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**International
Criminal
Court**

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Date: 12 March 2026

THE APPEALS CHAMBER

Before: Judge Solomy Balungi Bossa, Presiding Judge
Judge Luz del Carmen Ibáñez Carranza
Judge Kimberly Prost
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

***THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public Document with Public Annex A

**Public Redacted Version of the "Corrigendum to the 'Ngaïssona Defence
Response to the Prosecution Appeal Brief (ICC-01/14-01/18-2846-Conf)'" , 12 March
2026, ICC-01/14-01/18-2886-Conf-Corr**

Source: Defence of Patrice-Edouard Ngaïssona

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I. INTRODUCTION

1. The Prosecution's appeal must be dismissed. First, there is no legal error: Trial Chamber V ("Trial Chamber" or "Chamber") had no obligation to address Article 25(3)(d) of the Rome Statute ("Statute") once it had accepted the primary mode of liability stated in the charges, i.e. responsibility under Article 25(3)(c). It was entirely within its discretion to address the charges through the most appropriate mode(s) of liability, provided it did not exceed the scope of the confirmed charges. The Chamber reached clear factual findings that fully disposed of the allegations of rape and persecution through rape, as required by Article 74(2) and Rule 142(2).
2. Second, even assuming *arguendo* a legal error did occur, the Prosecution cannot demonstrate any material effect on the substance of the Judgment. The Trial Chamber made two dispositive factual findings that foreclose liability for rape under both Articles 25(3)(c) and 25(3)(d): (i) rape did not form part of any clear pattern of conduct, and therefore could not be part of a common purpose; and (ii) Mr Ngaïssona's awareness of rape amounted only to an "abstract risk", far below the cognitive threshold required for criminal responsibility under Article 30.
3. These findings alone defeat the Prosecution's material effect theory. Nothing in the Judgment permits the Appeals Chamber to infer that a conviction under Article 25(3)(d) would have followed. To the contrary, had the Chamber examined Article 25(3)(d) separately, its analysis would have been identical, and the same dispositive findings would have ended the Article 25(3)(d) inquiry.
4. Third, even if the Appeals Chamber were to take the further view, contrary to the submissions of the Ngaïssona Defence ("Defence"), that material effect is established, the Prosecution's argument still cannot prevail. Article 25(3)(d) contains several distinct and cumulative requirements that cannot be satisfied by simply transposing findings made under Article 25(3)(c) or Article 7(1). The Prosecution identifies no findings in the Judgment establishing: (i) the existence and contours of a group acting with a common criminal purpose involving rape; (ii) any

contribution by Mr Ngaïssona having influenced the commission of rape; or (iii) that he acted with the aim of furthering such a criminal purpose. Because these constitutive elements were never established, any meaningful assessment of liability under Article 25(3)(d) would require a full, independent review of the underlying evidence, not selective reliance on findings reached for a different mode of liability. Any such review would yield only one result: the evidentiary record does not sustain Mr Ngaïssona's conviction for rape and persecution through rape under Article 25(3)(d)(i).

5. For all these reasons, the Defence respectfully requests that the Prosecution's appeal be dismissed.

II. CONFIDENTIALITY LEVEL

6. Pursuant to Regulation 23bis(1) of the Regulations of the Court ("Regulations"), the response is confidential since it refers to information with the same confidentiality level. The Defence will file a public redacted version as soon as practicable.

III. SUBMISSIONS

A. The Trial Chamber did not err in law

7. There is no legal basis to support the Prosecution's claim that, having acquitted Mr Ngaïssona of rape under Article 25(3)(c), the Trial Chamber was obliged to conduct a separate analysis under Article 25(3)(d). As such, no legal error arises.
8. The International Criminal Court ("Court")'s statutory and regulatory framework does not provide for such an obligation. While Article 74(5) provides that the trial judgment must contain a "full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions",¹ Rule 142(2) requires that it "decide separately on each charge". The trial chamber in *Ruto and Sang* held that separate

¹ See e.g., *Prosecutor v. Gbagbo and Blé Goudé*, Judgment on the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, [ICC-02/11-01/15-1400](#), 31 March 2021 ("Gbagbo and Blé Goudé NCTA Appeals Judgment"), para. 161.

verdicts attach to each count,² reflecting distinct factual incidents, rather than different modes of liability.³ Here, given the Trial Chamber issued separate and fully reasoned verdicts on Counts 40-41, no legal omission or error arises.⁴ The Chambers Practice Manual, although non-binding,⁵ recognises the trial chamber's discretion in determining "*which one, if any, of the confirmed alternative is applicable to each case*".⁶ It does not prescribe an obligation, upon an acquittal, to address *all* alternative modes of liability.⁷

9. The Court's jurisprudence only further affirms the Trial Chamber's broad discretion in assessing the charges through the mode(s) of liability it considers most appropriate, provided it remains within the scope of the confirmed charges.⁸ For instance, in assessing Mr Ntaganda's liability for Article 8(2)(e)(i) relating to the attack on Sayo, Trial Chamber VI concluded that his role was "better qualified as indirect co-perpetration, as alternatively charged" rather than the primary mode of direct perpetration given the circumstances of that case.⁹ It determined, similarly to the impugned Judgment,¹⁰ that while a person's conduct may be capable of

² *Prosecutor v. Ruto and Sang*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), [ICC-01/09-01/11-1334](#), 3 June 2014, para. 27.

³ On the division of a 'count' along geographical and temporal circumstances, *see e.g.*, Judgment, [ICC-01/14-01/18-2784-Conf](#), 24 July 2025 ("Judgment"), pp. 12-18; Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona', [ICC-01/14-01/18-403-Conf-Corr](#), 11 December 2019 ("Decision on the Confirmation of Charges"), pp. 104-112.

⁴ *Judgment*, pp. 1409-1412, paras 4126-4132; *see* Prosecution Appeal Brief, [ICC-01/14-01/18-2846-Conf](#), 25 November 2025 ("Prosecution Appeal Brief"), para. 11 ("Trial chambers do not have discretion to disregard any charges" (emphasis added)).

⁵ *Prosecutor v. Gbagbo and Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court", [ICC-02/11-01/15-369](#), 18 December 2015, para. 54.

⁶ *Prosecution Appeal Brief*, para. 13, and fn. 19. Paragraph 57 of the [Chambers Practice Manual](#) defines the confirmed charges as delimitating the scope of the trial, while paragraph 67 describes the possibility for the Prosecution to plead alternative modes of liability and for the pre-trial chamber to confirm alternative charges when the evidence is sufficient to sustain each alternative.

⁷ *Prosecution Appeal Brief*, para. 13.

⁸ *See also* [Rome Statute](#), Article 74(2).

⁹ *Prosecutor v. Ntaganda*, Judgment, [ICC-01/04-02/06-2359](#), 8 July 2019 ("Ntaganda TJ"), paras 744, 759 ("In this regard, taking into account the role played by Mr Ntaganda in relation to the assaults on Mongbwalu and Sayo, and even though the extent of Mr Ntaganda's involvement in the setting up of a guard unit for himself is demonstrated by the evidence, the Chamber finds that direct perpetration is not the appropriate mode of liability under which to consider, in this specific context, Mr Ntaganda's precise role and individual criminal responsibility. In the view of the Chamber, to accurately reflect the occurrence of these crimes pursuant to a common plan between Mr Ntaganda and the co-perpetrators, Mr Ntaganda's individual criminal responsibility is to be qualified as indirect co-perpetration, as alternatively charged").

¹⁰ *Judgment*, p. 1328, para. 3886 ("The Chamber recalls that the modes of liability for both accused are presented in the alternative. As further explained below, the Chamber *accepts the primary alternative stated in the charge*

satisfying elements of one or more modes of liability, it did not find it “appropriate or necessary [...] to reach any further finding on the remaining liability alternatives”.¹¹ Similarly in *Al Hassan*, Trial Chamber X rendered its verdict on the “mode of liability best suited to denote the accused’s responsibility”.¹² In *Abd-Al-Rahman*, Trial Chamber I recharacterised Counts 1-11 to ‘ordering’ pursuant to Article 25(3)(b) as the most suitable mode of liability.¹³ In *Blé Goudé and Gbagbo*, Judge Henderson declined to conduct a separate analysis under the potential alternative mode of liability of Article 28, given the particular weakness of the Prosecution’s case in that regard.¹⁴ While Judge Henderson chose to address all other alternative modes of liability, his approach was specific to the no case to answer stage, where the chamber had to determine whether the Prosecution’s evidence, taken at its highest and absent a Defence case, could lawfully sustain a conviction.¹⁵ It does not create a binding precedent that would require all trial chambers to proceed similarly. In *Ongwen*, Trial Chamber IX set out the legal principles only for those charged modes of liability it deemed relevant to its findings,¹⁶ as did the Trial Chamber here.¹⁷

for each of the accused, which is responsibility under Article 25(3)(a) of the Statute as indirect perpetrator, or direct or indirect co-perpetrator, as the case may be, in relation to Mr Yekatom, and under Article 25(3)(c) of the Statute for aiding, abetting or otherwise assisting in relation to Mr Ngaïssona. *The primary alternative being established, the Chamber does not proceed to consider the further subsidiary modes of liability, Article 25(3)(b) and (d) of the Statute, respectively*” (emphasis added)), p. 1323, para. 3868.

¹¹ [Ntaganda TJ](#), para. 1200.

¹² *Prosecutor v. Al Hassan*, Trial Judgment, [ICC-01/12-01/18-2594-Red](#), 26 June 2024 (“Al Hassan TJ”), para. 1582. See also para. 1584, where Trial Chamber X also exercised its discretion in declining to recharacterise the flogging of Al-Husyan Bin ‘Umar pursuant to Article 25(3)(a).

¹³ *Prosecutor v. Abd-Al-Rahman*, Trial Judgment, [ICC-02/05-01/20-1240](#), 6 October 2025, paras 998-1000.

¹⁴ *Prosecutor v. Gbagbo and Blé Goudé*, Reasons of Judge Geoffrey Henderson, [ICC-02/11-01/15-1263-AnxB-Red](#), 16 July 2019 (“Gbagbo and Blé Goudé TJ Reasons of Judge Henderson”), para. 2030 (“Given the previous conclusions in relation to the contextual elements and the fact that the Prosecutor makes only a half-hearted effort to formulate a cogent and sufficiently detailed case on the basis of superior responsibility, the present decision will not provide a separate evidentiare [sic] analysis of the potential alternative charges under article 28 of the Statute”), para. 2034 (“Seeing this level of laconism and absence of rigour on the part of the Prosecutor, there is no appropriate basis for the Chamber to entertain this alternative form of criminal responsibility.”).

¹⁵ [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), paras 3, 9. See also [Gbagbo and Blé Goudé NCTA Appeals Judgment](#), para. 317.

¹⁶ *Prosecutor v. Ongwen*, Trial Judgment, [ICC-02/04-01/15-1762-Red](#), 4 February 2021 (“Ongwen TJ”), para. 2780.

¹⁷ [Judgment](#), pp 1323-1327, paras 3868-3883, where the Trial Chamber set out the legal requirements for the modes of liability of Article 25(3)(a) and (c) (“the Chamber outlines the applicable law under Articles 25(3)(a) and 25(3)(c) of the Statute, corresponding to the primary modes of liability confirmed by the Pre-Trial Chamber for the respective accused. For reasons set out below, the Chamber considers unnecessary to set out the requirements for the alternative modes of liability charged by the Prosecution and confirmed by the Pre-Trial Chamber”). See [Prosecution Appeal Brief](#), para. 16.

10. These examples illustrate trial chambers' broad discretion in determining how to address different modes of liability, as well as flexibility inherent in judicial reasoning.¹⁸ They confirm that the Trial Chamber did not err in issuing its verdict on Counts 40–42 solely under Article 25(3)(c); rather, it proceeded based on the discretionary powers granted by the Court's legal framework.
11. Implicit in the Prosecution's appeal is an assumption that after acquitting Mr Ngaïssona of rape on Article 25(3)(c), the Trial Chamber was required to proceed to analyse Counts 40–41 through Article 25(3)(d) as a procedural fallback.¹⁹ This reflects a profound misunderstanding of the structure of Article 25, which does not mandate a sequential obligation to assess alternative modes of liability once an acquittal is pronounced. Article 25(3)(d) is a unique form of group liability entailing its own distinct elements: liability only arises where an accused contributes to a crime committed by a 'group acting with a common purpose', and where the specific mental elements of Article 30 and subsections 25(3)(d)(i) or (ii) are met.²⁰ Consistent with its broad discretion, the Trial Chamber determined that this was not a case in which liability under Article 25(3)(d) was appropriate or necessary to consider, mirroring the approach taken in other cases where chambers expressly declined to proceed to alternative modes once the conduct was more accurately captured under a different mode of liability.²¹
12. The Prosecution's emphasis on alternative charging is misplaced.²² This standard practice, designed to promote judicial economy while providing notice pursuant to

¹⁸ See also *Prosecutor v. Ruto et al.*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, [ICC-01/09-01/11-1](#), 8 March 2011, para. 36 ("Moreover, the possibility for the Prosecutor to charge in the alternative does not necessarily mean that the Chamber has to respond in the same manner"); *Prosecutor v. Stanišić and Župljanin*, Decision denying prosecution motion requesting findings on all modes of liability charged in the indictment, [IT-08-91-T](#), 16 January 2013, paras 2-3 ("However, neither in the *Gotovina* case nor in any other cases relied upon by the Prosecution did the Appeals Chamber establish a rule that a Trial Chamber must make findings on all modes of liability charged in an indictment. The Trial Chamber also notes that it would not be in the interests of judicial economy – nor would it be consistent with the Trial Chamber's duty to ensure an expeditious trial – to make superfluous findings on modes of liability, which would potentially add many months to the case").

¹⁹ [Prosecution Appeal Brief](#), paras 2, 7, 18.

²⁰ See below III.B.1 and B.2.

²¹ [Judgment](#), p. 1328, para. 3886. In any event, see below paras 15-18 and III.B.1. and B.2.

²² [Prosecution Appeal Brief](#), paras 9, 12 and fn. 24, where the Prosecution relies on examples where charges were confirmed in the alternative, which is standard practice at the Court.

Article 67(1)(a), rests on the premise that a trial chamber “is better poised to assess the relevant circumstances”.²³ It does not in any way limit the trial chamber’s discretion in applying the mode(s) of liability it considers most appropriate; while a chamber cannot go beyond the scope of the confirmed facts and circumstances, nothing prevents it from resolving the case on a narrower basis where warranted.²⁴ Provided notice is given to the accused, the chamber retains broad discretion in this regard. The Prosecution in this case itself emphasised that “as with multiple modes of liability”, the pre-trial chamber “should not constrain the Trial Chamber, but should rather give it deference since, informed by a full trial, it will be better placed to resolve questions of concurrence of offences”.²⁵

13. Further, the Prosecution’s invocation of victims’ right to an effective remedy is misplaced.²⁶ Victims are not entitled to a conviction or to a particular outcome in criminal proceedings.²⁷ Here, P-2462 was clearly notified of the verdict of acquittal.²⁸
14. In sum, there is no legal omission capable of reversing Mr Ngaïssona’s acquittal on Counts 40-41. Judge Henderson’s reminder that chambers are not obliged to “rescue” the Prosecution’s case by seeking alternative legal characterisation of the facts is directly applicable;²⁹ the Prosecution now asks the Appeals Chamber to do precisely that, recast the Chamber’s findings simply because it is dissatisfied with the outcome.

²³ [Decision on the Confirmation of Charges](#), para. 121; *see also* Document Containing the Charges, [ICC-01/14-01/18-282-Conf-AnxB1](#), 18 September 2019 (“DCC”), para. 627.

²⁴ [Rome Statute](#), Article 74(2); *see above* paras 9-10.

²⁵ [DCC](#), para. 627.

²⁶ [Prosecution Appeal Brief](#), para. 19.

²⁷ *Prosecutor v. Gbagbo and Blé Goudé*, Appeal Judgment, Separate Concurring Opinion of Judge Eboe-Osuji, [ICC-02/11-01/15-1400-Anx1-Red](#), 31 March 2021 (“Gbagbo and Blé Goudé, Concurring Opinion of Judge Eboe-Osuji”), para. 320 (“There is no justice in convicting someone of such criminal conduct, only because rape is an odious crime and an intractable scourge that understandably provokes strong emotive reaction and a wish to punish anyone accused of the crime”); *see also* ECtHR, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, *Budayeva and others v. Russia*, [Judgment](#), 20 March 2008, para. 144 (“It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence [...] or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence”); ECtHR, Application no. 48939/99, *Öneryildiz v. Turkey*, [Judgment](#), 30 November 2004, para. 147 (“[...] On the other hand, [...] neither Article 13 nor any other provision of the Convention guarantees an applicant a right to secure the prosecution and conviction of a third party or a right to ‘private revenge’”).

