



Original: English

**No. ICC-01/14-01/18
Date: 21 March 2019**

PRE-TRIAL CHAMBER II

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR V. ALFRED YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

Public

Decision on the Defence Requests for leave to appeal the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for Alfred Yekatom
Stéphane Bourgon
Mylène Dimitri

Counsel for Patrice-Edouard Ngaissona
Geert-Jan Alexander Knoops

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this decision on the Defence requests for leave to appeal the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’.¹

I. Procedural history

1. On 11 November 2018, the Chamber issued a warrant of arrest for Alfred Yekatom,² who was surrendered to the Court on 17 November 2018.³
2. On 7 December 2018, the Chamber issued a warrant of arrest for Patrice-Edouard Ngaïssona,⁴ who was surrendered to the Court on 23 January 2019.⁵
3. On 23 January 2019, Eric Plouvier was appointed as counsel by Ngaïssona to represent him in the proceedings before the Court.⁶
4. On 28 January 2019, the Chamber requested observations from the Prosecutor, the Yekatom Defence and the Ngaïssona Defence (collectively, the ‘Defence’) on the feasibility of joining the cases against Yekatom and Ngaïssona.⁷
5. On 7 February 2019, the Chamber granted Eric Plouvier’s request to withdraw as counsel to Ngaïssona, stipulating that such withdrawal shall take effect after he has

¹ Ngaïssona Defence, [Defence Request for leave to appeal the “Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters”](#) (ICC-01/14-01/18-87), 26 February 2019, ICC-01/14-01/18-127; Yekatom Defence, [Adjonction de la Défense de M. Alfred Rombhot Yekatom à la demande sollicitant l’autorisation d’interjeter appel de la décision relative à la jonction soumise par la Défense de M. Patrice-Edouard Ngaïssona](#), 26 February 2019, ICC-01/14-01/18-128.

² [Warrant of Arrest for Alfred Yekatom](#), ICC-01/14-01/18-1-Red (the public redacted version was issued on 17 November 2018).

³ Registrar, Rapport du Greffe sur l’Arrestation et la Remise de M. Alfred Yekatom, 22 November 2018, ICC-01/14-01/18-17-US-Exp, paras 19, 25.

⁴ [Warrant of Arrest for Patrice-Edouard Ngaïssona](#), ICC-01/14-01/18-89-Red (the public redacted version was issued on 13 December 2018).

⁵ Registrar, Rapport du Greffe sur la Remise de Patrice-Edouard Ngaïssona, 25 January 2019, ICC-01/14-01/18-101-US-Exp, paras 5, 15.

⁶ Registrar, [Notification of the Appointment of Mr Eric Plouvier as Counsel for Mr Patrice-Edouard Ngaïssona](#), 24 January 2019, ICC-01/14-01/18-100, para. 4.

⁷ [Order seeking observations on the feasibility of joining the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona](#), ICC-01/14-01/18-67.

submitted observations on the feasibility of joining the cases against Yekatom and Ngaïssona.⁸

6. On 15 February 2019, Geert-Jan Alexander Knoops was appointed as Ngaïssona's new counsel.⁹

7. On the same day, the Chamber issued the 'Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters', whereby it decided, *inter alia*, to join the cases against the two suspects (the 'Joinder Decision').¹⁰

8. On 26 February 2019, the Ngaïssona Defence submitted the 'Defence Request for leave to appeal the "Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters" (ICC-01/14-01/18-87)' (the 'Ngaïssona Request for Leave to Appeal'), seeking leave to appeal the Joinder Decision on two different issues:

(i) Whether the Chamber erred in failing to give the opportunity to the newly appointed Defence team to provide relevant observations as to the feasibility of the joinder in a context where the withdrawing Counsel alerted the Chamber of his limited possibility to make submissions on the substance of the joinder request and asked that his successor be permitted to make "any further or different submissions" (the 'First Issue').

