

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/14-01/18**
Date: **30 September 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

Prosecution responses to the questions of the Appeals Chamber

Source: Office of the Prosecutor

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

☒ **The Office of the Prosecutor**

☒ **Counsel for the Defence**

D29

D30

☒ **Legal Representatives of the Victims**

V44

V45

☐ **Legal Representatives of the Applicants**

☐ **Unrepresented Victims**

☐ **Unrepresented Applicants
(Participation/Reparation)**

☐ **The Office of Public Counsel for
Victims**

☐ **The Office of Public Counsel for the
Defence**

☐ **States' Representatives**

☐ **Amicus Curiae**

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

☐ **Counsel Support Section**

☐ **Victims and Witnesses Unit**

☐ **Detention Section**

☐ **Victims Participation and Reparations
Section**

☐ **Other**

INTRODUCTION

1. The Prosecution hereby responds to the questions posed by the Appeals Chamber in its order of 25 August 2026.¹

SUBMISSIONS

I. Question A: What are the elements of a “common purpose” under article 25(3)(d) of the Statute and how do those differ from the elements of an “organizational policy” within the meaning of article 7(2)(a) of the Statute?

2. As a matter of law, a “common purpose” under article 25(3)(d) and an “organisational policy” under article 7(2) are distinct concepts, with distinct elements.² As a matter of fact, however, the same evidence may establish both, and the two may arise from the same facts. Thus, while a finding that an organisational policy existed does not, by itself, necessarily establish a common purpose (and *vice versa*), a finding on one —such as in this case— *may* show the existence of the other.³

3. First, in terms of function, the “common purpose” is an objective requirement of the mode of responsibility provided for under article 25(3)(d). Article 25(3)(d) concerns accessorial liability arising from group criminality. It requires, *inter alia*, that the charged crime be committed by a group of persons acting with a common purpose. By contrast, an “organisational policy” is one of the contextual elements of crimes against humanity under article 7. Article 7(2) provides, *inter alia*, that the “attack directed against any civilian population” be carried out “pursuant to or in furtherance of a State or organisational policy to commit such attack”. The requirement of a “State or organisational policy” ensures that an attack against the civilian population has a ‘collective’ dimension, such that a State or organisation may be said to have encouraged it, by its acts or deliberate omissions.⁴

¹ [ICC-01/14-01/18-2929](#) (“Order”), para. 7.

² [ICC-01/14-01/18-2846-Red](#) (“Prosecution Appeal”), para. 62; [ICC-01/14-01/18-2886-Corr-Red](#) (“Ngaïssona Response”), para. 30.

³ [Prosecution Appeal](#), para. 62; *contra* [Ngaïssona Response](#), para. 30.

⁴ The policy requirement, has, only a “modest purpose”: specifically, to “screen out ‘ordinary crime’, that is, unconnected crimes committed by diverse individuals” (D. Robinson, “The Draft Convention on Crimes Against Humanity: what to do with the definition?” in M. Bergsmo and Song T. (eds.), *On the Proposed Crimes against Humanity Convention* (Brussels: Torkel Opsahl Academic E-Publisher, 2014), p. 111, *see also* pp. 107, 111-112, 117-122, 133); D. Robinson, “Crimes against humanity: a better policy on ‘policy’”, in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: OUP, 2015), p. 710).

4. Second, in terms of requirements, a common purpose under article 25(3)(d) consists of a shared aim, goal or objective of the group.⁵ To engage liability under article 25(3)(d), the common purpose must involve the commission of a crime within the jurisdiction of the Court.⁶ This requirement is fulfilled when the group has accepted that such a crime will occur in the ordinary course of events.⁷ A policy, however, consists of connected acts, comprising the attack, that are promoted or encouraged by the organisation.⁸ It does not require a shared purpose among the members of the organisation involving those acts. Nor must every member of the organisation support or endorse those acts.⁹ The expression “pursuant to or in furtherance of” requires a link between the attack and the policy, in order to screen out ordinary crimes perpetrated by isolated and uncoordinated individuals acting randomly on their own.¹⁰

5. In terms of the details required and factors relevant to proving a common purpose and an organisational policy, neither requires heightened detail and may be inferred from a variety of factors. For a common purpose, it is not required that the group agree on the exact manner in which crimes will be committed. A common purpose may exist even where the exact contours of all crimes are not yet known provided the group shares the relevant aim, goal, or objective.¹¹ It may be established by, *inter alia*, the group’s “subsequent concerted action”.¹² It may also be inferred from the wider circumstances.¹³ Similarly, a policy may consist of a pre-established design or plan, but may also crystallise, develop, and evolve extemporaneously through the perpetrators’ conduct.¹⁴ The “policy” may also be inferred from a variety of factors, including: the manner in which the acts occur; a recurrent pattern of violence; the use of public

⁵ [ICC-01/12-01/18-2594-Red](#) (“*Al Hassan TJ*”), para. 1236 (see [Prosecution Appeal](#), para. 29). It is not necessary to establish an agreement or common plan of action within the meaning of article 25(3)(a), since article 25(3)(d) does not result in a reciprocal imputation of the acts of the members of the group ([Al Hassan TJ](#), paras. 1235-1236; [ICC-01/04-01/07-3436-tENG](#) (“*Katanga TJ*”), para. 1629 but see [ICC-01/04-01/10-465-Red](#) (“*Mbarushimana CD*”), para. 271).

⁶ [Al Hassan TJ](#), para. 1237.

⁷ [Al Hassan TJ](#), para. 1237; [Katanga TJ](#), paras. 1626, 1627, 1630. This is an objective assessment to fulfil one of the objective requirements of article 25(3)(d). It does not require an assessment of the intent of each member of the group, since each person in the group need not be identified. See also [Prosecution Appeal](#), paras. 66, 88.

⁸ Elements of Crimes (“*EoC*”), art. 7(3). In exceptional circumstances, a policy may be shown by a deliberate failure to take action, which is consciously aimed at encouraging such attack (*EoC*, art. 7, fn. 6).

⁹ [ICC-01/05-01/08-3343-AnxII](#) (“*Bemba TJ*, Judge Ozaki Separate Opinion”), para. 30.

¹⁰ [ICC-01/14-01/18-2784-Red](#) (“*Judgment*”), para. 3775; [ICC-02/05-01/20-1240](#) (“*Abd-Al-Rahman TJ*”), para. 700; [ICC-02/04-01/15-1762-Red](#) (“*Ongwen TJ*”), para. 2678; [ICC-01/05-01/08-3343](#) (“*Bemba TJ*, para. 161).

¹¹ [Al Hassan TJ](#), para. 1238.

¹² [Katanga TJ](#), para. 1626.

¹³ See [ICC-01/04-02/06-2666-Red](#) (“*Ntaganda AJ*”, para. 918). The judgment concerns the “common plan”, but its reasoning also applies by analogy to the “common purpose”.

¹⁴ *Judgment*, para. 3776; [Abd-Al-Rahman TJ](#), para. 698; [Al Hassan TJ](#), para. 1110; [Ongwen TJ](#), para. 2679; [ICC-01/04-02/06-2359](#) (“*Ntaganda TJ*”), para. 674; [Katanga TJ](#), para. 1108 (no “formal design”), 1110 (the policy may “become clear [...] only in the course of its implementation, such that the definition of the overall policy is possible only *in retrospect*”, emphasis supplied).

or private resources to further the policy; the involvement of the State or organisational forces in the commission of crimes; statements, instructions or documentation attributable to the State or the organisation condoning or encouraging the commission of crimes; preparatory meetings; and/or a “motive” or “purpose” underlying the policy.¹⁵ Chambers of the Court have considered that in principle, an organisation “committing a systematic attack against a civilian population will satisfy the policy requirement.”¹⁶ Similar reasoning could be followed with respect to the common purpose, in the sense that a group committing a pattern of crimes against a civilian population may satisfy the common-purpose requirement, although, as discussed below,¹⁷ such a pattern is not necessary.

II. Question B: Can findings of a pattern of violence for purposes of establishing the contextual elements of crimes against humanity be relied upon to establish the common purpose under article 25(3)(d) of the Statute

6. A criminal purpose can be inferred from circumstantial evidence, and judges may rely on all relevant evidence adduced at trial to infer its existence.¹⁸ As noted in response to Question A, the relevant means of proof for a group common purpose and an organisational policy both include a pattern of violence.¹⁹ Thus, a pattern of violence establishing a widespread or systematic attack against a civilian population pursuant to, or in furtherance of a policy, may generally also be relevant to establishing a shared aim, goal or objective to commit crimes within the jurisdiction of the Court, or that entails the commission of such crimes (i.e., a common purpose). In any event, while evidence of a pattern of violence may be relevant as a matter of fact, it is not required as a matter of law to establish a common purpose. It is just one factor that may be assessed with others to establish the existence of a common purpose, and/or to determine what crimes formed part of that common purpose. This is a case-specific, fact-based assessment.²⁰

¹⁵ [Judgment](#), para. 3776; [Abd-Al-Rahman TJ](#), para. 698; [Al Hassan TJ](#), para. 1110; [Ongwen TJ](#), para. 2679; [Ntaganda TJ](#), para. 674. See also [Katanga TJ](#), para. 1109.

