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**International
Criminal
Court**

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Date: **26 February
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
NGAISSONA***

Public

**Defence Request for leave to appeal the “Decision on the joinder of the cases
against Alfred Yekatom and Patrice-Edouard Ngaissona and other related matters”
(ICC-01/14-01/18-87)**

Source: Defence of Patrice-Edouard Ngaissona

Document to be notified in accordance with regulation 31 of the *Regulations of the****Court to:*****The Office of the Prosecutor**

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I. Introduction

1. The Defence of Patrice-Edouard Ngaïssona (the “Defence”) hereby seeks leave to appeal the “*Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters*” (the “Impugned Decision”) issued on 20 February 2019 pursuant to article 82(1)(d) of the Rome Statute (the “Statute”) and rule 155 of the Rules of Procedure and Evidence (“the Rules”).¹

II. Procedural history

2. On 24 January 2019, Eric Plouvier was appointed Counsel for Patrice-Edouard Ngaïssona.²
3. On 25 January 2019, Patrice-Edouard Ngaïssona made his first appearance before Pre-Trial Chamber II (the “Chamber”).³
4. On 28 January 2019, the Chamber ordered the Office of the Prosecutor (the “Prosecution”), the Defence of Alfred Yekatom (the “Yekatom Defence”) and the Defence to provide observations on the feasibility of joining the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona.⁴
5. On 4 February 2019, the Prosecution filed the “*Prosecution’s Observations Regarding Joinder*”.⁵
6. On the same day, Eric Plouvier filed the “*Requête aux fins de retrait du conseil*”, in which Mr Plouvier sought the Chamber’s leave to withdraw as counsel for Patrice-Edouard Ngaïssona.⁶

¹ ICC-01/14-02/18-34, ICC-01/14-01/18-87.

² ICC-01/14-02/18-13.

³ Transcript of 25 January 2019, ICC-01/14-02/18-T-1-ENG.

⁴ ICC-01/14-02/18-16.

⁵ ICC-01/14-02/18-24.

⁶ ICC-01/14-02/18-26-Corr.

7. On 7 February 2019, the Chamber authorised Mr Plouvier to withdraw from the present case as lead counsel.⁷
8. On 11 February 2019, both Defence teams filed their observations in relation to the feasibility of a joinder.⁸ In his observations, Mr Plouvier alerted the Chamber from the outset that he was not given the adequate means to provide all relevant and final observations and that such circumstances weighed “*in favour of the Pre-Trial Chamber permitting a newly-appointed counsel to make any further or different submissions at an appropriate time*”.⁹
9. On 15 February 2019, Mr Geert-Jan Alexander Knoops was officially appointed as the new Counsel of Patrice-Edouard Ngaïssona.¹⁰
10. On 20 February 2019, *i.e.* three (3) business days after Mr Knoops’ appointment, and while his Defence team was not yet fully constituted,¹¹ the Chamber decided to join the cases of *Prosecutor v. Alfred Yekatom* and *Prosecutor v. Patrice-Edouard Ngaïssona*.

III. Applicable Law

11. Article 82(1) of the Statute provides that:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...] (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial Chamber or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. Pursuant to rule 155(1) of the Rules:

When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall [...] make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.

⁷ “Decision on Withdrawal of Counsel”, dated 7 February 2019, ICC-01/14-02/18-30.

⁸ ICC-01/14-01/18-82; ICC-01/14-02/18-31.

⁹ ICC-01/14-02/18-31, para. 2. *See also*, ICC-01/14-02/18-31, para. 11.

¹⁰ ICC-01/14-02/18-33-Anx3.

¹¹ Lauriane Vandeler, Marion Carrin and Sara Pedroso were appointed on 20 February 2019, the day the Impugned Decision was delivered.

13. Regulation 65 of the Regulations of the Court further provides that:

1. An application for leave to appeal under rule 155 shall [...] specify the legal and/or factual reasons in support thereof. [...]
2. An application for leave to appeal under article 82, paragraph 1 (d), shall specify the reasons warranting immediate resolution by the Appeals chamber of the matter of the issue.

