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**International
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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 NGAÏSSONA***

Public Document

Ngaïssona Defence responses to the questions of the Appeals Chamber

Source: Defence of Patrice-Edouard Ngaïssona

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I. INTRODUCTION

1. The Defence for Patrice-Edouard Ngaïssona (“Defence”) hereby submits its consolidated response to the Appeals Chamber’s questions, notified on 25 August 2026,¹ and to the “Prosecution responses to the questions of the Appeals Chamber”² and the “Victims’ Additional Submissions pursuant to Order No. ICC-01/14-01/18-2929 A A2 A3”,³ both submitted on 30 September 2026.
2. In answering the Chamber’s legal questions, the Defence makes two reservations. First, the Defence reserves its position on whether it must be afforded an opportunity to make further submissions on the evidence, and on the factual findings and inferences required, before any acquittal could be reversed on a basis materially different from that advanced by the Prosecution.⁴ The absence of higher review of a conviction entered on appeal would make full protection of the Defence’s fair trial rights all the more important, without prejudice to the reservation that follows. Second, and independently of those procedural safeguards, the Defence reserves its position on whether reversing an acquittal and entering a conviction on appeal, a course unprecedented at the ICC, is compatible with the right to have the conviction and sentence reviewed by a higher tribunal, recognised in Article 14(5) of the International Covenant on Civil and Political Rights, read in light of Article 21(3) of the Statute, and on the resulting implications for the appropriate appellate remedy.⁵

II. SUBMISSIONS

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?

i. Elements of a common purpose

3. Court jurisprudence provides ample guidance in defining the constitutive elements of the common purpose, an objective element of Article 25(3)(d).

¹ Order requesting further written submissions, [ICC-01/14-01/18-2929](#), 25 August 2026 (“Order”).

² Prosecution responses to the questions of the Appeals Chamber, [ICC-01/14-01/18-2935](#), 30 September 2026 (“Prosecution Additional Submissions”).

³ Victims’ Additional Submissions pursuant to Order No. ICC-01/14-01/18-2929 A A2 A3, [ICC-01/14-01/18-2933](#), 30 September 2026 (“CLRv Additional Submissions”).

⁴ See *Prosecutor v. Gotovina and Markač*, Appeal Judgment, [IT-06-90-A](#), 16 November 2012 (“Gotovina and Markač AJ”), paras 108, 154; *Prosecutor v. Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, [ICC-01/04-01/07-3363](#), 27 March 2013 (“Katanga Regulation 55 Appeal”), paras 95, 100-102. See, in particular, Question C.

⁵ [ICCPR](#), Article 14(5); Human Rights Committee, General Comment No. 32, [CCPR/C/GC/32](#), 23 August 2007, para. 47; [Rome Statute](#), Article 21(3).

4. The Court defines the common purpose as a “shared goal, aim or objective”.⁶ The common purpose must either (i) be to commit the charged crimes; or (ii) involve the commission of the charged crimes.⁷ In the first scenario, the commission of the charged crimes constitutes the purpose itself. For example, the common purpose may be to commit rape. In the second scenario, the common purpose may be broader and need not itself be criminal, but must involve the commission of the charged crimes.⁸ For example, the common purpose may be to bring about regime change while involving rape, either because the group intended to commit rape or because the group was aware that the commission of rape would occur in the ordinary course of events, according to the ‘virtual certainty’ test of Article 30(2)(b).⁹ In either scenario, the charged crimes must form part of the common purpose and group members must harbour the same intent in relation to those crimes.¹⁰
5. To determine the existence and scope of the common purpose, Chambers have applied a two-fold inquiry: first, whether a common purpose exists and, if so, its content or scope, which need not be “purely” criminal;¹¹ and second, whether each of the charged crimes formed part of the common purpose by virtue of the group members’ shared intent, assessed on a crime-by-crime basis.¹² That a common purpose need not be “specifically directed” at the commission of the crimes does not displace the separate requirement that the charged crimes form part of the common purpose.¹³
6. Given the common purpose is defined by its group members’ shared intent in relation to that common purpose, the common purpose must be shared by all members of the group.¹⁴ It also

⁶ *Prosecutor v. Al Hassan*, Public redacted version of Trial Judgment, [ICC-01/12-01/18-2594-Red](#), 26 June 2024 (“Al Hassan TJ”), para. 1236.

⁷ *Prosecutor v. Katanga*, Judgment pursuant to Article 74 of the Statute, [ICC-01/04-01/07-3436-tENG](#), 7 March 2014 (“Katanga TJ”), para. 1627; [Al Hassan TJ](#), paras 1237, 1622, 1645-1646. [Prosecution Additional Submissions](#), paras 7-8.

⁸ *Ibid.*

⁹ [Al Hassan TJ](#), paras 1237, 1622, 1645-1646, 1655; [Katanga TJ](#), para. 1662. [Prosecution Additional Submissions](#), paras 4, 7-8.

¹⁰ See below Question C. [Katanga TJ](#), paras 1627 and 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”), 1662.

¹¹ [Katanga TJ](#), para. 1627; [Al Hassan TJ](#), para. 1645.

¹² [Katanga TJ](#), paras 1624-1631, in particular, paras 1624 (“It must first be underscored that it is a *sine qua non* of the application of article 25(3)(d) of the Statute that the existence of a group of persons driven by and acting with a common purpose be established. Further, the persons who committed the crime must belong to the group, whether they form all or part of it.”), 1628, 1653 (“It will then determine whether each crime charged formed part of the common purpose”); [Al Hassan TJ](#), paras 1620, 1622, and see also for an example of a crime-by-crime analysis, paras 1623-1659. See also Question C.

¹³ [Prosecution Additional Submissions](#), paras 7-9. [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; *Prosecutor v. Lubanga*, Decision on the confirmation of charges, [ICC-01/04-01/06-803-tEN](#), 29 January 2007, para. 344.

¹⁴ [Al Hassan TJ](#), para. 1235 (“The Chamber places emphasis on the use of the specific term ‘common purpose’ which defines the group”); *Prosecutor v. Gbagbo and Blé Goudé*, Reasons of Judge Geoffrey Henderson, [ICC-02/11-01/15-1263-AnxBRed](#), 16 July 2019 (“Gbagbo and Blé Goudé TJ Reasons of Judge Henderson”), para.

follows that perpetrators of the crimes, including through the forms of commission recognised in Article 25(3)(a), must be members of the group, whether they form all or part of it.¹⁵ To this end, a minimum degree of identification of group members is required in order to assess the shared intent requirement, including of the perpetrators of the charged crimes.¹⁶

7. As opportunistic crimes committed by members of a group may not be attributed to the group as a whole, it follows that if a limited number of group members agree to commit the charged crimes, without the consent or knowledge of the rest of the group, a common purpose may only be inferred among the limited group members in question and in relation to the crimes involved in the shared common purpose.¹⁷ This was for instance the object of Judge Akane's separate and partly dissenting opinion in *Al Hassan*, where she considered *inter alia* that abuses committed by one individual group member did not embody the views of other members of Ansar Dine/AQIM and therefore fell outside the scope of the common purpose.¹⁸
8. Although members of the group need not explicitly agree on the exact manner in which the crimes encompassed in the common purpose would be carried out,¹⁹ the contours of the common purpose and group membership must be sufficiently defined and supported by probative evidence.²⁰ In addition, the extemporaneous formation of a common purpose does not negate the requirement that the shared purpose must exist at the time the crimes are

1951; [Katanga TJ](#), paras 1624, 1627; *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, Minority Opinion of Judge van den Wyngaert"), para. 192; *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](#), 13 November 2019 ("Al Hassan Confirmation Decision"), para. 940. See also [Katanga TJ](#), paras 1627 and fn. 3592, 1628, 1630; [Al Hassan TJ](#), para. 1717, fn. 5200; *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 ("Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Prost"), para. 17, fn. 40; Public redacted version of "Prosecution Appeal Brief", ICC-01/14-01/18-2846-Conf, 25 November 2025, [ICC-01/14-01/18-2846-Red](#), 27 November 2025 ("Prosecution Appeal Brief"), para. 30, fn. 48.

¹⁵ [Katanga TJ](#), para. 1624.

¹⁶ See *contra* [Prosecution Additional Submissions](#), para. 4, fn. 7. 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, [ICC-01/14-01/18-2886-Corr-Red](#), 12 March 2026 ("Response"), paras 24-26. See also [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), paras 1394-1399 (where Judge Henderson cautioned that generic labels such as "pro-Gbagbo forces" cannot substitute proof that particular individuals belonged to the alleged group, while stressing that where affiliation is inferred, it must be established by additional evidence; the commission of a crime alone cannot establish group membership without risking circular reasoning).

¹⁷ [Al Hassan TJ](#), para. 1237; [Katanga TJ](#), para. 1630; *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 and Partly Dissenting Opinion of Judge Akane"), paras 27-28; [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), paras 1917-1918; [Katanga TJ, Minority Opinion of Judge van den Wyngaert](#), paras 23, 191. See also [Prosecution Additional Submissions](#), para. 8.

¹⁸ [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), paras 4-6, 12-13, 20, 22.

¹⁹ [Prosecution Additional Submissions](#), para. 5, fn. 11; [Al Hassan TJ](#), para. 1238.

