

PARTIALLY DISSENTING OPINION OF JUDGE HENDERSON

1. I agree with my colleagues that the request to submit, pursuant to rule 68 of the Rules, the prior recorded statements of Witnesses P-0428 and P-0501 should be granted. I also concur that it is possible to authorise the submission of the declarations of Witnesses P-0549 and P-0550.¹

2. I am further in agreement to authorise the submission of the documents that are annexed to the statements of Witnesses P-0428, P-0549, P-0550 and P-0501. For the reasons explained in my Partially Dissenting Opinion of 13 June 2016,² I would though authorise their submission, for the truth of their contents, on the basis of paragraph 43³ of the Directions on the Conduct of Proceedings and not on the basis of rule 68 of the Rules.⁴

3. In line with the reasoning set out in my partly dissenting opinion to the decision of 9 June 2016⁵ and bearing in mind the Chamber's approach to the evidence of Witness P-0369⁶, I respectfully disagree with the majority's decision

¹ CIV-OTP-0092-0254 (and the English translation of the declaration, CIV-OTP-0092-0255); CIV-OTP-0092-0252 (and the English translation of the declaration, CIV-OTP-0092-0251).

² Partially Dissenting Opinion of Judge Henderson, 13 June 2016, ICC-02/11-01/15-573-Anx, paras 31-34.

³ Except for the submission of CIV-OTP-0071-0919 (sketch made by P-0501), which is submitted under Rule 68(3).

⁴ I note that the Prosecutor did not comply with the requirements of paragraph 44 of the Directions on the Conduct of Proceedings, in that she did not make an attempt to show the relevant and probative value (including authenticity) of these documents. However, under the current circumstances and having analysed said documents, I do not think that the lack of reasoning on the part of the Prosecutor should stand in the way of allowing their submission.

⁵ Partially Dissenting Opinion of Judge Henderson, 13 June 2016, ICC-02/11-01/15-573-Conf-Anx.

⁶ Decision on 'Defence's Motion to Preclude and Exclude the prospected Evidence of Witnesses P-369, or, in the alternative, to restrict the Scope of Witness P-0369's intended Evidence', 13 May 2016, ICC-02/11-01/15-539; see also, Separate Opinion of Judge Henderson, 21 March 2016, ICC-02/11-01/15-466-Conf-Anx.

to grant the introduction of the entire statement of Witness P-0414 for the truth of its content under rule 68(3), including all its annexes.

4. In my view, we can accept the introduction of P-0414's prior recorded testimony for the purpose of authenticating the [REDACTED] documents that are annexed to it and to explain the methodology behind the production of a number of them. We can also permit the introduction of her statement insofar as it contains her own personal observations. However, we cannot, in my view, admit those parts of her statement that contain anonymous hearsay, speculation or opinion evidence.
5. On that understanding, I have no objection against allowing the introduction of Witness P-0414's prior recorded testimony on the basis of rule 68(3) of the Rules.
6. As far as the annexes to Witness P-0414's statement are concerned, I accept that annexes 1-5⁷ can be introduced through rule 68 of the Rules. However, the other annexes should be submitted through paragraph 43 of the Directions on the Conduct of Proceedings.



Judge Geoffrey Henderson

Dated 19 July 2016

At The Hague, The Netherlands

⁷ CIV-OTP-0054-0627; CIV-OTP-0054-0628; CIV-OTP-0054-0629; CIV-OTP-0054-0630; and CIV-OTP-0054-0631. Annex 3 (CIV-OTP-0054-0629) seems to have been neither produced nor annotated by the witness during the statement taking and, from a formal perspective, it would have been preferable to introduce it via paragraph 43 of the Directions on the Conduct of Proceedings.