation Decision, pp. 51-52, paras. 14-18.

and the attack on Boy Rabe on or around 20-24 August 2013 (“August Boy Rabe attack”).¹³

13. All of the Eleven Witnesses are victims of the April or August Boy Rabe attack or otherwise can provide direct evidence about them. Several witnesses¹⁴ provide specific information that goes to show the Seleka’s policy to target the population of Boy Rabe, as part of its attack on the civilian population in Bangui perceived to support BOZIZE. Some witnesses¹⁵ provide information related to the pro-BOZIZE forces’ attempt to disrupt DJOTODIA’s two inauguration events, including the August 2013 investiture ceremony; this is relevant to the chapeau elements of both war crimes and crimes against humanity. Multiple witnesses¹⁶ also reference the 5 December 2013 attack by the Anti-Balaka on the Seleka in Bangui, which is relevant to the chapeau elements of war crimes. Key aspects of each witness’s evidence are further highlighted below.

P-0100

14. P-0100 was [REDACTED] of Boy Rabe. P-0100’s prior recorded testimony consists of a single witness statement and 11 associated items that were used and explained by the witness in his statement, including [REDACTED] in Boy Rabe during 2013.¹⁷

15. P-0100 was present in Boy Rabe [REDACTED] and witnessed the Seleka’s attacks on Boy Rabe in April and August 2013. P-0100 describes the Seleka’s *modus operandi*,¹⁸

¹³ Confirmation Decision, para. 60.

¹⁴ See, especially, P-0100, P-1523, P-1563, P-1825, P-1970, P-2042 and P-2087.

¹⁵ See, e.g., P-0100; P-1277; P-1524; P-1825; P-2087.

¹⁶ See, e.g., P-0100, P-1277, P-1424, P-1563, P-1825.

¹⁷ See Annex A (A1) for the complete list.

¹⁸ See, e.g., **P-0100**, [CAR-OTP-2027-2535-R01](#) at 2540-2541, para. 29 (stating that the Seleka regarded Boy Rabe as a pro-BOZIZE area and targeted it heavily in 2013, especially in April, committing many crimes against the residents), para. 34 (stating that through 2013, the Seleka killed a countless number of Boy Rabe residents, raped many women and girls, looted almost every house, and detained and tortured many residents).

identifies particular Seleka commanders who were involved in the operations,¹⁹ and names a number of the victims.²⁰ He provides information relevant to the Seleka's policy to attack a civilian population, as he witnessed a Seleka official's public threat to burn or raze Boy Rabe, apparently in retaliation for signs of resistance in the neighbourhood.²¹

16. P-0100 also provides details relevant to the Seleka armed group's level of organisation, including that they were well-equipped and possessed heavy weaponry,²² and details relevant to the continuation of the armed conflict, including about (i) an attack on Seleka forces carried out by pro-BOZIZE forces in an attempt to disrupt one of DJOTODIA's inauguration events;²³ and (ii) the 5 December 2013 attack by the Anti-Balaka on the Seleka in Bangui.²⁴

P-1277

17. P-1277 is [REDACTED] in Boy Rabe, [REDACTED] in 2013.²⁵ [REDACTED], P-1277 kept [REDACTED] in his neighbourhood.²⁶ He provides information about the April and August 2013 Boy Rabe attacks,²⁷ and the pro-BOZIZE forces' firing of a shell from Boy Rabe in August 2013 to disrupt DJOTODIA's second inauguration event.²⁸ He also provides corroboration of the Seleka's September 2013 abduction of trial witness P-0662; he heard about this from [REDACTED].²⁹

¹⁹ See, e.g., **P-0100**, [CAR-OTP-2027-2535-R01](#) at 2546, paras. 67, 76-77, 82 (providing hearsay information that Seleka leader DJOTODIA was present during the April 2013 Boy Rabe operation and a description of personally seeing Seleka commanders Nourredine ADAM and Khalil ABDEL KADER during the August 2013 Boy Rabe operation).

²⁰ **P-0100**, [CAR-OTP-2027-2535-R01](#) at 2560-2561, paras. 152-155.

²¹ **P-0100**, [CAR-OTP-2027-2535-R01](#) at 2543, para. 44.

²² See, e.g., **P-0100**, [CAR-OTP-2027-2535-R01](#) at 2553, para. 110.

²³ **P-0100**, [CAR-OTP-2027-2535-R01](#) at 2541, paras. 35, 38.

