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No. ICC-01/14-01/21

Date: 8 July 2022

PRE-TRIAL CHAMBER II

Before:

**Judge Rosario Salvatore Aitala, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public

Decision on the 'Prosecution's application to amend the charges'

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

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**Unrepresented Applicants for
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Detention Section

**Victims Participation and Reparations
Section**

Other
Trial Chamber VI

PRE-TRIAL CHAMBER II of the International Criminal Court issues this Decision on the ‘Prosecution’s application to amend the charges’.¹

I. Procedural background

1. On 9 December 2021, the Chamber confirmed part of the charges brought against Mr Said and committed him for trial.² Following the transmission of the record of the proceedings by the Registry,³ the Presidency constituted and referred the case to Trial Chamber VI,⁴ which set the date for the commencement of the trial to 26 September 2022.⁵

2. On 18 March 2022, the Prosecution notified Mr Said and informed Trial Chamber VI that it intended ‘to present evidence at trial related to incident (r) at paragraph 33 of the Document Containing the Charges (“DCC”), which Pre-Trial Chamber II did not confirm’, demonstrating that it falls ‘within the temporal scope of the charges’.⁶

3. On 22 April 2022, Trial Chamber VI issued its decision on the Notification⁷ and concluded that, since ‘Incident R does not currently form part of the facts and circumstances described in the charges’, ‘it is not permissible for the Prosecution to introduce evidence at trial for the purpose of establishing Incident R, absent an amendment to the charges’.

¹ Prosecution’s application to amend the charges, 5 May 2022, ICC-01/14-01/21-294-Conf (the ‘Application’) (public redacted version notified on 9 May 2022; ICC-01/14-01/21-294-Red).

² Decision on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21-218-Conf (the ‘Confirmation Decision’) (public redacted version notified on the same day; ICC-01/14-01/21-218-Red).

³ Transmission to the Presidency of the record of the proceedings, including the Decision on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21-218-Conf, dated 09 December 2021, 10 December 2021, ICC-01/14-01/21-219-Conf with confidential *ex parte* Annexes 1-3.

⁴ Decision constituting Trial Chamber VI and referring to it the case of The Prosecutor v. Mahamat Said Abdel Kani, 14 December 2021, ICC-01/14-01/21-220.

⁵ Decision Setting the Commencement Date of the Trial and Related Deadlines, ICC-01/14-01/21-243.

⁶ Prosecution’s Notification Related to Incident (r) of Paragraph 33 of the Document Containing the Charges, ICC-01/14-01/21-262-Conf (the ‘Notification’) (public redacted version notified on the same day; ICC-01/14-01/21-262-Red).

⁷ Decision on Prosecution Notification regarding the Charges (ICC-01/14-01/21-262-Red), ICC-01/14-01/21-282 (the ‘22 April 2022 Decision’).

4. On 5 May 2022, the Prosecution filed the Application requesting the Chamber to amend the charges pursuant to article 61(9) of the Rome Statute (the ‘Statute’) and rule 128 of the Rules of Procedure and Evidence (the ‘Rules’).

5. On 16 May 2022, the Office of Public Counsel for Victims (‘OPCV’) responded to the Application.⁸ Following the filing of the Application’s translation into French,⁹ and pursuant to the Single Judge’s instruction,¹⁰ the Defence also responded to the Application on 3 June 2022.¹¹

II. Submissions of the parties and participants

6. The Prosecution requests the Chamber to amend the charges confirmed against Mr Said ‘by including two additional victim incidents at the [*Office Central de Répression du Banditisme* (‘OCRB’)] that fall within the temporal scope of the confirmed charges’. The first, defined as ‘Incident R’, corresponds to the facts already described at paragraph 33(r) of the DCC: the Prosecution submits that, contrary to the Chamber’s conclusion at paragraph 117 of the Confirmation Decision, evidence shows that those facts would fall within the temporal scope of the charges. The second, defined as ‘Incident P-3047’, was not part of the DCC and is ‘an additional victim incident concerning trial Witness P-3047’: the Application contains an outline of the evidence that, in the Prosecution’s submission, establishes the relevant facts to the applicable standard, as well as of the reasons owing to which the Prosecution would not have been able to rely on such evidence at the confirmation hearing.

