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No: **ICC-01/14-02/18**  
Date: **11 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. PATRICE-EDOUARD NGAÏSSONA***

**Public**

**Observations on Joinder**

**Source:** Defence for Patrice-Edouard Ngaïssona

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

**The Office of the Prosecutor**  
 Ms Fatou Bensouda, Prosecutor  
 Mr James Stewart

**Counsel for Patrice Edouard Ngaïssona**  
 Me. Eric Plouvier

**Legal Representatives of the Victims****Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants  
(Participation/Reparation)****The Office of Public Counsel for Victims****The Office of Public Counsel for the  
Defence****States' Representatives****Amicus Curiae****REGISTRY**

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**Registrar**  
 Mr Peter Lewis

**Defence Support Section****Victims and Witnesses Unit****Detention Section**

**Victims Participation and Reparations  
 Section**

**Other**

## I. INTRODUCTION

1. The Defence of Patrice-Edouard Ngaïssona offers these submissions pursuant to the the Pre-Trial Chamber's order of 28 January 2019,<sup>1</sup> and following those of the Prosecution dated 4 February 2019, whose title appears to assume that joinder has already occurred.<sup>2</sup>
2. The Defence underscores that it has not had the opportunity to consult Mr. Ngaïssona adequately on all matters potentially relevant to this submission; that technical difficulties involving Citrix have precluded access to relevant materials; that virtually no disclosure has been made by the Prosecution; and that not even the Prosecution's application for an arrest warrant, let alone a statement of the charges, has yet been produced. These factors weigh in favour of the Pre-Trial Chamber permitting a newly-appointed counsel to make any further or different submissions at an appropriate time.
3. The Defence does not disagree that there appears to be a substantial overlap in the charges that militates in favour of joinder. However, the Statute does not clearly empower the Pre-Trial Chamber to order joinder at this stage. The Defence disagrees with the Prosecution's submissions as to timing of the confirmation hearing, and disagrees that all decisions in the *Yekatom* case should bind Mr. Ngaïssona. To the contrary: (i) the confirmation hearings should be held on the date already fixed for the *Yekatom* case; and (ii) Mr Ngaïssona should be permitted to litigate any matters *de novo*. Natural justice requires no less.

## II. JOINDER

4. The Defence does not disagree, based on the information available to it, that the overlap between the warrants of arrest against Mr Yekatom and Mr Ngaïssona suggests that joinder is warranted at some stage.
5. It is regrettable, however, that the Prosecution has not yet produced a document defining the "charges" upon which joinder is to be based according to the language of Article 64(5).<sup>3</sup> The lack of definition of the "charges," accordingly, raises doubt as to

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<sup>1</sup> Ngaïssona, Order seeking observations on the feasibility of joining the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-02/18-16, 28 January 2019 ("Prosecution Observations").

<sup>2</sup> *Yekatom & Ngaïssona*, Prosecution's Observations Regarding Joinder, ICC-01/14-01/18 & ICC-01/14-02/18, 4 February 2019.

whether it is suitable or within the Pre-Trial Chamber's powers to order joinder now. This doubt is reinforced by the placement of Article 64(5) in Part VI of the Statute ("the Trial"), and not in Part V of the Statute ("Investigation and prosecution") that regulates the confirmation of charges. Although the Katanga Pre-Trial Chamber found in 2008 that the placement of Article 64(5) did "not preclude joint proceedings at the Pre-Trial stage,"<sup>4</sup> subsequent Appeals Chamber jurisprudence has suggested a more textually restrained approach in respect of fundamental powers.<sup>5</sup> Furthermore, few if any of the practical aspects cited by the Prosecution will offer a significant saving of time or resources at the confirmation stage.<sup>6</sup>

### III. TIMING

6. The Prosecution submits that the confirmation date currently set for Mr Ngaiissona's confirmation hearing – 18 June 2019 – should be adopted for both accused. Rather than committing unequivocally to this date, this date is referred to as "a good target."<sup>7</sup>
7. Confirmation hearings should be heard as soon as possible. The Prosecution, having sought and obtained an arrest warrant, should be in a position to effect full disclosure virtually immediately. It should also be ready to proceed to a confirmation hearing on the basis of those materials alone. Accordingly, confirmation hearings can and should be heard as soon as the Defence has had a reasonable opportunity to review that disclosure and to conduct any necessary investigations. The Prosecution, conversely, should not be permitted to delay the confirmation hearing to conduct additional investigations.
8. The Defence submits that the Yekatom confirmation date should be adopted as the date for any joined case. The Defence should be accorded wide latitude to request a delay at a later stage based on its review of the disclosure. For the time being, however, the

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<sup>3</sup> ICC Statute, Art. 64(5) ("Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused") (underline added).

<sup>4</sup> Katanga, Decision on Joinder of the Cases against Germain KATANDA and Mathieu NGUDJOLO CHUI, ICC-01/04-01/07-257, 10 March 2008, p. 9.

<sup>5</sup> Bemba et al., Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/05-01/13-2276-Red, 8 March 2018, para. 80 ("in light of the above reasons, the Appeals Chamber considers that the Trial Chamber erred in law in finding that it had the inherent power to impose a suspended sentence, and therefore acted ultra vires in ordering the conditional suspension of the remaining terms of imprisonment imposed on Mr Kilolo and Mr Mangenda.")

<sup>6</sup> Prosecution Observations, para. 6.

<sup>7</sup> Prosecution Observations, para. 3.

Prosecution should be compelled to proceed according to the timeline established in the *Yekatom* case.

#### IV. PRIOR DECISIONS SHOULD NOT BIND MR NGAÏSSONA'S DEFENCE

9. The "right to be heard" has been expressly affirmed and broadly defined by the Appeals Chamber.<sup>8</sup> Mr Ngaïssona cannot properly be bound by decisions on which he has had no opportunity to comment. It would be equally improper to impose a burden on Mr Ngaïssona to challenge any decisions with which he disagreed, to be evaluated according to the higher threshold of reconsideration. The Prosecution invocation of efficiency<sup>9</sup> -- which is, in any event, overstated -- must give way to fundamental fairness.
10. By one procedure or another, Mr Ngaïssona's defence must have the opportunity to litigate every judicial decision so far, and to have the Trial Chamber approach those decisions as against him according to a *de novo* standard.

#### V. CONCLUSION

11. Any new counsel for Mr Ngaïssona should be given wide latitude, in light of the circumstances described above, to make any new or different submissions on the issue of joinder and its modalities. Subject to that caveat, the Defence of Mr Ngaïssona accepts that there appear to be indications that joinder is suitable, but questions whether the Statute confers authority for joinder at the confirmation stage. The confirmation hearing should be heard as early as possible, with the Ngaïssona Defence accorded wide latitude to assess the situation on the basis of prompt and full disclosure of the materials in support of the charges. Finally, no decisions taken to date in the *Yekatom* case should be treated as binding as against Mr Ngaïssona, which would be a violation of natural justice.

  
 Eric Plouvier  
 Counsel for Patrice-Edouard Ngaïssona

<sup>8</sup> *Katanga & Ngudjolo*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", 29 July 2010, para. 56.

<sup>9</sup> Prosecution's Observations, paras. 14-15.

Respectfully submitted this 11 February 2019,  
At Paris, France.