²⁴ **P-0100**, [CAR-OTP-2027-2535-R01](#) at 2558, paras. 139-140.

²⁵ **P-1277**, [CAR-OTP-2051-0966-R01](#) at 0969, paras. 11-13.

²⁶ **P-1277**, [CAR-OTP-2051-0966-R01](#) at 0970, 0987, paras. 19, 122.

²⁷ **P-1277**, [CAR-OTP-2051-0966-R01](#) at 0970-0972, paras. 20-26.

²⁸ **P-1277**, [CAR-OTP-2051-0966-R01](#) at 0970-0971, paras. 20-21.

²⁹ **P-1277**, [CAR-OTP-2051-0966-R01](#) at 0972, para. 27-29.

18. Of particular note, P-1277 is a [REDACTED] witness to the Seleka's shelling of a church in the 4th *arrondissement* (on the border of Boy Rabe) during the April 2013 Boy Rabe operation.³⁰ This happened on 14 April 2013, a Sunday, and the church was filled with worshipers at the time.³¹ [REDACTED] contains a list of the civilians killed and wounded during the church incident, including the names of four people whose legs had to be amputated.³²

19. P-1277's prior recorded testimony³³ includes his witness statement and its 7 annexes, including relevant pages from the [REDACTED]. The 7 annexes are all signed and dated by the witness.

P-1424

20. P-1424, a Boy Rabe resident, was nearby when four Seleka elements shot [REDACTED] (P-1427) and three other young men during the August Boy Rabe attack.³⁴ P-1424 also describes how the Seleka shot at him during this same incident, and he had to dive to the ground to avoid being hit.³⁵ P-1424's prior recorded testimony³⁶ includes his witness statement and its annex, which is a diagram drawn by the witness of his neighbourhood, pinpointing the scene of the crime he describes.³⁷

³⁰ P-1277, [CAR-OTP-2051-0966-R01](#) at 0971-0972, 0974, paras. 24-26, 38.

³¹ P-1277, [CAR-OTP-2051-0966-R01](#) at 0971, para. 24.

³² P-1277, Annex A-2, [CAR-OTP-2039-0444-R01](#) (reporting a 14 April 2013 attack on the *Église Fédération Membre de Frère*, and noting the names of 2 deceased and 4 people who had limbs amputated).

³³ See Annex A (A2) for the complete list.

³⁴ P-1424, [CAR-OTP-2049-0198-R01](#) at 0201-0202, paras. 16-24.

³⁵ P-1424, [CAR-OTP-2049-0198-R01](#) at 0202, para. 21.

³⁶ See Annex A (A3) for the complete list.

³⁷ P-1424, Annex A, [CAR-OTP-2043-0312](#).

P-1427

21. P-1427 describes being shot and almost killed by the Seleka during the August 2013 Boy Rabe operation.³⁸ He also witnessed the Seleka's killing of [REDACTED] and two friends, who were forced to lie on the ground [REDACTED].³⁹ P-1427's prior recorded testimony⁴⁰ includes his witness statement and its two annexes: (i) a diagram depicting the location of the Seleka attack in which he was injured and the location of the three other victims,⁴¹ and (ii) a photograph of the witness taken during the interview showing his scars from the incident.⁴²

P-1523

22. P-1523 witnessed the Seleka torture and kill her husband, [REDACTED], at their home during the August 2013 Boy Rabe operation.⁴³ At the time, P-1523 and her husband had been in the process of getting ready to flee the area with their [REDACTED] children.⁴⁴ She states that the Seleka killed her husband on accusations of being a soldier, even though he was neither a soldier nor involved with the armed resistance.⁴⁵ She also 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).⁴⁶

23. P-1523's prior recorded testimony is comprised of her statement and associated material.⁴⁷ The associated material includes (i) a document containing a record of the

³⁸ P-1427, [CAR-OTP-2051-0180-R01](#) at 0183, paras. 13-21.

³⁹ *Id.*

⁴⁰ See Annex A (A4) for the complete list.

⁴¹ [CAR-OTP-2043-0370](#).

⁴² [CAR-OTP-2043-0422](#).

⁴³ P-1523, [CAR-OTP-2134-2637-R01](#) at 2641, paras. 24-28.

⁴⁴ P-1523, [CAR-OTP-2134-2637-R01](#) at 2641, paras. 24, 28.