²⁰ See [Katanga TJ](#), paras 1624, 1626, 1628, 1653; [Al Hassan TJ](#), paras 1234, 1618; [Katanga TJ, Minority Opinion of Judge van den Wyngaert](#), para. 192, fn. 263. *Contra* [Prosecution Additional Submissions](#), para. 5 ("neither requires heightened details").

committed.²¹ In cases where a common purpose covers several months, a particular “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”.²² Contrary to the Prosecution’s suggestion, a “group committing a pattern of crimes against a civilian population” cannot, by itself, satisfy the common purpose requirement: the evidence must establish that the charged crime were encompassed by a goal shared by the group’s members.²³

9. In sum, a common purpose is an aim, goal or objective shared by members of a defined group of persons acting in concert, of which the perpetrators of the charged crimes must be members. The common purpose must either be to commit the charged crimes or involve their commission by virtue of the group’s shared intent to commit the crimes or shared awareness that the commission of the crime would occur in the ordinary course of events.

ii. Distinctions between the common purpose and the organisational policy

10. Legal findings as to the existence of an organisational policy may not be simply transposed to the common purpose inquiry, because a policy and a common purpose are fundamentally distinct concepts, serving different functions and subject to different constitutive and evidentiary requirements.²⁴ The comparison below does not purport to be exhaustive, but identifies the most significant distinctions between a common purpose and a policy.
11. The first distinguishing factor between a common purpose and a policy is the required nexus between the charged crimes and the common purpose or policy. The policy is defined as a design, plan or other form of organisation²⁵ actively promoting or encouraging an attack

²¹ [Katanga TJ](#), paras 1626, 1630.

²² [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), para. 13. See also [Katanga TJ](#), paras 1626 (“definition of the criminal 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”), 1630. For more examples of a crime-by-crime analysis, see *Prosecutor v. Katanga*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, [ICC-01/04-01/07-3319-tENG/FRA](#), 21 November 2012 (“Katanga Regulation 55 Decision”), para. 30, fn. 50, citing *Prosecutor v. Katanga*, Decision on the confirmation of charges, [ICC-01/04-01/07-717](#), 30 September 2008 (“Katanga Confirmation Decision”), paras 275, 279, 281, 306, 325, 426, 435.

²³ [Prosecution Additional Submissions](#), para. 5, see also paras 6, 10. See below Questions B and D.

²⁴ [Prosecution Additional Submissions](#), paras 4, 6, 10; [CLRv Additional Submissions](#), paras 10, 13. See [Response](#), paras 30-33.

²⁵ [Katanga TJ](#), paras 1109, 1142-1156; *Prosecutor v. Bemba*, Judgment pursuant to Article 74 of the Statute, Separate opinion of Judge Kuniko Ozaki, [ICC-01/05-01/08-3343-AnxII](#), 21 March 2016 (“Bemba TJ, Separate Opinion of Judge Ozaki”), para. 30; *Prosecutor v. Ntaganda*, Judgment, [ICC-01/04-02/06-2359](#), 8 July 2019 (“Ntaganda TJ”), para. 674 (“A policy may consist of a pre-established design or plan, but it may also crystallise and develop only as actions are undertaken by the perpetrators”). See also [Katanga Confirmation Decision](#), para. 396; *Prosecutor v. Bemba*, 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 (“Bemba Confirmation Decision”), para. 81; *Prosecutor v. Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, [ICC-02/11-01/11-656-Red](#), 12 June 2014 (“Gbagbo Confirmation Decision”), para. 215; *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the

targeting a particular civilian population or a part thereof by a State or organisation.²⁶ Whereas for Article 25(3)(d), the charged crimes must form part of the common purpose,²⁷ for the policy, the required nexus is between the attack and the policy.²⁸ As held by Judge Ibáñez in *Ntaganda*, “it is the attack rather than the underlying acts attributable to the accused that must be shown to have been carried out in pursuance or furtherance of the policy - the course of conduct that makes up the attack must reflect a link to the State or organisational policy.”²⁹ It need not be shown that each and every act forming the attack was carried out pursuant to or in furtherance of an organisational policy.³⁰ The policy inquiry therefore concerns the attack as a whole,³¹ in contrast to the common purpose inquiry, which requires a crime-by-crime analysis of whether the charged crimes themselves fall within the common purpose.³²

12. The second distinguishing factor is the mental elements of the Article 25(3)(d) group and the Article 7(2)(a) organisation. The shared intent concerning the charged crimes is the defining criterion of the group acting with a common purpose.³³ By contrast, Articles 7(1) and (2)(a) do not require all members of the organisation or all perpetrators of the underlying acts to share such an intention concerning the charged crimes.³⁴ According to Trial Chamber II in *Katanga*, it need only be shown that the “organisation meant to commit an attack against a civilian population”.³⁵ Furthermore, according to Judge Henderson in *Gbagbo and Blé Goudé* there

Situation in the Republic of Kenya, [ICC-01/09-19-Corr](#), 31 March 2010 (“Situation in Kenya”), para. 85.

²⁶ [Elements of Crimes](#), Article 7: Crimes against humanity, “Introduction”, para. 3, fn. 6; [Katanga TJ](#), para. 1108; [Ntaganda TJ](#), para. 673.

²⁷ [Katanga TJ](#), paras 1630, 1664, 1693; [Al Hassan TJ](#), paras 1237, 1622, 1655, *see also* paras 1636, 1642, 1646, 1658, 1659. *See below* Question C.

²⁸ [Prosecution Additional Submissions](#), para. 4; *Prosecutor v. Bemba*, Judgment pursuant to Article 74 of the Statute, [ICC-01/05-01/08-3343](#), 21 March 2016 (“Bemba TJ”), para. 161; [Katanga TJ](#), paras 1115-1116. *See also* [Gbagbo Confirmation Decision](#), para. 214 (“[T]he ‘policy’, for the purposes of the Statute, must be understood as the active promotion or encouragement of an attack against a civilian population by a State or organization”).

²⁹ *Prosecutor v. Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda’s appeal, [ICC-01/04-02/06-2666- Anx3](#), 30 March 2021 (“Ntaganda AJ, Separate Opinion of Judge Ibáñez”), para. 154; [Ntaganda TJ](#), para. 673; [Katanga TJ](#), para. 1115; [Bemba TJ](#), para. 161; [Al Hassan TJ](#), para. 1111; *Prosecutor v. Said*, Trial Judgment, [ICC-01/14-01/21-1054-Red](#), 23 September 2026 (“Said TJ”), para. 607.

³⁰ [Katanga TJ](#), paras 1115, 1165; [Said TJ](#), para. 607. *See also* [Prosecution Additional Submissions](#), para. 4.

³¹ *Prosecutor v. Bemba et al.*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, [ICC-01/05-01/08-3636-Anx2](#), 8 June 2018 (“Bemba AJ, Separate Opinion of Judge Van den Wyngaert and Judge Morrison”), para. 72 (explaining that the policy must be aimed more broadly at committing acts listed in Article 7(1) of the Statute). *See also* [Elements of Crimes](#), Article 7: Crimes against humanity, “Introduction”, para. 3; [Said TJ](#), para. 607; [Bemba TJ](#), para. 161; [Katanga TJ](#), para. 1115.

³² [Katanga TJ](#), paras 1627, 1653; [Al Hassan TJ](#), para. 1622.

³³ [Katanga TJ](#), paras 1627 and fn. 3592, 1628, 1630; *see also* [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), para. 1951; [Al Hassan TJ](#), para. 1717, fn. 5200; [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Prost](#), para. 17, fn. 40.

³⁴ [Prosecution Additional Submissions](#), para. 4; [Katanga TJ](#), para. 1108. *See also* [Elements of Crimes](#), Article 7: Crimes against humanity, “Introduction”, para. 3, fn. 6.

³⁵ [Katanga TJ](#), para. 1113. Article 7(1) (“‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”).

need not be a meeting of minds between the designers of the criminal policy and those who implement it on the ground.³⁶ The policy may also become clear to the perpetrators in the course of its implementation such that the definition “of the overall policy is possible only *in retrospect*, once the acts have been committed”.³⁷ Conversely, the shared intent of the relevant group members to pursue the common purpose must exist at the time of the commission of the charged crimes.³⁸

13. The third distinguishing factor is that the policy element does not require that perpetrators of Article 7(1) crimes be members of the organisation, “although regard may be had to this aspect as evidence of the connection between the attack and the State or organisational policy”.³⁹ It is also not required that the perpetrators necessarily be motivated by the policy.⁴⁰
14. The fourth distinguishing factor is the legal function of the two concepts. The common purpose forms part of the basis for attributing individual criminal responsibility to an accused through a specific and carefully crafted type of group criminality involving a shared criminal purpose.⁴¹ By contrast, the Article 7(2)(a) policy is a “jurisdiction-endowing provision elevating ordinary crimes to the level of international crimes.”⁴² It serves to establish the broader organisational

³⁶ [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), para. 97 (note that the policy and common plan were discussed together given the Prosecution’s submission’s in that case).

³⁷ [Katanga TJ](#), para. 1110 (emphasis in original); [Bemba TJ](#), para. 161. See also [Katanga TJ](#), para. 1165; Guénaél Mettraux, ‘[Chapeau or Contextual Elements](#)’ in *International Crimes: Law and Practice: Volume II: Crimes Against Humanity*, May 2020 (“Mettraux”), p. 323; Judgment, [ICC-01/14- 01/18-2784-Conf](#), 24 July 2025 (“Judgment”), para. 3775; *Prosecutor v. Abd-Al-Rahman*, Trial Judgment, [ICC-02/05-01/20-1240](#), 6 October 2025 (“Abd-Al-Rahman TJ”), para. 700. See also [Katanga Confirmation Decision](#), para. 396 (“an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion”). See similar formulations in [Bemba Confirmation Decision](#), para. 81; [Gbagbo Confirmation Decision](#), para. 215; [Situation in Kenya](#), para. 85.

³⁸ See [Katanga TJ](#), para. 1626, see also para. 1664; [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), para. 13.

³⁹ [Katanga TJ](#), para. 1115; *Prosecutor v. Al Hassan*, Decision on the Prosecutor’s Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, [ICC-01/12-01/18-35-Red2-tENG](#), 22 May 2018, para. 50; [Bemba TJ](#) para. 161.

⁴⁰ [Bemba TJ](#), para. 161; [Katanga TJ](#), paras 1108, 1125.

