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**No. ICC-01/14-02/18
Date: 20 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

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 Edouard-Patrice Ngaïssona
Geert-Jan 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 (the “Chamber”) of the International Criminal Court (the “Court”) issues this decision on joinder of the cases against Alfred Yekatom (“Yekatom”) and Patrice-Edouard Ngaïssona (“Ngaïssona”).

I. PROCEDURAL HISTORY

1. On 30 October 2018, the Prosecutor submitted under seal, *ex parte*, an application for the issuance of warrants of arrest for Yekatom and Ngaïssona (the “Application of 30 October 2018”).¹

2. On 11 November 2018 and 7 December 2018, the Chamber issued warrants of arrest for Yekatom and Ngaïssona respectively, for their alleged criminal responsibility for crimes against humanity and war crimes committed in various locations in the Central African Republic (the “CAR”).² On 17 November 2018, Yekatom was surrendered to the Court and arrived at the Detention Centre of the Court on the following day,³ while Ngaïssona was arrested by the French authorities on 12 December 2018 and surrendered to the Court on 23 January 2019.⁴

3. On 23 November 2018, Yekatom made his first appearance before the Chamber during which the confirmation hearing was scheduled to commence on Tuesday, 30 April 2019.⁵ On 25 January 2019, Ngaïssona made his first appearance before the Chamber during which the confirmation hearing was scheduled to commence on 18 June 2019.⁶

¹ ICC-01/14-18-US-Exp, together with 11 under seal, *ex parte* annexes.

² *Prosecutor v. Alfred Yekatom*, Pre-Trial Chamber II, “Warrant of Arrest for Alfred Yekatom”, 11 November 2018, ICC-01/14-01/18-1-US-Exp; a public redacted version of the warrant was issued on 17 November 2018, *see* ICC-01/14-01/18-1-Red; *Prosecutor v. Patrice-Edouard Ngaïssona*, Pre-Trial Chamber II, “Warrant of Arrest for Patrice-Edouard Ngaïssona”, 7 December 2018, ICC-01/14-02/18-2-US-Exp; a public redacted version was registered on 13 December 2018, ICC-01/14-02/18-2-Red.

³ ICC-01/14-01/18-17-US-Exp, paras 19, 25.

⁴ ICC-01/14-02/18-9-US-Exp; ICC-01/14-02/18-14-US-Exp, paras 5 and 15.

⁵ ICC-01/14-01/18-T-1-ENG, p.8.

⁶ ICC-01/14-02/18-T-1-ENG, p.9.

4. On 28 January 2019, the Chamber ordered the Prosecutor, the Defence of Yekatom and the Defence of Ngaïssona to provide observations on the feasibility of joining the cases against Yekatom and Ngaïssona.⁷

5. On 4 February 2019, the Prosecutor filed the “Prosecution’s Observations Regarding Joinder”⁸ (the “Prosecutor’s Observations”), submitting that joinder “is the most appropriate course of action at this stage”.⁹ The Prosecutor argues that in light of the “significant duplication in the evidence and issues relevant to both Suspects” joining the cases would “enhance fairness and judicial economy”. In particular, the Prosecutor submits that joinder would prevent both “the unnecessary costs and work of having witnesses testify more than once” and “the duplication or inconsistent presentation of evidence”. Furthermore, joinder would allow for issues affecting both cases, such as disclosure, to be addressed by the Chamber “consistently, fully and efficiently”. In addition, the Prosecutor submits that joinder at this stage would not unfairly prejudice either suspect given the overlap between the two cases. Consequently, the Prosecutor requests that the cases be joined and that the date for the confirmation hearing be set to 18 June 2019. The Prosecutor requests further that with respect to decisions issued to date, particularly on disclosure, these decisions should be adopted in the joint case *mutatis mutandis* to “ensure that the Parties are able to continue discharging their duties, efficiently, and in line with the Chamber’s prior instructions”.