⁴⁵ P-1523, [CAR-OTP-2134-2637-R01](#) at 2641, para. 25.

⁴⁶ P-1523, [CAR-OTP-2134-2637-R01](#) at 2639, paras. 3-5.

⁴⁷ See Annex A (A5) for the complete list.

statement P-1523 gave to the *Commission Mixte d'Enquete* about her husband's murder,⁴⁸ and (ii) photographs of her deceased husband, including several photos of his mutilated corpse at the morgue.⁴⁹

P-1524

24. P-1524 is [REDACTED] in Boy Rabe.⁵⁰ He describes the Seleka's policy of targeting Boy Rabe for killings, rapes, looting and other violence because it was seen as loyal to BOZIZE, given its ethnic composition and the presence of large numbers of FACA officers.⁵¹ He provides detailed eyewitness information about both the April and August Boy Rabe attacks, including the involvement of senior Seleka commanders.⁵² He recalls that one big operation took place after some Presidential Guards fired at the National Assembly to disrupt the formal inauguration of DJOTODIA. He also corroborates P-1825's account of being forced at gunpoint to help the Seleka carry looted goods during a Seleka operation in Boy Rabe.⁵³

25. P-1524's prior recorded testimony includes his statement and its five annexes.⁵⁴ One annex is a list P-1524 [REDACTED].⁵⁵ This list includes the name of *viva voce* trial witness P-1264, thus corroborating her evidence [REDACTED].⁵⁶

⁴⁸ [CAR-OTP-2005-3227-R01](#) at 3230-3231.

⁴⁹ [CAR-OTP-2045-1016](#), [CAR-OTP-2045-1018](#), [CAR-OTP-2005-3227-R01](#).

⁵⁰ **P-1524**, [CAR-OTP-2062-0468-R01](#) at 0470, para. 12.

⁵¹ **P-1524**, [CAR-OTP-2062-0468-R01](#) at 0471, paras. 18-20.

⁵² **P-1524**, [CAR-OTP-2062-0468-R01](#) at 0472-0488.

⁵³ **P-1524**, [CAR-OTP-2062-0468-R01](#) at 0485, para. 85.

⁵⁴ See Annex A (A6) for complete list.

⁵⁵ [CAR-OTP-2062-0495](#).

⁵⁶ **P-1264**, [CAR-OTP-2036-0065-R01](#).

P-1563

26. P-1563 was [REDACTED] at a secondary school in Boy Rabe called *Lycée Boganda*, which the Seleka took over as a base during 2013.⁵⁷ He provides information about a large-scale Seleka operation in Boy Rabe.⁵⁸ On this occasion, he saw multiple high level Seleka commanders, including President DJOTODIA, and their men arriving at Lycee Boganda, where the leaders conferred together.⁵⁹ P-1563 then heard the head Seleka at Lycee Boganda tell his men that he had spoken with his superiors and that the people from Boy Rabe were stubborn and had to be killed. This evidence is pertinent to the Seleka's policy to attack a civilian population.⁶⁰ After this, the witness saw almost 40 Seleka vehicles arrive and heard shooting all day.⁶¹ In the evening, the Seleka vehicles brought back a lot of looted goods, including sacks of rice.⁶² P-1563 also speaks about the 5 December 2013 attack.⁶³

27. P-1563's prior recorded testimony includes his statement and its two annexes.⁶⁴

P-1825

28. P-1825, [REDACTED], was forced by the Seleka during the April Boy Rabe attack to assist the Seleka in their widespread pillaging activities.⁶⁵ He saw over 100 Seleka men conducting house-to-house looting activities, taking all types of goods.⁶⁶ He also describes killings, rapes and beatings committed by the Seleka and identifies a number

⁵⁷ P-1563, [CAR-OTP-2087-9352-R01](#) at 9355, para. 13.

⁵⁸ The witness is not sure about the date of the operation, but from other details he provides, particularly the reference to the looting of Ngaissona's depot, the Prosecution considers that he is referring to the April 2013 Boy Rabe operation.

⁵⁹ P-1563, [CAR-OTP-2087-9352-R01](#) at 9358, para. 30.

⁶⁰ P-1563, [CAR-OTP-2087-9352-R01](#) at 9358, para. 30.

⁶¹ P-1563, [CAR-OTP-2087-9352-R01](#) at 9358-9359, para. 30-36.

⁶² P-1563, [CAR-OTP-2087-9352-R01](#) at 9359, para. 34.