(ii) Whether the Chamber misapplied Rule 136 of the Rules when relying on the expectation that the evidence and issues in the two cases are largely the same and, therefore a joint trial would enhance fairness and judicial economy by avoiding the duplication or inconsistent presentation of evidence while not causing serious prejudice to either suspect (the 'Second Issue').¹¹

9. On the same day, the Yekatom Defence submitted the 'Adjonction de la Défense de M. Alfred Rombhot Yekatom à la demande sollicitant l'autorisation d'interjeter appel de la décision relative à la jonction soumise par la Défense de M. Patrice-Edouard Ngaïssona' (the 'Yekatom Request for Leave to Appeal'), joining

⁸ [Decision on Withdrawal of Counsel](#), ICC-01/14-01/18-117.

⁹ Registrar, [Notification of the Appointment of Mr Geert-Jan Knoops as Counsel for Mr Patrice-Edouard Ngaïssona](#), 20 February 2019, ICC-01/14-01/18-120-Corr, para. 4.

¹⁰ [Joinder Decision](#), ICC-01/14-01/18-87.

¹¹ [Ngaïssona Request for Leave to Appeal](#), ICC-01/14-01/18-127, paras 17, 21.

the Ngaissona Request for Leave to Appeal and seeking leave from the Chamber to appeal the Joinder Decision with regard to the Second Issue.¹²

10. On 4 March 2019, the Chamber received the ‘Prosecution’s Response to Defence Request for Leave to Appeal “Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaissona and other related matters (ICC-01/14-01/18-87)” (ICC-01/14-01/18-127 & ICC-01/14-01/18128)’ (the ‘Prosecutor’s Response’).¹³

II. Applicable law

11. The Chamber notes article 82(1)(d) of the Rome Statute (the ‘Statute’), rule 155 of the Rules of Procedure and Evidence (the ‘Rules’) and regulation 65 of the Regulations of the Court.

12. The Chamber, mindful of the exceptional character of the remedy of the interlocutory appeal, recalls that for leave to be granted, the following specific requirements must be met:

(a) the decision must involve an issue that would significantly affect (i) *both* the ‘fair’ and ‘expeditious’ conduct of the proceedings; *or* the outcome of the trial; and

(b) in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.¹⁴

13. The Chamber notes that the requirements set out in (a) and (b) above are cumulative. Failure to demonstrate one makes it unnecessary for the Chamber to address the other.

¹² [Yekatom Request for Leave to Appeal](#), ICC-01/14-01/18-128.

¹³ [Prosecutor’s Response](#), ICC-01/14-01/18-139.

¹⁴ *See further* Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168, paras 7-19; Pre-Trial Chamber III, *The Prosecutor v. Jean Pierre-Bemba Gombo*, [Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure](#), 25 August 2008, ICC-01/05-01/08-75, paras 4-20 (*see especially* paras 13-16 on the interpretation of the notion of ‘fairness’); Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on the Prosecutor’s Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges \(ICC-01/09-01/11-859\)](#), 6 September 2013, ICC-01/09-01/11-912, paras 14-22 and n. 22 for further references.

14. Before turning to its analysis, the Chamber clarifies that, while a determination pursuant to article 82(1)(d) of the Statute is not an opportunity to examine arguments on the merits of the decision, the Chamber will do so, to a certain extent, when such arguments have a bearing on the criteria set out in article 82(1)(d) of the Statute.¹⁵

III. Determination of the Chamber

A. The First Issue

15. The Ngaiissona Defence submits that the Chamber failed to provide it with the opportunity to present ‘adequate and verified observations’ on the joinder of the cases.¹⁶ It takes issue with the fact that the Chamber relied on submissions made by the previous counsel, despite the fact that the previous counsel had informed the Chamber that he did not have the capacity to deal with the case file, did not have proper access to the case file, and had not consulted with Ngaiissona before making his submissions.¹⁷ The Ngaiissona Defence submits that the Chamber also failed to address the previous counsel’s request to allow the yet to be appointed new counsel ‘to make any further or different submissions’.¹⁸

16. Regarding the requirement that the issue affect the fair and expeditious conduct of the proceedings or the outcome of the trial, the Ngaiissona Defence submits, in essence, that: Ngaiissona’s right to be heard and the principle of equality of arms have been breached; the issue could cause delays in the proceedings by leading to extensive and unnecessary litigation;¹⁹ and the Joinder Decision could have a significant impact on the outcome of the case as it ‘will shape to a large extent the substantive and procedural modalities of the pre-trial and trial proceedings’.²⁰ The Ngaiissona Defence finally submits that an immediate resolution by the Appeals Chamber would materially advance the proceedings.²¹

¹⁵ Pre-Trial Chamber III, *The Prosecutor v. Jean Pierre-Bemba Gombo*, [Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure](#), 25 August 2008, ICC-01/05-01/08-75, para. 9.