²⁸ [Prosecution Appeal Brief](#), para. 19 (“P-2462 has the right to know whether Mr Ngaïssona is criminally responsible as charged, and thus whether she is entitled to reparations for this harm”).

²⁹ [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), para. 9.

15. Even assuming *arguendo* that the Trial Chamber was required to address Article 25(3)(d) separately, no legal error arises, as the Chamber disposed of the determinative elements of that mode of liability. After having expressly acknowledged the Defence submissions on the counts of rape under Article 25(3)(d),³⁰ the Chamber made two explicit findings that are dispositive for rape under both Articles 25(3)(c) and (d): it found (i) there was no pattern of rape from which a common purpose involving rape could be inferred;³¹ and (ii) Mr Ngaïssona’s awareness of rape merely amounted to “knowledge of an abstract ‘risk’”, falling short of Article 30’s knowledge standard that the consequence will occur in the ordinary course of events.³²
16. These findings were reached at the level of the charged counts (Counts 40 and 41) and Article 30, rather than through the lens of Article 25(3)(c). The Chamber’s determinations operate cumulatively but independently: without a criminal purpose involving rape, Article 25(3)(d) cannot be engaged;³³ and without Article 30 knowledge that rape would occur, the mental element for the crime cannot be met under any mode of liability.³⁴ The Chamber having already made the key factual determinations, there was no legal requirement to restate the same conclusions under another mode. Therefore, a separate analysis pursuant to Article 25(3)(d) was unnecessary.
17. Trial chambers enjoy broad discretion in structuring their reasons. They are not required to articulate every step of their reasoning for each particular finding; they have “a degree of discretion as to what to address and what not to address”.³⁵ Here,

³⁰ [Judgment](#), p. 1410, para. 4127.

³¹ [Ibid.](#), p. 1411, para. 4131. *See below* III.B.1.a).

³² [Ibid.](#), pp. 1410-1411, paras 4128-4129.

³³ *See Prosecutor v. Katanga*, Judgment pursuant to Article 74 of the Statute, [ICC-01/04-01/07-3436-tENG](#), 7 March 2014 (“Katanga TJ”), para. 1630; *see below* III.B.1.a).

³⁴ For a more detailed analysis *see below* III. B.2.

³⁵ *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, [ICC-01/05-01/08-3636-Red](#), 8 June 2018 (“Bemba AJ”), paras 53-54 (“a trial chamber is not required to address all the arguments raised by the parties” [...]) “The Appeals Chamber notes that a trial chamber thus has a degree of discretion as to what to address and what not to address in its reasoning.”); *see also Prosecutor v. Ntaganda*, Judgment on the appeals against the decision of Trial Chamber II of 14 July 2023 entitled “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659”, [ICC-01/04-02/06-2908](#), 1 November 2024, para 403; *Prosecutor v. Said*, Judgment on the appeal of Mr Mahamat Said

the Trial Chamber was explicit: absent a clear pattern of criminal conduct relating to rape and the knowledge that rape would occur during the Bossangoa attack, criminal responsibility could not be established.³⁶

18. In conclusion, the Trial Chamber committed no legal error. Irrespective of the scope of its discretion in analysing alternative mode(s) of liability, it made the factual findings necessary to dispose of the elements of both Articles 25(3)(c) and (d).

B. No material effect is established

19. Even assuming *arguendo* a duty to address Article 25(3)(d) separately, the Prosecution's appeal fails because it does not establish material effect under the Appeals Chamber's jurisprudence. A judgment is "materially affected by an error of law" if the chamber "would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error".³⁷ The Prosecution must demonstrate "a 'high likelihood' that had it not been for the alleged error, the chamber would not have acquitted".³⁸ No such showing is possible in this case. Consideration of Article 25(3)(d) would neither have altered the acquittal on Counts 40–41 nor even changed the substance of the Trial Chamber's reasoning, which already disposes of the essential elements of that mode of liability.³⁹ There is therefore no basis to find material effect. By urging the Appeals Chamber to revisit the Trial Chamber's findings, the Prosecution goes far beyond a

Abdel Kani against the decision of Pre-Trial Chamber II entitled 'Decision on the "Prosecution's Request for Extension of Contact Restrictions"', [ICC-01/14-01/21-111](#), 29 June 2021, paras 44, 79; *Prosecutor v. Nzabonimana*, Judgment, [ICTR-98-44D-A](#), 29 September 2014, para. 471 ("Since the Trial Chamber stated that it would discuss these modes of liability in its legal findings "where applicable" the Appeals Chamber considers that the Trial Chamber *implicitly considered the applicability of these modes of liability to the alleged crimes*. The Appeals Chamber finds no error in the Trial Chamber's decision to only explicitly discuss the form of responsibility it concluded was most appropriate. Accordingly, the Prosecution has not shown that the Trial Chamber erred in this respect" (emphasis added)).

³⁶ [Judgment](#), pp. 1410-1411, paras 4128-4129, 4131.

³⁷ *Prosecutor v. Thomas Dyilo Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, [ICC-01/04-01/06-3121-Red](#), 1 December 2014 ("Lubanga AJ"), para. 19, *citing Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", [ICC-01/04-169](#), 13 July 2006, para. 84.

³⁸ See e.g., *The Prosecutor v. Ngudjolo Chui*, Judgment on the Prosecutor's Appeal against the Judgment pursuant to Article 74 of the Statute, [ICC-01/04-02/12-271](#), 7 April 2015 ("Ndgujolo AJ"), para. 285; [Gbagbo et Blé Goudé NCTA Appeals Judgment](#), para. 264.

³⁹ See *above* paras 15-16.

material-effect inquiry.⁴⁰ The Defence will however address the Prosecution's interpretation of Article 25(3)(d) and, further, explain why, even on the Prosecution's own factual assertions, material effect remains unsustainable.

B.1. There is no group acting with a common purpose encompassing rape and persecution through rape pursuant to Article 25(3)(d) of the Statute

20. The Trial Chamber's factual findings – particularly that there was no pattern of conduct encompassing rape – precludes a finding that a 'group acting with a common purpose' existed. Even if the Appeals Chamber were to engage with the underlying evidence in this respect – which would be unwarranted given the absence of a legal error or showing of material effect – it would conclude that the Chamber's acquittal on the rape counts is firmly grounded in the case record.⁴¹

a) The Judgment precludes a finding that the Anti-Balaka was a group acting with a common purpose which included the commission of rape

21. The Trial Chamber's findings establish that the requirements of a 'group acting with a common purpose' are not met. The Prosecution recognises that for Mr Ngaïssona to be held liable for rape and persecution through rape (Counts 40–42) pursuant to Article 25(3)(d), rape must have formed part of a group's common purpose, requiring a showing of a shared intent – through the application of the intent standard of Article 30(2)(b) – among the members of a group.⁴² Yet, the Chamber identified no pattern of conduct relating to rape that could satisfy the Article 30(2)(b) knowledge requirement for the crime to form part of any common purpose. It also avers that 'organisational policy' (Article 7(1)) and 'common purpose' (Article 25(3)(d)) are distinct legal concepts.⁴³ Yet, it conflates these principles.⁴⁴ The Appeals Chamber should reject this conceptual shortcut, which is

⁴⁰ See e.g., [Prosecution Appeal Brief](#), paras 61-71, 72-77, 81-90.

⁴¹ Given the inclusion of persecution through rape in an alleged common purpose presupposes that rape formed part of such a common purpose, the present response focuses primarily on demonstrating that rape did not form part of any alleged common purpose. See *Prosecutor v. Kupreškić et al.*, Appeal Judgment, [IT-95-16-A](#), 23 October 2001, para. 98; *Prosecutor v. Al Hassan*, Judgment, Separate and partly dissenting opinion of Judge Tomoko Akane, [ICC-01/12-01/18-2594-OPI](#), 26 June 2024 ("Al Hassan TJ, Separate opinion of Judge Akane"), para. 99.

⁴² [Prosecution Appeal Brief](#), para. 30, fn. 48. See also Prosecution Trial Brief, [ICC-01/14-01/18-723-Conf](#), 9 November 2020 ("Prosecution Trial Brief"), para. 240, fn. 638.

⁴³ [Prosecution Appeal Brief](#), para. 62.

⁴⁴ [Prosecution Appeal Brief](#), paras 62-63.

incompatible with the legal requirements of Article 25(3)(d) and is factually untenable in this case.

i. The Anti-Balaka is not a 'group acting with a common purpose'

22. The Chamber's findings on the organisation (Article 7(1)) cannot be extended to a 'group acting with a common purpose' (Article 25(3)(d)), as they are distinct legal concepts.⁴⁵ Whereas Article 25(3)(d) defines the group in function of its members' shared purpose and intent, Article 7 does not.

23. The Trial Chamber held that an organisation may include different groups, as long as those groups have "'mechanisms' sufficiently efficient to ensure the 'coordination' necessary to carry out the attack within the meaning of the framework".⁴⁶ The 'group' pursuant to Article 25(3)(d) requires a higher threshold of precision as to membership.⁴⁷ While it may be argued that it is not required that each and every member of the organisation be known or named, or that they unanimously endorse the policy, members of a 'group' must harbour the same intent to commit the charged crimes;⁴⁸ they must mean to cause [...] the crime or be aware that the crime will occur in the ordinary course of events".⁴⁹ This "may be established by, *inter alia*, the group's collective decisions and action, or its

⁴⁵ [Prosecution Appeal Brief](#), paras 59-65.

⁴⁶ [Judgment](#), p. 1343, para. 3925, citing [Katanga TJ](#), para. 1119. In its Appeal Brief, the Defence challenged the Trial Chamber's application of the Article 7(1) legal standard of the 'organisation'. It argued that the Chamber (i) erred in law in misapplying the Article 7 standard for an organisation; (ii) erred in fact in finding that an organisation existed before the 5 December attack, (iii) after the 5 December attack, and (iv) in the period of early 2014-June 2014, see Corrigendum of the 'Ngaïssona Defence Appeal Brief against the Trial Judgment', [ICC-01/14-01/18-2847-Conf-Corr](#), ('Ngaïssona Appeal Brief'), paras 385-410.

⁴⁷ [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), para. 1948; *Prosecutor v. Gbagbo*, Dissenting Opinion of Judge Christine Van den Wyngaert, [ICC-02/11-01/11-656-Anx](#), 12 June 2014 ("Gbagbo Dissenting Opinion of Judge van den Wynagert"), para. 8 ("The Amended Document Containing the Charges does not provide any precise indication as to the composition of such a group. Indeed, given that nobody would argue that *all* FDS members, *all* mercenaries, *all* militia members and *all* youth group members constituted one large "group acting with a common purpose", it is necessary to know who did belong to the alleged group acting with a common purpose"); *Prosecutor v. Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", [ICC-01/05-01/13-2275-Red](#), 8 March 2018 ("Bemba et al. AJ"), para. 868, relying on [Lubanga AJ](#), para. 22.

⁴⁸ [Katanga TJ](#), paras 1627, 163; *Prosecutor v. Al Hassan*, Corrected Version of "Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud", [ICC-01/12-01/18-461-Corr-Red-tENG](#), 3 May 2024 ("Al Hassan Confirmation Decision"), para. 940; [Gbagbo Dissenting Opinion of Judge van den Wynagert](#), para. 9.

⁴⁹ [Katanga TJ](#), paras 1627, 1630 ("only those crimes which the group harboured the intention to commit, [...] and falling within the ordinary course of events, can therefore be attributed to the said group").

omissions” or “subsequent concerted actions of the group”.⁵⁰ The shared intent of the group is the “central concept” behind Article 25(3)(d).⁵¹ While it is not required to show that members of an ‘organisation’ under Article 7(1) perpetrated the underlying crimes, it is required that those crimes be perpetrated by members of the ‘group’ under Article 25(3)(d).⁵²

24. Nothing in the Judgment supports the Prosecution’s expansive articulation of the ‘group’ as the Anti-Balaka as a whole, which it argues equates to the Article 7(1) ‘organisation’ defined in the Judgment.⁵³ This approach would imply that every person falling under the Anti-Balaka label – potentially tens of thousands of unidentified and loosely affiliated individuals – “harboured the intention to commit” rape as part of a shared common purpose. Although the Trial Chamber accepted that the multiple and heterogenous groups that ultimately converged under the Anti-Balaka label satisfied the notion of an organisation pursuant to Article 7(1),⁵⁴ its very broad and general description of the Anti-Balaka certainly provides no basis to infer the specificity required to prove a “group of persons driven and acting with a common purpose”.⁵⁵

25. It follows that no inference of a common purpose may logically be drawn from the “subsequent concerted action” of individuals who have not been shown to form

⁵⁰ [Katanga TJ](#), para. 1627; *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, [ICC-01/04-01/10-465-Red](#), 16 December 2011 (“Mbarushimana Confirmation Decision”), para. 271.

⁵¹ [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), para. 1951; [Katanga TJ](#), para. 1628.

⁵² [Katanga TJ](#), paras 1624, 1628; [Al Hassan TJ](#), para. 1618; *Prosecutor v. Katanga*, Judgment pursuant to article 74 of the Statute, Minority Opinion of Judge Christine Van den Wyngaert, [ICC-01/04-01/07-3436-AnxI](#), 7 March 2014 (“Katanga TJ, Opinion of Judge van den Wyngaert”), para. 192, fn. 263.

⁵³ [Prosecution Appeal Brief](#), paras 61-71. This proved to be a fatal flaw in the Prosecution’s case in *Gbagbo and Blé Goudé*, where it relied on the same factual elements for the common plan (Article 25(3)(a)), the organisational policy (Article 7(1)) and the common purpose (Article 25(3)(d)), see [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), paras 1954-1955; see also [Katanga TJ, Opinion of Judge van den Wyngaert](#), paras 193-194.

⁵⁴ [Judgment](#), pp. 574-575, para. 1526 (“[T]he Chamber is of the view that the various Anti-Balaka groups did not have to be a monolithic or singular entity and/or ideologically homogeneous at any stage of the events”), p. 1343, para. 3925 (“Accordingly, the Chamber considers that there is no requirement, as a matter of law, that an organisation for the purposes of Article 7 of the Statute be homogenous, or otherwise a strictly hierarchical, top-down organisation, as such. Indeed, it may well include a variety of groups, as long as those groups have ‘mechanisms’ sufficiently efficient to ensure ‘coordination’ necessary to carry out the attack within the meaning of the framework”). On the existence of various groups and individuals “forming in various localities in the CAR”, see e.g. [Judgment](#), p. 422, para. 1101, pp 455-456, para. 1182. See [Ngaißona Appeal Brief](#), paras 385-410, in which the Defence challenges the Trial Chamber’s assessment of the Article 7(1) organisation.

⁵⁵ [Katanga TJ](#), para. 1624; [Prosecution Trial Brief](#), para. 236; [Al Hassan Confirmation Decision](#), para. 940.

such a group in the first place.⁵⁶ Very little is known about the identity of P-2462's attackers, their potential ties to other alleged Anti-Balaka members or groups, let alone their subsequent concerted action. The Chamber's findings that P-2462 is a Muslim woman, and that she was raped by an Anti-Balaka, do not, in themselves, establish that the perpetrator belonged to the 'group' sharing the intent to commit rape as part of a common purpose.⁵⁷ The Trial Chamber did not find – and the Prosecution does not allege – that the perpetrator of P-2462's rape belonged, for example, to a narrower Anti-Balaka group whose members agreed to commit rape, or for which rape was inevitable, which could have permitted some precision as to the group requirement.⁵⁸ The Chamber did not even address, let alone, determine whether Mr Ngaïssona was a member of the alleged 'group' prior to his appointment as Anti-Balaka coordinator in 2014, which is relevant in defining the contours of the 'group',⁵⁹ nor that the alleged shared intent of members of the 'group' to commit rape existed at the time of P-2462's rape.⁶⁰ In any event, such

⁵⁶ [Katanga TJ](#), paras 1625-1626; [Mbarushimana Confirmation Decision](#), para. 271.