⁴¹ [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), para. 13; [Katanga TJ](#), para. 1628. See also *Prosecutor v. Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, Partly concurring opinion of Judge Chile Eboe-Osuji, [ICC-01/04-02/06-2666-Anx5-Corr](#), 30 March 2021 (“Ntaganda AJ, Partly Concurring Opinion of Judge Eboe-Osuji”), para. 66; *Prosecutor v. Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, Separate opinion of Judge Howard Morrison on Mr Ntaganda’s appeal, [ICC-01/04-02/06-2666-Anx2](#), 30 March 2021, (“Ntaganda AJ, Separate Opinion of Judge Morrison”), paras 37-40.

⁴² *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, [ICC-01/09-19-Corr](#), 31 March 2010, para. 26.

character of the attack required to engage Article 7,⁴³ and limit the Court’s jurisdiction “to the sort of criminality that is organized and planned”.⁴⁴

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?

15. In theory, findings of a pattern of violence for the purposes of establishing the contextual elements of crimes against humanity may have some relevance to establishing the elements of a common purpose. However, a ‘pattern of violence’, implying a broad range of conduct, cannot, without more, prove the common purpose under Article 25(3)(d).⁴⁵ Contextual elements, like the constitutive elements of a common purpose, must be established beyond reasonable doubt.⁴⁶ Accordingly, where circumstantial evidence, including pattern evidence, is relied upon to establish either, the inference must be the only reasonable one.⁴⁷
16. The Court’s jurisprudence recognises a pattern of violence as one of several factors that may, cumulatively, support an inference of an organisational policy. It is not, in itself, determinative, but forms part of a broader, multi-factorial assessment of the contextual elements of crimes against humanity.⁴⁸

⁴³ [Situation in Kenya](#), para. 98 (in determining whether an act forms part of an attack, “the Chamber must consider the nature, aims and consequences of such an act”). See also *Prosecutor v. Ongwen*, Trial Judgment, [ICC-02/04-01/15-1762-Red](#), 4 February 2021 (“Ongwen TJ”), para. 2677; [Judgment](#), para. 3925.

⁴⁴ [Mettraux](#), pp. 291-292. [Prosecution Additional Submissions](#), para. 3, fn. 4. [Katanga Confirmation Decision](#), para. 396; [Gbagbo Confirmation Decision](#), para. 215; [Bemba Confirmation Decision](#), para. 81; [Bemba TJ, Separate Opinion of Judge Ozaki](#), para. 30; *Situation in the Republic of Côte d’Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, [ICC-02/11-14](#), 3 October 2011, para. 43; [Situation in Kenya](#), para. 84. See also UN General Assembly, [Report of the International Law Commission on the Work of its Sixty-Ninth Session](#), UN Doc. A/72/10, Supp No. 10 (2017), pp. 38-39, para. 24 (noting that the introduction of the policy element in the ILC Draft Code “sought to exclude ‘ordinary’ crimes of individuals acting on their own initiative and without any connection to a State or organization”).

⁴⁵ [CLRV Additional Submissions](#), para. 18 (“The CLRV do not submit that a pattern of violence established for purposes of article 7 *ipso facto* proves a common purpose”) and [Prosecution Additional Submissions](#), para. 6 (“while evidence of a pattern of violence may be relevant as a matter of fact [...]. It is just one factor that may be assessed with others to establish a common purpose”).

⁴⁶ [Prosecution Additional Submissions](#), para. 10 (“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”); *Prosecutor v. Ongwen*, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”, [ICC-02/04-01/15-2022-Red](#), 15 December 2022, paras 320-321.

⁴⁷ *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. See [Prosecution Additional Submissions](#), para. 10; Public redacted version of “Prosecution consolidated response to Yekatom’s and Ngaïssona’s appeals against the Judgment and Yekatom’s request to present additional evidence”, 27 February 2026, [ICC-01/14-01/18-2885-Red](#), 8 May 2026, para. 362. See also [Ntaganda TJ](#), paras 69-70; [Al Hassan TJ](#), para. 21.

⁴⁸ [Judgment](#), paras 3776 (for the policy), 3779 (for the systematic nature of the attack); [Ntaganda TJ](#), para. 674, citing [Katanga TJ](#), para. 1109 (“the existence of such a State or organisational policy can therefore be inferred by discernment of, *inter alia*, repeated actions occurring according to a same sequence”), see also para. 1112; [Said TJ](#), para. 608; [Ongwen TJ](#), para. 2679; [Bemba TJ](#), para. 160; [Ntaganda AJ, Separate Opinion of Judge Ibáñez](#), paras 9, 98, 153, 204(d). In comparison, the systematic nature of the attack itself refers to the existence of a pattern

17. Judge Henderson cautioned that although patterns can provide circumstantial proof of key elements such as a common plan or policy, an analysis of the “true nature and extent of a pattern” must be conducted to determine 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” and that the patterns are “genuine”.⁴⁹ In the *Bemba* appeal, Judges Van den Wyngaert and Morrison also emphasised that establishing a pattern requires proof of the underlying individual criminal acts, while criticising the Trial Chamber’s circular reasoning in defining the policy solely by reference to the fact that an attack against the civilian population was committed.⁵⁰ Judges Van den Wyngaert and Morrison endorsed Judge Ozaki’s separate opinion that “while a pattern of violence may be relevant from an evidentiary perspective, it does not itself constitute a policy”.⁵¹ The *Katanga* Trial Chamber also cautioned against equating a ‘policy’ with a ‘regular pattern’.⁵² These judicial findings underscore that (a) a pattern of violence or crimes must be carefully assessed and substantiated through the underlying acts from which it is derived; and (b) the evidentiary significance of that pattern depends on the extent it supports the inference that a policy existed.
18. Caution is all the more warranted for a common purpose analysis, which requires particularised findings on the scope of the purpose, the group’s shared intent, and whether the charged crimes formed part of that purpose.⁵³ In this regard, although the evidentiary value of a pattern of violence is case-specific,⁵⁴ such circumstantial evidence would in every case need to support the particular inference that the crime in question formed part of the common purpose, either because the group shared an intention to commit the crime in question or an awareness that the crime would occur in the ordinary course of events.⁵⁵ In the present case, the CLRV’s reliance on the Chamber’s general findings concerning patterns of Anti-Balaka conduct cannot establish

of crimes, see [Ongwen TJ](#), para. 2682; [Ntaganda TJ](#), para. 692; [Katanga TJ](#), para. 1123.

⁴⁹ [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), paras 80, 1888-1896.

⁵⁰ [Bemba AJ, Separate Opinion of Judge Van den Wyngaert and Judge Morrison](#), paras 60, 66 (“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”), 69 (“The fact that many crimes against civilians were committed does not, in and of itself, elevate those crimes to crimes against humanity”). See also [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), para. 31, fn. 58.

⁵¹ [Bemba AJ, Separate Opinion of Judge Van den Wyngaert and Judge Morrison](#), para. 69; [Bemba TJ, Separate Opinion of Judge Ozaki](#), para. 30.

⁵² [Katanga TJ](#), para. 1112.

⁵³ See Questions A and C. See also [Gbagbo and Blé Goudé TJ Reasons of Judge Henderson](#), para. 87 (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”).

⁵⁴ See [Prosecution Additional Submissions](#), paras 6, 10.

⁵⁵ See Questions A and C.

those elements, particularly in light of the Chamber's express finding that rape did not form part of any Anti-Balaka pattern of conduct – a finding the CLRV overlook.⁵⁶

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?

i. *The charged crime must form part of the common purpose*

19. The Court's jurisprudence and statutory framework leave no ambiguity: the charged crime must form part of the common purpose pursuant to Article 25(3)(d).⁵⁷ Liability under Article 25(3)(d) has never been established solely on the basis that a crime was committed "in the context of" a common purpose.
20. First, the Court's jurisprudence on Article 25(3)(d) establishes this requirement clearly. Trial Chamber II held in *Katanga* that to "be satisfied that the perpetrator's acts were encompassed by the common purpose, it will also be necessary to show that *the crime at hand formed part of the common purpose*" and that 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 and incur the accused's liability under article 25(3)(d)".⁵⁸ More recently, Trial Chamber X in *Al Hassan* held that where the common purpose involves the commission of a crime, "what must be established is that the crime or crimes committed *were part of the common purpose*".⁵⁹ In applying this principle, trial chambers have in practice undertaken a crime-by-crime assessment to determine whether each charged crime formed part of the common purpose.
21. In *Katanga*, Trial Chamber II conducted a crime-by-crime assessment of whether the charged crimes formed part of the common purpose, examining *inter alia* whether members of the groups harboured the intent to commit the crimes.⁶⁰ Crucially, although it found that the acts of rape and enslavement formed "an integral part" of the broader context (the militia's design to attack the predominantly Hema civilian population of Bogoro), it could not find that those

⁵⁶ [CLRV Additional Submissions](#), paras 20, 32, 34; [Judgment](#), para. 4131.

⁵⁷ [Prosecution Additional Submissions](#), para. 8 ("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" (emphasis in original)). See also [Prosecution Appeal Brief](#), para. 30, fn. 48. See *contra* [CLRV Additional Submissions](#), paras 22-24, 29.

⁵⁸ [Katanga TJ](#), para. 1630 (emphasis added). The CLRV failed to include altogether the requirement of shared intent in answering Questions A and C.

⁵⁹ [Al Hassan TJ](#), para. 1237 (emphasis added). See also [Al Hassan Confirmation Decision](#), para. 940; [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), para. 27.