IV. Submissions

14. The Defence hereby submits that the Impugned Decision meets all the following legal criteria as set forth in article 82(1)(d) of the Statute:

- a. the Impugned Decision involves two appealable issues,
- b. which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,
- c. and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

- a. The Impugned Decision raises two appealable issues (the "Issues")

15. The Appeals Chamber of the Court has ruled that an "issue" is "*a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination, i.e. not merely a question over which there is a disagreement or conflicting opinion*".¹²

16. The Impugned Decision raises Issues, which clearly do not merely consist of a disagreement or a conflicting opinion. Rather, they raise fundamental

¹² *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, ICC-01/04-168, 13 July 2006, para. 9.

questions of law, regarding fair trial and due process rights guaranteed to suspects and accused persons by the Statute and internationally recognized human rights, namely under Articles 67 and 21(3). More specifically, the Issues raise, among others, a fundamental question of procedural law as to a suspect's right to be heard and the right to have adequate time for the preparation of the defence, as provided for in Article 67(1)(b) of the Statute, within the context of a joinder request. Moreover, the Issues also trigger a fundamental question of law as to the correct legal interpretation and application of Rule 136 of the Rules, in conjunction with Article 64(5) of the Rome Statute, for which a resolution is essential at this crucial pre-trial stage. Finally, the Issues raise an important question of law concerning the applicable definition and delimitation of the charges prior to the order on a joinder of cases.

17. In the Defence's view, the Impugned Decision raises the following appealable 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"*

18. The Defence respectfully submits that the Chamber failed to provide the opportunity to the Defence to present adequate and verified observations on the question of joinder. Rather, it relied on previous counsel's partial observations,¹³ based largely on assumptions, in a context where previous counsel was withdrawing from the case on the basis of his "incapacity" to deal with the case file¹⁴ and despite his own admission that his submissions

¹³ ICC-01/14-02/18-31.

¹⁴ ICC-01/14-02/18-26-Corr, para. 5.

were made without Mr Ngaïssona's prior consultation on this matter and without having had proper access to the case file.¹⁵ Indeed, technical difficulties involving Citrix would have precluded him access to relevant materials.

19. The Chamber failed to address former counsel's request to allow the yet to be appointed new Counsel "to make any further or different submissions" in respect of the question of joinder.¹⁶ Mr Geert-Jan Alexander Knoops has been formally appointed on 15 February 2019 and has been busy on 18 and 19 February 2019 constituting his team. Part of it only was formally appointed on 20 February 2019, the very date on which the Chamber rendered the Impugned Decision. The Defence was therefore deprived from the possibility to present Mr Ngaïssona's views on the feasibility of the joinder, in violation of Article 67(1)(b) of the Statute, which would have been the Defence's priority task, had the Decision not been rendered in the meantime.
20. As a result, the Impugned Decision, including conclusions as to the failure of the Defence to demonstrate arguments against the joinder,¹⁷ cannot apply to the Defence, which was not adequately heard.
21. In light of the above arguments, the Defence submits that the above issue arising out of the Impugned Decision constitutes an appealable issue within the meaning of Article 82(1)(d) of the Statute.
- (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*

¹⁵ ICC-01/14-02/18-31, paras 2, 12. See also Impugned Decision, paras 7, 9, 12.

¹⁶ ICC-01/14-02/18-31, para. 2.

¹⁷ See Impugned Decision, para. 12, noting that "neither Defence has demonstrated that joining the cases at this stage of the proceedings would seriously prejudice the suspects or would be contrary to the interests of justice".

22. The Defence respectfully submits that the Chamber based its reasoning to join the cases against Patrice Ngaiisona and Alfred Yekatom on the mere expectation that the evidence the Prosecution intends to rely on to establish the charges in the two cases against the suspects will be the same,¹⁸ whereas, at this stage, such an expectation is speculative and premature.
23. Article 64(5) of the Statute provides that “the Trial Chamber may, as appropriate, direct that there be a joinder or severance in respect of charges against more than one accused”. The charges hence constitute the centre of gravity of a decision of joinder or severance, which is reinforced by Rule 136(1) of the Rules, which provides that “[p]ersons accused jointly shall be tried together”.
24. The Defence submits that only when the charges are known to the Chamber, the parties and participants, the Chamber may order a joinder of cases. A “charge” is as a complex notion which may not be reduced to a mere accusation but is composed of three intrinsic elements: (i) facts, (ii) a legal characterization of the facts and (iii) a liability mode.¹⁹ In the *Bemba* case,²⁰ Pre-Trial Chamber III explained why the liability mode is intrinsic within the nature, cause and content of the charges and its importance within the concept of charges vis-à-vis the rights of the Defence:

“If the Chamber were to read article 61(7)(c)(ii) of the Statute in such a manner as to exclude the mode of liability, considerations of fairness would also arise since the Defence would be deprived of its rights to be informed promptly and in detail of the nature, cause and content of the charges, in accordance with article 67(1)(a) of the Statute, and of the opportunity to submit observations thereto”.²¹

¹⁸ ICC-01/14-02/18-34, para. 11: “[...] it is expected that the evidence the Prosecutor intends to rely on to establish the charges against the suspects will also be substantially the same.”