⁵⁷ [Prosecution Appeal Brief](#), para. 70; [Judgment](#), p. 992, para. 2857. *See also* [Katanga TJ, Opinion of Judge van den Wyngaert](#), para. 191 (“A “group” only exists by virtue of the fact that all of its members share the common purpose. In other words, unless there is evidence to suggest that every member of a particular existing group/organisation agreed to a common criminal purpose, it is not permissible to equate existing groups/organisations with “groups acting with a common purpose” in the sense of article 25(3)(d). Indeed, it is perfectly conceivable that a limited number of members of an existing group or organisation agree to commit a crime together without the consent (or perhaps even knowledge) of the rest of the group. In such a scenario, the “group acting with a common purpose” is constituted only by those individuals who share the common purpose”).

⁵⁸ The existence of a such a narrower 'group' is in any event not established by the evidence of this case. *See* [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), para. 1948; [Katanga TJ Opinion of Judge van den Wyngaert](#), para. 23 (“Moreover, even if it were possible in this case to infer from the fact that a number of Ngiti fighters intentionally committed crimes in Bogoro on 24 February 2003 that they constituted a group acting with a common purpose, such an inference could only result in a finding that those specific individuals formed a group acting with a common purpose. However, it would not be possible to infer anything about the criminal purpose (or otherwise) of other members of the Ngiti fighters of Walendu-Bindi, who were not present at the scene(s) of the crime(s). More importantly, such an inference could only warrant a finding that there was a common purpose among the perpetrators of the crimes in question at the time when the crimes were committed. It is not possible to infer from the mere fact that physical perpetrators acted with *mens rea* on the day the crimes were committed that they shared a common purpose to commit these crimes beforehand”).

⁵⁹ *See e.g.*, [Prosecution Trial Brief](#), paras 198-300, where it is unclear whether the Prosecution considers Mr Ngaïssona as a member of the Anti-Balaka prior to his role as national coordinator. Although an accused's membership is relevant in defining the contours of the 'group', it is not “a decisive ingredient for ascertaining and establishing that person's individual responsibility for the purposes of article 25(3)(d)” as “the article criminalises contribution to the commission of a crime within the jurisdiction of the Court, irrespective of an accused's membership of the group”, [Katanga TJ](#), para. 1631; *see also* [Mbarushimana Confirmation Decision](#), para. 275.

⁶⁰ [Katanga TJ](#), paras 1626, 1630; [Al Hassan TJ, Separate opinion of Judge Akane](#), para. 13 (“I am of the view that in circumstances, such as the case at hand, where the Chamber is called upon to determine whether there was a common purpose covering several months shared by a group exercising control over an area, a careful analysis must be carried out with respect to each of the charged crimes, *having due regard to actions taken over the course of time*” (emphasis added)).

inferences based on circumstantial evidence would need to be the only reasonable ones.⁶¹

26. The Prosecution's generic references to the Chamber's findings that Mr Ngaïssona contributed to "groups coalescing into the Anti-Balaka in 2013" or "individuals willing or meant to assist the efforts in bringing François Bozizé back to power"⁶² also do not permit an inference that: (i) these individuals formed part of a group who shared the alleged 'criminal element' of the objective of ousting the Seleka regime;⁶³ or (ii) the perpetrators of P-2462's rape were members of such group(s). The use of the Anti-Balaka label "cannot replace actual proof of affiliation or identification with the relevant group".⁶⁴

ii. There is no common purpose encompassing rape

27. Assuming *arguendo* that the Anti-Balaka formed a group within the meaning of Article 25(3)(d), the Judgment does not support an inference that its members shared the intent to commit rape as part of a common purpose. First, the Trial Chamber's conclusion that the rapes in Bossangoa, including P-2462's rape, did not form part of any pattern of criminal conduct,⁶⁵ and therefore could not have been foreseen in the ordinary course of events, precludes a finding that the Anti-Balaka shared the requisite intent to commit rape as part of a common purpose under Article 25(3)(d).⁶⁶ This is because the Court's jurisprudence applies the same virtual certainty test of Article 30(2)(b) for assessing the group's shared intent to commit a crime as part of the common purpose under Article 25(3)(d).⁶⁷

⁶¹ See [Prosecution Appeal Brief](#), para. 57. The Prosecution does not allege that the Anti-Balaka had an explicit agreement to target the Muslim population through rape, but rather, that such a common purpose may be inferred. See [Bemba et al AJ](#), para. 868.

⁶² [Prosecution Appeal Brief](#), para. 75; [Judgment](#), pp. 640-641, para. 1695, pp. 289-290, para. 828; See also [Gbagbo and Blé Goudé TJ, Reasons of Judge Henderson](#), paras 1917-1918 ("Even if the Prosecutor's version of the common plan is accepted, it is still hard to see how committing random violence against innocent civilians would in any way contribute to keeping Mr Gbagbo in power").

⁶³ See *below* III.B.3.a).

⁶⁴ [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), para. 1394.

⁶⁵ [Judgment](#), p. 1411, para. 4131.

⁶⁶ [Prosecution Appeal Brief](#), para. 90.

⁶⁷ [Katanga TJ](#), para. 1627, fn. 3592 ("In this respect, the Chamber considers that it must construe the concept of "common purpose" with reference to article 30(2)(b) of the Statute"); [Al Hassan TJ](#), para. 1717, fn. 5200 ("With respect to the intention of the group to commit the crime, the Majority relies on the definition set out in Article

28. While the Defence submits that identifying a crime as part of a pattern of conduct does not, by itself, establish knowledge,⁶⁸ the Chamber treated the existence of such a pattern as decisive of whether the crimes were known to occur in the ordinary course of events.⁶⁹ By excluding P-2462's rape from any such pattern of Anti-Balaka conduct, the Chamber necessarily indicates that it was an isolated incident rather than part of broader, concerted action. Without a pattern, the alleged group simply could not have possessed the requisite shared awareness, beyond reasonable doubt, that the rape would occur in the ordinary course of events.⁷⁰
29. In effect, the Prosecution invites the Appeals Chamber to overturn the Trial Chamber's express determination that rape did not form part of any pattern of criminal conduct. Yet that determination was a factual assessment for which deference is owed towards the Chamber as trier of fact. The Prosecution does not allege an error of fact, nor could the Appeals Chamber reassess this finding in the context of a material-effect inquiry.⁷¹ The Chamber's exclusion of rape from the

30(2)(b) of the Statute that the group meant to cause the consequence or was aware that it would occur in the ordinary course of events"); *Prosecutor v. Al Hassan*, Trial judgment, Separate and Partly Dissenting Opinion of Judge Kimberly Prost, [ICC-01/12-01/18-2594-OPI2](#), 26 June 2024, para. 17, fn. 40; [Al Hassan TJ, Separate opinion of Judge Akane](#), para. 56. Despite expressing disagreement with the Majority's application, in principle, of the 'ordinary course of events' standard to the group acting with a common purpose under Article 25(3)(d), Judge Akane nevertheless concluded that some crimes such as rape and forced marriage could not occur in the ordinary course of events and that both Mr Al Hassan and the 'group' could therefore not have the requisite *mens rea* ("The reasons set out above in relation to the common purpose applies *mutatis mutandis*: in circumstances where even senior members of Ansar Dine/AQIM, such as P-0150, were of the view that there were no marriages involving 'direct compulsion' it is implausible that Mr Al Hassan had any awareness that the charged forced marriages, and associated acts of rape and/or sexual slavery, would occur in the ordinary course of events. Accordingly, I am also of the view that Mr Al Hassan lacked the requisite *mens rea*").

⁶⁸ [Ngaïssona Appeal Brief](#), paras 344-347.

⁶⁹ [Judgment](#), p. 1411, para. 4131.

⁷⁰ [Katanga TJ](#), paras 1600, 1630; *See* [Al Hassan TJ, Separate opinion of Judge Akane](#), para. 30 and fn. 56, where Judge Akane articulated that a mere awareness of the crimes by members of the group is not sufficient to establish that they shared a common purpose or that the crimes formed part of the concerted actions of the group. *See also* [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), paras 1917-1920.

⁷¹ For an error of fact, it must be shown that the Trial Chamber "misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts" or that "it is impossible to "discern objectively how the Trial Chamber's conclusion could have reasonably been reached from the evidence on the record", *see* [Ngudjolo AJ](#), paras 22-24; *Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'", [ICC-01/04-01/10-283 OA](#), 14 July 2011, para. 16; *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on applications for provisional Release", [ICC-01/05-01/08-1626-Red OA7](#), 19 August 2011, para. 45; [Lubanga AJ](#), para. 21; [Gbagbo and Blé Goudé, Concurring Opinion of Judge Eboe-Osuji](#), paras 68-70.

Anti-Balaka criminal pattern is the factual premise that precludes a conviction under Article 25(3)(d).⁷²

30. Second, the Chamber's findings on the 'policy' (Article 7(1)) cannot be transposed to a finding on a 'common purpose' encompassing rape (Article 25(3)(d)).⁷³ The 'policy' and the 'common purpose' are functionally distinct and entail different evidentiary thresholds.⁷⁴ While the 'organisational policy' is one of the minimum threshold criteria for a crime to qualify as a crime against humanity and is considered part of the "background to the case",⁷⁵ the 'group acting with a common purpose' serves to attach individual criminal responsibility to an accused through a distinct and carefully crafted form of criminal group liability.⁷⁶
31. The common purpose of Article 25(3)(d) entails a far more rigorous standard than the policy of Article 7(1). It is functionally akin to the concept of the 'common plan' pursuant to Article 25(3)(a) of the Statute.⁷⁷ Here, the common purpose must be to commit the crime (of rape and persecution through rape) or must encompass its execution.⁷⁸ Unlike for the organisational policy, Article 25(3)(d) requires a showing beyond reasonable doubt that participants in the common purpose "harbour the same intent".⁷⁹ A contextual reading of the Statute in good faith and the application of the rule against surplusage reinforce the conceptual distinctions between 'policy' and 'common purpose', and 'group' and 'organisation'. Had the drafters of the

⁷² [Judgment](#), p. 1341, para 3919, p. 1346, para. 3932, pp. 1411-1412, paras 4131-4132.

⁷³ [Prosecution Appeal Brief](#), paras 59-65.

⁷⁴ [Prosecution Appeal Brief](#), paras 25, 39, 62.

⁷⁵ G. Mettraux, '[Chapeau or Contextual Elements](#)' in *International Crimes: Law and Practice: Volume II: Crimes Against Humanity*, May 2020, pp. 224-225.

⁷⁶ See below paras 65-68.

⁷⁷ [Mbarushimana Confirmation Decision](#), para. 271; [Katanga TJ](#), paras 1628-1629; K. Ambos, [Article 25: Individual criminal responsibility](#), in *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (München: Beck/Hart, 2021), pp. 1226-1227 ("Thus, the special feature of subpara. (d) lies in the reference to 'a crime by a group of persons acting with a common purpose'. While 'common purpose' is not identical to 'common plan' within the meaning of subpara. (a), they both require an agreement and this agreement must, in line with the considerations above (mn. 11), contain at least 'a more or less concrete crime to be committed'").

⁷⁸ [Katanga TJ](#), para. 1627.

⁷⁹ [Katanga TJ](#), paras 1627, 1630; *Prosecutor v. Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", [ICC-01/05-01/13-2275-Red](#), 8 March 2018 ("Bemba et al. AJ"), para. 868, relying on [Lubanga AJ](#), para. 22.

Statute intended these terms to be interchangeable, they would have employed the same terminology across Articles 7(1) and 25(3)(d).⁸⁰

32. As a matter of evidence, although the ‘policy’ underlying an attack must be proven beyond reasonable doubt and through probative evidence,⁸¹ the proving of the common purpose necessitates a higher level of precision and detail, and evidence of higher probative value.⁸² The Trial Chamber’s labelling of rape and persecution through rape as crimes against humanity based on a nexus between the act and the

⁸⁰ [Katanga TJ](#), paras 43-47; [Ongwen TJ](#), para. 2722; *Prosecutor v. Lubanga*, Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007, [ICC-01/04-01/06-926](#), 13 June 2007, para. 8.

⁸¹ *Prosecutor v. Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, [ICC-02/11-01/11-432](#), 3 June 2013 (“Gbagbo Adjournment Decision”), para. 35 (“[...] the Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. [...] Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges”). On the necessity for each instance of criminal conduct that is alleged to form part of the Article 7(1) attack, see *Prosecutor v. Bemba*, Appeal Judgment, Separate opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, [ICC-01/05-01/08-3636-Anx2](#), 8 June 2018, paras 60, 66 (“The real question is whether it is logically possible to prove the existence of a forest beyond a reasonable doubt without proving the existence of a sufficient (depending on how one defines a forest) number of trees beyond a reasonable doubt. Whereas trees exist independently of the forest, forests do not exist independently of the trees that constitute it.” [...] the ‘multiple commission’ and ‘widespread’ requirements are legal elements, which must be substantiated by way of material facts, and those material facts must be concrete (that is, have a time and place, identified victims and perpetrators, etc.). Each of these material facts must be proved to the relevant standard. This means that there must be sufficient evidence for each individual instance of criminal conduct that is alleged to be part of the ‘course of conduct involving the multiple commission of [criminal] acts’. The Prosecutor’s approach would suggest that one could prove a pattern of killings without proving a single specific death. This is wrong, because a ‘course of conduct’ does not exist independently from the individual criminal acts, it is merely the sum of these acts”).

⁸² [Gbagbo Adjournment Decision](#), para. 22 (“Accordingly, each incident underlying the contextual elements must be proved to the same threshold that is applicable to all other facts. This is not to say that there is no difference between crimes that underlie a suspect's individual criminal responsibility and crimes being committed as part of incidents which only establish the relevant context. The crimes which are alleged to prove the suspect's individual criminal responsibility must be linked to the suspect personally, whereas incidents proving the contextual circumstances do not require such an individualised link. As such, the former set of crimes will inevitably need to be proven in greater detail than the latter. Indeed, in order to be considered relevant as proof of the contextual elements, the information needed may be less specific than what is needed for the crimes charged but is still required to be sufficiently probative and specific so as to support the existence of an "attack" against civilian population. The information needed must include, for example, details such as the identity of the perpetrators, or at least information as to the group they belonged to, as well as the identity of the victims, or at least information as to their real or perceived political, ethnic, religious or national allegiance(s)”), and para. 36; [Katanga TJ](#), para. 1165 (“With specific regard to the acts of sexual violence committed against victims who pretended not to be Hema in order to escape certain death, the Chamber recalls that it need not be shown that each act was committed pursuant to or in furtherance of the policy but rather that a nexus between the act and the attack must be established”); *Prosecutor v. Ntaganda*, Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda’s appeal, [ICC-01/04-02/06-2666-Anx3](#), 30 March 2021, para. 156 (“[A]n interpretation in light of the object and purpose of the Rome Statute warrants an understanding of the policy requirement as imposing a minimum threshold that aims at excluding ordinary crimes from the realm of crimes against humanity; the policy requirement was conceived to exclude spontaneous criminal occurrences and distinguish between what is of concern to the international community on the one hand and, on the other, the sort of crimes that should remain the exclusive concern of domestic jurisdictions”).

attack against the civilian population does not amount to finding that these crimes formed part of a common purpose, which requires proof of shared intent.⁸³

33. Trial Chamber II in *Katanga* held that defining the common purpose of the group “presupposes specification of the criminal goal pursued; its scope, by pinpointing its temporal and geographic purview; the type, origins or characteristics of the victims pursued; and the identity of the members of group, although each person need not be identified by name”.⁸⁴ Illustratively, it concluded that although the alleged rapes and sexual slavery committed in Bogoro formed part of the Article 7(1) “design to attack the predominantly Hema civilian population of Bogoro” pursuant to a policy, the evidence did not show that these acts formed part of a common purpose under Article 25(3)(d).⁸⁵ Here too, the Prosecution did not prove that rape and persecution through rape constituted part of an Anti-Balaka common purpose.

34. Third, the Prosecution’s predominant reliance on broad generalisations to assert that rape formed part of an Anti-Balaka common purpose to inflict retributive violence against the Muslim population, reveals the absence of foundation of its appellate stance. Its argument that because rape amounts to the “same type of conduct and, at least, a similar kind of injury or harm contemplated under the Criminal Purpose”, the Appeals Chamber should infer that rape formed part of the Anti-Balaka’s alleged criminal purpose, is untenable.⁸⁶ A mere similarity between rape and other crimes falls short of the legal standard for proving that rape formed part of a group’s shared common purpose beyond reasonable doubt pursuant to Article 25(3)(d).⁸⁷ Likewise, the Prosecution’s arguments that “there is no principled

⁸³ [Katanga TJ](#), paras 1165, 1627. [Judgment](#), pp. 1295-1297, paras 3769-3772, p. 1402, para. 4098, p. 1405, para. 4108. *See above* paras 22-26.

⁸⁴ [Katanga TJ](#), para. 1626.