⁶³ P-1563, [CAR-OTP-2087-9352-R01](#) at 9359-9360, paras. 39-48.

⁶⁴ See Annex A (A7) for complete list.

⁶⁵ P-1825, [CAR-OTP-2079-0315-R01](#).

⁶⁶ P-1825, [CAR-OTP-2079-0315-R01](#) at 0320, para. 30.

of Seleka commanders who were present.⁶⁷ He further provides information relevant to the Seleka's policy to attack a civilian population, as the Seleka accused him of being BOZIZE's supporter before beating him and forcing him to assist the Seleka's looting.⁶⁸ P-1825 also provides information about the shooting that occurred the night before DJOTODIA's second inauguration event, as well as the 5 December 2013 Anti-Balaka attack.⁶⁹

29. P-1825's prior recorded testimony includes his statement and associated items, including photographs shown to the witness during the interview about which he made substantive comments.⁷⁰

P-1970

30. [REDACTED] the Central African Republic. During 2013, he was based at [REDACTED] where he saw ADAM regularly.⁷¹ He is an eyewitness of [REDACTED] during the August Boy Rabe attack.⁷² He states that the Seleka and ADAM in particular were against the Boy Rabe neighbourhood and that [REDACTED]."⁷³ This information is relevant to the Seleka's policy to attack a civilian population. P-1970's prior recorded testimony includes his statement and one photograph he provided.⁷⁴

P-2042

31. P-2042 is [REDACTED] in Boy Rabe. He witnessed a relevant encounter in his neighbourhood in 2013, during which ADAM and other Seleka commanders visited the home of [REDACTED].⁷⁵ P-2042, whose home was located nearby the

⁶⁷ P-1825, [CAR-OTP-2079-0315-R01](#) at 0318-0323.

⁶⁸ P-1825, [CAR-OTP-2079-0315-R01](#) at 0317-0318, paras. 14-25.

⁶⁹ P-1825, [CAR-OTP-2079-0315-R01](#) at 0324-0325.

⁷⁰ See Annex A (A8) for complete list.

⁷¹ P-1970, [CAR-OTP-2087-9396-R01](#)-R01 at 9401, paras. 20-23.

⁷² P-1970, [CAR-OTP-2087-9396-R01](#)-R01 at 9404-9405, para. 36.

⁷³ P-1970, [CAR-OTP-2087-9396-R01](#)-R01 at 9404, para. 34.

⁷⁴ See Annex A (A9) for complete list.

⁷⁵ P-2042, [CAR-OTP-2074-0002-R01](#) at 0004-0005, para. 15.

[REDACTED] home, heard [REDACTED].⁷⁶ This information is relevant to the Seleka's policy to attack a civilian population. P-2042 states that this encounter occurred after the Seleka's coup, and he thinks sometime before the Seleka launched a large-scale operation on Boy Rabe.⁷⁷

32. P-2042 also describes the Seleka's crimes committed during the August Boy Rabe attack, including a rape of a woman that he witnessed, and the looting of his own house.⁷⁸ P-2042's prior recorded testimony includes his statement and associated items, including (i) photographs he commented on during his interview, and (ii) his signed complaint to OJED, a non-governmental organisation.⁷⁹

P-2087

33. P-2087, [REDACTED], provides information on the April and August Boy Rabe attacks. Of particular note, his evidence on the August Boy Rabe attack is relevant to the existence of a non-international armed conflict, as he explains (i) armed men's firing of weapons against the Seleka base prior to DJOTODIA's August inauguration ceremony; and (ii) the Seleka's subsequent retaliation to the Boy Rabe neighbourhood, during which there was a kinetic exchanges of fire between the Seleka and the resistance FACA soldiers who remained there.⁸⁰

34. P-2087's information is also 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 (during the August Boy Rabe attack)⁸¹ and the arbitrary detention of P-0662 and another Boy Rabe resident.⁸² He also provides other

⁷⁶ P-2042, [CAR-OTP-2074-0002-R01](#) at 0005, para. 15.

⁷⁷ P-2042, [CAR-OTP-2074-0002-R01](#) at 0005, para. 15.

⁷⁸ P-2042, [CAR-OTP-2074-0002-R01](#) at 0008-0010, paras. 29-36.

⁷⁹ See Annex A (A10) for complete list.

⁸⁰ P-2087, [CAR-OTP-2074-2965-R01](#) at 2970-2973, paras. 34-52.