¹⁶ [Ngaiissona Request for Leave to Appeal](#), ICC-01/14-01/18-127, para. 18.

¹⁷ [Ngaiissona Request for Leave to Appeal](#), ICC-01/14-01/18-127, para. 18.

¹⁸ [Ngaiissona Request for Leave to Appeal](#), ICC-01/14-01/18-127, para. 19.

¹⁹ [Ngaiissona Request for Leave to Appeal](#), ICC-01/14-01/18-127, para. 37.

²⁰ [Ngaiissona Request for Leave to Appeal](#), ICC-01/14-01/18-127, paras 36-37, 39-40.

²¹ [Ngaiissona Request for Leave to Appeal](#), ICC-01/14-01/18-127, para. 42.

17. The Prosecutor argues, in response, that the First Issue does not constitute an ‘appealable issue’. According to the Prosecutor, Ngaïssona’s previous counsel made no such request for the new counsel to be allowed to make further or different submissions, but merely alluded to this possibility.²² In any case – the Prosecutor submits – this ‘alleged request’ was based on largely unsubstantiated claims concerning the lack of opportunity to adequately consult with Ngaïssona and technical difficulties.²³ Lastly, the Prosecutor argues that even if the First Issue were an appealable issue, it would not ‘significantly affect the fairness of the proceedings or the outcome of the trial, and [its] immediate resolution would delay, not materially advance, the proceedings’.²⁴

18. The Chamber considers that the Ngaïssona Defence has not demonstrated that the First Issue ‘significantly affect[s] the fair and expeditious conduct of the proceedings or the outcome of the trial’ within the meaning of article 82(1)(d) of the Statute. Firstly, in relation to the fairness of the proceedings the Chamber does not see why Ngaïssona’s present counsel is in a better position than his former counsel to submit observations on the feasibility of the joinder of the two cases. Eric Plouvier was appointed as counsel for Ngaïssona on 23 January 2019.²⁵ The Chamber sought the views of the parties on the feasibility of the joinder on 28 January 2019 and gave the Defence two weeks to present its views.²⁶ The Ngaïssona Defence submitted its observations on 11 February 2019.²⁷ As lead counsel, Eric Plouvier was, at the time, fully representing the interests of Ngaïssona and had complete responsibility for the conduct and presentation of Ngaïssona’s defence. He had sufficient time and information to consult with his client and discern any potential prejudice to Ngaïssona should the cases be joined.²⁸

19. Secondly, the Ngaïssona Defence fails to acknowledge that the Chamber has considered the interests of the Defence before joining the proceedings and did not

²² [Prosecutor’s Response](#), ICC-01/14-01/18-139, para. 2.

²³ [Prosecutor’s Response](#), ICC-01/14-01/18-139, para. 3.

²⁴ [Prosecutor’s Response](#), ICC-01/14-01/18-139, para. 7.

²⁵ Registrar, [Notification of the Appointment of Mr Eric Plouvier as Counsel for Mr Patrice-Edouard Ngaïssona](#), 24 January 2019, ICC-01/14-01/18-100, para. 4.

²⁶ [Order seeking observations on the feasibility of joining the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona](#), 28 January 2019, ICC-01/14-01/18-103.

²⁷ [Observations on Joinder](#), ICC-01/14-01/18-118.