⁸⁵ [Katanga TJ](#), paras 1663-1665.

⁸⁶ [Prosecution Appeal Brief](#), paras 66-68, 71, 90.

⁸⁷ [Prosecution Appeal Brief](#), para. 67. *See Al Hassan TJ, Separate opinion of Judge Akane*, para. 22, in which Judge Akane explicitly rejected such a “key characteristics” prosecutorial approach with respect to the ‘common purpose’ analysis (“Respectfully, I also disagree with my colleagues that these acts of the Hesbah under Mohammed Moussa shared ‘key characteristics’, namely that these were ‘the same types of punishments, imposed for the same category of perceived violations of measures, carried out by Mohammed Moussa in his capacity as head of Hesbah and/or by other Hesbah members in their official capacity, all in aid of the common goal of imposing their version of Sharia’”).

reason to distinguish acts of rape – or sexual violence more generally – from other violent crimes against persons as falling within a range of crimes that the group committed pursuant to a criminal purpose” and that “[s]exual crimes should be subject to the same threshold compared to other violent crimes” express a mere disagreement with the Chamber’s findings excluding rape from any pattern of Anti-Balaka conduct.⁸⁸ The Chamber adopted neither of those factual biases. Rather, it squarely addressed the Prosecution’s concerns by noting that it did not view sexual violence as “exceptional” in the context of armed conflict; however, in this particular case, it could not conclude that rape formed part of any “clear pattern of criminal conduct”.⁸⁹

35. Similarly, the Prosecution’s attempt to link P-2462’s rape to an alleged common purpose by stating that P-2462’s rape occurred “in the context of the Anti-Balaka’s attack in Bossangoa”, is plainly insufficient to infer that it formed part of a criminal purpose.⁹⁰ Judge Henderson rejected such prosecutorial shortcuts. He held that while the content of the common purpose may, in principle, be inferred from circumstantial evidence, “this theoretical possibility does not relieve the Prosecution from formulating a cogent argument in this regard”. The Prosecution must “clearly identify all the pieces of the puzzle and, crucially, how they fit together. Simply listing a large number of individual factual claims and corresponding evidence and arguing that everything must be assessed holistically is not sufficient. [...] Chambers should not have to guess about the particulars of the Prosecutor’s evidentiary arguments”.⁹¹ Here, it is not excluded that the perpetrator

[...] To hold that there were ‘key characteristics’ in these circumstances is akin to holding that any act done in the name of enforcing Ansar Dine/AQIM’s rules and prohibitions would automatically form part of the common purpose. I am of the view that such an interpretation is untenably expansive”).

⁸⁸ [Prosecution Appeal Brief](#), paras 66-67, 71, 90.

⁸⁹ [Judgment](#), p. 1411, para. 4131. [Gbagbo and Blé Goudé, Concurring Opinion of Judge Eboe-Osuji](#), para. 320 (“There is no justice in convicting someone of such criminal conduct, only because rape is an odious crime and an intractable scourge that understandably provokes strong emotive reaction and a wish to punish anyone accused of the crime”).

⁹⁰ [Prosecution Appeal Brief](#), para. 70, citing [Judgment](#), para. 4097.

⁹¹ See [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), paras 85-87.

of P-2462's rape was driven exclusively by personal gain or opportunistic motives falling outside any shared common purpose.⁹²

36. In sum, the Prosecution's claim that the Anti-Balaka was a group acting with a common purpose encompassing rape is irreconcilable with the Trial Chamber's factual findings in the Judgment, from which no such inference beyond reasonable doubt can be drawn. The inference that persecution through rape formed part of a common purpose equally fails.⁹³ Therefore, even if the Trial Chamber had considered Article 25(3)(d) separately, this would not have changed the substance of the Judgment.

b) The underlying facts and evidence do not support a finding beyond reasonable doubt that rape formed part of a group's common purpose pursuant to Article 25(3)(d)(i)

37. The Trial Chamber's acquittal on the counts of rape are firmly grounded in the evidence. If the Appeals Chamber were to review the evidence on rape – which is unjustified given the absence of a legal error and a showing of material effect – it would readily determine that the case record contains limited evidence of sexual violence attributable to the Anti-Balaka during the relevant period. The evidence suggests that incidents of rape involving purported Anti-Balaka members,

⁹² On the relevance of motive, see [Judgment](#), p. 1462, para. 4286; [Gbagbo and Blé Goudé, Concurring Opinion of Judge Eboe-Osuji](#), paras 319-321 (“In the case of rape, rapists need to be punished for their crimes, regardless of their motive. But there is a different consideration if the inquiry into rape committed during an armed conflict or violent unrest has to look beyond the crime of rape committed by the actual rapist (for which he must be convicted personally). Typically in such cases, the question arises whether the rape (for which the actual rapist remains accountable) was opportunistic rape or whether the rape served an instrument of policy. The inquiry into whether the rape was used as an instrument of policy is essentially an inquiry into motive. Yet, that particular inquiry into motive serves a certain purpose in international criminal law. That purpose is not to ascertain whether the primary culprit may or may not be punished for his crime—in this case rape. It is rather whether to establish an ulterior purpose for the primary crime, which would then make both the primary perpetrator and someone else guilty of that crime or of another crime such as a crime against humanity”); [Gbagbo and Blé Goudé TJ, Reasons of Judge Henderson](#), para. 1389 (“The mere fact that an FDS member or a pro-Gbagbo militia member killed or raped a pro-Ouattara civilian does not ipse facto mean that the former was acting pursuant to a putative organisational policy. It is quite possible that the relevant individuals had different reasons for committing the crime. Regular criminality, personal reasons, self-defence, etc., are among many possible motives for why a person might engage in certain conduct regardless or even despite the existence of a policy. In some cases the violence may not have had a particular motive at all, as in the case where a police officer uses excessive force in the execution of his or her duties”); [Al Hassan TJ, Separate and partly dissenting opinion of Judge Tomoko Akane](#), para. 27. See below III.B.1.b).

⁹³ [Judgment](#), p. 1648.

including P-2462's rape, were random and isolated acts, and widely condemned by the Anti-Balaka.

38. First, beyond the absence of evidence that the perpetrator of P-2462's rape belonged to any defined group with a shared intent to commit rape, the evidence of Anti-Balaka sexual violence is sparse and inconclusive, and the Prosecution relies primarily on evidence of Seleka sexual and gender-based violence or broader sexual violence in CAR since 2003.⁹⁴ The Prosecution's reliance on this evidence to argue that rape formed part of a retributive Anti-Balaka common purpose is wholly speculative, rests on improper stereotyping of the CAR population, and is irrelevant in showing that rape formed part of an alleged Anti-Balaka common purpose, or that rape was committed as part of retributive violence against Muslims.⁹⁵

39. The assessment of whether a particular crime formed part of a common purpose cannot proceed on such generalisations and evidentiary shortcuts; it demands a careful analysis of "the link of the individual crimes to the common purpose,

⁹⁴ Out of 140 documents submitted by the Prosecution relating to sexual and gender-based violence in its bar table motion, the Prosecution labelled only eight documents as related to alleged sexual and gender-based violence committed by Anti-Balaka (consisting of: four NGO and IO reports, three media reports, and one set of untested notes provided by a Rule 68(2)(b) witness ([CAR-OTP-2001-5386](#); [CAR-OTP-2002-0039-R01](#); [CAR-OTP-2022-0375](#); [CAR-OTP-2031-0157](#); [CAR-OTP-2001-4909](#); [CAR-OTP-2001-4967](#); [CAR-OTP-2073-0893](#); [CAR-OTP-2057-0911-R01](#))).

⁹⁵ [Prosecution Appeal Brief](#), para. 69; [Katanga TJ, Opinion of Judge van den Wyngaert](#), para. 258 ("Be that as it may, one should be extremely careful not to exaggerate the significance of motives like "ethnic hatred" or "desire for revenge". Whereas ethnicity sometimes does play an important role in the type of conflict that took place in Ituri, it is essential not to fall into the trap of oversimplification. There is a real danger in treating entire populations, or vast categories within a population, as abstract entities with a mind of their own. Whatever sociologists and anthropologists may be able to teach us about the collective characteristics of social and ethnic groups, it is not permissible in a judicial context to extrapolate from such collective traits any firm conclusions about how individual members of the group acted or behaved in a particular context. Even though international criminal law deals with what is sometimes described as "group" or "mass criminality", its ultimate concern is with specific individuals and their personal criminal behaviour. It is therefore inappropriate to lump together entire populations and attribute collective criminal intentions to all their members. Individuals are not predetermined to act or think in a particular way simply because they belong to a certain social or ethnic group, even if a considerable majority of the group does act or think that way. Accordingly, without very solid and sufficiently specific evidence showing that particular members of a certain social or ethnic group actually shared the intent to commit crimes, it is not possible to speak of a "group acting with a common purpose" in the sense of article 25(3)(d)"); [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), paras 72-77, where Judge Henderson criticises the Prosecution's simplistic narrative of the role of nationality, ethnicity and religion in Côte d'Ivoire ("The Prosecutor's narrative is also built around a unidimensional conception of the role of nationality, ethnicity, and religion (in the broadest sense) in Côte d'Ivoire in general and during the post-electoral crisis in particular. Without a nuanced understanding of how the different national, ethnic and religious groups related to each other and how these relations had developed socio-historically, it is not possible to provide an accurate portrayal of what happened. Although nationality, ethnicity and religion are clearly significant in Ivorian society, the composition of civil society and political organisations was a lot more complex and multifaceted than the Prosecutor's narrative might lead one to believe. [...] Without a more detailed and nuanced understanding of the reality in this regard, no narrative can hope to be more than a caricature").

looking *inter alia* at the possible motive of the perpetrators of the crimes, and exclude any unrelated or opportunistic acts”.⁹⁶ The case record suggests that incidents of rape, in particular P-2462’s rape, were isolated, rather than reflective of a broader pattern. For instance, one report indicates “it was not able to reach a more broad-ranging conclusion as to whether these crimes [rape] were widespread or systematic”,⁹⁷ while another concludes that “although some rapes by anti-balaka fighters have also been reported [...] it was unable to confirm information on the level of sexual violence experienced by the Muslim population”.⁹⁸ The Prosecution avers that the Trial Chamber “discussed”⁹⁹ six alleged incidents of rape in the Judgment, from which an Anti-Balaka common purpose encompassing rape may be inferred.¹⁰⁰ However, these alleged incidents are insufficiently probative, detailed, and linked in their circumstances, to support the existence of a pattern from which an Anti-Balaka common purpose may be inferred.¹⁰¹ Only two instances of rape (P-2462 and P-2657) – forming a single incident,¹⁰² – allegedly occurred in Bossangoa on 5 December 2013.¹⁰³ The Chamber made reference, in passing, to a single hearsay testimony evoking sexual violence *prior* to 5 December, in Bowaye, which is hardly indicative of a pattern of conduct or a shared intent of the alleged

⁹⁶ [Al Hassan TJ](#), para. 1237; [Katanga TJ](#), para. 1630; [Al Hassan TJ, Separate opinion of Judge Akane](#), paras 27-28 (“I am of the view that the Prosecution failed to sufficiently explain how these acts of rape were linked to the dissemination of Ansar Dine/AQIM’s ideology or their application of their conception of Sharia in order to control Timbuktu in a manner that matched their ideology.”).

⁹⁷ [CAR-OTP-2001-7017](#), at 7118, para. 482.

⁹⁸ [CAR-OTP-2001-2769](#), at 2811.

⁹⁹ [Prosecution Appeal Brief](#), para. 70; In the [Judgment](#), the Trial Chamber briefly mentioned in passing testimonies addressing directly or indirectly incidents of sexual violence *see* paras 1346, 1962, 2029, 2105, in its general factual findings for the different locations.

¹⁰⁰ [Prosecution Appeal Brief](#), para. 70.

¹⁰¹ [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), para. 80 (“To establish the true nature and extent of a pattern, it is indispensable for the party alleging it to demonstrate that the examples provided as proof of the pattern are representative samples of the totality of relevant events and not simply chosen because they fit a preconceived conception”), para. 1888 (“Anyone can claim the existence of a pattern by cherry-picking examples that fit preconceived characteristics and ignoring all other information that does not conform. The burden is upon the Prosecutor to show how and why she selected the incidents relied upon”); [Al Hassan TJ, Separate opinion of Judge Akane](#), para. 31.

¹⁰² *See* [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), paras 1889-1891 (“It should be noted also that, in order to establish the existence of a pattern covering a prolonged period and a large area, what matters is not so much the total number of victims as the number of incidents. For example, when during a singular attack on a particular location three people are killed and seven injured, however tragic this is, this would only count as one instance for the purposes of the existence of a pattern of physical violence. If, on the other hand, there are ten different incidents where a single individual is killed or injured, this counts as ten instances of a potential pattern”).

¹⁰³ [Judgment](#), pp. 984-992, paras 2832-2857.

group to commit rape on 5 December in Bossangoa.¹⁰⁴ Three out of the six alleged ‘incidents’ of sexual violence briefly mentioned in the Judgment occurred in 2014, and in different uncharged locations; three of them stem from untested Rule 68(2) statements.¹⁰⁵

40. Although little is known as to the identity, group membership, and shared intent of the perpetrators of P-2462’s and P-2657’s¹⁰⁶ rapes in Bossangoa, their testimonies suggest that these were random acts, rather than conduct pursuant to a defined common purpose.¹⁰⁷ Their evidence is distinguishable, for instance, from the *Ntaganda* case.¹⁰⁸ In its factual discussion on the common plan, Trial Chamber VI considered *inter alia* “the words pronounced by a UPC/FPLC soldier during a rape and at a moment when many of the victims were raped: he compared the Lendu to non-human elements to be exterminated.”¹⁰⁹ Here, the limited and inconclusive evidence of Anti-Balaka sexual violence does not establish a shared discriminatory purpose to commit P-2462’s rape, nor that members of the ‘group’ were aware it would occur in the ordinary course of events.¹¹⁰ The Prosecution’s reliance on factors which are inherent to the crime of rape to support the existence of a pattern is equally flawed.¹¹¹ The Chamber’s exclusion of rape from a pattern of conduct

¹⁰⁴ [Judgment](#), p. 516, para. 1346 (“P-2453 later heard from another woman that the Anti-Balaka forced [REDACTED] into sexual intercourse” (emphasis added)); [Prosecution Appeal Brief](#), para. 70. [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), para. 1916 (“However, in this case, there is no independent evidence indicating that the crimes that were committed on 12 April 2011 were envisaged to be part of the common plan. Indeed, the Prosecutor asks us to infer the existence and content of the common plan – in part – from the occurrence of the criminal conduct”).

¹⁰⁵ [Prosecution Appeal Brief](#), para. 70; [REDACTED].

¹⁰⁶ Although P-2657’s alleged rape is not charged in this case, it is addressed by the Prosecution as allegedly indicative of a common purpose pursuant to Article 25(3)(d), [Prosecution Appeal Brief](#), para. 70.

¹⁰⁷ **P-2462**: [T-059](#), in particular pp. 23-30; [T-060](#), pp. 30-37; **P-2657**: [T-104](#), in particular pp. 19-24; [T-105](#), pp. 23-28 (cited in the [Judgment](#), paras 2832-2857). [Katanga TJ](#), para. 1630 (“Crimes ensuing solely from opportunistic acts by members of the group and which fall out with the common purpose cannot be attributed to the group’s concerted action.”); [Al Hassan TJ](#), para. 1237; [Al Hassan TJ, Separate opinion of Judge Akane](#), para. 27. For an example of an alleged rape perpetrated by alleged ‘Anti-Balaka’ that was considered clearly opportunistic based on a personal vendetta deriving from a work-related misunderstanding, see: [CAR-OTP-2001-5386](#), at 5587.

¹⁰⁸ [Prosecution Appeal Brief](#), para. 66.

¹⁰⁹ [Ntaganda TJ](#), para. 805, cited by the Prosecution, [Prosecution Appeal Brief](#), para. 66, fn. 135. The factual circumstances also differ from *Al Hassan*, where the Majority relied on shared similarities between incidents of sexual violence to infer that rape formed part of the common purpose, [Al Hassan TJ](#), para. 1651; See also [Al Hassan TJ, Separate opinion of Judge Akane](#), para. 31.

¹¹⁰ On the functional similarities between the common plan and the common purpose, see above para. 31.