¹⁶ [Judgment](#), para. 3776; [Abd-Al-Rahman TJ](#), para. 698; [Al Hassan TJ](#), para. 1110; [Ongwen TJ](#), para. 2679; [Katanga TJ](#), para. 1111. The Chamber have emphasised that that the terms ‘systematic’ and ‘policy’ should not be understood as synonymous since the analysis of the systematic nature of the attack goes beyond the existence of a policy.

¹⁷ See below paras. 6, 10.

¹⁸ [Katanga TJ](#), para. 1626; [Mbarushimana CD](#), para. 271; see generally, Rule 63(2) of the Rules of Procedure and Evidence; [Judgment](#), para. 136; [ICC-01/05-01/13-2275-Red](#) (“*Bemba et al. AJ*”), para. 1386; [Abd-Al-Rahman TJ](#), para. 174.

¹⁹ See above para. 5.

²⁰ Relevant factors include, for example, the nature of the objective of the group (violent, discriminatory, and/or retributive), the identity of the perpetrators, the characteristics of the victims (gender, religion, ethnicity), and the temporal and geographical scope of the violence. See [Katanga TJ](#), para. 1626. See also [Prosecution Appeal](#), para. 71.

III. Question C: Must it be established that the crime with which the person is charged was part of the common purpose or is it sufficient to show that the crime was committed in the context of pursuing the common purpose? In the case of the latter scenario, what level of awareness must the accused have in relation to the commission of the crime?

7. For a person to be convicted under 25(3)(d), the charged crime must be within the scope of the common purpose.²¹ As a matter of law, for a crime to be part of a common purpose, the group may either have a collective or shared intent to commit the charged crime (common purpose *to commit* the charged crime), or they may have a collective or shared intent that *entails* the commission of the charged crime (common purpose that *involves* the commission of the charged crime).²²

8. Whether the “crimes committed *in the context of pursuing* the common purpose” *formed part* of such common purpose, is a matter of evidence. If the evidence shows that the group had a collective or shared intent *to commit* those crimes, or a collective or shared intent that *entailed* their commission, the crimes should, as a matter of law, be considered part of the common purpose. As a result, they can therefore be attributed to the accused. By contrast, charged “crimes committed *in the context of pursuing* the common purpose” that result solely from the independent and/or individual initiative of members of the group,²³ and that clearly exceed the group’s collective or shared intent, would not be part of the common purpose and cannot therefore be attributed to the accused.

9. The accused’s level of awareness in relation to the commission of the charged crime does not depend on whether the group’s common purpose was specifically directed at the commission of that crime or whether instead the common purpose involved its commission. Rather, the requisite level of awareness depends on the form of liability charged under article 25(3)(d), which is addressed in response to Question H below.²⁴

IV. Question D: Can the common purpose be inferred from a showing of a pattern of criminality?

10. As noted, a common purpose can be inferred from circumstantial evidence.²⁵ When a person is charged under article 25(3)(d), the existence of a common purpose must be proved beyond reasonable doubt, as it is an element of a mode of responsibility. Judges may, in

²¹ See [Al Hassan TJ](#), paras. 1234, 2140; [Katanga TJ](#), paras. 1624, 1628, 1630.

²² [Katanga TJ](#), para. 1627; [Mbarushimana CD](#), para. 271; [Al Hassan TJ](#), para. 1237.

²³ [Al Hassan TJ](#), para. 1237.

²⁴ See below [Response to Question H](#).

²⁵ See above para. 6.

principle, rely on all relevant evidence adduced at trial, including evidence showing a pattern of criminality,²⁶ in determining whether a common purpose existed.²⁷ Accordingly, where the pattern of criminality is such that the only reasonable inference is that there was a shared (criminal) aim, goal or objective, a chamber should rely on that pattern to find that a common purpose existed. Also as noted, whether a pattern of criminality is relevant to, and/or capable of supporting, the inference that a common purpose existed is necessarily a case-specific, fact-based assessment.²⁸

V. Question E: In light of the existing conflicting opinions in the Court’s jurisprudence, is there a threshold applicable to a contribution pursuant to article 25(3)(d) of the Statute? Does the special *mens rea* (“with the aim of furthering”) justify liability for any contribution that is intentionally directed at furthering the group’s criminal activity or purpose?

11. Chambers of the Court have adopted different formulations concerning the requisite level of contribution under article 25(3)(d); nevertheless, their opinions are substantively reconcilable.

12. While two Chambers have required that the contribution be “significant,”²⁹ others have either not employed that terminology or have expressly rejected the proposition that the contribution must meet a threshold of being “significant.”³⁰ In any event, notwithstanding these different formulations, the approaches adopted by the Chambers are not substantively conflicting and can be reconciled. The relevant decisions have consistently interpreted article 25(3)(d) as a “residual form of accessory liability”³¹ and requiring a link between the accused’s contribution and the charged crime, noting that article 25(3)(d) expressly provides for a contribution “‘in any other way’ to the commission of the crime.”³²

13. Accordingly, to establish that an accused contributed to the commission of a crime, it must be shown that their conduct influenced, or otherwise had a bearing on, the occurrence of the crime or the manner in which it was committed.³³ Instead of applying any particular

²⁶ See above para. 5

²⁷ See above para.6.

²⁸ See above para. 6 and fn. 20.

²⁹ [Katanga TJ](#), paras 1632-1633; [Mbarushimana CD](#), para. 283.

³⁰ [ICC-01/09-01/11-373](#) (“Ruto et al. CD”), paras. 353-354; [Al Hassan TJ](#), paras. 1241-1244, fn. 4027; [ICC-01/12-01/18-461-Corr-Red-tENG](#) (“Al Hassan CD”), para. 948; [ICC-02/04-01/15-422-Red](#) (“Ongwen CD”), para. 44; [ICC-01/12-01/15-84-Red](#) (“Al Mahdi CD”), para. 27; [ICC-01/04-01/10-514](#) (“Mbarushimana AJ, Separate Opinion of Judge Fernández de Gurmendi”), paras. 7-15.

³¹ [Al Hassan TJ](#), para. 1243; [Katanga TJ](#), para. 1618; [Mbarushimana CD](#), paras. 278, 283.

³² [Prosecution Appeal](#), para. 32.

³³ [Katanga TJ](#), paras. 1632-1633; [Al Hassan CD](#), para. 948; [Ongwen CD](#), para. 44. See also [Mbarushimana CD](#), para. 279 (indicating that the contribution is “less” than that under article 25(3)(c)).

threshold, this requires a case-by-case normative assessment.³⁴ It is not necessary to establish that the crime was contingent upon, or even determined by, the accused's contribution.³⁵ Once such influence or bearing on the crime is established, the level or degree of the contribution need not be further qualified.³⁶ Thus, under article 25(3)(d), only contributions that are "inconsequential", "immaterial",³⁷ "neutral",³⁸ or "infinitesimal"³⁹ to the commission of the crime are excluded from criminal liability.

14. The language of article 25(3)(d) makes clear that an accused is liable under article 25(3)(d) only for those crimes to whose commission they contributed in any way, and not for all crimes committed by a group acting with a common purpose,⁴⁰ or for all crimes forming part of that common purpose.⁴¹ Accordingly, *as a matter of law*, liability for a crime arises from any intentional contribution to a group's broader criminal activity or purpose, only when it had a bearing or influence on that crime. *As a matter of fact and evidence*, a person's contribution to the group's broader criminal activity or purpose, with the aim of furthering that activity or purpose, may, on a case-by-case basis, be found to have influenced or otherwise have had a bearing on the commission of a particular crime by the group. Where this is established, liability for that crime under article 25(3)(d)(i) may be justified. As further elaborated below, the special *mens rea* requirement serves to distinguish liability under article 25(3)(d)(i) from liability under article 25(3)(d)(ii), but does not affect the interpretation or application of the objective element of contribution to the crime under article 25(3)(d).

VI. Question F: What distinguishes the term "contributes" in article 25(3)(d) of the Statute from "aids, abets or otherwise assists" in article 25(3)(c) of the Statute?