6. On 11 February 2019, the Defence for Yekatom filed the “Observations de la Défense de M. Alfred Rombhot Yekatom sur la faisabilité de joindre les affaires « Le Procureur c. Alfred Yekatom » et « Le Procureur c. Patrice-Édouard Ngaïssona »”¹⁰ (“Yekatom’s Observations”). The Defence for Yekatom is opposed to joining the two cases at this stage and request the Chamber to postpone its decision until it is able to make more informed observations based on an understanding of what the specific charges against Yekatom and Ngaïssona will be and the evidence that the Prosecutor

⁷ ICC-01/14-01/18-67 and ICC-01/14-02/18-16.

⁸ ICC-01/14-01/18-76 and ICC-01/14-02/18-24.

⁹ Prosecutor’s Observations, para. 1 *et seq.*

¹⁰ ICC-01/14-01/18-82.

intends to present.¹¹ In the event that the Chamber decides to proceed with its decision to join the cases and to schedule the confirmation hearing to commence on 18 June 2019, the Defence for Yekatom request that the Chamber maintain the date without the possibility of further delay and order the Prosecutor to file the document containing the charges against him by 1 April 2019.

7. On 12 February 2019, the Defence for Ngaïssona filed its “Observations on Joinder”¹² (“Ngaïssona’s Observations”). In essence, the Defence for Ngaïssona submit that while joinder may be warranted at some stage it is questionable whether it is “within the Pre-Trial Chamber’s powers to order joinder now”.¹³ In addition, they submit that in the event that the cases are joined the confirmation hearing should commence as early as possible, that being Tuesday, 30 April 2019, the date set in the Yekatom case. Moreover, they argue that any decision taken to date in the Yekatom case should in no way bind Ngaïssona as this would constitute “a violation of natural justice”.

II. ANALYSIS

A. *The issue of joinder*

8. Article 64(5) of the Rome Statute (the “Statute”) provides that “[u]pon 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”. Rule 136 of the Rules of Procedure and Evidence (the “Rules”) provides further that:

1. Persons accused jointly shall be tried together unless the Trial Chamber, on its own motion or at the request of the Prosecutor or the defence, orders that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interests of justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2.
2. In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.

¹¹ Yekatom’s Observations, paras 3, 4, 15, 16, 17, 18, and 38.

¹² ICC-01/14-02/18-31.

¹³ Ngaïssona’s Observations, paras 3 and 5.

9. At the outset the Chamber recalls that Pre-Trial Chamber I has previously interpreted the abovementioned provisions by noting that “[...] the ordinary meaning of article 64(5) of the Statute and rule 136 of the Rules provides that there shall be joint trials for persons accused jointly, and establishes a presumption for joint proceedings for persons prosecuted jointly”.¹⁴ Pre-Trial Chamber I went on to find that the placement of article 64(5) in Part VI of the Statute (which regulates “The Trial” proceedings) as opposed to Part V (which regulates “Investigations and Prosecutions”) did not “preclude joint proceedings at the Pre-Trial stage, but rather supports the general rule that there is a presumption of joint proceedings for persons prosecuted jointly”.¹⁵ The Appeals Chamber later confirmed that “the interpretation accorded to article 64(5) of the Statute and rule 136 of the Rules by the Pre-Trial Chamber in no way violates the principle of legality”.¹⁶ In light of this the Chamber finds that, contrary to the submission of the Defence for Ngaïssona, the Chamber’s power to order joinder of the cases at this stage of the proceedings is well founded in the Court’s statutory instruments. In this respect, the suggestion of the Defence for Ngaïssona that subsequent Appeals Chamber pronouncements may have an impact on the Chamber’s power is rejected for being misleading and irrelevant.¹⁷

10. As such, the Chamber understands article 64(5) of the Statute and rule 136 of the Rules as conferring broad discretion on the Chamber to join or sever charges against more than one person. Whether separate trials are necessary in order to avoid ‘serious prejudice’ to the suspects and to protect the interests of justice, as provided in

¹⁴*Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, “Decision on the Joinder of Cases against Germain Katanga and Mathieu Ngudjolo Chui”, 10 March 2008, [ICC-01/04-01/07-257](#), pp 7.