¹¹¹ [Prosecution Appeal Brief](#), para. 67; See [Al Hassan TJ, Separate opinion of Judge Akane](#), para. 31 (“I also respectfully disagree with my colleagues’ finding that there was a pattern between the instances of rape in detention. In my view, the four charged incidents of rape in detention are insufficient to make such a broad finding, considering

mirrors the limited overall evidence of alleged Anti-Balaka sexual violence, the limited scope of the charges as confirmed, as well as the Prosecution's investigative and trial strategy.¹¹²

41. Second, the evidence shows that Anti-Balaka members widely condemned sexual violence. Rape was among the strict prohibitions among various Anti-Balaka groups; new recruits were informed accordingly, and rape was sanctioned.¹¹³ Anti-Balaka traditional rituals, including wearing *gris-gris*, prohibited sexual intercourse, as such acts were believed to nullify the rituals' protective effects.¹¹⁴ Individuals who committed sexual violence were believed not to be real Anti-Balaka, but rather among those causing "troubles in various neighbourhoods".¹¹⁵ Such evidence further undermines the notion that rape formed part of an Anti-Balaka common purpose.

B.2. Mr Ngaïssona did not possess the required knowledge in relation to rape and persecution through rape pursuant to Article 25(3)(d)(i) of the Statute

42. The Prosecution's appeal regarding the mental element under Article 25(3)(d)(i) raises questions of statutory interpretation that are ultimately theoretical in the present case. As demonstrated above, rape was not part of any common purpose,¹¹⁶

in particular that the elements forming said 'pattern' are nothing but general"), fn. 58 ("Notably, since the Chamber itself found that members of Ansar Dine/AQIM generally carried weapons, I fail to see how the use of weapons would be a distinguishing factor establishing a pattern. While my colleagues also refer to the involvement of multiple men, this is not true for all cases, even within the scarce sample of the four charged incidents. In addition, the elements for the crime of rape requires that there be a use of force, threat of force, or coercion. To say [sic] that the use of 'threats' constitute an element establishing a pattern within the acts of rape seems unnecessary, as such threats are but the element of the crime of rape. To say that there is a 'pattern' amongst these acts of rape on the basis of these general factors is akin to saying that there is a pattern between several cases of murder as the victims were all killed with a weapon during hostilities. Respectfully, I am of the view that this falls short of constituting a 'pattern', and even if it does, it certainly has no meaning in the context of Article 25(3)(d)").

¹¹² At trial, the Prosecution predominantly relied on evidence concerning Seleka sexual violence or broader conflict-related sexual rather than Anti-Balaka-specific incidents, *see e.g.*, [ICC-01/14-01/18-224-Conf](#); and filings [ICC-01/14-01/18-239-Conf](#), paras 14-15 and [ICC-01/14-01/18-530](#), para. 36, in which the LRV expresses dissatisfaction with the Prosecution's investigations with respect to sexual violence. [Decision on the confirmation of charges](#), para. 107 ("[a]bsent any information as to the identity of the victim and/or the perpetrators, and in light of the fact that the evidence regarding the second rape is indirect and too vague, the Chamber finds that the factual allegation of the Prosecutor is not established to the relevant standard").

¹¹³ *See e.g.*, **D30-4496**: [CAR-D30-0022-0001-R03](#), at 0007, para. 40; [CAR-OTP-2085-2953](#), at [00:12:00] to [00:12:37]; [CAR-OTP-2107-6989](#), at 6997, lns 245-252; [Al Hassan TJ, Separate opinion of Judge Akane](#), para. 28.

¹¹⁴ **D30-4496**: [CAR-D30-0022-0001-R03](#), at 0007, para. 40; **P-0888**: [T-122](#), p. 75, lns 3-6; **P-2251**: [T-043](#), p. 38, lns 18-23; [CAR-OTP-2001-2769](#), at 2826. *See also* [Al Hassan TJ, Separate opinion of Judge Akane](#), para. 28.

¹¹⁵ **P-2251**: [CAR-OTP-2093-0045-R01](#), at 0064, para. 122.

¹¹⁶ *See above* III.B.1.a).

which precludes liability under Article 25(3)(d)(i): there was no criminal purpose regarding rape for Mr Ngaïssona to further.¹¹⁷

43. In any event, the Prosecution has failed to show that knowledge of a “substantial risk” satisfies the intent requirement for the principal crime(s) under Article 25(3)(d)(i). Article 30 governs the mental element applicable to that provision, which is consistent with its ordinary meaning, read in the overall context of the Statute.
44. The Prosecution’s theory rests entirely on a novel “substantial risk” standard that lacks any legal basis.¹¹⁸ Even assuming *arguendo* that such a lower standard applied, the Chamber’s characterisation of Mr Ngaïssona’s knowledge regarding rape as awareness of an “abstract risk”,¹¹⁹ which it found insufficient for criminal responsibility, cannot satisfy it. The Prosecution cannot demonstrate material effect through compound speculation that the Chamber would have both adopted an unprecedented legal standard and reassessed the facts to elevate Mr Ngaïssona’s knowledge beyond what it found. Such conjecture falls far short of the Appeals Chamber’s requirement that the Judgment would have been substantially different.¹²⁰

a) Article 30 governs the mental element under Article 25(3)(d)(i)

i. *The Statute contains no gap that would justify introducing a lower mens rea standard*

45. The principle of *lex specialis* mandates that the Statute’s specific provisions take absolute precedence over any general customary rule. Article 21 establishes a clear hierarchy of applicable law: the Court must first apply the Statute, Elements of Crimes, and Rules of Procedure and Evidence; only when these sources fail to

¹¹⁷ [Katanga TJ](#), para. 1630 (“Only those crimes which the group harboured the intention to commit (the common purpose being to commit the crime or encompassing its execution), and falling within the ordinary course of events, can therefore be attributed to the said group *and incur the accused’s liability under article 25(3)(d)*” (emphasis added)).

¹¹⁸ See e.g., [Prosecution Appeal Brief](#), para. 34.

¹¹⁹ [Judgment](#), para. 4128.

¹²⁰ See e.g., [Ngudjolo AJ](#), para. 285; [Gbagbo et Blé Goudé NCTA Appeals Judgment](#), para. 264.

provide a solution may the Court turn to applicable treaties, principles and rules of international law.¹²¹

46. There is no lacuna in the Statute that would permit, let alone require, recourse to external *mens rea* standards: Article 30 provides a comprehensive default mental element applicable “unless otherwise provided”, and nothing in Article 25(3)(d) displaces or modifies this framework. Accordingly, there is no basis to look beyond Article 30 or to import external standards to define the level of knowledge required.¹²² This is consistent with the Statute’s structure, which sets out exhaustive modes of liability in Article 25(3) and reflects deliberate drafting choices to avoid borrowing broader, more flexible approaches from the *ad hoc* tribunals.¹²³

(i) *The “unless otherwise provided” rule*

47. Under Article 30(1) of the Statute, unless a statutory provision provides otherwise, criminal responsibility requires that the material elements be committed with intent and knowledge. Article 30(2)(b) defines “intent” in relation to a consequence as meaning to cause that consequence or knowing that the consequence will occur in the ordinary course of events. Article 30(3) further defines “knowledge” as awareness that a circumstance exists or that a consequence will occur in the ordinary course of events.

48. Article 30’s default rule applies unless the Statute expressly displaces it and governs not only principal perpetrators but also secondary participants. Because complicity is inherently accessory, an accomplice must hold a dual mental element: intent regarding their own contribution and intent with regard to the principal’s crime(s).¹²⁴ This twofold mental requirement, which is uncontested by the

¹²¹ S. Lord, ‘[Joint Criminal Enterprise and the International Criminal Court](#)’ (2013) Thesis in International Criminal Law - Stockholm University (“S. Lord, ‘Joint Criminal Enterprise and the International Criminal Court’”), p. 58.

¹²² K. Ambos, ‘[The Subjective Requirements of International Crimes](#)’ in *Treatise on International Criminal Law: Volume I: Foundations and General Part*, (2nd edn, Oxford Law Pro, Oxford University Press 2021) (“K. Ambos, ‘The Subjective Requirements of International Crimes’”), p. 395.

¹²³ See e.g., [Katanga TJ](#), para. 1619.

¹²⁴ K. Ambos, ‘[The Subjective Requirements of International Crimes](#)’, pp. 391-392; A. Eser, Mental Elements - Mistakes of Fact and Law’ in A Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) (“A. Eser, ‘Mental Elements - Mistakes of Fact and Law’”), Chapter II.J “Mental Element and Complicity”, see Annex A.

Prosecution,¹²⁵ has been recognised in the *Orić*¹²⁶ and *Bemba et al.* cases,¹²⁷ and aligns with longstanding domestic doctrines.¹²⁸

49. Article 25(3)(d)(i) does not displace Article 30's cognitive standard in relation to crimes. The expression "with the aim of" in Article 25(3)(d)(i) introduces a specific purpose-based mental element: the accused must mean, by his contribution to the crime, to further the group's criminal activity or purpose. This wording defines a volitional requirement in relation to the accused's contribution – what the accused must seek to advance – but it does not set out any intent standard regarding the resulting crime(s).
50. This mirrors the structure of Article 25(3)(c), which – while introducing a purposive element ("for the purpose of facilitating") – does not alter the mental element required regarding the principal offence. As the Trial Chamber held in *Bemba et al.*, Article 30 applies to *all* participation modes under Article 25 "unless otherwise provided", and any heightened subjective element relates only to the accused's own conduct, not to the underlying crime.¹²⁹ The same logic governs Article 25(3)(d)(i): its "aim of furthering" clause addresses the mental element aspect of the contribution but leaves untouched Article 30's intent requirement for the principal crime(s).
51. The Appeals Chamber confirmed this interpretation in the *Bemba et al.* case when it examined the phrase "when committed intentionally" in Article 70(1) – language structurally similar to Article 25(3)(d)'s requirement that contributions be "intentional". Applying the Vienna Convention's principles of ordinary meaning,

¹²⁵ [Prosecution Appeal Brief](#), paras 26, 36-37.

¹²⁶ *Prosecutor v. Orić*, Trial Judgment, [IT-03-68-T](#), 30 June 2006, para. 279 ("intention contains a cognitive element of knowledge and a volitional element of acceptance, and [...] this intention must be present with respect to both the participant's own conduct and the principal crime he is participating in"). See also *Prosecutor v. Kordić & Čerkez*, Trial Judgment, [IT-95-14-2](#), 28 February 2001, para. 380.

¹²⁷ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute, [ICC-01/05-01/13-1989-Red](#), 19 October 2016 ("Bemba et al. TJ"), paras 97-98.

¹²⁸ K. Ambos, [‘The Subjective Requirements of International Crimes’](#), pp. 391-392.

¹²⁹ [Bemba et al. TJ](#), paras 97-98, which refers to the 'accessory' in general, not the aider and abettor specifically. See also Eser, 'Mental Elements - Mistakes of Fact and Law', Chapter II.J ("accomplices in group crimes, who, beyond their ordinary double intent, must have a special intention according to Article 25(3)(d) of the ICC Statute") and K. Ambos, [‘The Subjective Requirements of International Crimes’](#), pp. 404-405.

context and purpose, as well as the principle of strict construction under Article 22(2), the Appeals Chamber confirmed that “when committed intentionally” does not introduce a special intent requirement but rather applies Article 30’s basic *mens rea* standard of intent and knowledge. It held that no additional mental element is required unless explicitly stated in the provision.¹³⁰ Crucially, it also determined the reference to “when committed intentionally” in the chapeau of Article 70(1) “must not be understood narrowly as referring to only article 30 (2) of the Statute, *but to the provision as a whole*”.¹³¹ The same interpretative principle applies here: an additional mental element is explicitly stated in Article 25(3)(d)(i) while Article 30’s basic *mens rea* standard continues to apply.

(ii) *Article 30 remains the interpretative framework*

52. The *Katanga* Trial Chamber approached Article 25(3)(d) as falling within the “otherwise provided” clause of Article 30, but its findings were limited and qualified. While it noted that Article 25(3)(d) contains mental-element language differing in some respects from Article 30, it nonetheless relied on Article 30 to interpret “intention” and “knowledge”. The decision therefore neither establishes that Article 25(3)(d) displaces Article 30’s *cognitive* standard in relation to the crimes, nor clarifies how the two provisions interact, nor excludes the continued relevance of Article 30 for assessing crime awareness under subparagraph (i).¹³²

53. The more recent *Al Hassan* Trial Judgment likewise does not support the Prosecution’s position that Article 25(3)(d) contains a mental element wholly distinct from Article 30.¹³³ While citing *Katanga*, the Chamber did not refer to the paragraph relied on by the Prosecution,¹³⁴ nor did it suggest that Article 30 is inapplicable. It merely observed that Article 25(3)(d) “contains a specific provision

¹³⁰ [Bemba et al. AJ](#), paras 675-681.

¹³¹ *Ibid.*, para. 680 (emphasis added). See *contra* [Prosecution Appeal Brief](#), para. 33, interpreting the term “intentional” in Article 25(3)(d) narrowly.

¹³² [Katanga TJ](#), para. 1637.

¹³³ [Prosecution Appeal Brief](#), paras 26, 38.

¹³⁴ *Ibid.*

defining the requisite intent”,¹³⁵ a formulation that falls far short of declaring a departure from Article 30’s framework. Accordingly, contrary to the Prosecution’s submission,¹³⁶ the question whether Article 25(3)(d) sets out a mental element different from that required under Article 30 is not settled in the jurisprudence, and *Al Hassan* does not advance their position.

54. The Prosecution’s position is also internally inconsistent. It contends that Article 30 should be disregarded for subparagraph (i) because Article 25(3)(d) allegedly creates a wholly distinct mental element,¹³⁷ yet simultaneously relies on Article 30 to interpret subparagraph (ii), citing *Katanga* for the proposition that subparagraph (ii) must be read “in accordance with Article 30(3) and Article 30(2)(b)”.¹³⁸ If Article 25(3)(d) truly operated as an entirely separate mental element, as the Prosecution asserts with respect to subparagraph (i), then the reliance on Article 30 for the interpretation of subparagraph (ii) would be incoherent. The Prosecution’s own treatment of the term “intentional” in the chapeau of Article 25(3)(d) underscores the same point.¹³⁹ Subparagraph (i) specifies only an additional volitional element in relation to the accused’s contribution – an elevated intent compared to Article 30(2)(a) – and does not “otherwise provide” for the accused’s intent regarding the group’s crime. Article 30(2)(b)’s requirement that the accused at least know the crime will occur in the ordinary course of events therefore continues to govern the cognitive element for the underlying offences. The Prosecution’s selective invocation of Article 30 confirms that Article 30 remains the governing standard unless expressly displaced – which subparagraph (i) does not do.

(iii) The calibration argument

55. The Prosecution argues that requiring only “substantial risk” awareness better calibrates culpability to the nature of the accused’s participation because his

¹³⁵ [Al Hassan TJ](#), para. 1245, citing [Katanga TJ](#), para. 1640, which merely underlines the two alternatives of Article 25(3)(d).

¹³⁶ [Prosecution Appeal Brief](#), para. 41.

¹³⁷ *Ibid.*, para. 38.

¹³⁸ *Ibid.*, para. 39.

¹³⁹ *Ibid.*, para. 33.

“cognition is primarily directed at the level of the common purpose” rather than at the crime itself.¹⁴⁰ This misconceives the structure of Article 25(3)(d)(i). First, this provision anchors responsibility in the accused’s contribution to a *specific crime* that forms part of the group’s common purpose, not merely to a generalised wrongdoing.¹⁴¹ Second, Article 25(3)(d)(i) does not replace knowledge of the crime with cognition at the level of the common purpose; it requires that the accused act “with the aim of furthering” the *criminal* activity or *criminal* purpose, i.e. the criminal element of the common purpose, “where such activity or purpose involves the commission of a *crime*” (emphasis added). The crime is not peripheral but central to the accused’s mental element as it is central to the group’s common purpose.¹⁴²

56. This alignment between the accused’s mental state and the group’s criminal purpose is inherent in the text.¹⁴³ First, the group’s common purpose is defined by what it collectively intends regarding the crimes. Jurisprudence establishes that this requires the group to either mean to cause the crime or know it will occur in the ordinary course of events – the Article 30 standard.¹⁴⁴ To “aim to further” that criminal purpose and not only a legitimate or mixed-motive plan, the accused must possess the same understanding of what crimes will occur. “Virtual certainty” and “substantial risk” reflect fundamentally different appreciations of the same crime. An accused cannot aim to further a purpose that differs from the group’s *actual* criminal purpose.¹⁴⁵ Second, critically, the Prosecution’s theory creates a

¹⁴⁰ [Prosecution Appeal Brief](#), para. 52.