15. The terms "aids, abets or otherwise assists" under article 25(3)(c) and "in any other way contributes" under article 25(3)(d) refer to the same threshold and form of contribution. Both provisions simply require a link between the contribution and the crime charged⁴² (i.e., that the contribution had a bearing or influence on the crime).⁴³ They also both encompass any form of

³⁴ [Al Hassan TJ](#), para. 1244; [Mbarushimana CD](#), para. 284; [Mbarushimana AJ, Separate Opinion of Judge Fernández de Gurmendi](#), para. 12.

³⁵ [Al Hassan TJ](#), para. 1243; [Katanga TJ](#), para.1633. [Mbarushimana CD](#), para. 279.

³⁶ [Al Hassan TJ](#), paras. 1241-1244; [Ruto et al. CD](#), para. 354; [Al Mahdi CD](#), para. 27; [Ongwen CD](#), para. 44; [Mbarushimana AJ, Separate Opinion of Judge Fernández de Gurmendi](#), paras. 8-15.

³⁷ [Katanga TJ](#), para.1632.

³⁸ [Mbarushimana AJ, Separate Opinion of Judge Fernández de Gurmendi](#), para. 12.

³⁹ [Mbarushimana CD](#), para. 277.

⁴⁰ [Katanga TJ](#), paras.1619, 1632, 1634; [Mbarushimana CD](#), paras. 282, 284-285; [Al Hassan TJ](#), para. 1243.

⁴¹ [Al Hassan TJ](#), para. 1240. See also [Prosecution Appeal](#), para. 31.

⁴² All references to "crime" in this section means the "type of crime" rather than a specific incident.

⁴³ See above paras. 11-12.

contribution to that crime (whether to the objective or subjective elements of the crime). The distinction between the provisions instead lies in the fact that subparagraph (d) is specifically concerned with participation in group criminality, as well as in the respective mental element required under each provision, namely, the purpose of the contribution.

16. Because article 25(3)(d) is the last form of individual criminal responsibility under article 25 and starts with “in any other way”, it may, *at first sight*, appear to fall within a hierarchy—with subparagraph (d) being a residual mode of responsibility requiring the lowest threshold of contribution. This was indeed the position taken by certain chambers and judges, at a time when the jurisprudence interpreting and applying article 25(3)(c) was emerging.⁴⁴ Subparagraph (d) was seen as constituting a residual mode of participation applicable only when an alleged accomplice’s conduct did not amount to a contribution that “otherwise assists” under subparagraph (c).⁴⁵ However, article 25 is better interpreted as not establishing a hierarchy between the different modes of liability enumerated therein.⁴⁶ A comparison of the case law interpreting and applying subparagraphs (c) and (d) of article 25(3) shows no substantive difference in the form or degree of contribution required under the two provisions. Just as under article 25(3)(d),⁴⁷ the contribution under 25(3)(c) does not require the meeting of any specific threshold,⁴⁸ and only requires the accused to assist in the commission of the crimes.⁴⁹

17. The distinction between the two provisions insofar as the contribution lies in the context in which the contribution is made, and the purpose of such contribution. Subparagraph (d) is specifically concerned with participation in group criminality. It also requires the accused to have made an intentional contribution to the charged crime, meaning that the accused’s acts were deliberate and undertaken with awareness that their conduct contributed to *the activities* of the group.⁵⁰ Moreover, the contribution must have been made either with the aim of furthering the group’s criminal activity or criminal purpose, or with knowledge of the group’s

⁴⁴ [Ruto et al. CD](#), paras. 353-354; [Mbarushimana CD](#), paras. 278-279. See also [Katanga TJ](#), para. 1618.

⁴⁵ *Ibid.*

⁴⁶ See [ICC-01/04-02/06-2666-Anx2](#) (“*Ntaganda* AJ, Judge Morrison Separate Opinion”), paras. 38-39; [ICC-01/04-02/06-2666-Anx5-Corr](#) (“*Ntaganda* AJ, Judge Eboe-Osui Separate Opinion”), paras. 66-76.

⁴⁷ See [Al Hassan TJ](#), paras. 1243-1244 (showing that no threshold is required); [Katanga TJ](#), para. 1635 (showing that no direct link is required). See also [Prosecution Appeal](#), paras. 31-32.

⁴⁸ See [Bemba et al. AJ](#), para. 1327; [ICC-01/05-01/13-1989-Red](#) (“*Bemba et al. TJ*”), para. 93; [Al Hassan CD](#), paras. 906, 897, [Ongwen CD](#), para. 43. See also [ICC-01/14-01/18-2885-Red](#) (“Prosecution Response Brief”), para. 535-544.

⁴⁹ [Bemba et al. TJ](#), paras. 90, 94; [Bemba et al. AJ](#), para. 1327. See also [Prosecution Response Brief](#), para. 538-539.

⁵⁰ [Al Hassan TJ](#), para. 1246; [Katanga TJ](#), paras. 1638-1639. See also [ICC-01/04-01/07-3436-AnxI](#) (“*Katanga* TJ, Judge Van den Wyngaert Minority Opinion”), para. 286; [Mbarushimana CD](#), paras. 288-289. The accused need not to have shared the group’s intention to commit the crime.

intention to commit the crime. By contrast, the purpose requirement under article 25(3)(c), which relates to the accessory's facilitation, must be directed at facilitating the commission of the crime charged.⁵¹

VII. Question G: The Appeals Chamber notes that article 25(3)(d) of the Statute is an innovation derived from the International Convention for the Suppression of Terrorist Bombings (hereinafter: "Terrorist Bombings Convention") which provided for a unique form of liability for inchoate crimes. Article 25(3)(d) of the Statute imports language from article 2(3)(c) of the Terrorist Bombings Convention almost verbatim with the notable exclusion of the word "general" from the text and a structural change, which entailed the creation of distinct sub-paragraphs, that reflect different options relating to the subjective elements that need to be met in order to establish this distinct mode of liability. In this regard:

(i): What, if any, impact does the drafting history have on how the subjective elements of the two sub-paragraphs of article 25(3)(d) of the Statute should be interpreted?

18. A treaty's drafting history may provide a supplementary means of interpretation to confirm or determine the meaning of a provision, or if the interpretation leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.⁵² The drafting history of article 25(3)(d) of the Rome Statute shows that its two sub-paragraphs were intended to capture certain types of participation in group criminality, drawing from analogous concepts in national jurisdictions. However, while this history is relevant in understanding the drafters' intentions in introducing article 25(3)(d), it provides limited guidance in interpreting the provision's subjective elements.

19. Article 25(3)(d) evolved from early proposals considered by the Preparatory Committee on the Establishment of an International Criminal Court ("PrepCom") to include different forms of criminal association found in national laws as forms of criminal responsibility under the Statute.⁵³ These included the offences of conspiracy and *association de malfaiteurs*, which were

⁵¹ See [Bemba et al. TJ](#), para. 97. See also ICTY, Prosecutor v *Šainović et al.*, Case No. IT-05-87-A, [Judgement](#), 23 January 2014 ("*Šainović et al. AJ*"), para. 1491; [Prosecution Response Brief](#), para. 559.

⁵² Vienna Convention on the Law of Treaties, 1969 ("[VCLT](#)"), article 32; [Bemba et al. AJ](#), para. 679; ICC-01/04-168 ("[DRC Extraordinary Review Judgment](#)"), para. 40.

⁵³ See e.g. PrepCom, [Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume 1 \(Proceedings of the Preparatory Committee during March-April and August 1996\)](#), U.N. Doc. A/51/22, 13 September 1996, para. 202 ("The view was expressed that such types of responsibility as solicitation, attempt, conspiracy, aiding and abetting, accessory after the fact, complicity and responsibility of superiors for acts of subordinates were also important and relevant to the task of the Preparatory Committee and, according to some delegations, they should be defined in the Statute. Several delegations stressed the need to resolve these issues in the Statute having regard to the different meanings and definitions used in national laws"); UN General Assembly, [Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996](#), U.N. Doc. A/52/37, 31 March 1997, p. 51, para. 27 ("As regards paragraph 3 and terms such as "association",

reflected in proposals to hold responsible persons who “agree[] with another person or persons that [a Rome Statute crime] be committed and an overt act is committed in furtherance of the agreement by any of these persons that manifests their intent”, or who “participate[] in an organisation which aims at the realisation of such a crime by engaging in an activity that furthers or promotes that realisation”.⁵⁴ These proposals gave rise to divergent views amongst those from common law and civil law systems.⁵⁵ When the proposals were presented at the Rome Diplomatic Conference,⁵⁶ article 2(3)(c) of the Terrorist Bombings Convention was suggested as a solution to bridge the differences.⁵⁷ Ultimately, the compromise was achieved by adopting the language of article 2(3)(c) of the Convention, with some amendments.⁵⁸ These included making it clearer that there was an option between the sub-paragraphs, with sub-paragraph (i) reflecting the concept of *association de malfaiteurs* (which criminalises membership or participation in a group organised around a criminal purpose) and sub-paragraph (ii) reflecting the concept of conspiracy (which criminalises participation in an agreement or plan to commit

“conspiracy”, etc., contained therein, it was pointed out that such terms were subject to different interpretations under the various legal systems and if they were to be retained they must be clearly defined in order to avoid confusion and satisfy the principle of legality”, 37 (“The view was expressed that membership in a criminal association should also be included in paragraph 3 of article 2. Some delegations voiced concern regarding this suggestion, which, in their view, would result in a vague link between the offender and the offence. [...] Other delegations considered the inclusion of the concept of conspiracy to be preferable. Two proposals were submitted to bridge the divergent views on the matter.”).