¹⁹ See Regulation 52 of the Regulations of the Court; Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute, Pre-Trial Chamber III, 3 March 2009, ICC-01/05-01/08-388, para. 28.

²⁰ ICC-01/05-01/08-388.

²¹ *Ibid.* para. 28.

25. The Defence submits that at the confirmation stage before the Court, only the Document Containing the Charges (“the DCC”) provides a complete and updated presentation of the charges brought against a Suspect by the Prosecution²² and that, in the absence of a DCC, like in the case at hand, a Chamber may not gain the necessary complete and updated knowledge of the charges to proceed to a joinder of cases.
26. In this regard, the Defence also submits that the warrant of arrest, and the application for a warrant of arrest cannot suffice to gain a complete and updated knowledge of the charges. Pursuant to Article 58 of the Statute, the warrant of arrest shall contain (a) the name of the person and any other relevant identifying information, (b) a specific reference to the crimes within the jurisdiction of the Court for which the person’s arrest is sought, and (c) a concise statement of the facts which are alleged to constitute those crimes. If it appears that a warrant of arrest, as provided for by the Statute, contains the first two elements necessary to appreciate the charges brought against a Suspect, namely the facts and their legal characterization, through conditions (b) and (c), Article 58 of the Statute does not require the Prosecution to state the modes of liability in its application for a warrant of arrest. Therefore, the warrant of arrest has not been conceived by the Statute as a document aiming at giving a full knowledge of the charges that will allow for an order to join cases.
27. In the *Katanga and Ngudjolo* case, Pre-Trial Chamber I based the joinder on the common application for a warrant of arrest against Germain Katanga and Mathieu Ngudjolo by the Prosecution,²³ a situation which led to the later severance of the joint case due to a change to the legal characterisation of one of the modes of liability:

²² See Regulation 52 of the Regulations of the Court.

²³ Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI, Pre-Trial Chamber I, 10 March 2008, ICC-01/04/01/07-257, p. 6.

“[t]he Majority will therefore propose herein change to the legal characterisation not of one of the crimes listed among the charges but of one of the modes of liability, for the Accused Germain Katanga alone.

[...]

As this step does not concern the Accused Mathieu Ngudjolo, the decision also severs the charges against him.”²⁴

28. The joinder and later severance of the cases in the *Katanga and Ngudjolo* case further reinforces the importance of the modes of liability to assess the charges. The fact that an application for a warrant of arrest or a warrant of arrest itself contains initial observations on the modes of liability, which is the case here,²⁵ cannot supplement the absence of a DCC that would contain proper notice and an assessment of the modes of liability.
29. Although the Prosecution had issued a DCC in the *Katanga* case,²⁶ the DCC in the *Ngudjolo* case had not been issued at the moment the cases were joined. In the present case, given the existence of the *Katanga and Ngudjolo* precedent, a joinder processed on the basis of warrants of arrest or applications for warrants of arrest,²⁷ which contain evidence that the Defence was not able to debate,²⁸ and without any DCC, do not enable the Chamber to correctly appreciate the nature, the content and the modes of liability of the charges.
30. For the foregoing reasons, the Defence submits that the Impugned Decision is premature and based on entirely speculative information, in the absence of a DCC in either of the cases at hand.

²⁴ Décision relative à la mise en œuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés, English version, Trial Chamber II, 21 November 2012, ICC-01/04-01/07-3319, paras 7-9.

²⁵ See for Patrice-Edouard Ngaïssona, ICC-01/14-02/18-2-Conf-Exp, para. 20.

²⁶ ICC-01/04-01/07-170.

²⁷ Noting that the Defence currently does not have access to the application for a warrant of arrest, as presented by the Prosecution.

²⁸ See for Patrice-Edouard Ngaïssona, ICC-01/14-02/18-2-Conf-Exp.

31. The Prosecution merely expects that the anticipated evidence will be the same. Similarly, the Chamber adopted this mere expectation.
32. In sum, the two Issues are appealable in that their resolution is essential for the determination of matters arising in the case and do not consist of mere disagreements of differences of opinions. Moreover, the Issues arise directly from the Impugned Decision on joinder.
- b. The resolution of the issue would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial
33. The two disjunctive criteria to be satisfied under the second prong of the test provided under Article 82(1)(d) are met.
34. First, the resolution of the Issues would significantly affect the fair and expeditious conduct of the proceedings. This Court has held that fairness is preserved when *“a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”*.²⁹ In other words, one of the fundamental aspects of the right to fair trial is that proceedings should be adversarial in nature and that there should be equality of arms, in the sense of a fair balance between the parties.³⁰
35. This Court has held that the right to a fair trial should be practical and effective³¹ and that the principles of a fair trial are not confined to the trial proceedings but also apply to the criminal investigation and pre-trial

²⁹ Prosecutor v. Bemba, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para.14.