7. In the Prosecution’s view, amending the charges as requested would (i) ‘not adversely impact the effectiveness and fairness of the proceedings’; (ii) ‘enable the effective prosecution of [Mr Said], while preserving his rights under the Statute, in particular, to be informed promptly of the charges against him, to have adequate time for the preparation of his defence, and to be tried without undue delay’; and (iii) ‘reflect

⁸ Victims’ response to the “Prosecution’s application to amend the charges” (ICC-01/14-01/21-294-Red), ICC-01/14-01/21-310-Conf-Exp (public redacted version notified on the same day; ICC-01/14-01/21-310-Red).

⁹ Prosecution’s submission of the translation of “Prosecution’s application to amend the charges”, ICC-01/14-01/21-294-Conf, dated 5 May 2022, 23 May 2022, ICC-01/14-01/21-324 with confidential Annex A.

¹⁰ Email sent on 13 May 2022 at 17:23.

¹¹ *Réponse de la Défense à la « Prosecution’s application to amend the charges »* (ICC-01/14-01/21-294-Conf), ICC-01/14-01/21-346-Conf (public redacted version notified on 13 June 2022; ICC-01/14-01/21-346-Red).

the true scope of the victimisation in this case’, thus allowing ‘the Trial Chamber to effectively exercise its truth-seeking function’ and preserving the rights of victims to reparations and participation in the proceedings.

8. The OPCV submits that the ‘incidents confirmed by Pre-Trial Chamber II [...] in [the Confirmation Decision] are indicative of the occurrence of crimes, rather than constituting an exhaustive list of specific criminal acts limiting the scope of the confirmed charges’. In the OPCV’s view, ‘all incidents suffered by victims within the temporal and geographical parameters of the present case [...] are to be considered part of the charges’: ‘[s]ince both Incident (r) and Incident P-3047 fall within these parameters, [...] there is no need for an “amendment” of the charges as requested by the Prosecution’. In the alternative, should the Chamber ‘be minded to entertain the merits of the Application’, the OPCV submits that it is ‘properly supported, justified and timely’ and should therefore be granted.

9. The Defence opposes the Application. In its view, the Application is a request to add new charges, and thus requires holding a new confirmation hearing pursuant to article 61(9) of the Statute. The Defence requests the Chamber to reject the Application since it would be (i) a mere attempt to re-litigate factual allegations that would not have been confirmed by the Pre-Trial Chamber, based on evidence available to the Prosecution before the confirmation hearing; (ii) not supported by the adduced evidence to the relevant standard; and (iii) inexcusably late. In the alternative, should the Chamber decide to address the merits of the Application, the Defence requests it to convene a new confirmation hearing.

III. Determination by the Chamber

10. The Prosecution indicates that the Application was filed ‘further’ and ‘pursuant to’ the 22 April 2022 Decision, in which Trial Chamber VI held that, since in the Confirmation Decision the factual allegations described at paragraph 33(r) of the DCC were found to fall outside the temporal scope of the charges, ‘Incident R did not form part of the confirmed charges and appears to have been explicitly excluded from the scope of the charges by the Pre-Trial Chamber’. Noting further that ‘a high degree of proximity is alleged between the acts and conduct of the Accused and the crimes committed’, Trial Chamber VI considered that ‘the scope of the charged crimes in this case is limited to the specific criminal acts listed by the Pre-Trial Chamber in paragraph

29 of the [operative part of the] Confirmation Decision’. Trial Chamber VI therefore concluded that ‘it is not permissible for the Prosecution to introduce evidence at trial for the purpose of establishing Incident R, *absent an amendment to the charges*’.¹²