⁵⁴ PrepCom, [Chairman’s Text on Article Bb., c and d., Individual criminal responsibility](#), U.N. Doc. A/AC.249/1997/WG.2/CRP.2/Add.2, 19 February 1997, p. 2. *See also* PrepCom, [Working paper submitted by Canada, Germany, Netherlands and the United Kingdom: Paper on criminal responsibility submitted by informal group representing various legal systems](#), U.N. Doc. A/AC.249/1997/WG.2/DP.1, 14 February 1997, pp. 1-2; PrepCom, [Text of the Draft Statute for the International Criminal Court: Part 3 – General Principles of Criminal Law](#), U.N. Doc. A/AC.249/1998/CRP.9, 1 April 1998, p. 3, fn. 5.

⁵⁵ UN General Assembly, [Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996](#), U.N. Doc. A/52/37, 31 March 1997, p. 51, para. 27.

⁵⁶ PrepCom, [Report of the Preparatory Committee on the Establishment of an International Criminal Court](#), U.N. Doc. A/Conf.183/2/Add.1, 14 April 1998, p. 50 (article 23(e)), fn. 5-6.

⁵⁷ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, [Official Records Volume II](#), U.N. Doc. A/Conf.183/13 (Vol. II), Summary records of the meetings of the Committee of the Whole, 16 June 1998, p. 132, para. 18 (“One particular thorny issue was the problem of conspiracy covered by paragraphs 7(d) and (e)(ii), although [Per Saland, the Chairman of the Working Group on General Principles of Criminal Law] hoped that the use of the compromise language of the recently adopted International Convention for the Suppression of Terrorist Bombings might help solve that problem”); P. Saland, “International Criminal Law Principles” in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), p. 199 (“Another very divisive issue throughout the Preparatory Committee meetings was conspiracy, a concept strongly advocated by common law countries but unknown in some civil law systems. We were helped by the successful negotiation in 1997 of the Convention for the Suppression of Terrorist Bombings, which had been adopted by consensus. In Rome, it was easy to reach agreement to incorporate, with slight modifications, the text from that Convention which we now find in paragraph 3(d) of Article 25 of the Statute”).

⁵⁸ A. Aust, “Counter-Terrorism – A New Approach: The International Convention for the Suppression of the Financing of Terrorism”, in *Max Planck Yearbook of United Nations Law* (2001), Vol. 5, 285 (“Aust”), pp. 300-301; [Al Hassan TJ](#), para. 1231 (fn. 4008).

an offence).⁵⁹

20. The drafting history of these provisions thus shows that while liability for “contributing to a group acting with a common purpose” was inspired by domestic offences concerning conspiracy and criminal association, it was a novel mode of liability which did not adopt the same requirements of those domestic offences.⁶⁰ Instead, it resulted from a “carefully crafted compromise”⁶¹ to accommodate different approaches to participation in group criminality.⁶² In this context, the Trial Chamber Majority in *Al Hassan* stated that it was “particularly important that Article 25(3)(d) of the Statute be interpreted using the ordinary meaning of the language employed by the drafters and that no additional criteria should be read in or otherwise introduced”.⁶³ The Prosecution concurs to the extent that reference to domestic *mens rea* standards for the offences of conspiracy or criminal association to interpret the subjective requirements for article 25(3)(d) would be unnecessary and inappropriate. This is because the provision was only inspired by, but is not equivalent to, those offences in domestic laws, where *mens rea* standards vary even amongst jurisdictions that recognise the same offences.⁶⁴

21. Moreover, since the drafters sought to reflect different approaches in the two sub-paragraphs, it is reasonable to infer that they understood each sub-paragraph as requiring

⁵⁹ Aust, pp. 300-301 (“But the negotiators were eventually reminded, by Canada, that the provision in the Terrorist Bombings Convention had been copied, but improved upon, in article 25 para. 3(d) of the Rome Statute of the International Criminal Court 1998. The new convention therefore contains that formulation, which makes it clear that there is an option between subparas (a) and (b). The first subparagraph reflects the civil law concept of *association malfaiteur*, the second the common law concept of conspiracy”); *Al Hassan TJ*, para. 1231 (fn. 4008) (“Subsequent to its inclusion in the *Terrorist Bombing Convention*, Article 2(3)(c) was criticised by some states with a Romano Germanic legal tradition as reflecting the common law concept of conspiracy which is unknown in other legal traditions. In the Rome Statute, improvements were made to the text of Article 25(3)(d) to clarify that the provision reflects both conspiracy and the civil law concept of *association malfaiteur*. Namely, through the creation of distinct subparagraphs, it was made clear that there are two options as to the requirements that need to be met to establish this mode of liability, reflecting the different, but analogous concepts in the two legal traditions, thereby setting a careful balance”). See Committee of the Whole, Working Group on General Principles of Criminal Law, *New Text of Article 23(7)(e)(ii)*, U.N. Doc. A/Conf.183/C.1/WGCP/L.3, 18 June 1998, p. 1. See further ICC-01/04-02/06-2666-Anx5 (“*Ntaganda AJ, Judge Eboe-Osuji Separate Opinion*”), paras. 70-73.

⁶⁰ M. Aksenova, *Complicity in International Criminal Law* (Oxford: Hart Publishing, 2016), p. 156 (stating that “notwithstanding the wide acceptance of planning as a form of criminal responsibility in international criminal law, neither planning nor conspiracy was included in the Rome Statute, paving the way for the novel category of criminal participation—‘contribution to the commission of a crime.’”); K. Ambos, “Article 25, Individual Criminal Responsibility” in K. Ambos (Ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (München: Beck/Hart, 2021) (“Ambos (2021)”), p. 1226, mn, 36.

⁶¹ *Al Hassan TJ*, para. 1231 (fn. 4008). See also Ambos (2021), p. 1226, mn, 36.

⁶² M. Cupido, “Group Acting with a Common Purpose” in J. de Hemptine, R. Roth, E. van Sliedregt (Eds.), *Modes of Liability in International Criminal Law* (Cambridge: CUP, 2019), p. 311.

⁶³ *Al Hassan TJ*, para. 1231 (fn. 4008). See also ICC-01/12-01/18-2594-OP12 (“*Al Hassan TJ, Judge Prost Separate Opinion*”), para. 6.

⁶⁴ See e.g. M. Jackson, *Complicity in International Law* (Oxford: OUP, 2015) (“Jackson”), pp. 47-48 (noting that for crime of conspiracy in the United States, accomplices must be shown to have provided their aid for the purpose of assisting the principal, whereas in England and Wales, the prevailing approach is that purpose is not required, but rather that the accomplice need only know of the principal’s criminal intent).

different mental elements, without overlap between the two as to any of the requirements. Article 25(3)(d)(ii) requires knowledge within the meaning of article 30 of the group's intention to commit the charged crime.⁶⁵ However, for article 25(3)(d)(i), there is no indication as to how the drafters considered the accused's mental state in aiming to further the group's criminal activity or criminal purpose should relate to the specific crime (or type of crime) with which the accused is charged.

22. Accordingly, as the Prosecution Appeal shows, it is necessary to interpret the subjective elements of article 25(3)(d)(i) in accordance with article 21(1)(b) and (c) of the Statute with reference to the ordinary meaning of the provision, in its context and in light of the object and purpose of the Statute, and with reference as required to international law and general principles of law derived from the national laws of legal systems of the world.⁶⁶

(ii): Does the exclusion of the word “general” from the text of article 25(3)(d)(i) of the Statute affect the interpretation of this provision?

