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**International
Criminal
Court**



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ICC-01/14-02/18

Date: **4 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 CASES OF PROSECUTOR *v.* ALFRED YEKATOM AND PROSECUTOR
***v.* PATRICE-EDOUARD NGAISSONA**

Public

Prosecution's Observations Regarding Joinder

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. Pursuant to the Order of Pre-Trial Chamber II (“Chamber”) the Prosecution provides its observations on the feasibility of joining the cases against Alfred YEKATOM (“YEKATOM”) and Patrice-Edouard NGAISSONA (“NGAISSONA”).¹ Joinder is the most appropriate course of action at this stage.

2. Since their inception, the two cases have been pled and prosecuted jointly. The Court’s statutory framework thus presumes the propriety of joinder. Further, consolidating the proceedings is pragmatic, the most efficient course forward, and would not unfairly prejudice either Suspect. Doing so, particularly early, would conserve valuable and limited Court and Prosecution resources, reduce potential hardship to witnesses, and advance the interests of justice. Likewise, joinder would promote judicial economy, as it would entail a singular pre-confirmation process.

3. In this respect, the Chamber should consider modifying the respective confirmation schedules, and adopt all decisions rendered to date *mutatis mutandis*, including the “Decision on Disclosure and Related Matters” (“Disclosure Decision”),² in the joint case. The Prosecution considers that 18 June 2019 — the date currently set for NGAISSONA’s confirmation hearing — is a good target for the proceedings on the confirmation charges concerning a joint case, and best protects the Suspect’s rights.

II. SUBMISSIONS

A. The cases against YEKATOM and NGAISSONA should be joined

a. *Joinder is presumed because the Suspects are charged jointly*

¹ ICC-01/14-01/18-67.

² ICC-01/14-01/18-64-Conf.

4. There is a presumption favouring joinder in this case. The Suspects are charged jointly. Further, from the beginning, the Prosecution has communicated its intention to prosecute the case jointly.³ YEKATOM's Defence was informed of this immediately upon NGAISSONA's arrest⁴ and the Prosecution has already begun disclosure in respect of both Suspects.⁵ Under such circumstances, a joint proceeding is presumed. As reflected in article 64(5) and rule 136(1), Suspects prosecuted together *shall* be tried together.⁶

5. While article 64(5) and rule 136(1) primarily apply at the trial stage, the presumption extends to pre-confirmation proceedings. During the pre-confirmation proceedings in the *Katanga and Ngudjolo* case, Pre-Trial Chamber I joined the two Suspects' cases, noting that "the ordinary meaning of article 64(5) of the Statute and rule 136 of the Rules [...] establishes a presumption for joint proceedings for persons *prosecuted jointly*."⁷ The Appeals Chamber confirmed this understanding, reasoning that it "in no way violates the principle of legality" but rather "give[s] expression to it".⁸ Similarly, the general rule for joint proceedings for persons prosecuted jointly applies here, absent a showing that separate proceedings are necessary to avoid serious prejudice to the Suspects or to protect the interests of justice. In this case, neither of those exceptions applies.

b. Joinder is appropriate in the circumstances

6. Practical considerations strongly favour joining the two cases. There is significant duplication in the evidence and issues relevant to both Suspects:

³ See ICC-01/14-01/18-50, para. 3; ICC-01/14-01/18-40-Conf, p. 6.

⁴ See ICC-01/14-01/18-45-Conf, paras. 34-35.

⁵ ICC-01/14-01/18-72; ICC-01/14-02/18-18.

⁶ See ICC-01/04-01/07-573, para. 7; ICC-01/04-01/07-257, p. 7; ICC-01/05-01/13-1269, para. 17.

⁷ ICC-01/04-01/07-257, p. 7 (emphasis added).

⁸ ICC-01/04-01/07-573, para. 9.

- *Same types of crimes*: NGAISSONA's and YEKATOM's crimes substantially overlap; with NGAISSONA being alleged to be responsible for all crimes alleged against YEKATOM including those committed in Bangui and the Lobaye Prefecture.⁹
- *Same contextual elements*: The contextual factors for articles 7 and 8 relevant to their criminal responsibility—the existence of a widespread and systematic attack against the civilian population and a non-international armed conflict—is near-identical.¹⁰ The organisational policy relevant to both cases—“to target primarily the Muslim population in Bangui and at least 5 western CAR Prefectures in retribution for Seleka crimes”—is also the same.¹¹
- *Related responsibility*: NGAISSONA's responsibility for certain crimes emanates from his coordination of and association with YEKATOM and YEKATOM is alleged to have committed his crimes pursuant to a common plan that includes NGAISSONA.¹²
- *Same evidentiary base*: The evidence the Prosecution intends to use in support of charges against YEKATOM is substantially the same as the evidence it intends to use against NGAISSONA given the overlap in the alleged crimes and contextual requirements. This means substantially the same witnesses, audio-visual information, and documentary evidence for both cases.

7. As a practical consequence, joining the two cases will enhance fairness and judicial economy.¹³ The Chamber will avoid the unnecessary cost and work of having witnesses testify more than once or with managing two separate but

⁹ Compare ICC-01/14-02/18-2-Red, pp. 11-14, 17-19 with ICC-01/14-01/18-1-Red, pp. 12-17.

¹⁰ Compare ICC-01/14-02/18-2-Red, paras. 6-15 with ICC-01/14-01/18-1-Red, paras. 6-17.

¹¹ Compare ICC-01/14-02/18-2-Red, para. 14 with ICC-01/14-01/18-1-Red, para. 16.