11. In the Confirmation Decision, the Chamber has analysed the factual allegations underlying each of the crimes charged, presented by the Prosecution as lists of specific criminal acts at paragraphs 33 and 64 of the DCC, relating, respectively, to the crimes allegedly committed at the OCRB and at the *Comité Extraordinaire pour la Défense des Acquis Démocratiques* (the ‘CEDAD’). As regards the specific instances relating to the OCRB in particular, following its examination of the supporting evidence the Chamber concluded, (i) as to the facts described at paragraph 33(a) of the DCC, that ‘[t]he Prosecution has failed to provide sufficient evidence on the identities of the alleged victims or whether they were targeted as perceived Bozizé supporters’;¹³ and, (ii) regarding the facts described at paragraph 33(r) of the DCC, that they fall ‘outside the temporal scope of the charges brought against Mr Said’.¹⁴ Paragraph 29 of the operative part of the Confirmation Decision, which contains the charges as confirmed ‘based on the DCC, from which the Chamber has deleted factual allegations which it did not [consider] sufficiently supported by the evidence’,¹⁵ therefore only mentions 18 out of the 20 specific examples introduced by the Prosecution in the DCC in connection with the OCRB.

12. As recalled by this Chamber on several occasions,¹⁶ including in section III.A. of the Confirmation Decision, the confirmation process serves to determine, pursuant to article 61(7) of the Statute, ‘whether there is sufficient evidence to establish substantial grounds to believe that Mr Said committed the crimes with which he is charged’.¹⁷ The

¹² Emphasis added.

¹³ Confirmation Decision, para. 83.

¹⁴ Confirmation Decision, para. 117. Contrary to the Prosecution’s submission, this conclusion was reached based on the available evidence at the time of confirmation, and not due to a ‘clerical mistake’ made by the Prosecution (Application, para. 13).

¹⁵ Confirmation Decision, para. 156.

¹⁶ See *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Decision on the ‘Prosecution’s application to amend the charges’, 14 March 2022, ICC-02/05-01/20-626, para. 15 (the ‘Abd-Al-Rahman Article 61(9) Decision’); Corrected version of ‘Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), 9 July 2021, ICC-02/05-01/20-433, ICC-02/05-01/20-433-Corr, para. 33 (the ‘Abd-Al-Rahman Confirmation Decision’).

¹⁷ Confirmation Decision, para. 34.

Chamber thus enters its findings based on the charges as brought by the Prosecution which, in the present case, set out the material facts and circumstances relevant to the charged crimes in lists of examples at paragraphs 33 and 64 of the DCC. As part of the confirmation proceedings, the Chamber assessed the evidence submitted in support at the relevant time. It confirmed all crimes satisfying the applicable standard, which ‘is met as soon as the Prosecutor offers concrete and tangible proof demonstrating a clear line of reasoning underpinning the specific allegations’.¹⁸

13. The Chamber’s approach follows from the ‘limited and specific scope and purpose’ of pre-trial proceedings, namely to protect ‘the suspect from wrongful and unfounded accusations, by ensuring that only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought are committed for trial’.¹⁹ The procedure of confirmation of charges serves to set the parameters of the case for trial and to ensure that the charges are clear and not deficient in form,²⁰ but the primary role and objective of the Pre-Trial Chamber, and of the confirmation of charges decision, is the filtering out of unmeritorious cases by ensuring that only those that are properly substantiated proceed to trial.²¹

14. To avoid the confirmation proceedings becoming ‘a trial before the trial’,²² a confirmation decision need not provide a conclusive determination on the charged crimes and the suspect’s responsibility.²³ Indeed, as the Chamber noted during the present case, the Confirmation Decision ‘only addresses what the Chamber considers necessary and sufficient for its determination on the charges’.²⁴ The Chamber therefore only refers in the Confirmation Decision ‘to those elements [...] which it considers necessary to show the line of reasoning underpinning its conclusions’,²⁵ such as, for instance, specific examples relating to the victims of confirmed charges as elements

¹⁸ Confirmation Decision, para. 38. See also Abd-Al-Rahman Article 61(9) Decision, para. 15; Abd-Al-Rahman Confirmation Decision, para. 37.

¹⁹ Confirmation Decision, para. 35. See also Abd-Al-Rahman Article 61(9) Decision, para. 16; Abd-Al-Rahman Confirmation Decision, paras 34, 39.

²⁰ See Confirmation Decision, para. 36. See also Abd-Al-Rahman Article 61(9) Decision, para. 16; Abd-Al-Rahman Confirmation Decision, para. 35.