²⁸ See [Joinder Decision](#), ICC-01/14-01/18-87, para. 12.

discern any potential prejudice.²⁹ The Chamber expressly stated in its Joinder Decision that, pursuant to rule 136 of the Rules, it was duty bound to consider any ‘serious prejudice’ to the Defence or the interests of justice before ordering the joinder of proceedings.³⁰ This obligation exists irrespective of any submissions made by the Defence and even in the absence of such submissions. Submissions from the parties assist and inform the Chamber in reaching its decision but, ultimately, the Chamber is best placed to assess whether a joinder of the cases is warranted, having the required understanding of *both* cases, their scope, the alleged crimes, and alleged roles of the suspects. That the Chamber has this power and corresponding obligation *vis-à-vis* the Defence is clear also based on the fact that the Chamber may join (or sever) cases *proprio motu*, pursuant to rule 136 of the Rules.

20. Thirdly, the Chamber considers that the First Issue does not affect the ‘expeditious conduct of the proceedings’. To the contrary, had the Chamber requested that the newly appointed Defence team submit further observations, this would have delayed the Joinder Decision and, with it, the entire pre-trial proceedings. Ensuring the continuation of proceedings without delay is a course of action that is consistent with the rights of the suspect, as provided for in article 67(1)(c) of the Statute, in conjunction with rule 121(1) of the Rules.

21. Lastly, the Chamber finds that the First Issue equally does not affect the outcome of the trial. The Chamber recalls that ‘the joinder of the cases in the proceedings leading to the confirmation hearing does not preclude the Defences for Yekatom and Ngaïssona from seeking severance at a later stage, if any’.³¹ At the current stage, however, the fairness and expeditiousness of proceedings dictates that the cases be joined.³²

22. In light of the foregoing, the Chamber finds that the First Issue identified by the Ngaïssona Defence does not ‘significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial’ within the meaning of article 82(1)(d) of

²⁹ [Joinder Decision](#), ICC-01/14-01/18-87, paras 12-13.

³⁰ [Joinder Decision](#), ICC-01/14-01/18-87, para. 10.

³¹ [Joinder Decision](#), ICC-01/14-01/18-87, para. 12.

³² See [Joinder Decision](#), ICC-01/14-01/18-87, para. 13.

the Statute. It follows that there is no need to delve into the remaining requirements of article 82(1)(d) of the Statute.

B. The Second Issue

23. The Ngaïssona Defence submits that the Joinder Decision was premature and entirely speculative when relying on the expectation that the evidence and issues in the two cases were largely the same.³³ According to the Ngaïssona Defence, the Chamber may order a joinder of the cases only once the charges are known, *i.e.* when the Prosecutor has submitted the document containing the charges.³⁴ Prior to that time, the Chamber is not in a position to correctly appreciate the nature and content of the charges – including, importantly, the modes of liability – based solely on warrants of arrest or applications for warrants of arrest.³⁵

24. The Ngaïssona Defence makes similar or identical submissions to the First Issue regarding the remaining requirements of article 82(1)(d) of the Statute, highlighting in particular that a premature joinder of the cases exposes Ngaïssona ‘to the risk of future severance proceedings, which would necessarily impair the expeditiousness of the overall proceedings’.³⁶

25. The Yekatom Defence endorses, in essence, the arguments made by the Ngaïssona Defence.³⁷ It submits, in addition, that the Chamber’s conclusion that ‘the information available to the Defence is sufficient to discern any potential prejudice’ is manifestly unreasonable and constitutes an error of law connected to the Second Issue.³⁸ The Yekatom Defence finally adds that, if it were to become necessary to sever the proceedings at a later stage, the prejudice to Yekatom would be much greater.

26. The Prosecutor submits, in response, that the Defence failed to identify an appealable issue and merely disagrees with the Chamber’s assessment.³⁹ According to

³³ [Ngaïssona Request for Leave to Appeal](#), ICC-01/14-01/18-127, paras 22, 30-31.

³⁴ [Ngaïssona Request for Leave to Appeal](#), ICC-01/14-01/18-127, paras 23-25.

³⁵ [Ngaïssona Request for Leave to Appeal](#), ICC-01/14-01/18-127, paras 25-29.

³⁶ [Ngaïssona Request for Leave to Appeal](#), ICC-01/14-01/18-127, para. 38.