⁸¹ P-2087, [CAR-OTP-2074-2965-R01](#) at 2975-2976, para. 66.

⁸² P-2087, [CAR-OTP-2074-2965-R01](#) at 2976, para. 67. As set out in the Pre-Confirmation Brief, the Prosecution submits that the two people referenced by P-2087 ([REDACTED]) were detained at the CEDAD. See Pre-

information relevant to the Seleka's policy to attack a civilian population. Specifically, he describes how he heard, shortly in advance of the August Boy Rabe attack, a Seleka commander use words that the witness understood to mean that civilians in Boy Rabe could be attacked along with the military.⁸³ P-2087's prior recorded testimony includes his statement and associated items.⁸⁴

C. The Prior Recorded Testimonies Have Sufficient Indicia of Reliability

35. The Prior Recorded Testimonies have sufficient indicia of reliability for introduction into evidence. The Eleven Witnesses have signed their statements, attesting that their testimony was read back to them, was given voluntarily, and that their contents were true to the best of their recollection of the events.⁸⁵ Where an interpreter was used, the witnesses confirmed that they read over the statement with the interpreter and confirmed its accuracy.⁸⁶ Their statements also bear the signature of an interpreter, certifying that each witness appeared to have heard and understood the translation.⁸⁷

36. The statements of all eleven witnesses are coherent and internally consistent. Furthermore, each witness mention events that are corroborated by other evidence, and many of them reference the same killings or acts of violence described by other

Confirmation Brief, ICC-01/14-01/21-155-Red, para. 262; *see also* **P-0662**, [CAR-OTP-2130-5398-R01](#), at 5401-5407, paras. 16-29 (Fr).

⁸³ **P-2087**, [CAR-OTP-2074-2965-R01](#) at 2972, paras. 42-46.

⁸⁴ *See* Annex A (A11) for complete list.

⁸⁵ **P-0100**, [CAR-OTP-2027-2535-R01](#) at 2563; **P-1277**, [CAR-OTP-2039-0419-R01](#) at 0441; **P-1424**, [CAR-OTP-2043-0306-R01](#) at 0311; **P-1427**, [CAR-OTP-2043-0363-R01](#) at 0368; **P-1523**, [CAR-OTP-2134-2637-R01](#) at 2644; **P-1524**, [CAR-OTP-2062-0468-R01](#) at 0491; **P-1563**, [CAR-OTP-2050-0105-R01](#) at 0116; **P-1825**, [CAR-OTP-2079-0315-R01](#) at 0327; **P-1970**, [CAR-OTP-2070-0995-R01](#) at 1005; **P-2042**, [CAR-OTP-2074-0002-R01](#) at 0012; **P-2087**, [CAR-OTP-2074-2965-R01](#) at 2983.

⁸⁶ **P-0100**, [CAR-OTP-2027-2535-R01](#) at 2563; **P-1427**, [CAR-OTP-2043-0363-R01](#) at 0368; **P-1523**, [CAR-OTP-2134-2637-R01](#) at 2644; **P-1524**, [CAR-OTP-2062-0468-R01](#) at 0491; **P-1563**, [CAR-OTP-2050-0105-R01](#) at 0116; **P-1825**, [CAR-OTP-2079-0315-R01](#) at 0327; **P-2042**, [CAR-OTP-2074-0002-R01](#) at 0012; **P-2087**, [CAR-OTP-2074-2965-R01](#) at 2983.

⁸⁷ **P-0100**, [CAR-OTP-2027-2535-R01](#) at 2564; **P-1427**, [CAR-OTP-2043-0363-R01](#) at 0369; **P-1523**, [CAR-OTP-2134-2637-R01](#) at 2644; **P-1524**, [CAR-OTP-2062-0468-R01](#) at 0491; **P-1563**, [CAR-OTP-2050-0105-R01](#) at 0117; **P-1825**, [CAR-OTP-2079-0315-R01](#) at 0327; **P-2042**, [CAR-OTP-2074-0002-R01](#) at 0013; **P-2087**, [CAR-OTP-2074-2965-R01](#) at 2983.

Prosecution witnesses.⁸⁸ Each witness generally distinguishes between information about which they have direct knowledge and information that they acquired from other sources.