²¹ See Abd-Al-Rahman Article 61(9) Decision, para. 16.

²² Confirmation Decision, para. 42.

²³ See Abd-Al-Rahman Article 61(9) Decision, para. 17.

²⁴ Confirmation Decision, para. 40.

²⁵ Confirmation Decision, para. 41.

instrumental to its findings. Pursuant to the relevant elements of crimes, the crimes that Mr Said has been charged with, and those confirmed against him, can be committed against ‘one or more persons’. If there is sufficient evidence to establish substantial grounds to believe that one or more persons were victims of such crimes, as alleged, and the relevant elements of the crimes are fulfilled, the charged crime may be confirmed, irrespective of the number of victims;²⁶ all the more so, because the exact number of victims may not be known at the time of confirmation, or may – due to the type of crime or circumstances at the time – never become known. The essential component of the charges, as framed by the Prosecution and confirmed by a pre-trial chamber, relates to the accused’s alleged conduct and role in the alleged crimes, not to the number of victims.

15. As found in the Confirmation Decision, Mr Said ‘was a senior member of the Seleka’ and was ‘effectively in charge of the OCRB as its *de facto* Director’.²⁷ Mr Said is allegedly responsible for the charged crimes ‘[d]ue to his position and presence at the OCRB’²⁸ and because he ‘was in charge of the OCRB detention centre, and the OCRB Seleka operating there, at the times when the arrest, detention and/or mistreatment of persons occurred’.²⁹

16. The Chamber’s indication of specific examples relating to the victims of the confirmed crimes in the Confirmation Decision was dictated by the limited and specific scope and purpose of the pre-trial proceedings and of the confirmation of charges decision. In this decision, the Chamber addressed only what was necessary and sufficient to decide whether or not to confirm the charges based on the evidence available to the Chamber at that specific point in time. Such examples therefore ought not to be understood as limitative or restrictive: the indication of examples is not a finding that there can be no further instances beyond those specifically mentioned.

17. Indeed, as revealed by relevant portions of the Confirmation Decision, the lists of criminal acts set out by the Prosecution at paragraphs 33 and 64 of the DCC are by

²⁶ Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021, ICC-01/04-02/06-2666-Conf (public redacted version notified on the same day; ICC-01/04-02/06-2666-Red), paras 335-336 (the ‘*Ntaganda Appeals Judgment*’). See also Abd-Al-Rahman Article 61(9) Decision, para. 17.

²⁷ Confirmation Decision, para. 69.

²⁸ Confirmation Decision, para. 76.

²⁹ Confirmation Decision, operative part, p. 55 para. 29.

nature illustrative of Mr Said's alleged criminal conduct: namely, they consist of factual indications that, if proven to the required standard, serve as a basis for the Chamber to enter its findings on the alleged crimes and the suspect's underlying conduct. As stated in the Confirmation Decision, in particular as regards the specific criminal acts mentioned at paragraph 33 of the DCC, the listing of criminal acts was meant to 'further illustrate the [...] facts and conduct in connection with the charged crimes at the OCRB' and, as a consequence, the Prosecution's 'list is meant to provide *examples* of the conduct underlying the charges'.³⁰

18. The mention of certain instances or victims in relation to the charges does not mean that any instances or victims not mentioned are 'not confirmed'. In the Confirmation Decision, the Chamber therefore did not determine that the individual instances set out at paragraph 33 of the DCC were 'confirmed' or 'not confirmed'. The Chamber's analysis was limited to assessing whether, on the basis of the evidence available to and relied upon by the Prosecution at the time and for the purpose of confirmation proceedings, those material facts and circumstances relevant to the charged crimes were proven to the applicable standard. While, as stated above, such determination could not be reached, at the relevant time, with regard to the factual instances mentioned at paragraphs 33(a) and (r) of the DCC, the Chamber concluded for the remaining 18 specific examples that they were 'proven to the required standard'.³¹ Analysing the evidence in support of these factual allegations is crucial as it is on the basis of the outcome of this assessment that the Chamber can consider 'that the objective elements of the [charged] crimes are sufficiently established to the required standard'³² and shall therefore be confirmed.