³⁷ [Yekatom Request for Leave to Appeal](#), ICC-01/14-01/18-128, paras 3-4.

³⁸ [Yekatom Request for Leave to Appeal](#), ICC-01/14-01/18-128, paras 5-6.

³⁹ [Prosecutor’s Response](#), ICC-01/14-01/18-139, para. 5.

the Prosecutor, the Chamber did not engage in speculation, but rather, based its determination on a holistic assessment of all information available to it.⁴⁰ The Prosecutor further submits that the Appeals Chamber has already determined that the Pre-Trial Chamber can join proceedings even before charges have been formally submitted.⁴¹ In any case, she argues that the Second Issue – as the first one – does not ‘significantly affect the fairness of the proceedings or the outcome of the trial, and [its] immediate resolution would delay, not materially advance, the proceedings’.⁴²

27. The Chamber considers that the Second Issue, as presented by the Defence, does not constitute an ‘appealable issue’ arising from the Joinder Decision. Firstly, the Defence is misrepresenting the Joinder Decision when stating that the Chamber relied on the mere expectation that the evidence and issues in the two cases were largely the same, which was speculative and premature.⁴³ The Chamber based its decision, *inter alia*, on the findings that: (i) ‘the contextual elements of the alleged crimes against humanity and war crimes in both cases are virtually indistinguishable’; and (ii) ‘all of the crimes alleged against Yekatom are also alleged against Ngaïssona’.⁴⁴ These findings are based on the Chamber’s assessment of the facts and evidence submitted in the context of article 58 proceedings.⁴⁵ As the Prosecutor highlights, the Defence ‘simply speculates that the overlap underpinning the joinder may dissipate when charges are formally laid’.⁴⁶

28. Secondly, in claiming that the Chamber may only order a joinder of the cases once the charges are known,⁴⁷ the Defence is in fact objecting to the Court’s legal framework and jurisprudence. The Chamber recalls that the Appeals Chamber has

⁴⁰ [Prosecutor’s Response](#), ICC-01/14-01/18-139, para. 5.

⁴¹ [Prosecutor’s Response](#), ICC-01/14-01/18-139, para. 6.

⁴² [Prosecutor’s Response](#), ICC-01/14-01/18-139, paras 7-8.

⁴³ [Ngaïssona Request for Leave to Appeal](#), ICC-01/14-01/18-127, p. 7 and para. 22; [Yekatom Request for Leave to Appeal](#), ICC-01/14-01/18-128, paras 3-4.

⁴⁴ [Joinder Decision](#), ICC-01/14-01/18-87, para. 11.

⁴⁵ See [Joinder Decision](#), ICC-01/14-01/18-87, para. 11 and corresponding footnotes.

⁴⁶ [Prosecutor’s Response](#), ICC-01/14-01/18-139, para. 5.

⁴⁷ [Ngaïssona Request for Leave to Appeal](#), ICC-01/14-01/18-127, para. 23; [Yekatom Request for Leave to Appeal](#), ICC-01/14-01/18-128, paras 3-4.

already confirmed that the Pre-Trial Chamber has the power to order the joinder of cases at this stage of the proceedings.⁴⁸

29. In light of the foregoing, the Chamber finds that the Second Issue as identified by the Defence does not constitute an ‘appealable issue’ within the meaning of article 82(1)(d) of the Statute. It follows that there is no need to consider the remaining requirements of article 82(1)(d) of the Statute.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Ngaïssona Request for Leave to Appeal; and

REJECTS the Yekatom Request for Leave to Appeal.

⁴⁸ Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases](#), 9 June 2008, ICC-01/04-01/07-573; [Joinder Decision](#), ICC-01/14-01/18-87, para. 9.

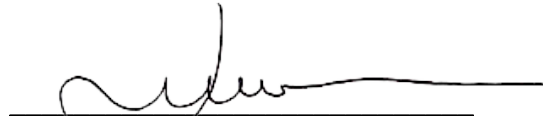
Done in both English and French, the English version being authoritative.



**Judge Antoine Kesia-Mbe Mindua,
Presiding Judge**



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Thursday, 21 March 2019

At The Hague, The Netherlands