# DISSENTING OPINION OF JUDGE GEOFFREY HENDERSON

1. I respectfully dissent from the majority decision that merely recognizes as submitted the items listed in Annex A to its decision. This outcome in my view represents an extravagant failure on the Chamber's part, to make any meaningful decision and is, in the circumstances, lacking both efficiency and fairness. I continue to have strong and fundamental misgivings about the Chamber's approach towards the introduction of evidence and, while this approach has been endorsed by the Appeals Chamber[1], I am strongly of the view that the Appeals Chamber's approach to the matter was deeply flawed, both as a matter of law and as a matter of principle.

2. In considering these five applications to introduce evidence, the majority's approach appears to have been an application of its own reasons as set out in its "Decision on the submission and admission of evidence".[2] In the majority's view, such an approach contributes to the expeditiousness of the proceedings.[3] I disagree. With the First Application having been made as long ago as 28 April, 2017, the Second Application on 31 July 2017, the Third Application on 15 December 2017, the Fourth Application on 22 December 2017 and the Fifth Application on 23 March 2018 and the only outcome of the Chamber's deliberation being a decision that defers the Chambers decision on these applications to the end of the trial, the appearance of expeditiousness is simply misleading.

3. I will not repeat what I have said previously regarding why this approach is legally flawed and carries with it the serious potential to undermine both the

[1] "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'", 8 March 2018, ICC-01/05-01/13-2275
[2] "Decision on the submission and admission of evidence", 29 January 2016, ICC-02/11-01/15-405.
[3] Ibid., para. 14.

fairness and efficiency of these proceedings.[4] Instead I wish to focus on some of the practical implications of the Chamber's permissive and essentially unfiltered approach in these applications. In particular, I want to highlight the very real challenges that arise from allowing the prosecutor to submit in this undisciplined manner lacking in rigour, whatever items of evidence that they wish, without applying any filter in terms of quality and/or relevance.

4. First, I am deeply concerned about the uncertainty that is being created. The Prosecutor has indicated that it has called all of her witnesses[5] and both accused have indicated that they intend to file motions to dismiss the charges.[6] By not ruling on the admissibility of the vast quantity of documentary and audio-visual evidence, the Defence may very well have to address all of the evidence in their submissions. Given that the Prosecutor has not demonstrated a serious effort to explain the relevance of all the submitted items, this places an unfair and impermissible burden on the defence requiring them to justify that the evidence is not relevant. Without a ruling on relevance by the Chamber, the Defence is thus to a large extent left guessing. It is no response to say that, in many cases, it should be possible for the Defence – or the Chamber for that matter - to surmise why the Prosecution has submitted a given exhibit. It is one thing to say that the Chamber will 'consider' the admissibility criteria at a later stage. It is quite another to suggest that the Defence must speculate in this regard, or simply assume that all the evidence will be admitted. This approach in my respectful view is not a model for fairness and good trial management.

5. My second major concern relates to the Chamber's ultimate assessment of the immense volume of evidence contained in these five applications. The Chamber has decided that it will recognize that evidence contained in Annex A has been

[4] ICC-02/11-01/15-405-Anx, ICC-02/11-01/15-773-Anx; ICC-01/05-01/13-2275-Anx.
[5] ICC-02/11-01/15-T-220, p. 91
[6] ICC-02/11-01/15-1158-Conf, para. 2; ICC-02/11-01/15-1157-Conf, para.

submitted but has not indicated whether or not it will ever inform the parties of any rulings on if the evidence is to be admitted or not and, if so, if the Chamber will provide reasons for admission or exclusion. On its face, the decision to wave the evidence through with the promise of later considering such objections is appealing as it gives the impression of expeditiousness, but is it fair? This approach, which was recently endorsed by the Appeals Chamber, does not require any ruling whatsoever by the Chamber.[7] This opaque decision making effectively leaves the parties entirely in the dark until the end of the trial and even beyond as this Chamber is only required to *consider* the objections. The parties are not entitled to any ruling and may certainly never know the impact of the Chamber's decision on these applications on the Chamber's Article 74 decision. This in my view is not fair.

6. Fact-finding is a key judicial function that should be guided by rationality, transparency and some level of precision. While judges must always maintain a holistic overview of all the evidence on the record, they must carefully check their impressions against the evidence submitted in the case to ensure that every finding they make is properly supported by evidence that is pertinent to the facts in question and meets the standard of proof. It is therefore important that the evidence be authentic, reliable and it must also be relevant. Evidence is relevant if it "makes the existence of a fact at issue more or less probable."[8] Whether or not this is the case will depend on "the purpose for which the evidence is adduced."[9] The Chamber's fact finding function is made unnecessarily inefficient when it allows its record to be inundated with evidence which is irrelevant or whose relevance has not clearly been explained and litigated. Some examples will illustrate the difficulty.

[7] ICC-01/05-01/13-2275, paras 572-599.
[8] ICC-01/04-01/07-2635, para. 16.
[9] Id.