¹⁴¹ See [Katanga TJ](#), para. 1619 (“the accused will not be considered responsible for all of the crimes which form part of the common purpose, but only for those to whose commission he or she contributed.”).

¹⁴² See above III.B.1.a). See [Katanga TJ, Opinion of Judge van den Wyngaert](#), para. 286.

¹⁴³ The Prosecution’s contention that “[t]he accused need not to have shared the group’s intention to commit the crime” is based on jurisprudence addressing Article 25(3)(d)(ii) and not Article 25(3)(d)(i). See Prosecution Appeal Brief Appeal, fn. 54, referring to [Mbarushimana Confirmation Decision](#), paras 288-289. See, in support, *Prosecutor v. Bosco Ntaganda*, Appeal Judgment, Separate opinion of Judge Howard Morrison on Mr Ntaganda’s appeal, [ICC-01/04-02/06-2666-Anx2](#), 30 March 2021, para. 37, suggests *a contrario* that subparagraph (i) requires that the accused actually share the group’s aim.

¹⁴⁴ [Katanga TJ](#), paras 1627, 1641; [Al Hassan TJ](#), para. 1237. See also, importantly, [Katanga TJ](#), para. 1630. See also [Prosecution Appeal Brief](#), para. 30; [Prosecution Trial Brief](#), fn. 638.

¹⁴⁵ See, in support of this interpretation, [Al Hassan TJ, Separate opinion of Judge Akane](#), para. 56 (“The reasons set out above in relation to the common purpose applies *mutatis mutandis*: in circumstances where even senior members of Ansar Dine/AQIM, such as P-0150, were of the view that there were no marriages involving ‘direct compulsion’ it is implausible that Mr Al Hassan had any awareness that the charged forced marriages, and associated acts of rape and/or sexual slavery, would occur in the ordinary course of events”).

contradiction. It accepts that the group must operate with virtual certainty, yet claims that the accused – who may or may not be a group member –¹⁴⁶ needs only to act with substantial-risk awareness. If the Prosecution’s logic were followed, this would permit a situation in which a group member does not share the group’s common purpose, an anomaly that the Statute clearly does not contemplate.

57. In any event, the principle of culpability does not authorise courts to rewrite Article 30’s statutory mental elements to achieve the Prosecution’s preferred calibration. The Statute has already calibrated culpability by distinguishing modes of liability under Article 25(3)(a) – (d), each subject to Article 30 unless otherwise provided. The “aim” requirement in subparagraph (i) is an additional element, not a substitute permitting dilution of the knowledge requirement. Accepting the Prosecution’s calibration logic would introduce arbitrary distinctions within the Statute,¹⁴⁷ and the Prosecution offers no principled basis for treating Article 25(3)(d)(i) differently.
58. Applying Article 30 to Article 25(3)(d)(i) yields a coherent mental element structure: (i) intentional contribution, as required by the chapeau; (ii) a special volitional element in relation to the accused’s own contribution; and (iii) at least knowledge that the crime will occur in the ordinary course of events, pursuant to Article 30. This interpretation, made in good faith, respects the ordinary meaning of subparagraph (i)’s text, applies the default rule as the Statute mandates, and generates a coherent framework for establishing criminal responsibility consistent with the twofold intent required of secondary participants.

(iv) The lack of redundancy between subsections (i) and (ii) of Article 25(3)(d)

59. The Prosecution appears to contend that Article 25(3)(d)(ii) requires “virtual certainty” that the group will commit the charged crime, and that, for this reason, Article 25(3)(d)(i) cannot impose the same standard, otherwise the two alternatives

¹⁴⁶ This needs not be proven or disproven, *see also above* para. 25, fn 59.

¹⁴⁷ [Prosecution Appeal Brief](#), para. 55.

would become redundant.¹⁴⁸ This argument cannot stand. First, neither Article 25(3)(d)(ii) nor Article 25(3)(d)(i) contains any express “virtual certainty” requirement; the Prosecution’s suggestion that such a threshold is somehow evident in subparagraph (ii) finds no support in the text. Article 30(3) defines knowledge to include both “awareness that a circumstance exists” and awareness that “a consequence will occur in the ordinary course of events”. Subparagraph (ii) explicitly requires “knowledge of the intention of the group to commit the crime”, which is plainly knowledge of a circumstance.¹⁴⁹

60. In any event, whether this provision also “otherwise provides” for knowledge regarding the consequence (i.e. the crime’s occurrence), or whether Article 30 supplies that cognitive element for subparagraph (ii) as well, need not be resolved in this appeal. What matters is that the two subparagraphs remain structurally distinct. Subparagraph (i) introduces a purposive mental element aligning with the group’s criminal purpose: the accused must act with the aim of furthering the group’s criminal objectives.¹⁵⁰ Subparagraph (ii), by contrast, requires a high degree of connection to the group’s intention to commit the specific crime,¹⁵¹ without requiring the accused to share, endorse or aim to advance that intention. Thus, assuming both subparagraphs apply the Article 30 knowledge standard regarding the crime, they continue to address different dimensions of culpability: purposive contribution under subparagraph (i) and knowing contribution under subparagraph (ii).

61. The Prosecution’s reliance on the *Katanga* Judgment is similarly misplaced. While it asserts that subparagraphs (i) and (ii) must have distinct mental elements,¹⁵² the

¹⁴⁸ See, in particular, [Prosecution Appeal Brief](#), fn. 65.

¹⁴⁹ [Katanga TJ](#), para. 1641 (“The Chamber takes the view that accused’s knowledge of the intention of the group must be defined with reference to article 30(3) of the Statute: the accused must be aware that the intention existed when engaging in the conduct which constituted his or her contribution”). See also [Katanga TJ](#) para. 1642 (“[k]nowledge of such circumstance must be established for each specific crime [...]”).

¹⁵⁰ [Prosecution Appeal Brief](#), fn. 56, referring to K. Ambos, ‘[Article 25](#)’, p. 1231 (“specific intention to promote the ideas of the group”).

¹⁵¹ [Katanga TJ](#), para. 1642 (“To incur liability as an accessory, the accused’s knowledge must be inferred from the relevant facts and circumstances and *be connected to the group’s intention*, as defined in article 30(2)(b) of the Statute, *to commit the specific crimes*” (emphasis added)).

¹⁵² [Prosecution Appeal Brief](#), paras 39-40.

Katanga Trial Chamber actually cautioned against interpretations that create redundancy or conflict with other statutory requirements, “particularly article 30”.¹⁵³ Reading subparagraph (i) as permitting a lower awareness threshold would contradict Article 30, undermine foreseeability, and produce precisely the kind of inconsistency the *Katanga* Trial Chamber warned against, namely incoherence among the various modes of liability under Article 25(3), all of which apply Article 30 with regard to the principal offence, unless otherwise provided. The *Katanga* case therefore provides no support for lowering the cognitive threshold under subparagraph (i) and confirms that Article 30’s mental element remains operative except where the Statute explicitly provides otherwise.

ii. *Incorporating a ‘substantial risk’ standard into Article 25(3)(d)(i) would contravene the statutory framework*

62. Even setting aside the *lex specialis* principle, and assuming *arguendo* a lacuna existed, any attempt to develop a lower mental threshold would be incompatible with the Statute’s text, drafting history, and legality requirements.
63. First, the Statute does not recognise *dolus eventualis*, recklessness, or any lesser form of culpability as a default standard.¹⁵⁴ As explained above, this follows from Article 30(2)(b) alternative (2), which requires awareness that the consequence “will” – and not merely “may” – occur in the ordinary course of events. Accordingly, unless a provision expressly adopts a lower threshold (which Article 25(3)(d) does not), such forms of culpability are deliberately excluded. The *Lubanga* Trial Chamber expressly confirmed that both the drafting history and the wording of Article 30 show the

¹⁵³ [Prosecution Appeal Brief](#), fn. 66, referring to [Katanga TJ](#), para. 1389.

¹⁵⁴ *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, [ICC-01/04-02/12-4](#), 20 December 2012, paras 38-39; *Prosecutor v. Ruto and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, [ICC-01/09-01/11-373](#), 23 January 2012, paras 335-336; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, [ICC-01/05-01/08-424](#), 15 June 2009, paras 357-369. See also A. Eser, “Mental Elements – Mistake of Fact and Mistake of Law”, IV.I (“as the statutory situation stands, the mere awareness of a risk which might occur [...] is not a sufficient base for criminal responsibility according to the ICC Statute, and thus does not require further elaboration” (footnotes excluded)).

Statute's deliberate rejection of *dolus eventualis* and recklessness.¹⁵⁵ And since Article 30 governs the mental element for all forms of participation, no participant – whether principal or accessory – can be held responsible for *dolus eventualis*, mere recklessness or negligence.¹⁵⁶

64. Second, although Article 25(3)(d)'s special mental elements drew inspiration from domestic systems,¹⁵⁷ this does not authorise importing liability concepts that fall outside the Statute and undermine the principle of legal certainty.¹⁵⁸ The drafting history shows that Article 25(3)(d) was a pragmatic compromise: a conscious departure from the expansive common-law notion of conspiracy toward a narrower model centred on an individual's intentional contribution to group criminality.¹⁵⁹ The drafters deliberately rejected conspiracy-like liability and, as Ambos explains, crafted Article 25(3)(d) as a “statutory surrogate of joint criminal enterprise”, *but* with stricter requirements, including a higher mental element threshold.¹⁶⁰
65. Third, applying liability standards not provided for in the Statute would violate Article 22(2), which requires strict construction of criminal law provisions and prohibits extension by analogy.¹⁶¹ In *Bemba et al.*, the Appeals Chamber reaffirmed that when interpreting criminal provisions, the Court must not only use the ordinary meaning of the terms read in their proper context but must also adhere to the principle of legality and the strict-construction requirement embodied in Article 22(2).¹⁶²

¹⁵⁵ *Prosecutor v. Thomas Dyilo Lubanga*, Judgment pursuant to Article 74 of the Statute, [ICC-01/04-01/06-2842](#), 14 March 2012, para. 1011 (“The plain language of the Statute, and most particularly the use of the words “will occur” in Article 30(2)(b) as opposed to “may occur”, excludes the concept of *dolus eventualis*”).

¹⁵⁶ See also on the application of *dolus eventualis* to Article 30 in general, K. Ambos, ‘[The Subjective Requirements of International Crimes](#)’, pp. 375-376.

¹⁵⁷ [Prosecution Appeal Brief](#), para. 42.

¹⁵⁸ [Rome Statute](#), Article 21(1).

¹⁵⁹ Z. Sanikidze, ‘[The Level of ‘Contribution’ Required Under Article 25 \(3\) \(D\) of the Rome Statute of the International Criminal Court](#)’, (2012) 83 *Revue Internationale de Droit Pénal* 221, p. 227; K. Ambos, ‘[General Principles of Criminal Law in the Rome Statute](#)’, (1999) *Criminal Law Forum*, pp. 12-13; C. F. Díaz-Paniagua, ‘[Negotiating Terrorism: The Negotiation Dynamics Of Four Un Counter-Terrorism Treaties, 1997-2005](#)’, pp. 282-290.

¹⁶⁰ K. Ambos, ‘[Joint Criminal Enterprise and Command Responsibility](#)’ (2007) 5 *Journal of International Criminal Justice* 159 pp. 172-173.

¹⁶¹ *Bemba et al. AJ*, para. 675; Kai Ambos, ‘[Joint Criminal Enterprise and Command Responsibility](#)’, pp. 172-173; [Prlić’s Motion](#) against the Application of JCE and in favour of the Application of Co-perpetration, para. 8.

¹⁶² *Bemba et al. AJ*, para. 675.

66. Against this backdrop, the Prosecution's reliance, *inter alia*, on JCE III to advocate a lower *mens rea* standard under Article 25(3)(d) is fundamentally misplaced. JCE III – judicially developed by the *ad hoc* tribunals – is structurally and conceptually incompatible with Article 25(3)(d). It not only “addresses group criminality and the commission of a crime which the accused themselves did not directly intend”,¹⁶³ but, critically, allows liability based on the mere foreseeability of crimes falling outside the common plan. This logic is irreconcilable with the Article 25(3)(d)'s constitutive elements, which require that the charged crimes be intended by the group.¹⁶⁴ Importing JCE III standards into the Statute would not fill a gap, it would circumvent the Statute's intentionally limited and specific system of individual criminal responsibility.¹⁶⁵

67. ICC jurisprudence confirms this incompatibility. In *Mbarushimana*, the Pre-Trial Chamber held that principles developed by the *ad hoc* tribunals cannot be applied to Article 25(3) because of significant structural differences, including the required mental element.¹⁶⁶ Judge Fernández de Gurmendi likewise stressed that JCE standards cannot be transplanted into Article 25(3)(d), as they stem from “statutory systems that are different from each other”.¹⁶⁷ The *Al Hassan* Trial Chamber reached the same conclusion, describing Article 25(3)(d) as “an innovation of the Statute”

¹⁶³ [Prosecution Appeal Brief](#), para. 44.

¹⁶⁴ S. Lord, ‘[Joint Criminal Enterprise and the International Criminal Court](#)’, p. 57 (“As for extended JCE, however, the principle modes of liability under the Rome Statute requires intent, whereas JCE only requires intent to furthering the common criminal objective is required, but not intent to the actual crime committed. JCE is therefore never applicable before the Court”); M. Odriozola-Gurrutxaga, ‘[The Doctrine of Joint Criminal Enterprise at the ad hoc Tribunals and its Applicability in the Rome Statute of the ICC](#)’, (2013) *Electronic Review of the IAPL* 1, p. 11 (“[Article 25(3)(d)] therefore excludes the criminal liability for the crimes which are not intended by the group, because they are just a possible consequence of the implementation of the common plan, where the awareness and acceptance of the risk of the commission of the crime is not shared with the rest of the members. On the contrary, under JCE III, members of a JCE can be held liable for the crimes of other members not explicitly agreed upon beforehand, provided that the crimes were a natural and foreseeable consequence of the plan and they consciously took that risk. This is precisely why JCE III does not fall into Article 25(3)(d) RS either”); M. Divac Öberg, ‘[Fact-Finding without Facts from the Perspective of the Fact-Finder](#)’, (2011) 105 *American Society of International Law Proceedings* 319, p. 322 (“Accordingly, it appears that the Rome Statute does not allow the ICC to import extended JCE doctrine”).

¹⁶⁵ The Prosecution itself emphasises this point. See *Prosecutor v. Thomas Dyilo Lubanga*, Decision on the confirmation of charges, [ICC-01/04-01/06-803](#), 14 May 2007, para. 323; G. P. Fletcher and J. D. Ohlin, ‘[Reclaiming Fundamental Principles of Criminal Law in the Darfur Case](#)’ (2005) 3 *Journal of International Criminal Justice* 539, p. 549.

¹⁶⁶ [Mbarushimana Confirmation Decision](#), paras 281-282.

¹⁶⁷ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”, Separate Opinion of Judge Silvia Fernández de Gurmendi, [ICC-01/04-01/10-514](#), 30 May 2012, para. 14.

and finding that jurisprudence developed under other statutory frameworks has “minimal, if any, relevance” to its interpretation.¹⁶⁸

68. Only an explicit codification could reconcile JCE III with the Statute. In its absence, importing JCE III’s *mens rea* requirement into Article 25(3)(d) would violate the Statute’s legality framework and the principle of legal certainty. Adopting a “substantial risk” or “foreseeability” standard would effectively reintroduce conspiracy liability through the backdoor, contrary to the drafters’ express intentions and the Statute’s carefully delimited system of individual criminal responsibility.¹⁶⁹
69. In any event, the Prosecution must show that the Trial Chamber would have convicted under the actual legal requirements of Article 25(3)(d)(i), not under a hypothetical standard the Chamber neither applied nor endorsed. Yet, its material-effect argument rests on a novel “substantial risk” mental element that has no basis in the Statute’s text, no support in established ICC jurisprudence,¹⁷⁰ and was never articulated by the Chamber. Such speculation cannot satisfy the demanding standard for material effect,¹⁷¹ particularly when it relies on a legal standard inconsistent with Article 25(3)(d)(i) read with Article 30. There is no basis to conclude the Chamber would have reached a different result under Article 25(3)(d)(i) than under Article 25(3)(c).¹⁷² Both provisions incorporate the same Article 30 knowledge standard for the crime as a consequence. The Trial Chamber’s finding that Mr Ngaïssona lacked knowledge that rape would occur in the ordinary course of events is therefore equally dispositive under Article 25(3)(d)(i) as it was under Article 25(3)(c). The Prosecution cannot demonstrate material effect by

¹⁶⁸ [Al Hassan TJ](#), paras 1230-1231.