23. The Statute's drafting history does not explain why the word “general” in article 2(3)(c) of the Terrorist Bombings Convention—which requires that the accused contribute “with the aim of furthering the *general* criminal activity or purpose of the group”⁶⁷—was removed from article 25(3)(d)(i) of the Statute. However, a reading of both provisions on their plain terms, in their context, and in light of their object and purpose, shows that while the word “general” has a specific meaning in the Convention, its use in the Statute would have been redundant and potentially confusing.

24. Specifically, the Terrorist Bombings Convention is concerned with the specific offence of terrorist bombing as set out in article 2(1) and (2).⁶⁸ As such, the reference to the “*general* criminal activity or purpose” of the group, which the accused aims to further, must be read as referring to a criminal activity or purpose directed towards the commission of that specific offence by whichever means specified in article 2(1) and (2).

⁶⁵ See below paras. 39-40.

⁶⁶ [Prosecution Appeal](#), paras. 43-53. See below [Response to Question H\(i\)](#).

⁶⁷ Article 2(3)(c) of the [Terrorist Bombings Convention](#) provides: “Any person also commits an offence if that person: [...] (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned”.

⁶⁸ [Terrorist Bombings Convention](#), article 2.

25. By contrast, the Statute is concerned with a far broader range of crimes encompassing war crimes, crimes against humanity, genocide and aggression. Thus, rather than refer to the “general” criminal activity or criminal purpose of the group, which could be unclear or confusing, article 25(3)(d)(i) removes the word “general” and instead qualifies that the activity or purpose “involves the commission of a crime within the jurisdiction of the Court”. In this way, article 25(3)(d)(i) of the Statute centres the group’s criminal activity or criminal purpose on the commission of Rome Statute crimes.

26. Thus, while the Statute and Terrorist Bombings Convention are worded differently in this respect, they both ensure that the criminal activity or criminal purpose of the group, which the accused aims to further, is an activity or purpose involving the specific offences that each treaty proscribes.

27. This interpretation is also consistent with the adoption of this mode of liability in other international treaties. For example, article 2(5)(c) of the 1999 International Convention for the Suppression of the Financing of Terrorism adopted article 25(3)(d) of the Statute *mutatis mutandis*, limiting the criminal activity or criminal purpose of the group to one that “involves the commission of an offence as set forth in paragraph 1 of this article”.⁶⁹ Article 3(1)(b) of the Statute of the Special Tribunal for Lebanon and article 2(4)(c) of the International Convention for the Suppression of Acts of Nuclear Terrorism—both of which concern a limited scope of crimes⁷⁰—also follow the wording of the Terrorist Bombings Convention by referencing the “general criminal activity or purpose of the group” without providing further qualification.⁷¹ Thus, regardless of how the criminal activity or criminal purpose is qualified, it is apparent from the wording and context of the relevant provision in each treaty that this qualification links the nature and scope of the group’s criminal activity or criminal purpose to the crimes proscribed under the treaty. It does not have a bearing on the interpretation of the provisions’ mental elements.

28. This interpretation is not affected by the chapeau of article 25(3), which provides that “a person shall be criminally responsible and liable for punishment *for a crime within the jurisdiction of the Court*” (emphasis added). This language in the chapeau ensures that an individual’s criminal responsibility under any of the modes listed under article 25(3) is limited

⁶⁹ [International Convention for the Suppression of the Financing of Terrorism 1999](#), article 2(5)(c).

⁷⁰ [Statute of the Special Tribunal for Lebanon 2007](#), article 3(1)(b); [International Convention for the Suppression of Acts of Nuclear Terrorism 2005](#), article 2(4)(c).

⁷¹ [Statute of the Special Tribunal for Lebanon 2007](#), articles 1 and 2; [International Convention for the Suppression of Acts of Nuclear Terrorism 2005](#), article 2(1), (2) and (3).

to Rome Statute crimes. Likewise, the reference in article 25(3)(d)(i) to a “criminal activity or criminal purpose [...] where such activity or purpose involves the commission of a crime within the jurisdiction of the Court” ensures that the group’s criminal activity or purpose—which the accused aims to further—also involves a Rome Statute crime.⁷²

VIII. Question H: In relation to each of the sub-paragraphs of article 25(3)(d) of the Statute:

(i): What are the *mens rea* requirements?

29. Article 25(3)(d) sets out the requisite mental elements of this mode of liability and as such, article 30, in its operative sub-paragraph (1) does not apply.⁷³ Both sub-paragraphs of article 25(3)(d) require that the accused *intentionally* contributed to the group’s commission or attempted commission of the crime. This entails that the accused meant to engage in the relevant conduct constituting the contribution to the group crime, in the sense that his or her actions or omissions were deliberate and made with awareness of the relevant conduct.⁷⁴ Chambers have also required proof that the accused was aware that his or her conduct “contributed to the activities of the group of persons acting with a common purpose”.⁷⁵ The requirement that the accused’s contribution was intentional applies only to his or her conduct, and not to the activity, purpose or criminal intention of the group referred to in sub-paragraphs (i) and (ii) of article 25(3)(d).⁷⁶

30. The additional mental elements specific to each sub-paragraph of article 25(3)(d) are as follows.

Article 25(3)(d)(i):

31. The accused must make their contribution with the “aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves a crime within the jurisdiction of the Court”.⁷⁷ In aiming to further the group’s criminal activity or criminal purpose, which involves the charged crime(s),⁷⁸ the accused must contribute for the purpose of promoting or advancing that criminal activity or criminal purpose.⁷⁹ While the group’s

⁷² See below Response to [Question K](#).

⁷³ See below Response to [Question H\(ii\)](#).

⁷⁴ [Al Hassan TJ](#), para. 1246; [Katanga TJ](#), paras. 1638-1639.

⁷⁵ [Al Hassan TJ](#), para. 1246; [Katanga TJ](#), para. 1639; [Mbarushimana CD](#), para. 288.

⁷⁶ [Al Hassan TJ](#), para. 1246; [Katanga TJ](#), para. 1638; [Mbarushimana CD](#), para. 288.

⁷⁷ See [Prosecution Appeal](#), para. 34.

⁷⁸ See above para. 7.

⁷⁹ [Al Hassan TJ](#), para. 1247. See below [Response to Question I](#).

“criminal activity” may be defined as its criminal conduct/acts, its “criminal purpose” is its criminal goal or ideological objective.⁸⁰ It is not sufficient that the accused knew that their conduct would further the group’s criminal activity or criminal purpose. Rather, they must have provided their contribution “with the aim of furthering” it. Whether the accused had a sufficient appreciation of the group’s criminal activity or criminal purpose to establish that they “aimed at furthering it” is a matter of evidence.⁸¹ However, unlike for liability under article 25(3)(a), (b) or (c), it is not necessary to show that the accused intended the commission of the charged crime.⁸²

32. Article 25(3)(d)(i) also requires that the accused has some awareness of the crime (or type of crime) with which they are charged, to hold them criminally responsible for that crime in a manner consistent with the principle of culpability.⁸³ The Statute is silent, however, as to the *degree* of awareness that the accused must have in relation to the charged crime. Nor does the drafting history of the Statute provide guidance in this respect.⁸⁴ It is, however, apparent that the accused need not have knowledge of the group’s intention to commit the crime, since this is a requirement of the alternative mental element under article 25(3)(d)(ii).⁸⁵ Moreover, the accused need not have “knowledge” within the meaning of article 30(3), in the sense of knowledge of a virtual certainty that the crimes will be committed.⁸⁶ This is because the *mens rea* for article 25(3)(d) “is encompassed by the “otherwise provided” of article 30, and departs from the general rule laid down by the latter provision”.⁸⁷

33. Rather, as the Prosecution Appeal sets out,⁸⁸ the minimum degree of awareness that an accused must have in relation to the charged crime is awareness of the *substantial risk* that the

⁸⁰ See [Katanga TJ](#), para. 1626; Ambos (2021), p. 1231, mn. 41; K. Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part*, 2nd Ed. (Oxford: OUP, 2021), p. 244.

⁸¹ See below [Response to Question I](#).

⁸² [Katanga TJ](#), para. 1638; [Mbarushimana CD](#), para. 289. *Contra* [Ngaïssona Response](#), para. 48.

⁸³ *Prosecutor v. Tadić*, IT-94-1-A, [Judgement](#), 15 July 1999, para. 186; *Prosecutor v. Delalić et al.*, IT-96-21-T, [Judgement](#), 16 November 1998, paras. 424-425. See also G. Werle & F. Jessberger, ““Unless Otherwise Provided”: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law” in *Journal of International Criminal Justice* (2005), Vol. 3, 35 (“Werle & Jessberger”), p. 36 (“The idea that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing and of the consequences that their actions may have is generally recognised in domestic and international criminal-justice systems.”).