¹² See ICC-01/14-02/18-2-Red, pp. 11-14, 17-19; ICC-01/14-01/18-1-Conf-Exp, paras. 13, 18, 19.

¹³ For the practical implications and benefits of joinder, see generally ICC-02/11-01/15-1, paras. 63-67; ICC-01/04-01/07-257, pp. 6, 8-9 and the cases cited therein.

substantially overlapping case files. In this sense, joinder prevents the duplication or inconsistent presentation of evidence. Issues which affect both cases, such as matters arising from disclosure, or factual or legal challenges to the evidence or proposed charges relevant to both Suspects can be addressed consistently, fully, and efficiently.

8. Joinder also minimises the potential impact that presenting evidence before the Court would have on the physical and mental well-being of witnesses. For many witnesses, the pain and trauma connected with recounting their horrific experiences in court will not have to be re-visited. Joinder would also permit a comprehensive examination of witnesses, saving witnesses from the inconvenience of traveling twice, spending unnecessary time away from work and family, and potential retraumatisation. Relatedly, the risk that protected witnesses are exposed is reduced by joining the cases.

9. Finally, joinder does not unfairly prejudice either Suspect, particularly if done at this stage. Joinder has no discernible impact on NGAISSONA given that his transfer to the Court was only recently executed and YEKATOM's case fully overlaps with his. With respect to YEKATOM, any consequential delay to the confirmation hearing would be relatively marginal and, in any case, outweighed by the benefit of a joint case. The Suspect's other rights are equally not prejudiced. As reflected by rule 136(2), joinder affords each Suspect the same rights as if they were tried separately.

10. Considering the above, joining the cases at this stage would be prudent.

B. Other matters affected by joinder

a. The Chamber should consider ordering a confirmation hearing for both Suspects on 18 June 2019

11. Should the Chamber join the cases, other aspects of the case will naturally be affected, including the date of the confirmation hearing. In such case, the Prosecution considers that the confirmation hearing for the joint case should be 18 June 2019, the currently scheduled date for NGAISSONA's confirmation hearing.¹⁴

12. A joint confirmation hearing will prevent the redundancy of arguments and issues, given the overlapping nature of the cases. It will allow NGAISSONA and YEKATOM to jointly present their challenges to the evidence and charges and allow the Chamber to render its decision consistently and fully informed of all the relevant arguments and issues.

13. Postponing YEKATOM's confirmation hearing date to meet NGAISSONA's is appropriate. A postponement to mid-June amounts to a relatively marginal delay of a month and a half, which is not unreasonable given the complexity and size of the anticipated case.¹⁵ The additional time will also provide the Defence adequate time to prepare any challenges to the evidence and the charges, if they so wish. Doing so will also ensure that NGAISSONA's right to have adequate time to prepare his defence is not affected.¹⁶

¹⁴ ICC-01/14-02/18-T-1-ENG, p. 9, l. 5-8.

¹⁵ See ICC-01/04-01/07-257 (where, as a consequence of joinder, the confirmation hearing for one suspect was postponed from 28 February 2008 to 21 May 2008).

¹⁶ See e.g. ICC-01/04-01/07-257, p. 11.

b. The Chamber should consider applying all decisions issued to date, including the Disclosure Decision

14. To date, the Chamber has issued a number of decisions that have helped the Prosecution facilitate its obligations to the Parties, particularly on disclosure. The Chamber should consider adopting these decisions to the joint case *mutatis mutandis* to ensure the Parties are able to continue discharging their duties, efficiently, and in line with the Chamber's prior instructions.

15. Adopting the Disclosure Decision, in particular, in the joint case best effectuates the principles of fairness and an expeditious proceeding. As noted by the Single Judge, "the *early* initiation of the process of disclosure, as soon as possible after the surrender of the suspect to the Court, better guarantees [...] the expeditiousness of the proceedings, guided by the overarching principle of fairness."¹⁷

16. As noted, the Prosecution has already begun discharging its disclosure obligations to both Suspects based on the guidelines set out by the Chamber. Adopting the Disclosure Decision in the joint case will create consistency and coherence and ensure there is a common understanding as to the nature of disclosure and of redactions between all Parties and the Chamber.

17. Adopting the Disclosure Decision and other decisions rendered so far *mutatis mutandis* in the joint case does not prejudice the Suspects. The Prosecution¹⁸ and YEKATOM¹⁹ have already advanced their respective arguments regarding the proposed disclosure regime in his case. The Chamber accounted for and dealt with those arguments.²⁰ NGAISSONA will have an opportunity to raise any concerns

¹⁷ ICC-01/14-01/18-64-Conf, para. 14.

¹⁸ See generally ICC-01/14-01/18-39; ICC-01/14-01/18-40-Conf; ICC-01/14-01/18-53.

¹⁹ See generally ICC-01/14-01/18-45-Conf; ICC-01/14-01/18-47; ICC-01/14-01/18-68.

²⁰ See generally ICC-01/14-01/18-64-Conf.

regarding the Disclosure Decision and in respect of his circumstances through his response to this filing, as requested by the Chamber.²¹

III. RELIEF SOUGHT

18. For the above reasons, the Prosecution considers that the best course of action at this juncture is to join the cases against NGAISSONA and YEKATOM. If the Chamber decides to join the cases, the Prosecution considers that the confirmation hearing should be set for 18 June 2019, and that all decisions issued to date should apply *mutatis mutandis* to the joint case.



Fatou Bensouda, Prosecutor

Dated this 4th day of February 2019

At The Hague, The Netherlands

²¹ ICC-01/14-02/18-16, p. 4.