⁶⁰ [Katanga TJ](#), paras 1630, 1641, 1646, 1653, 1656-1658, 1662, 1664. See also [Katanga Regulation 55 Decision](#), para. 30 (the Katanga Trial Chamber noted that the criminal intent of the group had been examined "crime by crime" in the Pre-Trial Chamber's confirmation decision).

crimes were encompassed by or fell within the common purpose.⁶¹ Mr Katanga could therefore not be found guilty of the charges concerning rape and sexual slavery as such crimes “were not part of the common purpose”.⁶²

22. Similarly, in *Al Hassan* Trial Chamber X examined the facts and evidence in relation to each crime to determine whether it formed part of Ansar Dine/AQIM’s common purpose.⁶³ The Majority held that although rape was not an objective of the group’s leadership, it formed part of the common purpose based on several factors, including but not limited to the group’s knowledge that rape would occur in the ordinary course of events.⁶⁴ While disagreeing with the Majority *inter alia* on the conclusions to be drawn from the evidence, Judge Akane similarly conducted a crime-by-crime analysis to determine whether the crimes formed part of the common purpose.⁶⁵ For example, with respect to acts of violence and other forms of ill-treatment, Judge Akane considered, among other factors, that the “clear shared intention of Ansar Dine/AQIM [...] was that punishments could only be imposed by seizing the Islamic Court”, to conclude that acts by members who chose not to follow that procedure fell outside the common purpose.⁶⁶ With respect to rape, Judge Akane held that the Prosecution failed to sufficiently explain how the acts of rape were linked to Ansar Dine/AQIM’s ideology and there was no evidence to suggest that rape in detention was committed to further the common purpose.⁶⁷ Judge Akane emphasised the need for a careful analysis of “the link of the individual crimes to the common purpose, looking *inter alia* at the possible motive of the perpetrators of the crimes”,⁶⁸ and that mere awareness of the crimes by members of the group was not sufficient to establish that they shared a common purpose.⁶⁹ Regardless of the differences in Judge Akane’s and the Majority’s approach to the evidence and the common purpose test, they were both of the consensus that the charged crimes must form part of the common purpose. Neither

⁶¹ [Katanga TJ](#), paras 1663-1664.

⁶² [Katanga TJ](#), para. 1693.

⁶³ [Al Hassan TJ](#), paras 1622, 1636-1637, 1646, 1655, 1658, 1659, 1668, 1693, 1709, 1720, 1728.

⁶⁴ [Al Hassan TJ](#), paras 1655 (“the Majority concludes that members of Ansar Dine/AQIM knew that acts of rape would be perpetrated against detained women in the ordinary course of events. On that basis, and in light of the above, the Majority, Judge Akane dissenting, is convinced that acts of rape in detention charged under Counts 11-12 were part of the common purpose”), 1656 (“What matters is how the members of the groups behaved in practice, their relevant knowledge, and, importantly, how the groups’ leadership reacted in light of repeated occurrences of rape committed in Timbuktu in 2012-2013”).

⁶⁵ [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), paras 22, 28-32, 36-39.

⁶⁶ [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), paras 22-23.

⁶⁷ For further analysis of Judge Akane’s reasoning on this point, see also [Al Hassan TJ, Separate Opinion of Judge Akane](#), paras 23-24, 33, 40.

⁶⁸ [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), para. 27 (emphasis in original). See also paras 22, 28-32, 36-39.

⁶⁹ [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), para. 30, 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; [Katanga TJ](#), para. 1630. See also [Response](#), para. 27, fn. 67.

treated evidence that the crimes were committed in the context of that common purpose, or mere awareness of the crimes by members of the group, as sufficient for the common purpose requirement of Article 25(3)(d).

23. Second, the statutory language of Article 25(3)(d) is also consistent with this reading. In particular, the *chapeau* requires a contribution to the commission of “such a crime” by a group acting with a common purpose. The common purpose requirement thus qualifies the group’s commission of the crime; it does not merely identify a group whose members commit crimes. This is reinforced by subparagraphs (i) and (ii), which respectively refer to a group’s criminal activity or purpose that “involves the commission of a crime” and to the “intention of the group to commit the crime”. Read together, these provisions require a substantive relationship between the charged crime and the common purpose. The *Katanga* and *Al Hassan* Trial Chambers identify that relationship as the crime’s inclusion in the common purpose.⁷⁰
24. Third, a mere showing that the charged crime was committed “in the context of” pursuing the common purpose would impermissibly expand the scope of Article 25(3)(d). It would risk attributing crimes based merely on their association with the group’s broader activities, as discussed above, without establishing that the crimes themselves fell within the scope of the common purpose by virtue of the group’s shared intent. This would introduce a broader basis of attribution than that permitted in *Katanga* and *Al Hassan*, and would require the identification of its statutory foundation. Any such interpretation must also be reasonably foreseeable and consistent with the essence of the statutory language.⁷¹ Most significantly, it would risk extending individual criminal responsibility under Article 25(3)(d) beyond the specific type of common purpose group criminality that the provision is designed to capture.
25. In sum, adopting the lower standard that the crimes need only have been committed “in the context of” the common purpose would not only depart from established jurisprudence, but would also be incompatible with the broader requirements of Article 25(3)(d), including the requirement that group members share the requisite intent in relation to the common purpose.⁷²
26. The alternative construction also raises concerns regarding Mr Ngaïssona’s fair trial rights. The Prosecution advanced its appeal on the basis that the charged rape formed part of the common purpose. If the Appeals Chamber instead treats commission ‘in the context of’ pursuing that

⁷⁰ [Al Hassan TJ](#), para. 1237, relying on [Al Hassan Confirmation Decision](#), para. 940 and [Katanga TJ](#), paras 1627, 1630.

⁷¹ Judgment on the appeal of Mr Alfred Yekatom against the decision of Trial Chamber V of 29 October 2020 entitled ‘Decision on motions on the Scope of the Charges and the Scope of Evidence at Trial’, [ICC-01/14-01/18-874](#), 5 February 2021 (“Decision on Scope of Charges and Evidence”), para. 47.

⁷² See Question A.

purpose as sufficient, the Defence must be sufficiently informed of the factual basis and afforded an effective opportunity to contest the factual findings and inferences relied upon to apply that alternative test before it is used to reverse the acquittals.⁷³ The present submissions should not be treated as exhausting that opportunity. The Defence reserves its position on whether further submissions are necessary once the content of the proposed test and the factual basis for its application have been identified, in accordance with the rights enshrined in Article 67(1) of the Statute.⁷⁴

ii. *The accused's awareness must satisfy the applicable mental requirements concerning the charged crime*

27. If, however, the Appeals Chamber were to hold that it suffices for the charged crime to have been committed in the context of pursuing the common purpose, without forming part of it, a separate subjective nexus between the accused and the charged crime would still be required. Such a construction would broaden the permissible relationship between the crime and the group's purpose, but it would not alter the mental elements required for responsibility for that

⁷³ [Gotovina and Markač AJ](#), paras 108 ("The Appeals Chamber will not enter convictions under alternate modes of liability where this would substantially compromise the fair trial rights of appellants or exceed its jurisdiction as delineated in the Statute"), 154 ("The Appeals Chamber observes that in the context of this case, drawing the inferences needed to enter convictions based on alternate modes of liability would also substantially undermine Markač's fair trial rights, as he would not be afforded the opportunity to challenge evidence relied on by the Appeals Chamber to enter additional convictions. The Appeals Chamber notes that Markač was provided the opportunity to discuss whether the Trial Chamber's findings implicate alternate forms of liability. However the scope of this additional briefing did not extend to challenging evidence presented to the Trial Chamber."). See also *Prosecutor v. Ntagerura et al.*, Appeal Judgement, [ICTR-99-46-A](#), 7 July 2006, paras 163-164.

⁷⁴ [Rome Statute](#), Article 67(1). On the effective opportunity to be heard, see *Prosecutor v. Jelisić*, Appeal Judgement, [IT-95-10-A](#), 5 July 2001, paras 26-27; *Prosecutor v. Bemba*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, [ICC-01/05-01/08-75](#), 25 August 2008, para. 14; *Prosecutor v. Bemba*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, [ICC-01/05-01/08-55](#), 31 July 2008, para. 22. On notice and the opportunity to prepare a defence following a proposed legal characterisation, see [Katanga Regulation 55 Appeal](#), paras 87-88, 95, 100-102; *Prosecutor v. Katanga*, Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), [ICC-01/04-01/07-3371-tENG](#), 15 May 2013, paras 11, 17, 27-28. On assessing the adequacy of notice in light of the accused's ability to prepare a meaningful defence, see [Decision on Scope of Charges and Evidence](#), paras 43-44, 54. On the opportunity to address a decisive issue raised by the Chamber itself, see also *Prosecutor v. Katanga and Ngudjolo*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova, [ICC-01/04-01/07-2297](#), 28 July 2010, paras 11-12, 55-57.

crime.⁷⁵ A contextual connection between that crime and the pursuit of the common purpose does not establish what the accused intended or knew about the crime.⁷⁶

28. Under Article 25(3)(d)(i), Article 30 would therefore continue to supply those mental requirements, for the reasons given under Questions H and J. Under Article 25(3)(d)(ii), the accused must contribute “in the knowledge of the intention of the group to commit the crime”. The text expressly ties the accused to the specific crime charged, through the group’s intention to commit it, and the Trial Chamber in *Katanga* defines that intention by reference to Article 30(2)(b).⁷⁷ As discussed above, a crime forms part of the common purpose where the group’s shared intention encompasses its commission, whether as an intended component of the undertaking or as a consequence understood to occur in the ordinary course of its implementation. Proof of the group’s intention to commit the crime therefore also establishes that the crime formed part of the common purpose.⁷⁸ A crime that occurs in the course of the group’s activities, but which the group did not intend, falls outside Article 25(3)(d)(ii), and a contextual connection cannot suffice. To hold otherwise would contravene both the text of the provision and the reading given to it by the jurisprudence.

29. Accordingly, even if commission of the charged crime in the context of pursuing the common purpose were sufficient, the mental elements concerning the charged crime would still need to be proved: under subparagraph (i), those supplied by Article 30; under subparagraph (ii), the express requirement of knowledge of the group’s intention to commit the crime, which a contextual connection cannot displace.