⁸⁴ See above [Response to Question G\(i\)](#). *Contra* [Ngaïssona Response](#), para. 46.

⁸⁵ See below para. 4646.

⁸⁶ See e.g. [Al Hassan TJ](#), paras. 1121, 1765. *Contra* [Ngaïssona Response](#), para. 59.

⁸⁷ [Katanga TJ](#), para. 1637; [Al Hassan TJ](#), paras. 1229-1248.

⁸⁸ [Prosecution Appeal](#), paras. 43-53.

group would commit the charged crime. The risk must be realistic and not merely hypothetical. This standard excludes implausibly remote scenarios.⁸⁹

34. The Prosecution has identified this standard in accordance with the principles in article 21(1)(b) and (c) of the Statute. It has drawn upon other sources including customary international law⁹⁰ and general principles of law from national laws of legal systems of the world,⁹¹ and has referred to the object and purpose of the Statute. In particular, under customary international law, reflected in the jurisprudence of the *ad hoc* tribunals, the degree of awareness for a person accused of contributing to crimes which they did not intend has been expressed as the awareness of a “foreseeable” risk, which is “not one of probability” but one of “possibility, albeit one that is not too remote”, and a risk that is “sufficiently substantial as to be foreseeable to an accused”.⁹² In relying on this standard, the Prosecution is not suggesting that the JCE III mode of liability in which this standard is used should apply in this Court.⁹³

35. The ‘substantial risk’ standard is also supported by the general principles of law, as demonstrated in the ICTY Appeals Chamber’s survey of *mens rea* across domestic jurisdictions in the *Blaškić* case. There, the ICTY Appeals Chamber found that the lowest degree of *mens rea* accepted across national systems for serious crimes such as murder or manslaughter where the accused did not have direct intent, is awareness of the substantial likelihood or risk that a crime will be committed.⁹⁴

36. Awareness under article 25(3)(d)(i) of a substantial risk that the charged crime will be committed is also compatible with the object and purpose of the Statute to put an end to impunity and to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished”.⁹⁵ It recognises the harm posed by individuals who willingly further group criminality, even when they may not mean to cause the charged crime or are not “virtually certain” that it will be committed, but are nevertheless aware of the

⁸⁹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR72.4, [Decision on Prosecution’s Motion Appealing Trial Chamber’s Decision on JCE III Foreseeability](#), 25 June 2009, para. 18.

⁹⁰ See ICC-01/04-02/06-1962 (“[Ntaganda Jurisdiction AD](#)”), para. 53; ICC-01/09-01/11-1598 (“[Ruto & Sang Witness Summonses AD](#)”), para. 105.

⁹¹ ICC-01/09-02/11-421 (“[Muthaura et al. Oral Submissions Decision](#)”), para. 11; ICC-01/04-01/06-772 (“[Lubanga Jurisdiction AD](#)”), para. 34.

⁹² [Prosecution Appeal](#), paras. 44-46.

⁹³ [Prosecution Appeal](#), para. 44. *Contra* [Ngaïssona Response](#), paras. 66-68.

⁹⁴ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, [Judgement](#), 29 July 2004, para. 42. See [Prosecution Appeal](#), paras. 47-49.

⁹⁵ [Statute](#), Preamble. See also ICC-01/04-01/07-1497 (“[Katanga & Ngudjolo Admissibility AD](#)”), para. 79; ICC-01/04-01/06-2205 (“[Lubanga Regulation 55 AD](#)”), para. 77.

substantial risk that it will be committed. This is a harm against which there is public interest in protecting society.⁹⁶

37. For specific intent crimes, persons charged under articles 25(3)(b)-(d) must know that the principal perpetrator(s) had the requisite specific intent for those crimes.⁹⁷ Accordingly, when such crimes are charged under article 25(3)(d)(i), the accused must be aware of the substantial risk that the crime will be committed with specific intent.

38. The above ‘substantial risk’ standard accords with the Court’s legal framework and the principle of legality.⁹⁸ First, since the Statute is silent on the requisite degree of awareness, and since article 30 does not apply,⁹⁹ it is both necessary and appropriate to refer to secondary sources of law in accordance with article 21(1)(b) and (c) of the Statute.¹⁰⁰ Second, adopting a ‘substantial risk’ standard of awareness does not create an unforeseeably low mental threshold. Article 25(3)(d)(i) already stipulates a *high* degree of intent on the part of the accused by requiring them to act with the aim of furthering the criminal activity or criminal purpose of the group. In this context, an awareness of the substantial risk that the charged crime(s) will be committed is justified in light of the accused’s willingness to support a group that is committing crimes, knowing that the group will commit crimes, but without meaning to cause a particular crime or being virtually certain that the particular crime will be committed.¹⁰¹ In this way, article 25(3)(d)(i) operates to effectively protect society from the dangers of group criminality. Finally, that article 25(3)(d)(i) does not require an accused to have knowledge of the charged

⁹⁶ See [Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging](#), STL-11-01/I, 16 February 2011, para. 245.

⁹⁷ See *e.g.*, ICC-02/11-01/11-656-Red (“[Gbagbo Confirmation Decision](#)”), paras. 249-250 (finding that Mr Gbagbo had the requisite awareness under article 25(3)(b) for the crime of persecution); [Al Hassan TJ](#), paras. 1595-1596, 1601-1602 (finding that Mr Al Hassan was aware of the essential elements of the crime that he was assisting, including torture as a war crime under article 8(2)(c)(i), for the purposes of *mens rea* under article 25(3)(c)), 1735-1736 (finding that Mr Al Hassan was aware of Ansar Dine/AQIM’s intention to commit persecutory acts on prohibited grounds, for the purposes of *mens rea* under article 25(3)(d)); [Katanga TJ](#), para. 1691 (finding that Mr Katanga knew the intention of the group to commit the war crime of pillaging, for the purposes of *mens rea* under article 25(3)(d)(ii)).

⁹⁸ *Contra* [Ngaïssona Response](#), paras. 62-65.

⁹⁹ See below [Response to Question H\(ii\)](#).

¹⁰⁰ [Prosecution Appeal](#), paras. 43-53.

¹⁰¹ See Jackson, p. 79 (“The principled concern with the dilution of the legal category of knowledge is less pronounced in instances where the putative accomplice is certain that an international crime will be committed but is not sure which one of the imagined set of crimes it will be. This is the example noted above where the soldier hands over a prisoner of war to paramilitaries in the knowledge that they routinely mistreat, torture, and/or kill detainees, but is unsure which will occur. Here, although we may think of the accomplice as reckless as to the commission of the *particular* crime that does occur, her practical certainty that she is assisting the commission of an international crime puts her beyond a moral threshold sufficient to justify inculcation on the basis of accomplice liability. Such situations, in addition to instances of wilful blindness, should be seen to fit within the legal category of knowledge.”).

crime(s) in the meaning of article 30 accords with judicial interpretations of this provision to date, which have not specified this as an additional requirement.¹⁰²

Article 25(3)(d)(ii):

39. Unlike article 25(3)(d)(i), article 25(3)(d)(ii) does not require that an accused have any intent regarding the group's criminal purpose or criminal activity. Rather, the accused must have knowledge of the group's intention to commit the specific type of crime or crimes to which he or she is contributing.¹⁰³ The two Trial Chambers that have applied article 25(3)(d)(ii) have stated that the *group's intention* to commit the crime must be interpreted with reference to article 30(2)(b). In other words, that the group meant to cause the consequence (which constitutes the crime) or knew that the crime would occur in the ordinary course of events.¹⁰⁴

40. Both Chambers also found that the *accused's knowledge* must be defined with reference to article 30(3) of the Statute, however, each articulated this requirement differently.¹⁰⁵ In *Katanga*, the Trial Chamber found that "knowledge" as defined in article 30(3) required the accused to be aware that the group intended to commit the charged crime (as defined under article 30(2)(b)) when engaging in the conduct that constituted his or her own contribution.¹⁰⁶ The accused must therefore be aware that (i) the group means to cause the consequence (which constitutes the crime); or (ii) the group knows that the crime would occur in the ordinary course of events. Thus, the *Katanga* Trial Chamber held that under article 30(3), the accused must know of a circumstance (i.e., the group's intention to commit the charged crime). The Trial Chamber in *Al Hassan* agreed but further held that the accused's knowledge may *also* be established by showing that the accused themselves knew that the charged crime would occur in the ordinary course of events (a consequence).¹⁰⁷ Nevertheless, the difference in these two approaches is theoretical: in practice, the same facts and evidence that would support an inference that the accused themselves knew that the charged crime would occur in the ordinary course of events would likely also support an inference that the accused knew of the group's

¹⁰² See e.g. [Al Hassan TJ](#), para. 1247; [Katanga TJ](#), para. 1640; [Al Hassan CD](#), para. 953; [ICC-02/11-02/11-186](#) ("Blé Goudé CD"), paras. 173, 180; [ICC-02/11-01/11-656-Red](#) ("Gbagbo CD"), paras. 252, 258; [Ongwen CD](#), para. 44; [Al Mahdi CD](#), para. 27; [Ruto et al. CD](#), paras. 351, 364; [Mbarushimana CD](#), para. 289; [ICC-01/09-02/11-382-Red](#) ("Kenyatta CD"), para. 421; [ICC-01/09-02/11-1](#) ("Muthaura et al. Summonses Decision"), para. 47. See also [Ntaganda AJ](#), Judge Morrison Separate Opinion, para. 37; [Katanga TJ](#), Judge Van den Wyngaert Minority Opinion, para. 288; ICC-01/04-01/10-465-Red ("[Mbarushimana CD](#), Judge Monageng Dissenting Opinion"), para. 128.