7. The first example, CIV-OTP-0025-0459, appears to be a receipt signed by the president of the GPP for receiving the sum of 200,000 CFCA from the secretariat of the deputy director of Mr Gbagbo's presidential cabinet. Neither the document nor the signature (which is actually from another individual who is not alleged to have been a GPP member and who also signed for other recipients)[10] has been authenticated. Moreover, no explanation is offered as to what the sum – the equivalent of 300 EUR – was for. The alleged transaction appears to be part of a series of monthly transactions, starting in May 2009 and ending in March 2011. Assuming these exhibits prove the actual transactions, it is not clear what they are supposed to demonstrate, apart from the fact that there were contacts between Mr Gbagbo and certain elements of the GPP.[11] However, considering the claimed size of the GPP (allegedly 8,000-9,000 men in Abidjan alone), the amounts involved appear to be almost insignificant. I therefore do not fully understand the relevance of these documents.

8. A second example is CIV-OTP-0074-0057, an excerpt from an RTI news bulletin of 18 December 2010, showing a report of Ivorian custom agents scanning three suspicious German diplomatic pouches and the returning of two containers originating from France from the port of Abidjan because they contained undeclared ammunitions. Leaving the question of the accuracy of the information to one side, I totally fail to see the relevance of this exhibit.

9. A third example is CIV-OTP-0084-4069, an inspection sheet from an external autopsy conducted at the Anyama morgue. The document does not appear to be dated and bears no signature. Although the document states that the person died on 16 December 2010 in Abobo, there is no indication as to the basis of this information. It is noted, in this regard, that the document states about the

[10] ICC-02/11-01/15-895-AnxA, p. 109-110.
[11] Although, as the Prosecution acknowledges, it is not clear to what extent Mr Zéguen was still in charge of the GPP at the relevant time

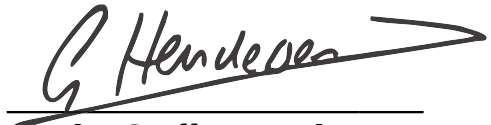
circumstances of the death that the person allegedly disappeared on 16 December 2010 and that his body was found in the Anyama morgue on 11 May 2011. The document does not provide an intelligible cause of death. The Prosecutor claims that this document corroborates the forensic report of P-0564 (CIV-OTP-0050-0003), however, it is rather likely that P-0564 relied on this inspection sheet for her report, in which case there is no corroboration at all. The Prosecutor further claims that the content of the inspection sheet is corroborated by the register of the Anyama morgue (CIV-OTP-0084-3044) and a list of "victims" provided by the Ivorian authorities of persons who were 'treated' by the Institut Medicine Légale (CIV-OTP-0073-1074). Yet, again, we are given no information about the source(s) of the information contained in these documents, making it hard to accept the claimed corroboration. In any event, none of the documents concerned provide any probative information about the circumstances under which the person in question met his end and who was responsible for his death. Nor does the Prosecutor point to other evidence in this regard in relation to this individual. In the absence of such information, it is questionable whether the document has any significant relevance.

10. The fourth example is CIV-OTP-0074-0071 another excerpt from an RTI news bulletin, this one on 28 January 2011. It shows some reality show contestants bring food and clothing to the population of Lakota, a village approximately 200 kilometers west of Abidjan. The village appears to have been attacked, but no further information has been provided. The evidence may or may not be relevant to an issue in this case, but without any clarity on its relevance, it is of no use.

11. As these four examples show, it is far from self-evident whether the exhibits contained in the bar table motions would all meet the admissibility criteria of article 69(4) of the Statute. In the absence of proper litigation on these issues, when the time comes it will also be difficult for me to either make a fully

informed admissibility decision or to make a proper evaluation of the evidentiary weight of these exhibits. Indeed, one of the greatest drawbacks of the approach adopted by the majority, in particular their failure to insist on compliance with paragraph 44 of the Chamber's Directions on the Conduct of Proceedings, is that it essentially eliminates the assistance from the parties that is crucial to giving the Chamber all the necessary information that it needs in order to fully assess the relevance and evidentiary weight of the exhibits. The scant written submissions contained in the annexes to the bar table motions hardly provide that information in this regard.

12. The burden to prove the charges and therefore to present the best possible evidence in support of them rests squarely upon the Prosecutor. They should not be permitted to simply dump reams of documents and videos into these trial proceedings without providing a proper and detailed justification, for each individual exhibit, on how it advances their theory of the case. There is no point in cluttering the case record with exhibits whose relevance to the charges is not clearly demonstrated or that are of such doubtful probative value that no sensible Trial Chamber could reasonably base any findings upon them. It is not clear to me what benefit my colleagues hope to achieve with today's decision. From where I stand, it is just another instance of kicking the can down the road.



**Judge Geoffrey Henderson**

Dated 1 June 2018

At The Hague, The Netherlands