⁷⁵ See Albin Eser, ‘[Mental Elements - Mistakes of Fact and Law](#)’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002), section IV.J, describing the special intention under Article 25(3)(d) as additional to the accomplice’s “ordinary double intent”; Kai 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) (“Ambos, ‘The Subjective Requirements of International Crimes’”), pp. 391-392, 404-405. See also Questions H and J. See [Prosecution Additional Submissions](#), paras 7-9 (the Prosecution requires the charged crime to fall within the common purpose, with the same awareness requirement whether that purpose is directed at committing the crime or involves its commission). *Contra* [CLRV Additional Submissions](#), paras 23-28.

⁷⁶ A comparison with extended joint criminal enterprise does not establish a different standard under Article 25(3)(d)(i), see [Prosecution Additional Submissions](#), para. 34, citing [Prosecution Appeal Brief](#), paras 44-46 (invoking JCE III and STL jurisprudence in support of a substantial-risk standard). See also Question H.

⁷⁷ [Katanga TJ](#), paras 1640-1642, in particular, para. 1641 (which defines the group’s intention and the accused’s knowledge of that intention by reference to Articles 30(2)(b) and (3) respectively). See also [Al Hassan TJ](#), para. 1248 (requiring awareness of the group’s intention concerning the specific crime or crimes).

⁷⁸ [Katanga TJ](#), paras 1630 and fn. 3592, 1641-1642. See also [Al Hassan TJ](#), para. 1237.

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

30. Although a pattern of criminality may be relevant in determining the existence of a common purpose generally, it cannot, without more, establish the particularised elements of the common purpose, including its scope, and whether the charged crimes formed part of that purpose by virtue of the group's shared intent, beyond reasonable doubt.⁷⁹
31. *Katanga* illustrates this point. The Trial Chamber considered the fact that the group attacked Bogoro "in accordance with a *regular pattern* and great violence" as one of several factors supporting its finding on the existence of a common criminal purpose.⁸⁰ Yet, although the Trial Chamber found that rape and enslavement formed part of the systemic attack directed against the civilian population and "formed an integral part of the militia's design to attack the predominantly Hema civilian population of Bogoro", it nevertheless concluded, in its crime-by-crime analysis, that there was insufficient evidence that rape formed part of the common purpose.⁸¹ Similarly in *Al Hassan*, the Majority considered a pattern of rape in detention relevant to whether rape formed part of the common purpose, but did not rely on the pattern alone, considering it alongside several other factors.⁸²
32. The CLRV's contention that the "Chamber's findings place rape within the same organised and patterned criminal campaign"⁸³ does not establish the purported existence of a common purpose encompassing rape and is at odds with the Chamber's express findings.⁸⁴ Even taking the CLRV's argument at face value, a finding that rape was committed within the "same organised and patterned criminal campaign" or during the same "attack", which it argues suffices to infer the existence of a common purpose,⁸⁵ does not, without more, resolve whether the group shared the requisite intent with respect to rape.⁸⁶ Trial Chamber II in *Katanga* is unequivocal: a crime

⁷⁹ See Question B (which applies *mutatis mutandis* with respect to inferences based on circumstantial evidence which must be the only reasonable one). See also [Prosecution Additional Submissions](#), paras 6, 10 ("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" (emphasis added)); [CLRV Additional Submissions](#), paras 17, 30.

⁸⁰ [Katanga TJ](#), paras 1656-1657 (emphasis added).

⁸¹ [Katanga TJ](#), paras 1167, 1653, 1664. See also [Al Hassan TJ](#), paras 1622-1659 (which applies a crime-by-crime analysis), and see paras 1655-1656 (regarding rapes in detention).

⁸² [Al Hassan TJ](#), paras 1647-1656; See also [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), para. 31, fn. 58 (Judge Akane dissented on this point, finding that generic or inherent features of an offence, such as criminality or violence, cannot, by themselves, establish the pattern required to link a crime to a common purpose).

⁸³ [CLRV Additional Submissions](#), para. 20, fn.18, citing [Judgment](#), paras 4095-4098, 4108 (which only concerns P-2462). See also [CLRV Additional Submissions](#), paras 33-34, fn. 38 (the CLRV refer to their own previous submissions).

⁸⁴ [Judgment](#), para. 4131 (The Chamber expressly held that although P-2462's rape was committed "in the context of the Anti-Balaka's attack on Bossangoa", there was insufficient evidence to conclude that rape formed part of a pattern of Anti-Balaka conduct). See also [Response](#), para. 39; [Katanga TJ](#), para. 1663.

⁸⁵ See [CLRV Additional Submissions](#), paras 33-34, fns 37-38 citing [Judgment](#), paras 4095-4098, 4108.

⁸⁶ *i.e.* the intention to commit rape or awareness the commission of rape will occur in the ordinary course of events.

does not necessarily form part of the common purpose even if it forms part of the same systematic attack used to infer the existence of a common purpose.⁸⁷ Furthermore, even an established pattern of rape would not, by its mere existence, establish that rape formed part of a shared common purpose.⁸⁸ In any event, the basis of the CLRV's contention is completely unfounded in light of the Chamber's express finding that although P-2462's rape was committed "in the context of the Anti-Balaka's attack on Bossangoa", there was insufficient evidence to conclude that rape formed part of a pattern of Anti-Balaka criminal conduct.⁸⁹

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?

i. Article 25(3)(d) imposes an objective threshold

33. Yes. Article 25(3)(d) imposes an objective threshold: the accused's conduct must amount to a contribution to the commission or attempted commission of the charged crime.⁹⁰ The jurisprudence gives this requirement concrete content by examining whether the conduct had a bearing on the occurrence of the crime or the manner of its commission.⁹¹ Support to the group or its activities must therefore be assessed by reference to its contribution to that crime.⁹² Whether a contribution must also attain an additional minimum degree⁹³ expressed through a qualifier such as "significant" is a separate question.⁹⁴ The words "in any other way" permit different forms of contribution; they do not alter its required connection to the crime.⁹⁵

34. The jurisprudence differs on whether the contribution must be characterised as "significant" or satisfy another minimum degree. The *Mbarushimana* Pre-Trial Chamber required a

See Questions A and C.

⁸⁷ [Katanga TJ](#), paras 1167, 1653, 1656-1657, 1663-1664.

⁸⁸ See [Al Hassan TJ](#), paras 1647-1656. See also Questions A and C.

⁸⁹ [Judgment](#), para. 4131; [Response](#), para. 39. See also [Katanga TJ](#), para. 1663.

⁹⁰ [Katanga TJ](#), para. 1619; [Al Hassan TJ](#), para. 1240.

⁹¹ [Katanga TJ](#), paras 1632-1633.

⁹² [Katanga TJ](#), para. 1619.

⁹³ The Defence will refer to this as an "additional minimum degree" to distinguish it from the requirement to establish a contribution to the crime.

⁹⁴ [Katanga TJ](#), para. 1632; [Mbarushimana Confirmation Decision](#), paras 276-285; *Prosecutor v. Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, [ICC-02/04-01/15-422-Red](#), 23 March 2016 ("Ongwen Confirmation Decision"), para. 44; *Prosecutor v. Al Mahdi*, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, [ICC-01/12-01/15-84-Red](#), 24 March 2016 ("Al Mahdi Confirmation Decision"), para. 27; [Al Hassan TJ](#), paras 1242-1244, fn. 4024; *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 ("Ruto and Sang Confirmation Decision"), paras 353-354; *Prosecutor v. Mbarushimana*, 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", [ICC-01/04-01/10-514](#), 30 May 2012 ("Mbarushimana AJ"), paras 65-69.

⁹⁵ [Rome Statute](#), Article 25(3)(d); [Katanga TJ](#), paras 1619, 1632-1635; [Al Hassan Confirmation Decision](#), para. 948.

“significant” contribution, and the *Katanga* Chamber adopted that formulation. Chambers in the *Ongwen*, *Al Mahdi* and *Al Hassan* cases, declined to impose an additional minimum degree of contribution. *Ruto and Sang* rejected a “substantial” contribution requirement without expressly resolving whether a “significant” contribution was required. The *Mbarushimana* Appeals Chamber did not settle the issue, considering it unnecessary to address the merits of that ground of appeal in light of the independently decisive findings.⁹⁶

35. *Al Hassan*’s confirmation decision expressly distinguished a minimum degree of contribution from its effect.⁹⁷ Although it declined to require a “significant” contribution or another minimum degree, it required the contribution to influence the commission of the crime.⁹⁸ It explained that conduct without a causal effect on the commission of the crimes was not a contribution under Article 25(3)(d). Rejecting an additional minimum degree requirement therefore did not eliminate a substantive limit on the conduct attracting responsibility.⁹⁹
36. *Katanga* similarly explained its “significant contribution” requirement by reference to the conduct’s connection to each crime, rather than solely to the group’s activities generally.¹⁰⁰ It required the contribution to have a bearing on the *occurrence* of the crime or the *manner* of its commission and emphasised its effect on the realisation of the crime.¹⁰¹ The *Al Hassan* trial judgment retained a case-specific assessment of the connection to the crime and stated that it was effectively applying *Katanga*’s requirement without the qualifier “significant”.¹⁰² These decisions give substantive content to the contribution requirement by requiring the accused’s conduct to influence the commission of the crime. Therefore, their disagreement over whether that contribution must additionally be characterised as “significant” does not remove that requirement.¹⁰³
37. Judge Fernández de Gurmendi’s separate opinion in *Mbarushimana* also emphasises the relationship between the contribution and the crime. She considered that apparently neutral

⁹⁶ [Mbarushimana Confirmation Decision](#), paras 276-285; [Katanga TJ](#), paras 1632-1634; [Ongwen Confirmation Decision](#), para. 44; [Al Mahdi Confirmation Decision](#), para. 27; [Al Hassan TJ](#), paras 1242-1244 and fn. 4024; [Ruto and Sang Confirmation Decision](#), paras 353-354; [Mbarushimana AJ](#), paras 65-69.