19. The Chamber conducted the same analysis for the evidence in support of the specific criminal acts listed at paragraph 64 of the DCC relating to the crimes allegedly committed at the CEDAD. However, in this case such analysis resulted in finding that 'the Prosecution has failed to identify any discernible link between the alleged facts and

³⁰ Confirmation Decision, para. 80 (emphasis added). Contrary to the Defence's submission, such language is therefore far from constituting a mere '*commentaire stylistique portant sur la manière dont l'Accusation présente les charges*' (ICC-01/14-01/21-346-Red, para. 42).

³¹ Confirmation Decision, para. 122.

³² Confirmation Decision, para. 123.

Mr Said’,³³ and the conclusion that the Prosecution had failed to establish substantial grounds to believe that Mr Said is individually criminally responsible in connection with the crimes allegedly committed at the CEDAD.³⁴

20. The Chamber’s findings as to the specific criminal acts listed by the Prosecution in respect of the confirmed charges must not therefore be considered as definitive or exhaustive, as they reflect the Chamber’s assessment of the available evidence at the time of confirmation allowing to set out the parameters of Mr Said’s involvement in the charged events. Indeed, the Chamber recognised that the extent of the victimisation in connection with the confirmed charges was broader than the individual examples it specifically mentioned in the operative part of the Confirmation Decision through the explicit language by which such examples are introduced, namely the word ‘including’.³⁵

21. The manner in which the charges have been confirmed is consistent with the Appeals Chamber’s jurisprudence on the level of specificity of the charges. The Appeals Chamber held that, ‘[f]or the purposes of article 74(2) of the Statute, the charges must be described in such a way that the trial chamber as well as the parties and participants are able “to determine with certainty which sets of historical events, in the course of which crimes under the jurisdiction of the Court are alleged to have been committed form part of the charges, and which do not”’. Indeed, ‘[i]t is not necessarily the case that such determination is possible only where the charging documents list all criminal acts underlying each charge exhaustively’. As further noted by the Appeals Chamber, ‘[d]epending on the circumstances of the case, the charges may be described in a less specific manner, for instance, by specifying a period of time during which and an area where criminal acts were allegedly committed by an identifiable group of perpetrators against an identifiable group of victims’. Importantly, while the document containing the charges ‘may also list or make reference to specific criminal acts, the scope of the case is not necessarily limited to them – “other criminal acts not mentioned in the document containing the charges may still fall within the – broadly described – facts and circumstances of the charges”’.³⁶

³³ Confirmation Decision, para. 135.

³⁴ Confirmation Decision, para. 153.

³⁵ Confirmation Decision, operative part, p. 55 para. 29 and pp. 61-62 (Section F).

³⁶ *Ntaganda* Appeals Judgment, para. 326.

22. In its 22 April 2022 Decision, Trial Chamber VI relied on the same ruling by the Appeals Chamber and correctly noted that, according to that jurisprudence, ‘the scale of criminality and the mode of individual criminal responsibility alleged are the guiding criteria in determining whether it is permissible for the “charges to be described with respect to confirmed temporal and geographical parameters” and for individual criminal acts and victims to be listed in a non-exhaustive manner’. On this basis, Trial Chamber VI concluded that ‘a broader description of the charges may be acceptable for the purpose of article 74(2) of the Statute in cases where the extent of the criminality is of a larger scale and the accused is further removed from the scene of crimes’.³⁷ However, as stated in the *Ntaganda* Appeals Judgment, such criteria are to be applied ‘[d]epending on the circumstances of the case’. The mention of specific examples of criminal acts in the Confirmation Decision must therefore not be understood as preventing the trial chamber hearing the case from finding that a larger number of individuals fell victim to the relevant crimes. The number of examples which were mentioned as relating to victims of the crimes listed in the charges as confirmed was based on the information placed before the Chamber at the time of confirmation. However, this number, while providing some indication of the scope of the charged crimes, does not change the crimes as charged if it is varied. As such, it does not constitute an upper limit of the number of specific instances or victims of the conduct described in the charges.