D. The Prior Recorded Testimonies Largely Relate to Background Information

37. The Prior Recorded Testimonies relate to background information that does not reflect on the central issues in this case. In particular, they pertain to background information relevant to the chapeau elements of the charges. They do not relate to Mr SAID specifically or the events at the OCRB, the core issue in this case. As such, they are especially appropriate for introduction in writing. Indeed, as the *Ongwen* Trial Chamber has noted, one important function of rule 68(2)(b) is to “focus live testimony on those topics of greatest relevance to the proceedings.”⁸⁹

38. The Defence may argue that they intend to contest all elements of the charges, including the chapeau elements of war crimes and crimes against humanity, and that therefore all this evidence must be tested via oral cross-examination. However, the Prosecution submits that the *factual* allegations put forth by the various chapeau-related witnesses at issue in this Request are unlikely to be materially in dispute. Rather, any matters of significant dispute will circle around the *legal significance* or characterisation of those factual allegations. The Defence can explore its themes in this regard during cross-examination of the many other Prosecution witnesses who will give testimony *viva voce* about the events in Boy Rabe in 2013. Furthermore, and possibly even more fruitfully, the Defence can develop this line of legal argument in its oral and written submissions in response to the Prosecution’s case, or by calling its own witnesses.

⁸⁸ See, e.g., *supra*, para. 17 (P-1277 corroborates P-0662); paras. 20-21 (P-1424 and P-1427 corroborate each other); paras. 24-25 (P-1524 corroborates P-1264 and P-1825); and para. 34 (P-2087 corroborates P-1424, P-1427, and P-0662).

⁸⁹ *Ongwen* Rule 68(2)(b) decision, para. 16.

E. The Prior Recorded Testimonies Are Cumulative to or Corroborative of Other Evidence, Including that of *Viva Voce* Witnesses Who Can Be Cross-Examined by the Defence

39. The Prosecution relies on the Prior Recorded Testimonies 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. Indeed, most of the Prosecution's planned 33 *viva voce* witnesses will testify in the courtroom about this topic. Four of these witnesses have been selected to testify *viva voce* specifically because of their information about the events in Boy Rabe (and despite providing no significant information about Mr SAID or the OCRB), with the express purpose of ensuring that the Defence has a sufficient opportunity to explore its themes.

40. In particular, the Prosecution proposes to call *viva voce* for this purpose: P-0342 ([REDACTED] who was present during the April Boy Rabe attack); P-0119 (a long-time Boy Rabe [REDACTED]); P-1263 (a victim of the April Boy Rabe attack); and P-1264 (a victim of the August Boy Rabe attack). All four of them saw ADAM and other Seleka commanders in Boy Rabe during the attack about which they will give evidence.⁹⁰

41. Other *viva voce* witnesses who will also testify about the events in Boy Rabe in 2013 include P-0547, P-2105, P-1167, P-2161, P-0787, P-2563, P-2240, P-2478, P-1429, P-1737, P-2504, P-0435, P-0349, P-2573, P-2328, P-2232, and P-0291. The Prior Recorded Testimonies are also corroborative and cumulative to the evidence of other Rule 68(2) witnesses and documentary evidence, the latter including public reporting,⁹¹

⁹⁰ **P-0342**, [CAR-OTP-2008-0499-R01](#) (1st statement) at 0505-0508, paras. 41-65; **P-0342**, [CAR-OTP-2116-0216-R01](#) at 0231-0239 (2nd statement), paras. 77-130; **P-0119**, [CAR-OTP-2032-0753-R01](#) at 0765-0766, 0772, paras. 84-92, 131-133; **P-1263**, [CAR-OTP-2045-0805-R01](#) at 0812-0827, paras. 45-139; **P-1264**, [CAR-OTP-2036-0065-R01](#) at 0069, paras. 28-34.

⁹¹ See, e.g., [CAR-OTP-2001-1767](#) at 1785-1787, 1794 (April); [CAR-OTP-2001-1870](#) at 1896, 1931-1936 (April); [CAR-OTP-2034-0270](#) at 0303, 0308, para.168, 190-191 (April); [CAR-OTP-2050-0989](#) (August); [CAR-OTP-2030-2330](#) (August); [CAR-OTP-2059-0046](#) (August); [CAR-OTP-2030-2323](#) (August).

complaints submitted by victims or their family members to NGOs,⁹² and documents produced by the government of the Central African Republic.⁹³

F. The Interests of Justice Would Be Served By Introducing the Prior Recorded Testimonies

42. The interests of justice would be served by the introduction of the Prior Recorded Testimonies via rule 68(2)(b). The Prosecution has estimated it will require an average of 4 hours for its examination of each crime base or chapeau-related witness. Accordingly, granting the Request would result in a savings of approximately 44 hours of direct examination time, thereby advancing the expeditiousness of the proceedings.

