

DISSENTING OPINION OF JUDGE GEOFFREY HENDERSON

1. I respectfully dissent from the majority decision recognizing as submitted the documentary evidence identified in Annex A of the Legal Representative's Application for the introduction of documentary evidence under paragraphs 43-44 of the Decision adopting amended and supplemented directions on the conduct of the proceedings ("Request").¹ I am not persuaded of its relevance to these proceedings and view the majority's decision to postpone their decision on admissibility as wrong both as a matter of law and as a matter of principle.

2. In this application, the Legal Representative of the Victims seeks to introduce into evidence a document which in summary, lists the names of 48 persons of Nigerien nationality who were allegedly killed in Abidjan and other locations in Côte d'Ivoire during the relevant timeframe of this case, to wit during the period January 2011 and May 2011. The Legal Representative points out that during that period, the Republic of Niger suffered the highest number of casualties among its citizens resident in Côte d'Ivoire and contends that the list is relevant to a number of issues including (i) the widespread and systematic character of the attacks against the civilian population and (ii) the targeting and persecution of civilians on political, racial, national, ethnic, cultural and religious grounds.

3. As was the case with previous decisions on the submission of evidence, the majority's evaluation of the relevance and probative value of the material that forms the subject of this application, appears to have been perfunctory. In echoing what was stated in the submissions of the Legal Representative, the majority appear to have casually accepted that the Legal Representative had sufficiently established that the proposed document is relevant to the victims'

¹ ICC-02/11-01/15-1088

interests and that it would contribute to the determination of the truth. In so doing, the majority appears to gloss over a number of problems.

4. First, in terms of relevance, I cannot help but note that of the 48 alleged victims, none of them died on the same date and location in which the charged crimes or the 34 incidents allegedly forming the attack took place. The dates of death of two victims coincided with the dates of charged incidents but neither of them died on the location where the charged crimes were committed. Five others allegedly died on the same dates as some of the 34 incidents which the Prosecution relies upon to prove the contextual elements. However, in all five cases, they died in different locations than where the relevant incidents took place. For 25 other alleged victims, the date of death is even unknown. For six the location is not provided and eight died outside of Abidjan. In fact, out of 48 alleged victims, there is only one victim about whom information is provided about date, place and cause of death. Accordingly, it is far from clear how the alleged deaths of the 48 Nigeriens relate to the charges as confirmed by the Pre-Trial Chamber and as detailed in the Prosecutor's pre-trial and mid-trial briefs.
5. It would seem that by asking to submit this evidence into the record, the Victims' Legal Representative aims to expand the Prosecutor's list of 34 incidents that are said to prove the attack against a civilian population. However, given that no evidence is provided about the circumstances of the demise of these 48 Nigeriens, judicially allowing the introduction of this evidence for this purpose would require an impermissible intellectual leap based on assumptions that have neither been articulated, nor substantiated by the Victims' Legal Representative.
6. Of equal concern is the negligible probative value of this evidence. First, as pointed out previously, the information provided is minimal. Second, the list of names of alleged victims is based entirely on anonymous hearsay. As I have

stated before, no reasonable chamber should ever rely on anonymous hearsay, for the simple reason that it is impossible to properly assess the credibility and reliability of its source.²

7. It might be objected that one should not be too demanding in terms of the quality and precision of the evidence in relation to the contextual elements. However, if, as in this case, the Prosecution attempts to prove the existence of an attack against a civilian population on the basis of a limited number of small-scale incidents that took place at different locations over a relatively extended period of time, it is imperative that the evidence for each incident meets the requisite standard of proof.
8. I note, in this regard, that the majority casually - and without providing any real reasons - find that the exhibits tendered by the Victims' Legal Representative "would contribute to the determination of the truth".³ As explained, I have serious doubts that this is indeed the case. This is significant, because victims do not have a statutory right to submit evidence in trial proceedings. As the Appeals Chamber has held, victims may, in the context of presenting their views and concerns in accordance with article 68(3) of the Statute, "bring to the Trial Chamber evidence that the Trial Chamber may consider necessary for the determination of the truth."⁴ However, in order for such evidence to be submitted, the Trial Chamber must "exercise its discretionary powers under the second sentence of article 69(3) of the Statute".⁵ In other words, this requires an affirmative finding by the Trial Chamber, which would, in my view involve, as an

² ICC-02/11-01/15-466-Conf-Anx, para. 5 et seq.; ICC-02/11-01/15-950-Anx, para. 6.

³ Majority decision, para. 10

⁴ "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial'", 16 July 2010, ICC-01/04-01/07-2288, para. 40.

⁵ "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial'", 16 July 2010, ICC-01/04-01/07-2288, para. 40.

absolute minimum, a finding that the evidence suggested by the victims passes the admissibility test.

9. Regrettably, for the foregoing reasons, I feel compelled to distance myself from the majority decision. In these circumstances, I would have rejected this Request.



Judge Geoffrey Henderson

Dated 19 June 2018

At The Hague, The Netherlands