¹⁵ [ICC-01/04-01/07-257](#), pp 8-9.

¹⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, “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 \(OA6\)](#), para. 9.

¹⁷ Ngaïssona’s Observations, para. 5 referring to *Prosecutor v. Jean-Pierre Bemba et al*, Appeals Chamber, “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, where the Appeals Chamber stated: “[i]n 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”.

rule 136 of the Rules, is a consideration to be taken into account in all cases where joint proceedings are contemplated.

11. In the circumstances at hand, the Chamber notes that the contextual elements of the alleged crimes against humanity and war crimes in both cases are virtually indistinguishable in that they constitute the same widespread and systematic attack against the civilian population (more specifically a widespread and systematic attack against “the Muslim population in Bangui and at least 5 western CAR Prefectures in retribution for Seleka crimes”)¹⁸ and the same armed conflict not of an international character (more specifically “an armed conflict not of an international character [...] on the territory of the CAR since at least September 2013 until at least December 2014 between the Seleka and the Anti-Balaka”).¹⁹ Moreover, the specific crimes alleged to have been committed by Yekatom and Ngaïssona correspond to a large extent in that all of the crimes alleged against Yekatom are also alleged against Ngaïssona including those committed in Bangui and the Lobaye Prefecture.²⁰ As a result, 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.

12. The Chamber notes 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. In the Chamber’s view the information available to the Defence is sufficient to discern any potential prejudice that may impede the rights of the suspects or the interest of justice should the cases be joined. A postponement of the Chamber’s decision in this regard on that basis is therefore unwarranted. In any event, the Chamber notes 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.

13. In the Chamber’s view, joint proceedings against Yekatom and Ngaïssona will serve to enhance the fairness and expeditiousness of the proceedings by avoiding the duplication of evidence, inconsistency in the presentation and assessment of evidence,

¹⁸ See ICC-01/14-02/18-2-Red, para. 14 and ICC-01/14-01/18-1-Red, para. 16.

¹⁹ See ICC-01/14-02/18-2-Red, para. 13 and ICC-01/14-01/18-1-Red, para. 15.

²⁰ See ICC-01/14-02/18-2-Red, pp 11-14 and 17-19 and ICC-01/14-01/18-1-Red, pp 12-17.

undue impact on witnesses and victims and unnecessary expense. The Chamber therefore considers that separate proceedings are not necessary at this stage in order to protect the interests of justice.

14. Accordingly, pursuant to article 64(5) of the Statute and rule 136 of the Rules, the Chamber finds it appropriate to join the cases against Yekatom and Ngaïssona. The Chamber shall ensure the fairness of these joint proceedings and under rule 136(2) of the Rules it shall accord the same rights to each suspect as if they were being tried separately.

B. Other related Matters

15. Having found that the cases against Yekatom and Ngaïssona are to be joined the Chamber now addresses the practical consequences of its decision on the case of the *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (the “joint case”).

(a) The Date of the Confirmation Hearing

16. The Chamber recalls that the dates for the commencement of the confirmation hearings for the Yekatom and Ngaïssona cases have previously been scheduled for 30 April 2019 and 18 June 2019 respectively. Given that the cases are now joined, it is necessary to vacate these dates and to set a new date for the commencement of the confirmation hearing in the joint case.

17. The Chamber notes the submission of the Defence for Ngaïssona in this regard recommending that the new date be set to 30 April 2019 to allow for the hearing to commence as soon as possible. The Prosecutor and the Defence for Yekatom on the other hand are unopposed to the date being set to 18 June 2019 to allow adequate time for the Defence to prepare any challenges to the evidence and the charges, if they so wish.