¹⁶⁹ Kai Ambos, ‘[Joint Criminal Enterprise and Command Responsibility](#)’, pp. 172-173; see [Prosecution Appeal Brief](#), paras 45-47.

¹⁷⁰ See [Prosecution Appeal Brief](#), para. 41 (“The Court’s case law has not set out the required degree of awareness under article 25(3)(d)(i)”).

¹⁷¹ [Ibid.](#), para. 43.

¹⁷² See [Ibid.](#), para. 26 (knowledge in relation to crime “does not *necessarily imply* that the accused must know with virtual certainty that the charged crimes would be committed”), para. 38 (“[t]he degree of awareness *need not* be determined by reference to article 30 [...]”), para. 40 (“Therefore, under article 25(3)(d)(i), the accused *may have* a degree of awareness lower than that of a ‘virtual certainty’ that the group will commit the charged crime” (emphasis added)). See also para. 88 (“[...] the only reasonable conclusion is that Mr Ngaïssona was aware of the substantial risk that the group would commit rape and persecution through rape [...]).

invoking a legal standard the Court never adopted and – given the Chamber’s application of Article 30 throughout the Judgment – would not have adopted.

b) Even under the Prosecution’s proposed standard, Mr Ngaïssona’s knowledge fell far below what Article 25(3)(d)(i) requires

70. Even assuming *arguendo* that the Trial Chamber should have addressed Article 25(3)(d)(i) separately, its findings foreclose any conclusion that Mr Ngaïssona possessed the knowledge required under that provision. The Prosecution’s material-effect theory rests on the assertion that, had the Chamber applied a “substantial risk” threshold, it would have convicted. This approach requires the Appeals Chamber to assume that the Trial Chamber would have both (i) adopted a novel mental element standard unsupported by the Statute or ICC jurisprudence, and (ii) reassessed its own factual findings in a manner inconsistent with its explicit characterisation of Mr Ngaïssona’s knowledge. Material effect cannot be demonstrated on the basis of such compounded speculation and appellate intervention is not required.

71. The Trial Chamber’s reasoning confirms that its analysis on the rape counts is dispositive both under Article 25(3)(c) and 25(3)(d). The Chamber explicitly addressed the Defence’s arguments under Article 25(3)(d) at paragraph 4127 and then assessed Mr Ngaïssona’s knowledge using Article 30’s standard, stating at paragraph 4128 that knowledge “requires ‘virtual certainty’ that the consequence in question would occur”. Applying this standard, the Chamber found at paragraph 4129 that Mr Ngaïssona had virtual certainty regarding killings, injuries, dislocation, and destruction of property, but held at paragraph 4131 that it was “unable to conclude that Mr Ngaïssona was aware that such criminal conduct would occur in the ordinary course of events”. Crucially, it characterised Mr Ngaïssona’s knowledge regarding rape, at paragraph 4128, as merely “an abstract ‘risk’”, which it found insufficient for criminal responsibility.

72. This characterisation is fatal to the Prosecution’s appeal argument even on its own terms. Substantial risk implies a significant, concrete, likelihood, whereas abstract

risk reflects only a generalised or remote possibility. The Chamber's inability to find a pattern of rape, even under its own pattern-based framework,¹⁷³ combined with its characterisation of Mr Ngaïssona's knowledge as "abstract risk" demonstrate that the evidentiary record could not meet even the Prosecution's proposed threshold. The Prosecution's theory would require the Appeals Chamber to assume that the Trial Chamber would not only adopt an unprecedented mental-element standard but also reassess the facts to elevate "abstract risk" to "substantial risk".¹⁷⁴ This compound speculation cannot demonstrate material effect or justify appellate intervention.

73. The Prosecution also misreads the Chamber's reasoning at paragraph 4131.¹⁷⁵ The Chamber's conclusion that it "must base its conclusions on the specific evidence and charges as presented and confirmed before it, and in relation to the individual criminal responsibility of a specific accused" reflects a core principle: the accused's mental state must be assessed based on what he knew given his particular role and circumstances, not on generalised awareness of broader patterns. This principle applies with equal force under Article 25(3)(c) and 25(3)(d)(i). The Defence's own appeal demonstrates why the Chamber's individualised approach at paragraph 4131 is the correct methodology.¹⁷⁶

74. Because the Chamber's individualised assessment found that Mr Ngaïssona's knowledge amounted only to an abstract risk; the basis for a conviction under Article 25(3)(d)(i) would be absent even under the Prosecution's hypothetical standard.¹⁷⁷ Consideration of Article 25(3)(d)(i) would not have materially affected the Judgment and no appellate intervention is warranted.

¹⁷³ See [Ngaïssona Appeal Brief](#), paras 341-347.

¹⁷⁴ See [Prosecution Appeal Brief](#), para. 90 qualifying rape or persecution through rape of "not merely a hypothetical or an implausibly remote scenario" in contradiction with the Chamber's express "abstract" finding. *See also* para. 54 ("[...] the risk must be realistic and not merely hypothetical").

¹⁷⁵ [Prosecution Appeal Brief](#), para. 90.

¹⁷⁶ See [Ngaïssona Appeal Brief](#), paras 374-381.

¹⁷⁷ *See above* paras 2, 15-17, 43.

B.3. The Trial Chamber's findings and underlying evidence do not support the inferences the Prosecution must draw to establish liability pursuant to Article 25(3)(d)(i)

75. In view of the above, it is unnecessary for the Appeals Chamber to consider the Prosecution's submissions that Mr Ngaïssona contributed to the charges of rape and persecution through rape pursuant to Article 25(3)(d)(i).¹⁷⁸ In any event, the facts as found throughout the Judgment and the underlying evidence do not allow to conclude that Mr Ngaïssona contributed to the commission of rape and persecution through rape, nor that he made his contribution with the aim of furthering the Anti-Balaka's criminal purpose.

- a) The Trial Chamber's findings and underlying evidence do not establish that Mr Ngaïssona contributed to the commission of the crimes of rape and persecution through rape pursuant to Article 25(3)(d)

76. The Prosecution asserts that to incur individual criminal liability pursuant to Article 25(3)(d), the accused's contribution must have had an effect on the commission of the crime.¹⁷⁹ This crucial requirement is fatal to the Prosecution's case.

77. None of the Trial Chamber's factual findings support the conclusion that Mr Ngaïssona's conduct had an effect on the commission of P-2462's rape. The Judgment barely engages with whether Mr Ngaïssona's contributions had an effect on the Bossangoa attack itself, let alone on crimes committed in that context. The Trial Chamber merely found that his financial support "made it possible for at least some of the elements to participate in the attacks during the advance and seminal attacks on [Bangui and] Bossangoa."¹⁸⁰ Such a vague finding does not allow to conclude that Mr Ngaïssona's financial assistance had a bearing on P-2462's rape. The Chamber did not determine the identities and role of the "elements" who would have participated to the Bossangoa attack with Mr Ngaïssona's financial assistance, nor the relative impact or effect of their participation on the Bossangoa attack. This impact cannot simply be presumed. A conviction under Article 25(3)(d)

¹⁷⁸ [Prosecution Appeal Brief](#), sections C.2.c-C.2-e.

¹⁷⁹ [Prosecution Appeal Brief](#), para. 32.

¹⁸⁰ See [Prosecution Appeal Brief](#), fn. 166, citing [Judgment](#), pp. 1384-1385, para. 4042, pp. 1602-1603, para. 4710, p. 1609, para. 4734.

requires a significant contribution, analysed in relation to the specific crime, to be proven beyond reasonable doubt.¹⁸¹

78. Besides, as argued in the Defence Appeal Brief, the Chamber failed to identify the evidentiary basis for its finding that Mr Ngaïssona's financial assistance allowed the participation of some elements to the Bossangoa attack.¹⁸² Any reliance on this factual conclusion without adequate and independent verification would therefore infringe Mr Ngaïssona's right to the presumption of innocence pursuant to Article 66(3).¹⁸³ An in-depth analysis of the case record shows that the Chamber's factual finding in this regard is entirely speculative. The Chamber also relies on findings of fact that lack a proper evidentiary basis, having been established on insufficiently corroborated untested evidence.¹⁸⁴
79. In the absence of any other findings concerning the impact of Mr Ngaïssona's contributions on the Bossangoa attack and crimes committed in its context, the Prosecution relies on broad factual findings which, it claims, generally show that Mr Ngaïssona contributed to the Anti-Balaka's activities. However, these findings have often been misrepresented and, in any event, are entirely inadequate to establish that Mr Ngaïssona contributed to P-2462's rape pursuant to Article 25(3)(d).
80. The Prosecution's submissions distort the Trial Chamber's core findings on the recipients of Mr Ngaïssona's contributions. Notably, the Chamber found that Mr Ngaïssona's financial assistance was directed to "individuals willing or meant to assist the efforts in bringing François Bozizé back to power".¹⁸⁵ Similarly, it found that he "engaged in activities pertaining to the organization and coordination of groups".¹⁸⁶ The Prosecution's portrayal of these findings as establishing a

¹⁸¹ [Katanga TJ](#), para. 1632.

¹⁸² See [Ngaïssona Appeal Brief](#), paras 22, 165.

¹⁸³ See [Gbagbo and Blé Goudé, Concurring Opinion of Judge Eboe-Osuji](#), para. 79.

¹⁸⁴ See [Ngaïssona Appeal Brief](#), paras 168-172.

¹⁸⁵ [Judgment](#), pp. 289-290, para. 828, cited at para. 75 of [Prosecution's Appeal Brief](#).

¹⁸⁶ [Judgment](#), para. 38.

contribution to the Anti-Balaka movement¹⁸⁷ is inaccurate and fails to grasp crucial nuances in the Judgment.

81. Factual findings such as the above do not allow to conclude that the Trial Chamber would have convicted Mr Ngaïssona under Article 25(3)(d). A contribution to vaguely identified “individuals” and “groups” is insufficient to ground a finding of criminal responsibility pursuant to Article 25(3)(d). While the jurisprudence does not require a direct nexus between the accused and the direct perpetrator, it does require for the contribution to have been effected through members of the group acting with a common purpose.¹⁸⁸ In its submissions, the Prosecution identifies the group acting with a common purpose as the Anti-Balaka as a whole.¹⁸⁹ Any attempt to blur the contours of the group even further ought not be permitted.
82. The Prosecution’s submissions overstate Mr Ngaïssona’s role and contributions as found in the Judgment, such as by asserting that his financial assistance in 2013 promoted the “formation and operationalising of the Anti-Balaka”.¹⁹⁰ Not only is there no such finding in the Judgment, but the Chamber clearly found that self-defence movements arose spontaneously and largely pre-dated the conflict,¹⁹¹ refuting the very suggestion that Mr Ngaïssona would have been involved in the “formation” of the Anti-Balaka. The Prosecution further deliberately misrepresents the timeframe of factual findings on financial assistance¹⁹² to conceal their plain irrelevance and lack of effect on the commission of crimes in Bossangoa.

¹⁸⁷ On financing, *see e.g.*, [Prosecution Appeal Brief](#), para. 75 (“provided financial contributions to promote the formation and operationalising of the Anti-Balaka”); on organisation and coordination, *see e.g.*, [Prosecution Appeal Brief](#), para. 73 (“played a central role in the organization of the Anti-Balaka”).

¹⁸⁸ [Katanga TJ](#), para. 1635 (“[t]he contribution to the crime may be made through the physical perpetrators themselves or through other members of the group acting with a common purpose. A direct nexus between the conduct of the accessory and that of the physical perpetrator need not be established”).

¹⁸⁹ *See above* paras 24-25.

¹⁹⁰ [Prosecution Appeal Brief](#), para. 75. Similarly, *see* para. 73.

¹⁹¹ The Trial Chamber found that self-defence groups formed or re-activated “*in parallel*” to the activities in Cameroon/Zongo” (emphasis added), *see* Judgment at pp. 403-404.

¹⁹² *See and compare* [Prosecution Appeal Brief](#), para. 75 (“[t]he Chamber found that “Mr Ngaïssona’s financial contributions to the activities of groups coalescing into the Anti-Balaka in 2013 [...] were regular and related to the Anti-Balaka manoeuvring or continuing to function”) and para. 77 (“[t]he Chamber considered that Mr Ngaïssona’s financial contributions “inter-locked with the inter-operability of the Anti-Balaka””) with [Judgment](#), section 7 (titled “Anti-Balaka in the aftermath of the attacks on 5 December 2013”), pp. 640-641, paras 1694-1695 (“Therefore, and on the basis of the evidence as outlined, the Chamber concludes that Mr Ngaïssona continued to provide financial assistance to the Anti-Balaka for various purposes *in 2014*. The Chamber concludes that these

83. The Prosecution's strategy is clear: to build an unsupported narrative where Mr Ngaïssona is a key contributor to the Anti-Balaka, in the hope that it would not need to show any actual impact of his contributions onto the crimes. This approach is particularly apparent from the Prosecution's reliance, in no less than three different sections of its Brief, on the Chamber's finding that Mr Ngaïssona acted as a "link to which the Anti-Balaka would make requests for weapons and ammunition."¹⁹³ A plain and objective reading of the Judgment leaves however no doubt that this finding relates to a specific episode, and not to Mr Ngaïssona's role *vis-à-vis* the entire Anti-Balaka movement.¹⁹⁴ The Prosecution's continued reliance on this one sentence speaks to the paucity of findings concerning the impact of Mr Ngaïssona's conduct on the Anti-Balaka movement.
84. The Prosecution repeatedly argues that the Chamber has already made all of the factual findings necessary to find Mr Ngaïssona guilty for rape and persecution through rape pursuant to Article 25(3)(d). If that was truly the case, the Prosecution would have had no need to distort the Chamber's findings and magnify Mr Ngaïssona's role towards the Anti-Balaka movement. In any event, even assuming the Prosecution's submissions adequately captured the Chamber's findings, they would still be inadequate to show an effect on the commission of rape in Bossangoa, given Article 25(3)(d) requires a link between the accused's contribution and the charged crimes, rather than merely the group's criminal activity in general terms.¹⁹⁵
85. The *Katanga* Trial Chamber was clear that "[a] person who stands charged pursuant to article 25(3)(d) will not incur individual criminal responsibility for those crimes which form part of the common purpose but to which he or she did not contribute".¹⁹⁶ It further held that under Article 25(3)(d), it is paramount that the

purposes included the purchase of weapons and ammunition. Further recalling its discussion of Mr Ngaïssona's financial contributions to the activities of groups coalescing into the Anti-Balaka in 2013, the Chamber concludes that Mr Ngaïssona's financial contributions to the Anti-Balaka activities during the period relevant to the charges were regular and related to the Anti-Balaka manoeuvring or continuing to function. In this way, even if the financial contributions aimed also, or even mainly, at daily subsistence or reimbursement of travel costs for meetings, they inter-locked with the inter-operability of the Anti-Balaka." (emphasis added)).

¹⁹³ [Prosecution Appeal Brief](#), paras 73, 80, 83.

¹⁹⁴ [Judgment](#), pp. 309-322, paras 865-889. *Relatedly*, see [Ngaïssona Appeal Brief](#), para. 193.

¹⁹⁵ [Prosecution Appeal Brief](#), para. 31, *citing* [Katanga TJ](#), para. 1632, [Al Hassan TJ](#), paras 1240, 1244.

¹⁹⁶ [Katanga TJ](#), para. 1619.

accused's contribution is linked to the commission of the specific crime, not merely to the group's general activities.¹⁹⁷ In *Al Hassan*, Judge Akane dissented on the finding that Mr Al Hassan could be found responsible for crimes committed by an institution he did not belong to, by mere fact of his being a "key player within a synergistic repression system". In Judge Akane's views, this merely demonstrated Mr Al Hassan's contribution to the activities of the group acting with a common purpose in general, rather than a contribution to the commission of crimes in particular.¹⁹⁸

86. In *Gbagbo*,¹⁹⁹ Judge Henderson stressed that Article 25(3)(d) requires an active and meaningful contribution to the commission of the charged crimes. It is not sufficient for the Prosecutor to rely on generic, broadly framed, or background actions that merely form part of the political or operational context. The contribution must have a discernible link to the specific crimes, not merely to the group's overall political objective. Judge Henderson emphasised the distinction between (i) creating general conditions in which crimes occur, and (ii) actively contributing to their perpetration. Only the latter falls within the scope of Article 25(3)(d).²⁰⁰ Political statements, meetings, or mobilisation relating to broad objectives are insufficient, absent evidence linking them to the physical commission of specific crimes.²⁰¹ Article

¹⁹⁷ [Katanga TJ](#), para. 1632 ("For the Chamber, it is paramount that the accused's contribution be connected to the commission of the crime and not solely to the activities of the group in a general sense. Indeed, a significant contribution, analysed in relation to each crime, must be proven beyond reasonable doubt"). In this case, while the contribution that led to Mr Katanga's conviction broadly consisted of logistical support to the group acting with a common purpose, the Trial Chamber assessed the specific relevance of that logistical support to the commission of the charged crimes. It particularly found that it had a "considerable influence on their occurrence and the manner of their commission", as it provided the group with the needed firepower to carry out the attack and commit the charged crimes, *see Katanga TJ*, paras 1679-1680. No comparable analysis was ever carried out in Mr Ngaissona's case.