³⁰ Prosecutor v. Bemba, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para. 14.

³¹ Prosecutor v. Bemba, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, 31 July 2008, para. 22.

proceedings.³²

36. The Issues go to the very heart of fairness since they concern Mr Ngaiissona's due process rights, including his right to be heard. There is a clear imbalance between the Defence and the Prosecution in that the Defence was not provided an opportunity to adequately present its views on a joinder, breaching the principle of equality of arms. A suspect's right to be heard is a fundamental component to a fair trial. The Defence is at a clear substantial disadvantage *vis-à-vis* the Prosecution.

37. Furthermore, the concept of "expeditiousness" must be read as "*closely linked to the concept of proceedings 'within a reasonable time', namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*".³³ The question of Mr Ngaiissona's right to present his views on the issue of joinder as well as the Pre-Trial Chamber's potential misapprehension of the "serious prejudice to the accused" under Rule 136 of the Rules could considerably delay proceedings and lead to extensive and unnecessary further litigation which could impact the expeditiousness of proceedings.

38. With regards to the Second Issue, a premature joinder, as ordered in the Impugned Decision, exposes Mr Ngaiissona to the risk of future severance proceedings, which would necessarily impair the expeditiousness of the overall proceedings, especially in light of the Chamber's position that "*the joinder of the cases in the proceedings leading to the confirmation hearing does not preclude the Defences for Yekatom and Ngaiissona from seeking severance at a later stage, if any*".³⁴ By issuing the Impugned Decision, the Chamber has not taken into account the consequences that a later severance of the cases, due to a

³² Situation in the Democratic Republic of Congo, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 11.

³³ Prosecutor v. Bemba, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para. 17.

³⁴ Impugned Decision, para. 12.

premature joinder, would have on the expeditiousness of the proceedings.

39. Second, the Issues satisfy the condition that the Impugned Decision involves issues that would significantly affect the outcome of the trial.

40. The Impugned Decision has significant and irreversible repercussions on the conduct of proceedings, which is why it requires immediate resolution. It will shape to a large extent the substantive and procedural modalities of the pre-trial and trial proceedings, in the situation where the charges would be confirmed against Mr Ngaïssona. For instance, a joinder would impact the Prosecution's presentation of the evidence, witness examination and cross-examination, protocols and directions on conduct of proceedings, Defence strategies and investigations, all of which could have a significant impact on the outcome of the trial, and ultimately would affect the determination of Mr Ngaïssona's individual criminal responsibility.

c. The issue requires an immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

41. The Appeals Chamber has held that for leave to appeal to be granted, the issue must be such "*that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial*".³⁵ "Advancing" the proceedings has been identified by the Appeals Chamber as "*removing doubts about the correctness of a decision or mapping a course of action along the right lines*" and the term "immediate" has been defined as "*underlin[ing] the importance of avoiding errors through the mechanism provided by subparagraph (d) by the prompt reference*

³⁵ Situation in the Democratic Republic of Congo, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 14.

*of the issue to the court of appeal”.*³⁶

42. Given that the Issues directly concern the right of Mr Ngaïssona to a fair trial and to mount an effective defence, as well as the Pre-Trial Chamber’s application of Rule 136 of the Rules, the immediate resolution of these Issues by the Appeals Chamber will materially advance the proceedings by “[r]emoving doubts about the correctness of [the] decision” which may later “unravel the judicial process”.³⁷ If leave to appeal is denied, the Impugned Decision could taint nearly every aspect of the case going forward. For instance, if it were to be determined that the Pre-Trial Chamber had not properly assessed the potential serious prejudice criterion of Rule 136 of the Rules caused to Mr Ngaïssona or that Mr Ngaïssona’s fundamental procedural rights were not respected, this could jeopardize the integrity of proceedings. Determination of the Issues by the Appeals Chamber at this stage would, therefore, ensure that proceedings “follow the right course”, and “provides a safety net for the integrity of the proceedings”.³⁸

RELIEF SOUGHT

43. For the foregoing reasons, the Defence respectfully requests the Chamber to GRANT leave to appeal the Impugned Decision.

³⁶ Situation in the Democratic Republic of Congo, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, paras 14-19; *See also*, Prosecutor v. Bemba, *Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure*, ICC-01/05-01/08-75, 25 August 2008, para. 20.

³⁷ Situation in the Democratic Republic of Congo, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, paras 15-16.

³⁸ Situation in the Democratic Republic of Congo, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 15.

Respectfully submitted,

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaissona

Dated this 26 February 2019,
At The Hague, the Netherlands.