⁹⁷ [Al Hassan Confirmation Decision](#), para. 948.

⁹⁸ [Al Hassan Confirmation Decision](#), para. 948.

⁹⁹ [Al Hassan Confirmation Decision](#), para. 948. See also Zurab Sanikidze, “The Level of ‘Contribution’ Required Under Article 25(3)(d) of the Rome Statute of the International Criminal Court”, 83 *Revue internationale de droit pénal* (2012), pp. 230-232 (requiring a causal connection and effect on the crime, without an additional degree of contribution).

¹⁰⁰ [Katanga TJ](#), para. 1632 and more broadly paras 1633-1635.

¹⁰¹ [Katanga TJ](#), para. 1633 (emphasis added).

¹⁰² [Al Hassan TJ](#), para. 1243, fn. 4027 citing [Katanga TJ](#), para. 1634 (“The Chamber is of the view that it will effectively apply the same requirement as that applied by Trial Chamber II in the *Katanga* Trial Judgment with respect to the contribution ‘in any other way’, but without reading into Article 25(3)(d) unnecessary qualifying word, such as ‘significant’”). See also [Al Hassan TJ](#), para. 1244.

¹⁰³ [Katanga TJ](#), paras 1632-1635; [Al Hassan TJ](#), paras 1243-1244, fn. 4027.

contributions were better assessed through their *normative* and *causal* links to the crime.¹⁰⁴ The *Al Hassan* Chamber expressly cited that reasoning when explaining the objective limits it retained despite its rejection of a minimum degree.¹⁰⁵ Even where no predetermined additional minimum degree is required, the assessment remains qualitative and contextual: the Chamber must explain, by reference to the conduct's causal and normative links to the crime, why it amounts to a contribution to its commission as not all "contributions" are within the meaning of Article 25(3)(d).¹⁰⁶ The importance of the conduct to the group cannot substitute for that assessment.¹⁰⁷

38. The Defence accordingly agrees that the jurisprudence consistently requires a link between the accused's contribution and the charged crime.¹⁰⁸ The Prosecution's submission that the conduct must influence or otherwise have a bearing on the crime is consistent with its Appeal Brief, which accepted that a contribution may be indirect but must have an effect on the crime.¹⁰⁹ The CLRV likewise recognise that support to the group must amount to a contribution bearing on the crime.¹¹⁰

39. However, the Prosecution's description of the excluded conduct as "inconsequential", "immaterial", "neutral", or "infinitesimal" brings together different considerations.¹¹¹ These terms are not interchangeable: for instance, apparently neutral conduct concerns the character of an activity, whereas an infinitesimal contribution concerns its magnitude. Judge Fernández de Gurmendi's approach requires an examination of the conduct's normative and causal links to the crime, rather than its classification by an abstract label.¹¹² The exclusions invoked by the Prosecution therefore call for an assessment of both the nature and extent of the conduct's contribution to the charged crime. The distinct function of these terms is evident when not

¹⁰⁴ *Prosecutor v. Mbarushimana*, 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 ("Mbarushimana AJ, Separate Opinion of Judge Silvia Fernández de Gurmendi"), para. 12 (emphasis added).

¹⁰⁵ [Al Hassan TJ](#), para. 1244, fn. 4029.

¹⁰⁶ [Al Hassan TJ](#), para. 1244.

¹⁰⁷ See also Kai Ambos, "The ICC and Common Purpose—What Contribution is Required under Article 25(3)(d)?", in Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), pp. 605-606 (discussing a threshold based on the contribution's normative and causal links to the crime); [DeFalco, "Contextualizing Actus Reus under Article 25\(3\)\(d\) of the ICC Statute: Thresholds of Contribution"](#), 11 *Journal of International Criminal Justice* (2013), pp. 730-732 (explaining that assessing the links between the conduct and the crime may produce similar results to assessing "significance", while avoiding an additional qualifier not expressed in the Statute).

¹⁰⁸ [Prosecution Additional Submissions](#), paras 11-12.

¹⁰⁹ [Prosecution Additional Submissions](#), para. 13; [Prosecution Appeal Brief](#), para. 32; [Response](#), para. 76.

¹¹⁰ [CLRv Additional Submissions](#), paras 37, 44.

¹¹¹ [Prosecution Additional Submissions](#), para. 13.

¹¹² [Mbarushimana AJ, Separate Opinion of Judge Silvia Fernández de Gurmendi](#), para. 12; [Al Hassan TJ](#), para. 1244, fn. 4029.

phrased in the negative: a consequential or material contribution is not the same as a non-neutral one. The findings must explain what bearing that conduct had on the crime's occurrence or manner of commission.

40. Requiring the accused's conduct to have an effect on the commission of the crime does not mean that the conduct must have been indispensable to its commission,¹¹³ nor must the contribution be provided directly to an identified physical perpetrator. In finding Article 25(3)(d) fulfilled, the *Katanga* Chamber relied upon contributions operating through group members and explained how weapons and ammunition secured military superiority and enabled the capture of Bogoro and facilitated crimes, including those committed with machetes.¹¹⁴ In *Al Hassan*, the accused's activities with the Islamic Police and the police's relationship with the Islamic Court, including the sending of reports and transfers of defendants, contributed to unlawful sentencing through the collaborative system linking the Police and the Islamic Court.¹¹⁵ These examples illustrate that a contribution may operate through a collective operation or institutional system, provided the findings explain how that contribution facilitated the crimes attributed to the accused.
41. Conversely and crucially, support for a broader objective or participation in creating circumstances in which crimes occur does not by itself establish a contribution to their commission. Judge Henderson's individual reasons in *Gbagbo and Blé Goudé* distinguish conduct serving the objective of maintaining Mr Gbagbo in power from conduct facilitating the particular crimes.¹¹⁶ That distinction answers the CLRV's reliance on the scale of Mr Ngaïssona's alleged support to the Anti-Balaka and on the rape having occurred during operations which his conduct allegedly enabled.¹¹⁷ The alleged extent of support to the movement answers a different question from how that support allegedly contributed to rape. A contribution may operate through a collective operation, but the crime's occurrence during that operation does not without more establish a contribution to its commission.
42. Accordingly, whether or not an additional minimum degree is required, it does not overturn the requirement of a contextual assessment establishing how the accused's conduct contributed to the charged crime. The jurisprudence requiring influence on the crime's commission gives concrete content to that inquiry. The Prosecution itself accepts that the contribution may be

¹¹³ [Katanga TJ](#), para. 1633.

¹¹⁴ [Katanga TJ](#), paras 1633-1635, 1674-1679.

¹¹⁵ [Al Hassan TJ](#), paras 1698-1700.

¹¹⁶ [Gbagbo and Blé Goudé, Reasons of Judge Henderson](#), paras 1957-1965, especially para. 1960 discussed in [Response](#), para. 86.

¹¹⁷ [CLRV Additional Submissions](#), paras 40-41, *see also* paras 46-47.

indirect but must have had an effect on the crime.¹¹⁸ Assessing the objective requirements of Article 25(3)(d) demands more than perceived culpability of the accused or his importance to the group; it must identify the features of his conduct that establish a contribution to the specific charged crime. Nor can the aim of furthering the group's criminal activity or purpose substitute for the objective contribution, as addressed right below.

ii. *The special mens rea does not dispense with the objective threshold*

43. The special *mens rea* does not justify liability for any conduct intentionally directed at furthering the group's criminal activity or purpose. Article 25(3)(d) requires a contribution to the commission or attempted commission of the crime, made with the requisite mental element. The words "with the aim of furthering" qualify the purpose with which that contribution is made; they do not replace its required connection to the crime with a connection to the group's activities generally.¹¹⁹ The Prosecution and CLRV both accept that the special *mens rea* cannot compensate for a failure to satisfy the objective contribution requirement.¹²⁰ The accused's aim may help explain how his conduct was connected to the crime, but the findings must establish how that conduct contributed to its commission. An aim to advance the group's criminal activity or purpose does not establish a contribution to every crime encompassed by it.¹²¹
44. A special subjective requirement may help explain why a broad range of contributions can attract liability. Eser, for example, describes the subjective requirements as restrictions accompanying the provision's relatively broad objective scope. His analysis nevertheless presupposes a contribution to a group crime.¹²² That rationale does not make the objective requirement vary with the strength of the accused's criminal aim: the chapeau prescribes the same contribution requirement for both subjective alternatives. As addressed above, the *Al Hassan* Trial Judgment retained the requirement of a connection to the crime despite rejecting an additional minimum degree of contribution.¹²³ Ambos' proposed assessment likewise retains an objective connection to the crime alongside the contributor's knowledge or purpose.¹²⁴

¹¹⁸ [Prosecution Appeal Brief](#), para. 32; [Response](#), para. 76.

¹¹⁹ [Al Hassan TJ](#), paras 1244-1245. See *Prosecutor v. Blé Goudé*, Decision on the confirmation of charges against Charles Blé Goudé, [ICC-02/11-02/11-186](#), 11 December 2014, para. 167; *Prosecutor v. Bemba et al.*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, [ICC-01/05-01/13-749](#), 11 November 2014, para. 35.

¹²⁰ [Prosecution Additional Submissions](#), para. 14; [CLRV Additional Submissions](#), para. 44.

¹²¹ Marjolein Cupido, "Group Acting with a Common Purpose", in *Modes of Liability in International Criminal Law* (2019), para. 15, p. 314; see also [Prosecution Additional Submissions](#), para. 14.

¹²² Albin Eser, "Individual Criminal Responsibility", in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002), pp. 802-803. See [CLRV Additional Submissions](#), paras 42-43.

¹²³ [Al Hassan TJ](#), paras 1243-1244.