¹⁹⁸ [Al Hassan TJ, Separate opinion of Judge Akane](#), paras 43-44.

¹⁹⁹ [Gbagbo and Blé Goudé TJ, Reasons of Judge Henderson](#), paras 1956-1965.

²⁰⁰ *Ibid.*, the Judgment held that contributions such as laying siege to a hotel, issuing political statements, calling for mobilisation, or encouraging resistance may relate to the group's general political aims but are not connected in any meaningful way to the physical commission of murders, rapes, or persecutions. The fact that these acts may have indirectly shaped the environment in which crimes were later committed does not transform them into contributions "to" those crimes. As Judge Henderson put it, it would be artificial to equate the creation of a general backdrop with an actual causal contribution to the crimes, illustrating the point with the analogy that the designers of the Titanic did not "meaningfully contribute" to the captain's act of steering it into an iceberg.

²⁰¹ [Gbagbo and Blé Goudé TJ, Reasons of Judge Henderson](#), para. 1965.

25(3)(d) does not criminalise actions that merely “allow” for crimes to occur; it requires contributions that occasion or influence the crimes themselves.

87. In light of this settled jurisprudence, Mr Ngaïssona’s alleged contribution to the crime of rape in Bossangoa cannot be established on the basis of his mere involvement in meetings in Cameroon with François Bozizé, Bernard Mokom or others,²⁰² or his participation in initiatives such as FROCCA.²⁰³ This conduct has no discernible link to the commission of rape in Bossangoa, rather relating to the general context of mobilisation against the Seleka regime following Bozizé’s overthrow. Participation in meetings could only amount to a contribution if the Prosecution demonstrated beyond reasonable doubt that the discussions were specifically connected to the commission of the charged crimes. In the present case, no such link was shown.

88. In the same vein, the Chamber’s finding that Mr Ngaïssona engaged in anti-foreign and anti-Muslim rhetoric²⁰⁴ cannot be argued to show that he contributed to the commission of rape in Bossangoa. Despite the Chamber’s findings that anti-foreign rhetoric “primed” the CAR population,²⁰⁵ it is impossible to conclude that by lamenting the foreign composition of the Seleka in a handful of speeches,²⁰⁶ Mr Ngaïssona had an actual bearing on the occurrence or manner of commission of crimes in Bossangoa, let alone P-2462’s rape. This is simply too speculative and far-fetched.

89. Lastly, the Prosecution argues that the Trial Chamber’s mere finding that Mr Ngaïssona aided and abetted the commission of crimes in Bossangoa pursuant to Article 25(3)(c) shows that he contributed to P-2462’s rape.²⁰⁷ This argument is unsustainable. The Chamber’s conclusion that Mr Ngaïssona aided and abetted the

²⁰² [Prosecution Appeal Brief](#), para. 73.

²⁰³ *Ibid.*, para. 74.

²⁰⁴ *Ibid.*, para. 76.

²⁰⁵ [Judgment](#), p. 23, para. 46.

²⁰⁶ *Ibid.*, pp. 489-490, paras 1270-1273.

²⁰⁷ [Prosecution Appeal Brief](#), para. 77 (“The Chamber established that Mr Ngaïssona aided, abetted or otherwise assisted the commission of other crimes forming part of the Anti-Balaka’s attack in Bossangoa. Mr Ngaïssona was thus found to have contributed to the Bossangoa Attack, including the targeting of residential areas, which created and contributed to coercive circumstances or conditions under which the rapes occurred”).

commission of crimes in Bossangoa is a legal conclusion, reached pursuant to the specific requirements of Article 25(3)(c). Treating it as a mere conclusion of fact would essentially result into bypassing the assessment of the distinct legal requirements set by Article 25(3)(d).

90. The Chamber's finding that Mr Ngaïssona aided and abetted the commission of crimes in Bossangoa pursuant to Article 25(3)(c) cannot automatically validate a finding that he contributed to the commission of specific crimes pursuant to Article 25(3)(d). When assessing liability under Article 25(3)(c), the Chamber expressly rejected the need to establish either (a) an effect of the conduct on the crimes, or (b) a causal link between the contribution to the group's activities and the crimes.²⁰⁸ It follows that the Chamber did not consistently nor rigorously assess whether Mr Ngaïssona's conduct had an effect on the crimes he was found guilty of.²⁰⁹ Since such a link is required under Article 25(3)(d), as acknowledged by the Prosecution, and given that the Chamber did not analyse the matter under that provision, it remains speculative what conclusion the Chamber would have reached had it applied Article 25(3)(d).

91. Given the specificity of the Trial Chamber's factual findings relating to Article 25(3)(c), the Prosecution has no basis to argue that the Chamber would have concluded that Mr Ngaïssona's conduct amounted to a contribution to the rape of P-2462 under Article 25(3)(d). Further, any attempt to reach an independent conclusion on this issue would necessitate a fresh and comprehensive assessment of the underlying evidence, and the record does not allow to establish that Mr Ngaïssona's contributions had a bearing on the commission of P-2462's rape.

²⁰⁸ [Judgment](#), p. 1383, para. 4038.

²⁰⁹ [Ngaïssona Appeal Brief](#), Ground II.A.2.

- b) The Trial Chamber's finding and underlying evidence do not establish that Mr Ngaïssona made his contributions with the aim of furthering the criminal purpose of the Anti-Balaka

92. Even if the Trial Chamber's findings and underlying evidence supported a conclusion that Mr Ngaïssona contributed to the commission of P-2642's rape pursuant to Article 25(3)(d), it remains impossible to conclude that such contribution was provided with the aim of furthering the criminal activity or criminal purpose of the Anti-Balaka. Article 25(3)(d)(i) requires a volitional alignment with the criminal goals pursued by the group acting with a common purpose, which cannot be inferred from the Judgment's findings or underlying evidence in the case at hand.
93. The Prosecution misleadingly presents the Trial Chamber's findings concerning anti-Muslim animus, suggesting that Mr Ngaïssona engaged in, instrumentalised and even commended the targeting of Muslim civilians ahead of the 5 December attacks.²¹⁰ Yet, in the context of the "coordinating activities" he was found to have engaged in,²¹¹ Mr Ngaïssona was never found to have encouraged, organised or even discussed the targeting of the local Muslim population. The evidence detailed in the Judgment merely suggests that, well ahead of the crimes, Mr Ngaïssona complained about the Seleka's largely foreign composition,²¹² not about the local Muslim population. To fill this crucial gap in evidence relating to Mr Ngaïssona's *mens rea*, the Prosecution resorts to findings and evidence that largely relate to a later timeframe.²¹³
94. In the absence of clear findings or underlying evidence that, at the time he provided his contribution, Mr Ngaïssona sought the targeting of the Muslim population, the Prosecution resorts, once more, to magnifying his role *vis-à-vis* the Anti-Balaka movement. It depicts him as the movement's creator²¹⁴ through alleged galvanising

²¹⁰ [Prosecution Appeal Brief](#), para. 84.

²¹¹ [Prosecution Appeal Brief](#), para. 83, *citing* para. 73.

²¹² [Judgment](#), paras 1270-1273.

²¹³ *See e.g.*, [Prosecution Appeal Brief](#), para. 84, *citing* para. 76.

²¹⁴ [Ibid.](#), para. 83; *Contra see above*, para 81.

actions,²¹⁵ which would have resulted in “enabling” the Anti-Balaka to execute its criminal purpose.²¹⁶ These submissions exaggerate and misstate the Judgment’s factual findings. Furthermore, even assuming they were correct, they would still fail to establish a volitional alignment between Mr Ngaïssona and the criminal component of the Anti-Balaka’s common purpose.

95. The Prosecution’s argument that the Trial Chamber has already paved the ground for a finding of intent under Article 25(3)(d)(i), when finding that Mr Ngaïssona’s assistance was provided “for the purpose of facilitating the commission of criminal acts targeting the Muslim population”, is similarly unsustainable.²¹⁷ A careful analysis of the Judgment shows that this conclusion was merely inferred from Mr Ngaïssona’s continued contribution despite his (presumed) knowledge that the Anti-Balaka had started targeting Muslim civilians.²¹⁸ Whether this reasoning was compatible with the higher intent required by Article 25(3)(c) is open to question and among the subject matters of the Defence Appeal Brief.²¹⁹

96. Indeed, the Defence has raised several material errors in the Chamber’s assessment of Mr Ngaïssona’s *mens rea* under Article 25(3)(c).²²⁰ The nature and breadth of these submissions will require the Appeals Chamber to engage with the evidence and legal reasoning underlying the conclusion that Mr Ngaïssona provided his contributions for the purpose of facilitating the commission of crimes towards the Muslim population. Therefore, the Prosecution’s suggestion that the Appeals Chamber may merely rely on the Trial Chamber’s findings without further analysis is, to an extent, moot.

97. In any event, should the Appeals Chamber not find any errors in the Trial Chamber’s assessment that Mr Ngaïssona had the required intent under Article 25(3)(c), that should not result into an automatic finding of intent pursuant to Article

²¹⁵ [Ibid.](#), para. 83.

²¹⁶ [Ibid.](#), para. 83.

²¹⁷ [Prosecution Appeal Brief](#), para. 82.

²¹⁸ See [Judgment](#), p. 1384, para. 4041, p. 1408, paras 4119-4120.

²¹⁹ [Ngaïssona Appeal Brief](#), Ground 2.B.

²²⁰ [Ibid.](#), Grounds 1.C.7, 2.B, 2.C.

25(3)(d)(i). The Prosecution’s suggestion that the two essentially overlap excessively trivialises legal concepts based on a mere perceived conceptual similarity. Article 25(3)(d)(i) presupposes a specific volitional alignment and intention to promote the ideas and acts of the group²²¹ which is unique to that mode of liability and completely absent from Article 25(3)(c). Should the Appeals Chamber find any merit in the Prosecution’s argument that the Chamber should have elaborated Mr Ngaïssona’s responsibility for rape and persecution through rape under Article 25(3)(d) in detail, and that its objective elements are established, then it cannot dispense with a rigorous assessment of whether Mr Ngaïssona’s mental state satisfied the special intent required by Article 25(3)(d)(i). Nothing in the Judgment provides a basis for drawing those conclusions without an extensive *de novo* evidentiary review.

98. Indeed, the Prosecution’s suggestion that the Appeals Chamber may rely on the Trial Chamber’s “factual findings” on the purpose of Mr Ngaïssona’s contribution²²² is disingenuous and reflects a fundamental misconception of the Judgment. The Trial Chamber’s findings in this regard are legal, not factual.²²³ They were reached upon assessing the applicability of a specific legal provision – Article 25(3)(c) – to facts as established by the evidence but are by no means transposable to a legal assessment governed by different requirements. Any deference by the Appeals Chamber towards these findings would contravene Mr Ngaïssona’s right to the presumption of innocence.²²⁴

99. A rigorous assessment of the evidence in the case at hand, unconstrained by the Trial Chamber’s legal findings,²²⁵ will establish that it is impossible to find, beyond

²²¹ K. Ambos, ‘[Article 25](#)’, p. 1231.

²²² [Prosecution Appeal Brief](#), para. 3.

²²³ Contrary to clear factual findings of the Trial Chamber, such as on the absence of a clear pattern of criminal conduct including rape (see [Judgment](#), p. 1411, para. 4131), leading it to characterize the risk of rape taking place as “abstract” (see [Judgment](#), p. 1410, para. 4128).

²²⁴ Pursuant to Article 66(3), *the Court* – and that includes the Appeals Chamber – must be convinced of the guilt of the accused beyond reasonable doubt. To that end, Article 83(1) equips the Appeals Chamber with all the powers of a Trial Chamber for the purpose of an appeal under Article 81. See [Gbagbo and Blé Goudé, Concurring Opinion of Judge Eboe-Osuji](#), para. 79.

²²⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeal judgment, Concurring Separate Opinion of Judge Eboe-Osuji, [ICC-01/05-01/08-3636-Anx3](#), 14 June 2018, para. 49. Judge Eboe-Osuji cautioned against “seeking to

reasonable doubt, that Mr Ngaïssona acted with the aim of furthering the Anti-Balaka's criminal purpose. The Trial Chamber has refused to engage with the question of the legitimacy of efforts to remove the Seleka from power.²²⁶ Yet the broader evidentiary record confirms that this is the context in which the Anti-Balaka came to existence and in which Mr Ngaïssona engaged in the contributions found in the Judgment. The Judgment also found that the Anti-Balaka's criminal purpose developed over time,²²⁷ with the first attacks against Muslim civilians having taken place in September 2013, therefore after Mr Ngaïssona engaged in several of the acts which the Trial Chamber considered aided and abetted the commission of the crimes.

100. Against this backdrop, it is impossible to conclude beyond reasonable doubt that Mr Ngaïssona provided contributions with the specific aim of furthering the targeting of Muslim civilians, rather than merely to assist in efforts to remove the Seleka from power. This conclusion is further reinforced by the utter lack of evidence that Mr Ngaïssona displayed anti-Muslim animus in the lead-up to the charged crimes, as well as by a plethora of evidence of his consistent commitment towards the end of hostilities, which he expressed publicly and openly in his role as Anti-Balaka coordinator.²²⁸

101. In light of the above, the Trial Chamber's factual findings do not allow to conclude that Mr Ngaïssona contributed to P-2642's rape, nor that he provided his contributions with the aim of furthering the commission of crimes against the Muslim civilian population. Therefore, if, contrary to the Defence's submissions, the Appeals Chamber were to identify a legal error and conclude that it materially affected the Judgment, the only appropriate remedy would be to conduct a *de novo* assessment of the evidence to ascertain whether Mr Ngaïssona's alleged

constrain the amplitude of powers that the Rome Statute has conferred upon the Appeals Chamber, particularly when such limitations do not flow directly or by necessary implication from the text of the Rome Statute; but were derived instead from received dicta of unexplained (or different) reasons, propounded by tribunals whose constitutive legal instruments contain no provisions similar to article 83(1) of the Rome Statute".

²²⁶ [Judgment](#), pp. 1345-1346, para. 3930.

²²⁷ *Ibid.*

²²⁸ See e.g., [Judgment](#), p. 684, para. 1811, pp. 688-689, paras 1822, 1825, p. 696, paras 1845, 1847, despite crucial flaws in the Trial Chamber's assessment of this evidence, as argued in [Ngaïssona Appeal Brief](#), Ground 1.C.7.

contributions had an effect on P-2642's rape and were made with the mental element required by Article 25(3)(d)(i). Such *de novo* assessment will yield only one possible conclusion: that the evidentiary record does not sustain Mr Ngaïssona's conviction for rape and persecution through rape pursuant to Article 25(3)(d)(i).

102. In any event, even assuming that the Appeals Chamber were to reverse the acquittals on the two counts and one underlying act of persecution, Mr Ngaïssona's joint sentence should remain the same. In issuing Mr Ngaïssona's sentence, the Trial Chamber found "most strikingly" that Mr Ngaïssona's responsibility across all counts was based on the same contributions.²²⁹ Ultimately, the Chamber increased the highest individual sentence of 11 years by only one additional year resulting in a 12 year joint sentence.²³⁰ In light of this, and the fact that the counts at issue arise from the same underlying events and geographical context already reflected in the joint sentence, there is no basis to assume that adding two rape counts and one underlying act of persecution would have any impact on Mr Ngaïssona's total sentence.

IV. RELIEF SOUGHT

103. For all these reasons, the Appeals Chamber should **REJECT** the Prosecution's appeal and **CONFIRM** the Trial Chamber's acquittal under Counts 40 and 41 of the charges.

Respectfully submitted,



Geert-Jan Alexander Knoop
on behalf of
Patrice-Edouard Ngaïssona

Dated this 12 March 2026

At The Hague, the Netherlands

²²⁹ [Judgment](#), pp. 1634-1635, para. 4827.

²³⁰ *Ibid.*, pp. 1638-1639, paras 4836, 4841.