18. With respect to the recommendation of the Defence for Ngaïssona, the Chamber notes that as early as 25 January 2019, during his first appearance before the Chamber, the date for the commencement of the confirmation hearing for Ngaïssona was scheduled for 18 June 2019. Since then the Defence for Ngaïssona has not submitted any observations concerning the scheduled date until it was prompted to do so by the Chamber on 11 February 2019. Nevertheless, the Chamber is of the view

that the date of 30 April 2019 may be prejudicial to Ngaïssona's right to have adequate time to fully prepare for the hearing. As such the Chamber considers that the date of 18 June 2019 is a more appropriate date. In this regard, the Chamber emphasises that any request to amend this new date will only be entertained if exceptional circumstances are established. Furthermore, the Chamber recalls that in accordance with rule 121(3) of the Rules, the Prosecutor shall provide, the Chamber and the persons concerned no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which she intends to present at the hearing.

(b) Joint Case Record

19. As a result of the joining of the two cases the documents contained in each case record must become part of the record of the joint case. Accordingly, the Chamber considers that the most efficient way of achieving this is to rename the record of the case of *Prosecutor v. Alfred Yekatom* to *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* while retaining the case record number as ICC-01/14-01/18. Thereafter, the Registry shall transfer all documents in the record of the case of *Prosecutor v. Patrice-Edouard Ngaïssona* into the record of the joint case being careful to maintain the same level of classification of each document until ordered otherwise. The case record of *Prosecutor v. Patrice-Edouard Ngaïssona* shall then be closed.

(c) Decision on disclosure and other pending issues

20. On 23 January 2019, the Chamber issued its "Decision on Disclosure and Related Matters"²¹ (the "Decision on Disclosure") in the case of *Prosecutor v. Alfred Yekatom* in which, *inter alia*, a regime for the disclosure of evidence between the parties and the Chamber was put in place.

21. As the cases are now joined the Chamber considers it appropriate to permit the Defence for Ngaïssona to make observations on the Decision on Disclosure in order to safeguard Ngaïssona's right to be heard on the issue.

²¹ ICC-01/14-01/18-64-Conf.

22. On 17 December 2018, the Prosecutor filed in the case of *Prosecutor v. Alfred Yekatom* the “Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses”²² (the “Protocol”) which recommends modifications to the Chamber’s protocol on the protection and safety of witnesses and victims, other individuals at risk as well as the safeguarding of the integrity of investigations. The Defence for Yekatom has since responded to the Protocol and also requested modifications.²³

23. As the cases are now joined and a decision on the Protocol is yet to be rendered the Chamber deems it appropriate to first receive observations, if any, from Ngaïssona beforehand.

²² ICC-01/14-01/18-35 with two annexes.

²³ See “Response to the Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses”, with two annexes, 7 January 2019, ICC-01/14-01/18-51. See also “Prosecution’s Reply to the Defence’s Response to the Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses (ICC-01/14-01/18-51)”, 16 January 2019, ICC-01/14-01/18-58.


FOR THESE REASONS, THE CHAMBER HEREBY

- a) **DECIDES** to join the cases of *Prosecutor v. Alfred Yekatom* and *Prosecutor v. Patrice-Edouard Ngaïssona*;
- b) **DECIDES** that the hearing on the confirmation of the charges in the case of *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* shall commence on 18 June 2019.
- c) **ORDERS** the Registry to rename the record of the case of *Prosecutor v. Alfred Yekatom* to *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* while retaining the case record number as ICC-01/14-01/18.
- d) **ORDERS** the Registry to transfer all documents contained in the record of the case of *Prosecutor v. Patrice-Edouard Ngaïssona* to the record of the case of *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* and re-stamp all documents accordingly by no later than 1 March 2019 at 16h00. The level of classification of all documents shall be maintained, until ordered otherwise.
- e) **ORDERS** the Registry to close the record of the case of *Prosecutor v. Patrice-Edouard Ngaïssona* once the abovementioned transfer of the documents is completed.
- f) **DECIDES** that the Defence for Ngaïssona may file its observations on the disclosure regime at the latest on 11 March 2019.
- g) **DECIDES** that the Defence for Ngaïssona may file its observations on the Protocol on the Handling of Confidential Information and Contacts with Witnesses at the latest on 11 March 2019.

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 Wednesday, 20 February 2019

At The Hague, The Netherlands