NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYLVESTER ATEMNKENG, Petitioner, v. MERRICK GARLAND, Attorney General, Respondent.	No. 18-70663 BIA A213–077–482 MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted November 14, 2022 **
San Francisco, California

Before: McKEOWN and PAEZ, Circuit Judges, and MOLLOY,*** District Judge.

Sylvester Atemnkeng, a native and citizen of Cameroon, petitions for review of a decision of the Board of Immigration Appeals ("BIA") dismissing Atemnkeng's appeal of an order by an Immigration Judge ("IJ") denying asylum,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

withholding of removal, and protection under the Convention Against Torture ("CAT"). Although the IJ determined Atemnkeng was credible, the IJ denied his application on the grounds that Atemnkeng failed to establish that his two arrests by the Cameroonian police rose to the level of persecution or were "on account of" a protected ground; rather, the IJ found Atemnkeng was the subject of an arson investigation. CAT relief was denied on similar grounds. The BIA affirmed, concluding that even if his treatment rose to the level of persecution, Atemnkeng failed to show a nexus to a protected ground. He petitions for review of that decision, arguing for the first time on appeal that the agency lacked jurisdiction due to a defective Notice to Appear ("NTA"). We have jurisdiction under 8 U.S.C. § 1252 and deny the petition for review.

1. Atemnkeng first argues that the agency lacked jurisdiction over his removal proceedings under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), because his NTA did not specify the time or place of his first hearing before the IJ. This challenge is unexhausted. *See* 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right[.]"); *Ruiz-Colmenares v. Garland*, 25 F.4th 742, 748 (9th Cir. 2022) ("We lack jurisdiction to consider Petitioner's argument because it was not raised before the agency."). Moreover, we have specifically held that a defective NTA does not divest the immigration court of jurisdiction

where, as here, the noncitizen receives the information in later hearing notices. *Karingithi v. Whitaker*, 913 F.3d 1158, 1162 (9th Cir. 2019); *see also United States v. Bastide-Hernandez*, 39 F.4th 1187, 1193–94 (9th Cir. 2022) (en banc).

2. Substantial evidence supports the BIA's decision that Atemnkeng failed to show a nexus between any past or future harm and a protected ground. Although Cameroonian police may have believed that Atemnkeng was affiliated with the Southern Cameroon National Council ("SCNC")—a political organization that advocates for English-speaking Cameroonians, the record does not compel the conclusion that he "was targeted *on account of* that opinion." *Khudaverdyan v. Holder*, 778 F.3d 1101, 1106 (9th Cir. 2015) (internal quotation marks omitted). Atemnkeng himself repeatedly stated that his arrests were related to a fire investigation, and he testified that a witness identified him near the building on the evening it was burned. While police may have suspected SCNC involvement in the same incident, the record does not compel the conclusion that the police sought Atemnkeng for reasons other than investigation of the fire. "Ordinary prosecution for criminal activity is not persecution 'on account of' a protected ground." *Lin v. Holder*, 610 F.3d 1093, 1097 (9th Cir. 2010). Nor does Atemnkeng provide any evidence beyond country-wide discord that he was mistreated because he is an English-speaker. *See Hussain v. Rosen*, 985 F.3d 634, 646 (9th Cir. 2021) ("[A]n applicant must show he was individually targeted on account of a protected ground

rather than simply the victim of generalized violence."). Because Atemnkeng's protected characteristics were not a reason, *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017), let alone "one central reason" for his persecution, *Khudaverdyan*, 778 F.3d at 1106 (quoting 8 U.S.C. § 1158(b)(1)(B)(i)), he did not meet his burden to establish eligibility for either asylum or withholding of removal.

3. Substantial evidence also supports the BIA's denial of CAT protection. While SCNC members and English-speaking Cameroonians have been arrested, detained, and harassed and the State Department report shows harsh prison conditions and some incidents of torture, the record does not compel the conclusion that it is more likely than not that Atemnkeng will be subjected to torture if returned to Cameroon.

PETITION DENIED.