¹⁰³ [Al Hassan TJ](#), para. 1248.

¹⁰⁴ [Al Hassan TJ](#), para. 1717 (fn. 5200); [Katanga TJ](#), para. 1641.

¹⁰⁵ [Al Hassan TJ](#), para. 1248; [Katanga TJ](#), para. 1641.

¹⁰⁶ [Katanga TJ](#), para. 1641.

¹⁰⁷ [Al Hassan TJ](#), para. 1248.

intention to commit the charged crime (which includes the group's knowledge that the crime would occur in the ordinary course of events), and *vice versa*.

41. Although such knowledge must be established for each specific type of crime for which the accused is charged (a general criminal intention will not suffice),¹⁰⁸ this does not mean that the accused must be aware of all the details of the crimes. The accused's knowledge of the group's intention with respect to the *types* of crimes charged will suffice.¹⁰⁹

42. Finally, for specific intent crimes, the accused must know that the principal perpetrators of the crimes will commit the crime with specific intent.

(ii): Does article 30 of the Statute apply or is the *mens rea* “otherwise provided” for?

43. Article 30 in its operative provision in sub-paragraph (1) does not apply in determining the *mens rea* requirements of article 25(3)(d). As the two Trial Chambers that have applied article 25(3)(d) have highlighted, the article contains specific provisions defining the requisite mental elements and is therefore “otherwise provided for” for the purposes of article 30(1).¹¹⁰ Accordingly, as the Trial Chamber stated in *Katanga*, article 25(3)(d) departs from the *general rule* in article 30 (i.e., that the material elements of a crime must be committed with intent and knowledge)¹¹¹ and that under article 25(3)(d), “the [a]ccused's individual criminal responsibility may be evinced absent establishment of all the requirements of article 30 of the Statute”.¹¹² Pre-Trial Chambers have also held the same.¹¹³

44. That article 30 does not apply is evident from the language and structure of article 25(3)(d) which—unlike the other provisions of article 25(3), including article 25(3)(c)—sets out the requisite mental elements in detail.¹¹⁴ As shown above, article 25(3)(d) provides for the accused's *mens rea* in respect of (i) his or her own contribution; and (ii) either (a) his or her intent and knowledge regarding the group's criminal activity or criminal purpose; or

¹⁰⁸ [Al Hassan TJ](#), para. 1248; [Katanga TJ](#), para. 1642.

¹⁰⁹ See the Appeals Chamber's interpretation of article 30 in the context of co-perpetration under article 25(3)(a): [Bemba et al. AJ](#), para. 1308. In the context of joint criminal enterprise, see, e.g., [Šainović et al. AJ](#), para. 1491; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, [Judgement](#), 28 February 2005, para. 276; *Prosecutor v. Brđanin*, IT-99-36-A, [Judgement](#), 3 April 2007, paras. 418, 420-425; *Prosecutor v. Brima et al.*, SCSL-2004-16-A, [Judgment](#), 22 February 2008, para.76.

¹¹⁰ [Al Hassan TJ](#), paras. 1245-1248; [Katanga TJ](#), paras. 1616-1642, especially para. 1637. *Contra* [Ngaïssona Response](#), paras. 52-53.

¹¹¹ [Statute](#), art. 30(1).

¹¹² [Katanga TJ](#), para. 1637.

¹¹³ See e.g. [Al Hassan CD](#), para. 952.

¹¹⁴ *Contra* [Ngaïssona Response](#), para. 50.

alternatively (b) his or her knowledge of the group’s intention to commit the charged crime. No other provision in article 25(3), including article 25(3)(c), explicitly sets out the intent and knowledge requirements in this detail. These unique features of article 25(3)(d) should be seen as a deliberate drafting choice to “otherwise provide” for the mental element of this novel mode of liability such that article 30 does not apply.¹¹⁵

45. Article 25(3)(d) must therefore be viewed as a stand-alone mode of liability with its own mental elements—similar to article 28 where the mental elements are also “otherwise provided for”—such that article 30 does not apply. That said, the *definitions* of “intent” and “knowledge” in article 30(2)(b) and 30(3) are relevant in interpreting the accused’s “*knowledge* of the *intention* of the group” in article 25(3)(d)(ii).¹¹⁶ There is no incoherence in doing so,¹¹⁷ given that article 30(1) is the operative provision that sets out the default mental elements under the Statute and article 30(2) and (3) simply define the relevant terms.

46. That article 30 (in its operative sub-paragraph (1)) does not apply to article 25(3)(d) is also apparent from a contextual reading of the latter provision, and is supported by the drafting history discussed above.¹¹⁸ The provision was adopted with minor modifications from article 2(3)(c) of the Terrorist Bombings Convention, which was its own self-standing provision in that treaty. It reflected a deliberate compromise among delegations to delineate alternative mental elements that would be acceptable to all.¹¹⁹ Read on their plain terms, the *mens rea* encapsulated in sub-paragraphs (i) and (ii) have different objectives: sub-paragraph (i) specifies a high degree of intent regarding the group’s criminal activity or criminal purpose,¹²⁰ while sub-paragraph (ii) stipulates a high degree of awareness regarding the group’s intention to commit the charged crime.¹²¹ These differences reflect an intentional drafting choice and should be interpreted so that neither sub-paragraph becomes redundant.¹²² This is achieved by reading article 25(3)(d)(i) as requiring that the accused have a different degree of awareness of the charged crime to that under article 25(3)(d)(ii) and one lower than requiring awareness that the group will commit the charged crime in the ordinary course of events.

¹¹⁵ *Contra* [Ngaïssona Response](#), para. 46.

¹¹⁶ [Al Hassan TJ](#), para. 1248; [Katanga TJ](#), para.1641; [Mbarushimana CD](#), para. 288.

¹¹⁷ *Contra* [Ngaïssona Response](#), para. 54.

¹¹⁸ *See above* para. 20.

¹¹⁹ *See above* para. 19.

¹²⁰ T. Hamilton, *The Arms Trade and International Criminal Law: Reframing Accountability for Complicit Weapons Suppliers* (Oxford: OUP, 2025), p. 95.

¹²¹ [Judgment](#), para. 4128; [Al Hassan TJ](#), paras. 1248, 1765; [Ongwen TJ](#), para. 2695.

¹²² [Bemba TJ](#), para. 77; [Katanga TJ](#), para. 1389.

47. As commentators have observed, to the extent that the mental element is “otherwise provided for”, such that article 30 does not apply, lower degrees of knowledge may be sufficient for criminal responsibility under the Statute.¹²³ Indeed, this is already the case in relation to article 28 which recognises a negligence standard for military commanders (who “should have known” their subordinates were committing or about to commit crimes) and an advertent recklessness standard for civilian superiors (who “consciously disregarded information which clearly indicated” their subordinates were committing or about to commit crimes).

48. For the above reasons, the general rule in article 30 of the Statute does not apply to the mental elements of article 25(3)(d).

IX. Question I: What awareness must the accused have as to the “criminal activity or criminal purpose of the group”? How specific must their knowledge be with regard to the crimes involved?