43. Granting the Request would also reduce cumulative in-court testimony about the events in Boy Rabe in 2013, which—as noted above⁹⁴—many *viva voce* witnesses will already address. This would streamline the presentation of the evidence and ensure that the focus of the trial remains on the events at the OCRB. Furthermore, the Eleven Witnesses would be saved the disruption of having to travel to appear in court. Finally, the Court would save valuable resources that could be used for other purposes. This is particularly important in these circumstances where multiple trials requiring Sango interpretation will be ongoing, likely prohibiting a continuous sitting schedule, and therefore meaning every hour of courtroom time devoted to this case is particularly valuable.

⁹² See, e.g., [CAR-OTP-2002-2252-R01](#) (April); [CAR-OTP-2009-1790-R01](#) (April); [CAR-OTP-2009-2119-R01](#) (August); [CAR-OTP-2041-0423-R01](#) (August).

⁹³ See e.g., [CAR-OTP-2075-0949](#) (August).

⁹⁴ See, *supra*, paras. 39-41.

G. Introduction of the Prior Recorded Testimonies is not Prejudicial To or Inconsistent with the Rights of the Accused

44. Introducing the evidence of the Eleven Witnesses under rule 68(2)(b) of the Rules causes no undue prejudice to the Accused. As noted above, this evidence is cumulative or corroborates other evidence, and it provides background information that is relevant but not central to the core of the case.

45. As noted above, the Defence will also be able to cross-examine other Prosecution witnesses that will testify live before the Chamber about the same topics or incidents as those referred to by the Eleven Witnesses, Furthermore, the Defence is unrestricted in its ability to call evidence to rebut the assertions of the Eleven Witnesses or to address any issues in the evidence in its oral or written submissions.

46. Judging from its brief remarks at the first status conference⁹⁵ and in its subsequent written submission,⁹⁶ the Defence may challenge the general fairness of the application of rule 68(2)(b) in light of other provisions of the Rome Statute (“Statute”), independently from the witnesses at issue in the Prosecution’s submission.⁹⁷ The Prosecution concurs with the Chamber’s view that the Defence’s response should be made based on each application made by the Prosecution,⁹⁸ and therefore submits that the Chamber should consider any objection to the use of rule 68(2)(b) on a case-by-case basis. Specifically, any claim of prejudice must be specific to the witness in question, not posed in the abstract.

⁹⁵ ICC-01/14-01/21-T-007-CONF-ENG ET.

⁹⁶ ICC-01/14-01/21-231-Conf-Red.

⁹⁷ ICC-01/14-01/21-T-007-CONF-ENG ET, p. 53, ln. 9 – p. 55, ln. 7 (arguing that the principle of orality is a guiding principle of the proceedings before the ICC, and therefore the Chamber should give instructions to the Prosecution even before actual rule 68 filings are advanced by the Prosecution); ICC-01/14-01/21-231-Conf-Red, para. 44 (arguing that in light of the Defence’s right to cross-examine witnesses under Article 67 of the Statute, Rule 68 must be used on an exceptional basis).

⁹⁸ ICC-01/14-01/21-T-007-CONF-ENG ET, p.54, lns.4 – 12, p.54, ln.7 – p.55, ln.6.

47. In particular, contrary to what the Defence may argue, there is no conflict between rule 68(2)(b) of the Rules and article 69(2) of the Statute. The principles of orality and publicity, implicitly referenced in article 69(2), are specifically made subject—in the very same sentence—to Article 68 of the Statute and to provisions in the Rules of Procedure and Evidence. Specifically, the first sentence of article 69(2) states: “The testimony of a witness at trial shall be given in person, *except to the extent* provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence.”⁹⁹

48. As recently observed by Judge Prost in the *Al Hassan* case, “[t]his balance properly reflects the multitude of legal systems which allow for evidence to be adduced other than through in person testimony.”¹⁰⁰ In this light, rule 68(2)(b) should not be viewed as “exceptional” but rather as “a different form of evidence authorised under the legislative scheme of this hybrid system.”¹⁰¹ Trial Chambers have generally understood rule 68 this way. For example, the *Yekatom and Ngaissona* Trial Chamber noted that rule 68 “represents one of the statutory exceptions to the rule of orality and publicity. This means that this way of introducing prior recorded testimony is *per se* generally considered compatible with the rights of the accused.”¹⁰²

49. In sum, the Trial Chamber is free to exercise its discretion to receive evidence under rule 68(2)(b), provided this remains consistent with rule 68(1)—namely, that it does not prejudice the rights of the accused.

