



Original: **English**

No.: **ICC-01/14-01/18**

Date: **4 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

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-01/14-01/18-128)

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Defence request seeking leave to appeal¹ the “Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaissona and other related matters” (“Decision”)² should be rejected. It does not identify any appealable issue within the meaning of article 82(1)(d). All of the alleged ‘issues’ are predicated on a misreading of the Decision or underlying submissions,³ or merely disagree with the Chamber’s reasoned assessment. Moreover, they concern a legal question already well-settled by the Appeals Chamber.⁴ In any event, the Request does not meet the two remaining cumulative requirements under article 82(1)(d) of the Statute.

II. SUBMISSIONS

A. The Request fails to identify an appealable issue

2. The First Issue⁵ mischaracterises the Decision in asserting that it erroneously failed to address Patrice-Edouard NGAISSONA’s (“NGAISSONA”) former counsel’s “request” to permit his prospective counsel to make further or different submissions on the feasibility of joinder.⁶ *First*, NGAISSONA’s former counsel made no such ‘request.’⁷ Rather, he merely alluded to factors that he claimed ‘weighed in favour’ of such possibility.⁸ Despite the caveat,⁹ NGAISSONA’s former Counsel made

¹ ICC-01/14-01/18-127 (“Ngaissona Request”); ICC-01/14-01/18-128 (“Yekatom Request”). Since Alfred YEKATOM (“YEKATOM”) joins and largely adopts NGAISSONA’s earlier request, the Prosecution submits this consolidated response. Because of this, NGAISSONA’s and YEKATOM’s requests are both collectively referred to as the “Request” and this response’s references to each of the requests are made only for further clarity.

² ICC-01/14-01/18-87.

³ See ICC-01/04-01/10-487, paras. 32-33; ICC-01/05-01/13-1278, para. 9.

⁴ ICC-01/05-01/08-2487-Red, para. 28.

⁵ Ngaissona Request, paras. 17-21; Yekatom Request, para. 2 (incorporating NGAISSONA’s submissions by reference).

⁶ Ngaissona Request, paras. 18-21.

⁷ Ngaissona Request, para. 19.

⁸ ICC-01/14-02/18-31, para. 2.

⁹ ICC-01/14-02/18-31, para. 11.

substantive submissions opposing joinder, which the Chamber accounted for in its Decision.¹⁰

3. *Second*, and in any event, former Counsel's alleged "request" was not based on his "incapacity" to deal with the case file.¹¹ Rather, he cited largely unsubstantiated claims, including an alleged lack of opportunity to adequately consult NGAISSONA, Citrix technical difficulties, and the absence of Prosecution disclosure and statement of the charges.¹² He did not refer to any issues regarding the alleged "'incapacity'" of counsel to deal with the case file"¹³ as a result of his withdrawal.¹⁴ To this extent, the First Issue also does not arise from the Decision.

4. Moreover, NGAISSONA's former Counsel did not rely on mere "assumptions"¹⁵ in agreeing that "there appear[ed] to be a substantial overlap in the charges that militat[e]d in favour of joinder."¹⁶ To the contrary, he did so "based on the information available"¹⁷ to the Defence.

5. The Second Issue¹⁸ ignores the Chamber's holistic assessment of all information available to it showing an overlap between the two cases and justifying their joinder at this stage, notwithstanding the absence of formal charges.¹⁹ The Request merely disagrees with the Decision's careful assessment of the facts. It simply speculates that the overlap underpinning the joinder may dissipate when charges are formally laid. The Chamber based the Decision on all information before it, and reasonably did not engage in speculation as the Request does now.

¹⁰ ICC-01/14-02/18-31, paras. 3-10.

¹¹ *Contra* Ngaissona Request, para. 18.

¹² ICC-01/14-02/18-31, para. 2.

¹³ Ngaissona Request, para. 18.

¹⁴ ICC-01/14-02/18-26.

¹⁵ *Contra* Ngaissona Request, para. 18.

¹⁶ ICC-01/14-02/18-31, para. 3.

¹⁷ ICC-01/14-02/18-31, para. 4.

¹⁸ Ngaissona Request, paras. 22-32; Yekatom Request, paras. 3-6.

¹⁹ Decision, paras. 11-13.

6. In any event, the Appeals Chamber in *Katanga & Ngudjolo* has already determined that a Pre-Trial Chamber can order the joinder of charges under article 64(5), even before charges are formally submitted.²⁰ Thus, the resolution of the same question by Appeals Chamber is neither necessary at this stage, nor would it materially advance the proceedings.²¹

B. The remaining article 82(1)(d) criteria are not met

7. Even assuming *arguendo* that the Chamber were to determine that the Request identifies appealable issues, it nevertheless fails to meet the remaining two cumulative requirements under article 81(1)(d). As framed, the issues do not significantly affect the fairness of the proceedings or the outcome of the trial, and their immediate resolution would delay, not materially advance, the proceedings.²²

8. The Decision permits joinder based on the overlap in the alleged crimes against both NGAISSONA and YEKATOM in “the circumstances at hand” at “this stage.”²³ As noted, the Request speculates that if this overlap disappears when charges are formally laid, this could cause unfairness. Even if this were the case, the Request presents no substantiated argument that it would inevitably, or even reasonably, affect the fairness or the outcome of the confirmation process. Moreover, the Decision expressly “[does] not preclude the Defences for Yekatom and Ngaissona from seeking severance at a later stage.”²⁴ As such, appellate intervention would merely delay rather than advance the proceedings.

²⁰ ICC-01/04-01/07-573, paras. 7-9. It is recalled that Pre-Trial Chamber I joined the *Katanga* and *Ngudjolo* cases based on information in warrants of arrest and before the Documents Containing the Charges had been submitted. ICC-01/04-01/07-257. This did not prevent the Appeals Chamber from upholding the Pre-Trial Chamber’s decision to join the two cases.

²¹ ICC-01/05-01/08-2487-Red, para. 28.

²² *Contra* Ngaissona Request, paras. 33-42; Yekatom Request, paras. 7, 8.

²³ Decision, paras. 11-13.

²⁴ Decision, para. 12.

III. RELIEF SOUGHT

9. For the reasons set out above, the Defence request for leave to appeal should be rejected.



Fatou Bensouda, Prosecutor

Dated this 4th day of March 2019
At The Hague, The Netherlands