49. The Prosecution’s Appeal focuses on the accused’s level of awareness required under article 25(3)(d)(i) in relation to the *crime* charged (i.e., awareness of the substantial risk that the type of crime will occur). It does not directly address the different question now raised by the Appeals Chamber, which concerns the accused’s awareness of the group’s criminal activity or criminal purpose, more generally.¹²⁴

50. Under article 25(3)(d)(i), the Statute requires that a person make their contribution to the charged crime *with the aim* of furthering the group’s criminal activity or criminal purpose involving the commission of a Rome Statute crime. In turn, the aim of furthering the group’s criminal activity or criminal purpose necessarily carries a cognitive component: aiming at an objective presupposes having some appreciation of it. This is because the accused’s aim to further the group’s criminal activity or criminal purpose has to be *conscious*: it must reflect some degree of awareness of what it is that the accused intends to further. A person cannot “aim

¹²³ Werle & Jessberger, p. 53 (“As far as it is not otherwise provided, Article 30 ICCSt. leaves no room for *dolus eventualis* or recklessness. [...] As far as it is otherwise provided for the mental element, however, *dolus eventualis* or recklessness may legitimately be made the basis for culpability.”). See also J.D. Ohlin, “Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise”, *Journal of International Criminal Justice*, Vol. 5 (2007), 69, p. 85 (“[] [I]f the defendant is furthering the criminal *purpose* of the group, it is certainly possible that he is unaware of the conduct that has been charged but could have foreseen its possibility”).

¹²⁴ To the extent that any passage of the Prosecution’s Appeal may be unclear in this respect, it should be understood as referring to the crimes *charged*, not to other *non-charged* crimes encompassed in the criminal activity or criminal purpose more broadly.

at furthering” a group’s criminal activity or criminal purpose (within the meaning of article 25(3)(d)(i)), if the latter is wholly unrepresented in their mind.¹²⁵

51. The question is thus whether an accused’s awareness of the group’s criminal activity or criminal purpose is sufficient to establish that he or she *consciously* aimed to further that criminal activity or criminal purpose. There is no legally required degree of specificity regarding the accused’s knowledge of the type of crimes involved—other than for those charged.

52. This is a matter of evidence. For example, depending on the circumstances, it may be sufficient to show that the accused knew of the group’s history of criminal behaviour to establish that his or her aim to further the group’s criminal activity or criminal purpose was not blind but informed (i.e. that he or she was in a position to consciously aim at furthering the group’s criminal activity or criminal purpose involving a Rome Statute crime). In other circumstances, it may be sufficient to establish that the person knew that the group’s criminal activity or criminal purpose is such that it involved certain types of crimes in order to reach the same legal conclusion that he or she consciously intended to further the criminal activity or criminal purpose of the group involving a Rome Statute crime. Article 25(3)(d)(i) addresses the public interest in protecting society from group criminality.¹²⁶ To this end, the accused must appreciate that he or she is aiming at furthering such group criminality.

53. By contrast, as regards the *charged* crime(s), the accused must at least be aware of the substantial risk that that type of crime or crimes will be committed by the group pursuing its criminal activity or purpose. As discussed in the Prosecution’s Appeal, the accused may only be held liable for the charged crimes to which he or she contributed within the group’s broader criminal activity or criminal purpose, while being aware of the substantial risk that they would be committed..¹²⁷

54. The accused is not legally required to have any specific awareness of the group’s wider criminality beyond the charged crimes, and for which the accused is not held criminally responsible. Article 25(3)(d)(i) is not a crime in itself, akin to criminal conspiracy or *association*

¹²⁵ A will unaccompanied by any cognitive appreciation would ultimately be blind. See [Prosecution Appeal](#), paras. 26, 36-37.

¹²⁶ [Prosecution Appeal](#), para. 53.

¹²⁷ See above [Response to Question H\(i\)](#). See also [Prosecution Appeal](#), paras. 52, 54. As a matter of evidence, in many situations, the accused is likely to have at least the same level of awareness for any other non-charged crime involved in the criminal activity or criminal purpose that he or she did not contribute to. However, such awareness is not legally required.

de malfaiteurs.¹²⁸ Nor is it a mode of liability entailing mutual attribution of all crimes within the group's criminal activity or criminal purpose, like co-perpetration under article 25(3)(a). For this reason, to the extent that the evidence shows that the accused sufficiently appreciated the group's broad criminal activity or purpose to establish that his or her aim to further it was *conscious* and not blind, the intent requirement for this aspect of article 25(3)(d)(i) is met.¹²⁹

X. Question J: Does the language of article 25(3)(d)(i) of the Statute provide for a different level of awareness with respect to the crimes than that required by article 25(3)(d)(ii) or any of the other modes of liability under article 25(3) of the Statute?

55. The language of article 25(3)(d)(i) does not expressly provide for *any* level of awareness of the charged crimes, let alone a different level of awareness than that required under article 25(3)(d)(ii) or any other mode of liability under article 25(3). Rather, a different (and lower) degree of awareness for the charged crimes arises implicitly under article 25(3)(d)(i), for the reasons set out above in answer to Question H(i) and (ii).

56. Specifically, the textual interpretation of article 25(3)(d) in good faith and in light of its context, object and purpose shows that a different (and lower) level of awareness with respect to the charged crimes is sufficient and appropriate for article 25(3)(d)(i).¹³⁰ The language of article 25(3)(d)(i) can be juxtaposed with that of article 25(3)(d)(ii). If the drafters had intended to apply the same knowledge of the charged crimes as required under the latter provision, it is reasonable to assume that they would have done so expressly. Moreover, unlike the other modes of liability in article 25(3), the mental elements of article 25(3)(d) are self-contained, such that it is not relevant to apply article 30, save to define “intent” and “knowledge” as set out in article 30(2) and (3).¹³¹ In this regard, the structure of article 25(3)(d) is unlike that of 25(3)(c), for which article 30 has been found to apply.¹³²

¹²⁸ See *above* paras. 19-20.

¹²⁹ On the facts of this case, there can be no doubt that Mr Ngaïssona consciously aimed to further the group's criminal activity or purpose, which included rape carried out with discriminatory intent: as the Trial Chamber found, he provided assistance “for the purpose of facilitating the commission of criminal acts targeting the Muslim population”. See [Prosecution Appeal](#), para. 82 recalling [Judgment](#), paras. 38, 4113. See also [Prosecution Appeal](#), paras. 83-86.

¹³⁰ See *above* paras. 31-38.

¹³¹ See *above* paras. 39-42.

¹³² *Contra* [Ngaïssona Response](#), para. 50.

XI. Question K: How should the phrase “where such activity or purpose involves the commission of a crime” be interpreted? Does it constitute an objective element or a subjective element?

57. The phrase “where such activity or purpose involves the commission of a crime within the jurisdiction of the Court”, which appears in subparagraph (i), does not introduce a *new* objective or subjective element to article 25(3)(d)(i). As shown above in response to Question G(ii), it qualifies the objective element of “the criminal activity or criminal purpose” by ensuring that such activity or purpose involves the commission of Rome Statute crimes (as opposed to any other crimes recognised in national or international law),¹³³ and replaces the use of the word “general” in the Terrorist Bombings Convention.¹³⁴ As such, it is part of the objective elements of the mode of liability.

58. The first sentence of article 25(3)(d) contains objective elements of the mode of liability, namely, that the accused contribute to the commission (or attempted commission) of the charged crime by a group of persons acting with a common purpose. The second sentence contains the subjective elements for article 25(3)(d)(i), namely, that the contribution must be intentional, and made with the aim of furthering the criminal activity or criminal purpose of the group. The clause, “where such activity or purpose involves the commission of a crime within the jurisdiction of the Court,” follows the latter subjective element and is preceded by a comma. That supports the interpretation that it qualifies the objective element relating to the group’s criminal activity or purpose. It clarifies that the “*criminal* activity or *criminal* purpose” of the group under article 25(3)(d) must involve the commission of a crime within the jurisdiction of the Court. This also assists in reading the objective element, which refers to “*such* a crime” (i.e. “a crime within the jurisdiction of the Court” as referenced in the chapeau of article 25(3))¹³⁵ being committed by a group acting with a common purpose. Under article 25(3)(d)(i), therefore, an accused’s contributions to a group’s crimes made with the aim of furthering the group’s criminal activity or criminal purpose may only give rise to criminal responsibility under the Statute if the crimes involved in the criminal activity or criminal purpose of the group fall within the subject-matter jurisdiction of the Court.

¹³³ See also [Ongwen CD](#), para. 44; [Al Mahdi CD](#), para. 27.

¹³⁴ See above paras. 23-28.

¹³⁵ See above para. 28.

CONCLUSION

59. The Prosecution respectfully submits the above answers in response to the Chamber's order and requests the Chamber to grant its appeal in the case against Mr Ngaïssona.

A handwritten signature in black ink, appearing to read 'Mandiaye Niang', with a large, stylized initial 'M' on the left.

Mame Mandiaye Niang, Acting Prosecutor

Dated this 30th day of September 2026

At The Hague, the Netherlands