¹²⁴ Kai Ambos, "What Contribution is Required under Article 25(3)(d)?", pp. 605-606.

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?

45. The Defence submits that “contributes” and “aids, abets or otherwise assists” describe overlapping forms of participation in the commission or attempted commission of a crime. That overlap does not make the requirements of the two provisions interchangeable.¹²⁵ The distinction between Articles 25(3)(c) and 25(3)(d) lies principally in the common-purpose group requirement and the respective subjective requirements.¹²⁶ Both provisions nevertheless require conduct connected to the commission or attempted commission of the charged crime. Neither the different verbs nor the words “in any other way” establish a hierarchy of contribution; the requirements of each provision must be determined in its statutory context.
46. The principal objective distinction lies in the collective setting expressly required under subparagraph (d): the crime must be committed or attempted by a group of persons acting with a common purpose. Subparagraph (c) contains no corresponding requirement, although assistance provided through a group may fall within it. Ambos likewise identifies this group dimension as a structural difference between Articles 25(3)(c) and (d).¹²⁷ Responsibility under both provisions nevertheless remains individual. In *Bemba et al.*, the Appeals Chamber expressly held that subparagraph (c) does not require assistance to a specific person: responsibility is established by reference to assistance in the commission or attempted commission of a crime.¹²⁸ Similarly, for Article 25(3)(d), *Katanga* held that a contributor is not responsible for every crime encompassed by the common purpose, but only for those to whose commission he or she contributed.¹²⁹

¹²⁵ Compare [Prosecution Additional Submissions](#), paras 15, 17. [Ntaganda AJ, Separate Opinion of Judge Morrison](#), para. 9 (“article 25(3)(c) and [...] 25(3)(d) are likely to overlap considerably in practice. The factual scenarios presented by mass and systemic criminality are too many and varied to be accounted for by neat distinctions between the particular categories of responsibility under articles 25(3) of the Statute. In my view, an attempt to create bright-line rules that would allow for these categories to be hermetically distinguished in practice is a doomed enterprise”), see also paras 38-39; *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford, [ICC-01/04-01/06-2842](#), 14 March 2012, paras 6 (rejecting a clear dividing line between the various forms of liability under Article 25(3), in particular the distinction between accessories and principals), 7 (“the plain text of Article 25(3) defeats the argument that subsections (a) - (d) of Article 25(3) must be interpreted so as to avoid creating an overlap between them. [...] in my judgment the plain language of Article 25(3) demonstrates that the possible modes of commission under Article 25(3)(a) - (d) of the Statute were not intended to be mutually exclusive”); [Ntaganda AJ, Partly Concurring Opinion of Judge Eboe-Osuji](#), para. 66 (Article 25(3)(d) is the “default provision or the *lex specialis* for the attribution of criminal responsibility arising from the criminal conduct of a ‘group of persons acting with a common purpose’”).

¹²⁶ Kai Ambos, ‘Article 25: Individual criminal responsibility’ in Kai Ambos (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (4th edn, Beck/Hart 2021) (“Ambos, Article-by-Article Commentary”), p. 1227, mn. 37, pp. 1240-1241, mn. 58.

¹²⁷ Kai Ambos, ‘Article 25’, in Otto Triffterer and Kai Ambos (eds), [The Rome Statute of the International Criminal Court: A Commentary](#), 3rd ed. (2016), p. 1024, mn. 50.

¹²⁸ [Bemba et al. AJ](#), para. 1329.

¹²⁹ [Katanga TJ](#), paras 1619, 1632-1635; [Al Hassan TJ](#), para. 1244.

47. The respective subjective requirements of Articles 25(3)(c) and (d) further demonstrate that the two provisions are legally distinct, notwithstanding any overlap in the conduct they encompass. Subparagraph (c) requires the purpose of facilitating the commission of the crime; subparagraph (d) requires an intentional contribution accompanied by either the aim specified in (i) or the knowledge specified in (ii). As Ambos observes, subparagraph (d)(ii) may apply where the purpose required under (c) is not established, reflecting the distinct requirements of the two provisions.¹³⁰ Those differences give the provisions distinct functions despite the overlap in the conduct they cover. The relationship between those requirements and Article 30 is addressed under Questions H-J.¹³¹
48. The fact that the same conduct may be relevant to more than one mode of liability does not mean that the legal requirements of those modes are identical. In *Al Hassan*, the Majority stated that, in the alternative to certain findings under subparagraphs (a) and (c), it would have found responsibility under (d) for torture and outrages upon personal dignity, drawing on its preceding findings and finding those crimes included in the common purpose.¹³² This illustrates factual overlap, not that findings satisfying one provision automatically satisfy another. Each provision nevertheless requires proof of its own elements.¹³³ The *Said* confirmation decision likewise illustrates the need to substantiate the accused's connection to the crimes where responsibility is alleged under both provisions.¹³⁴
49. As the Prosecution recognises, the position of subparagraph (d) within Article 25(3) and the words "in any other way" do not establish a hierarchy in which it constitutes a lesser form of responsibility.¹³⁵ Any suggestion that subparagraph (d) would command a less rigorous

¹³⁰ [Ambos, Article-by-Article Commentary](#), pp. 1240-1241, mn. 58.

¹³¹ [CLRV Additional Submissions](#), para. 51. See Questions H-J.

¹³² [Al Hassan TJ](#), para. 1692. These were expressly alternative findings of the Majority. Judge Akane disputed the propriety of making additional findings on alternative modes after identifying the mode supporting conviction, [Al Hassan TJ, Separate and Partly Dissenting Opinion of Judge Akane](#), paras 82-87. That objection does not deny the possibility of factual overlap; the passage from [Ntaganda TJ](#), para. 1200, quoted in her para. 84 expressly recognises that conduct may satisfy the elements of more than one mode. See Question A.

¹³³ *Contra* [Prosecution Additional Submissions](#), para. 16 and fns 47-48. See also [Ntaganda AJ, Separate Opinion of Judge Morrison](#), para. 9 (on overlap between (c) and (d)).

¹³⁴ *Prosecutor v. Said*, Decision on the confirmation of charges against Mahamat Said Abdel Kani, 9 December 2021, [ICC-01/14-01/21-218-Red](#), para. 128 ("Said Confirmation [Decision](#)"), para. 128.

¹³⁵ [Prosecution Additional Submissions](#), para. 16; [Ntaganda AJ, Separate Opinion of Judge Morrison](#), paras 38-39 ("Although article 25(3)(d) is often dismissed as a residual form of liability that should only be used in relation to types of contribution that are not captured in articles 25(3)(a)-(c) of the Statute, this focuses only on the first part of its wording '[i]n any other way contributes to the commission or attempted commission of such a crime'. If this were the sole purpose and scope of the provision, the drafters could have stopped there. 39. The better view of article 25(3)(d) of the Statute is that it is specifically aimed at dealing with group criminality and its defining feature is the reference 'to the commission or attempted commission of such a crime by a group of persons acting with a common purpose'"); [Ntaganda AJ, Partly Concurring Opinion of Judge Eboe-Osuji](#), paras 66-76; *Prosecutor v. Bemba et al.*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", [ICC-01/05-01/13-2276-Red](#), 8 March 2018, paras 59-62.

objective and subjective threshold than its preceding subparagraphs should therefore be rejected.¹³⁶ As Ambos explains, “in any other way” may refer to the forms of contribution rather than their degree, particularly given the similarly broad expression “otherwise assists” under (c).¹³⁷ Any characterisation of (d) as ‘residual’ cannot therefore substitute for examining its constituent elements or make it a catch-all for conduct that fails to satisfy another mode of liability.

50. The earlier jurisprudence suggesting a lower degree of contribution under subparagraph (d) must also be read in light of its assumptions concerning subparagraph (c). In *Ruto and Sang*, the Pre-Trial Chamber assumed, *arguendo*, that assistance under (c) required a substantial contribution and reasoned that (d) must require less to preserve a hierarchy between the modes of liability.¹³⁸ Subsequent Chambers have expressly rejected an additional minimum degree of assistance under (c), including in *Bemba et al.* and *Al Hassan*.¹³⁹ Those developments undermine the assumed benchmark for the comparison. The threshold applicable under (d) must therefore be determined on its own terms, as addressed under Question E.

51. As to effect, the jurisprudence under subparagraph (d) gives concrete content to the contribution requirement. In *Katanga*, the Trial Chamber required the contribution under (d) to influence or have a bearing on the occurrence of the crime or the manner of its commission.¹⁴⁰ The Prosecution’s comparison itself retains that requirement.¹⁴¹ In *Bemba et al.*, the Appeals Chamber held that assistance which facilitates or furthers the crime satisfies the objective requirement under (c), expressly describing such facilitation or furtherance as an effect indicating that the person assisted in its commission.¹⁴² That judgment did not determine the

¹³⁶ [CLRV Additional Submissions](#), paras 9, 36.

¹³⁷ Kai Ambos, [“What Contribution is Required under Article 25\(3\)\(d\)?”](#), pp. 601-602 (“I am, of course, aware that my earlier view that the expression ‘in any other way’ displays the lowest objective threshold within the different modes of attribution of Article 25 implies a lower threshold for subparagraph (d) and has indeed been interpreted in this sense. Upon further reflection I must, however, confess that I fail to see a normatively convincing reason to continue to defend this view. Specifically, I am no longer convinced that such a distinction can be based on the expression ‘in any other way’ in subparagraph (d) for the simple fact that subparagraph (c) uses similar and essentially identical language (‘otherwise assists’), with the Spanish version practically using identical wording (‘algún modo’ v ‘algún otro modo’). Apart from that, it can be plausibly argued, as did the Ruto defence, that the term ‘any’ only refers to the type, but not to the degree of the contribution. I am equally unconvinced that the difference can be derived from a terminological distinction between assistance and contribution, giving the latter term a broader meaning”). The phrase derives from Article 2(3)(c) of the [Terrorist Bombings Convention](#), which addressed contribution “in any other way” following separate provisions on accomplice participation and organising or directing an offence.