23. In light of the above considerations,³⁸ and based on its findings in the Confirmation Decision, the Chamber does not consider that in the present case such ‘a high degree of proximity’ exists between the acts and conduct of Mr Said and the crimes allegedly committed that the scope of the charged crimes in this case must be limited to the specific criminal acts listed in paragraph 29 of the operative part of the Confirmation Decision.³⁹

24. Since, as noted above, the number of victims or specific instances mentioned in the charges does not establish an upper limit for the purposes of the whole trial, so long

³⁷ 22 April 2022 Decision, para. 15.

³⁸ See in particular para. 15 above.

³⁹ Compare 22 April 2022 Decision, paras 16-17.

as other material facts underpinning the confirmed crimes, which are at a later stage found to relate to victims of such crimes, fall within the temporal and geographical parameters, as well as within the charged role of the accused, a trial chamber assessing the relevant evidence may include those specific criminal acts in the crimes as charged.⁴⁰ To avoid any doubt on the side of the parties about the scope of the Confirmation Decision, which might arise at a later stage of the trial, the Chamber considers it appropriate to emphasise that in addition to the number of examples mentioned in the Confirmation Decision not indicating an absolute maximum, this number must similarly not be understood as a minimum threshold for the existence of the crime as charged. A trial chamber may still find the crimes as charged to have been committed if the evidence, as presented at trial, establishes a lower number of specific criminal acts to the required standard than the number of acts for which the pre-trial chamber assessing the evidence presented in relation to those acts, during confirmation proceedings, found there to have been substantial grounds to believe that they were committed.

25. Naturally, any change in numbers of alleged factual examples forming the basis of the confirmed charges and presentation of evidence thereof by the Prosecution must not come as a surprise to the accused or his defence. The Prosecution and the chambers confirming a case and hearing a trial have a shared duty to ensure that the accused has received proper notice of the content and scope of the charges against him or her by the time the trial commences.⁴¹ A pre-trial chamber can provide such notice in the confirmation decision. It would be unworkable for the Prosecution to come back to the relevant pre-trial chamber every time it has identified one or more further victims of a specific crime that has already been confirmed. However, the Defence needs to be put on notice. Subsequent to the confirmation decision, and prior to the commencement of the trial, the burden to provide notice shifts to the Prosecution: more detailed notice must be promptly provided if and when information has become available that allows further specification. This may be done by way of auxiliary documents, such as a trial brief.⁴²

⁴⁰ As similarly noted in the Abd-Al-Rahman Article 61(9) Decision, para. 23.

⁴¹ See also Abd-Al-Rahman Article 61(9) Decision, para. 25.

⁴² *Ntaganda* Appeals Judgment, para. 325.

26. In light of the above, the Chamber notes that ‘Incident R’ was not included in the list of examples based on its assessment of the evidence presented at the time. It is not for this Chamber to re-assess, based on the submissions and additional evidence provided with the Application, whether the person concerned was a victim of the alleged crime. Such a re-assessment, which would effectively amount to a request for reconsideration of the Chamber’s initial findings, is not necessary because it would ultimately be for the trial chamber to consider whether an act falls within the scope of a crime as charged and confirmed. Similarly, the Chamber need not address ‘Incident P-3047’ at the present stage, that is after the rendering of the confirmation decision, as part of which this alleged victim was not considered.

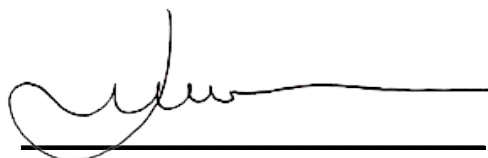
27. The Chamber therefore concludes that the charges as confirmed allow for the exercise by Trial Chamber VI of its powers and functions relevant to the assessment of the evidence relating to the additional material facts and circumstances relevant to the confirmed crimes indicated in the Application, which, as anticipated by the Prosecution, will in any event be presented at trial.⁴³ The procedure envisaged in article 61(9) of the Statute does not constitute an appropriate avenue to request modification of the charges such as the one sought by the Prosecution in the present case.

⁴³ Application, paras 27, 31.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Prosecution's Application.

Done in both English and French, the English version being authoritative.



Judge Rosario Salvatore Aitala

Presiding



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Friday, 8 July 2022

At The Hague, The Netherlands