50. Here, even if any of the Prior Recorded Testimonies could be considered to touch upon materially disputed topics, none of them are unique or so significant, in light of

⁹⁹ Statute, article 69(2) (emphasis added).

¹⁰⁰ *Al Hassan*, Dissenting Opinion of Judge Kimberly Prost, ICC-01/12-01/18-1924-Anx, para. 8.

¹⁰¹ *Id.* Of note, other international tribunals—even those whose framework is understood to have been more heavily influenced by the common-law tradition than the ICC’s legal framework—have made ample use of this form of evidence, particularly where, as here, the evidence goes to proof of the chapeau elements of the charges.

¹⁰² *Yekatom and Ngaissona*, Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, ICC-01/14-01/18-685, 16 Oct. 2020, para. 6.

the nature of the issues addressed and the entirety of the evidence expected to be submitted in the case, as to preclude introduction via rule 68(2)(b).¹⁰³ Some of the Eleven Witnesses provide relevant information about the participation of high-ranking Seleka commanders in the Boy Rabe attacks, evidence which supports the Prosecution's claim that the crimes in Boy Rabe took place according to a State or organisational policy. In the absence of other such evidence, this information might be considered relatively unique or of high significance. However, here, other *viva voce* witnesses are in a similar or better position to give evidence about this topic.¹⁰⁴ In these circumstances, it is unnecessary that the Eleven Witnesses be called to testify *viva voce*, and examination by the parties may be dispensed of without prejudicing the rights of the Accused.

H. The Certification Process Should be Overseen by the Registry's Senior Legal Adviser and Should Be Allowed to Take Place Remotely

51. According to sub-sections (ii) and (iii) of rule 68(2)(b), the witness at issue must sign a declaration verifying that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief.¹⁰⁵ In order to satisfy these requirements, the Prosecution requests that the Chamber (i) designate the Registry's Senior Legal Adviser ("SLA"), or a person delegated by the SLA, to witness

¹⁰³ See *Abd-al-Rahman*, Second Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), ICC-02/05-01/20-625-Red, 11 March 2022, paras. 30, 38, 46, 55, 62, 73, 79 (allowing introduction of the evidence of several witnesses under rule 68(2)(b), despite Defence claims that their evidence concerned materially disputed issues, where the Chamber determined that the witnesses' evidence was not "so unique or significant" as to preclude its introduction under rule 68(2)(b); see also *Abd-al-Rahman*, First Rule 68(2)(b) Decision, paras. 52, 59 (noting as a relevant factor whether other *viva voce* witnesses were in a similar or better position to speak to the same issues).

¹⁰⁴ See, *supra*, paras. 40-41.

¹⁰⁵ Rules, rule 68(2)(b)(ii)-(iii).

declarations made pursuant to this provision;¹⁰⁶ and (ii) authorize remote certifications due to the current challenges imposed by the ongoing COVID-19 pandemic.¹⁰⁷

V. RELIEF SOUGHT

52. For the above reasons, the Prosecution that requests the Chamber:

(a) introduce into evidence the Prior Recorded Testimonies, as set out in Annex 1 to this filing, subject to the fulfilment of rules 68(2)(b)(ii) and (iii);

(b) designate the Registry's SLA, or other persons delegated by the SLA, to witness the required declarations; and

(c) authorise remote certifications.



Karim A. A. Khan QC, Prosecutor

Dated this 11th day of May 2022

At The Hague, The Netherland

¹⁰⁶ This is an established practice of the Court. *See, e.g., Abd-al-Rahman* First Rule 68(2)(b) decision, para. 17; *Yekatom & Ngaissona*, Decision on the Prosecution's Request in Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-01/14-01/18-508, 6 May 2020, p. 7.

¹⁰⁷ Remote certification has been allowed in recent trials, including in *Al Hassan* and *Abd-al-Rahman*. *See, e.g., Abd-al-Rahman* First Rule 68(2)(b) decision, para. 18.