¹³⁸ [Ruto and Sang Confirmation Decision](#), para. 354; compare [Mbarushimana Confirmation Decision](#), para. 279.

¹³⁹ [Ongwen Confirmation Decision](#), para. 43; [Al Mahdi Confirmation Decision](#), para. 26; *Prosecutor v. Bemba et al.*, Judgment pursuant to Article 74 of the Statute, [ICC-01/05-01/13-1989-Red](#), 19 October 2016 (“Bemba et al. TJ”), para. 93; [Al Hassan TJ](#), para. 1224.

¹⁴⁰ [Katanga TJ](#), paras 1632-1635.

¹⁴¹ [Prosecution Additional Submissions](#), paras 13-15. See also [Prosecution Appeal Brief](#), para. 32.

¹⁴² [Bemba et al. AJ](#), paras 1327, 1329. See also [Al Hassan TJ](#), para. 1225.

requirements of subparagraph (d). As discussed under Question E, *Al Hassan*'s subsequent confirmation decision expressly required an effect, while its trial judgment endorsed *Katanga*'s approach without the qualifier "significant".¹⁴³

52. Accordingly, the requirements of Articles 25(3)(c) and (d) must each be established on their own terms. The different subjective requirements, or the presence of the requisite common-purpose group, may explain why particular conduct falls within one provision but not the other; however, neither dispenses with the objective contribution required under subparagraph (d).

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.

- 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?*

53. The drafting history supports treating subparagraphs (i) and (ii) as distinct subjective connections between the contributor and the group. The Terrorist Bombings Convention formula was adopted at Rome to resolve disagreement over conspiracy. The earlier formulation based on agreement and an overt act was replaced by a requirement of intentional contribution to the commission or attempted commission of a crime by a group acting with a common purpose.¹⁴⁴ The text ultimately adopted thus requires a contribution to the commission or attempted commission of the crime; agreement to a common purpose alone is insufficient, as addressed under Question E.

54. The two subjective alternatives predate their division into separate subparagraphs. Article 3(4) of the European Union Extradition Convention required an intentional contribution accompanied by knowledge either of the group's purpose and general criminal activity or of its intention to commit the relevant offence. Finland proposed substantially the same formulation during the Terrorist Bombings Convention negotiations.¹⁴⁵ The first alternative was

¹⁴³ [Al Hassan Confirmation Decision](#), para. 948; [Al Hassan TJ](#), paras 1243-1244 and fn. 4027.

¹⁴⁴ [A/CONF.183/C.1/SR.1](#), para. 18; [A/CONF.183/2/Add.1](#), draft Article 23(7)(e)(ii), pp. 48-50; [A/CONF.183/C.1/WGPP/L.3](#), draft Article 23(7)(e), Official Records, vol. III, p. 251; Per Saland, "International Criminal Law Principles", in Roy S. Lee (ed.), [The International Criminal Court: The Making of the Rome Statute](#) (1999), pp. 199-200; Kai Ambos, ["Article 25"](#), p. 1010, mn. 28. See also [Ntaganda AJ, Partly Concurring Opinion of Judge Eboe-Osuji](#), paras 67, 73, fn. 75; [Ntaganda AJ, Separate Opinion of Judge Morrison](#), para. 39, fn. 49.

¹⁴⁵ [Convention relating to extradition between the Member States of the European Union](#), Article 3(4); [Explanatory Report](#), discussion of Article 3(4); Finnish proposal, [A/C.6/52/WG.1/CRP.12](#), reproduced in [A/C.6/52/L.3](#), Annex

subsequently changed to require an “aim of furthering” the group’s general criminal activity or purpose, while the second retained knowledge of the group’s intention to commit the offence. Díaz-Paniagua attributes that change to Switzerland and describes it as an increase in the required intentionality.¹⁴⁶

55. This development highlights the distinction between the two alternatives, both of which require an intentional contribution. The first requires an aim to further the group’s criminal activity or purpose; the second requires knowledge of the group’s intention to commit the crime, without additionally requiring that aim.¹⁴⁷ Their separation into subparagraphs made an existing distinction explicit; it did not create the two alternatives. Neither the compromise between different legal traditions nor the separation into subparagraphs supports the Prosecution’s assertion that their requirements cannot overlap.¹⁴⁸ The distinction concerns the nature and object of the contributor’s subjective relationship to the group; it does not, by itself, establish different degrees of awareness that the charged crime will occur.¹⁴⁹

56. The Rome negotiations also support reading Article 25 within Article 30’s general framework. Introducing draft Article 23, now Article 25, Saland explained that the general intent requirement in draft Article 29, now Article 30, would apply without repetition in draft Article 23.¹⁵⁰ That statement preceded the “common purpose” formulation into draft Article 23 and does not resolve how every subsequently adopted special requirement interacts with Article 30. It nevertheless supports taking Article 30 as the starting point and identifying precisely what another provision otherwise provides. The Prosecution’s reliance on the absence of further drafting guidance concerning the contributor’s awareness of the charged crime overlooks that statutory starting point. Before resorting to Articles 21(1)(b) and (c) to identify a different

II, p. 24.

¹⁴⁶ [A/C.6/52/L.3](#), Annex II, pp. 48-49 (A/C.6/52/WG.1/CRP.45/Rev.1) and p. 57 (Swiss A/C.6/52/WG.1/CRP.46); Carlos Fernando Díaz-Paniagua, *Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997-2005*, pp. 287-290, especially p. 289 (the available documentary record does not independently establish the sequence of CRP.45/Rev.1 and CRP.46, both dated by Díaz-Paniagua to 1 October 1997).

¹⁴⁷ Marja Lehto, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts* (Martinus Nijhoff, 2010), p. 175. See also [Ntaganda AJ, Separate Opinion of Judge Morrison](#), para. 37.

¹⁴⁸ [Prosecution Additional Submissions](#), paras 21, 46. Anthony Aust, ‘Counter-Terrorism – A New Approach: The International Convention for the Suppression of the Financing of Terrorism’ (2001) 5 Max Planck Yearbook of United Nations Law 285, pp. 300-301 (this links the alternatives to different legal traditions when discussing the later Terrorist Financing Convention negotiations; he does not establish that their requirements cannot overlap). See also [Al Hassan TJ](#), para. 1231 and fn. 4008. [Ntaganda AJ, Partly Concurring Opinion of Judge Eboe-Osui](#), para. 67 (Judge Eboe-Osui’s account expressly presents the explanation based on different legal approaches as presumptive). On the relationship with [Rome Statute](#), Article 30, see Question H.

¹⁴⁹ Compare [Terrorist Bombings Convention](#), Article 2(3)(c), with [Rome Statute](#), Article 25(3)(d). See also [Response](#), paras 58-60.

¹⁵⁰ [A/CONF.183/2/Add.1](#), draft art. 23(7) and accompanying note, pp. 48-50; [A/CONF.183/C.1/SR.1](#), paras 18, 24.

standard, it must first establish a statutory gap. The silence of the drafting history does not do so, because Article 30 already supplies the default rule.¹⁵¹

57. The available drafting history does not disclose any agreement to adopt substantial-risk awareness under subparagraph (i). The April 1998 draft contained a bracketed definition of recklessness applicable where another provision expressly permitted a crime to be committed recklessly; it did not establish recklessness as the general standard. The definition was subsequently deleted following Saland's explanation that the concept appeared nowhere in the draft Statute.¹⁵² Its deletion is consistent with retaining intent and knowledge as the default, although it does not independently resolve whether subparagraph (i) "otherwise provides". That question must be answered by interpreting the adopted provisions; the drafting history supplies no affirmative basis for the substantial-risk standard advanced by the Prosecution.

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?*

58. As to the omission of "general", the available records disclose no express explanation. The "common purpose" formulation first entered the Rome negotiations in the working paper of 18 June 1998, already omitting "general"; the available records do not document a separate decision to delete that word. At the same time, the Rome formulation added, *inter alia*, "criminal" before "purpose", inserted the requirement that the group's activity or purpose involve a crime within the Court's jurisdiction, and separated the alternatives into distinct subparagraphs.¹⁵³ The omission of "general" therefore appears to be part of a broader adaptation of the Convention's language, although the records do not establish its intended substantive effect. The jurisdictional interpretation advanced by the Prosecution and the CLRV is plausible.¹⁵⁴ However, the contemporaneous omission of "general" and the addition of the jurisdictional clause do not establish that the latter was intended to replace the former, as the Prosecution suggests, or resolve the omission's implications for the accused's mental state.¹⁵⁵

¹⁵¹ See *contra* [Prosecution Additional Submissions](#), paras 22, 32. See also Question H.

¹⁵² [A/CONF.183/2/Add.1](#), draft art. 29(4), pp. 55-56. On its proposed deletion and approval, see [A/CONF.183/C.1/SR.1](#), para. 24; [A/CONF.183/C.1/SR.8](#), para. 77; [A/CONF.183/C.1/SR.9](#), paras 1-5. See also [A/CONF.183/DC/R.8](#), Official Records, vol. III, p. 257.

¹⁵³ Compare [Terrorist Bombings Convention](#), Article 2(3)(c), with [A/CONF.183/C.1/WGGP/L.3](#), Official Records, vol. III, p. 251; [A/CONF.183/C.1/WGGP/L.4](#), Official Records, vol. III, pp. 253-255; and [Rome Statute](#), Article 25(3)(d)(i).

¹⁵⁴ See [Prosecution Additional Submissions](#), paras 23-28; [CLR V Additional Submissions](#), paras 59-62. See also Question K.

¹⁵⁵ [Prosecution Additional Submissions](#), para. 57; [A/CONF.183/C.1/WGGP/L.3](#), Official Records, vol. III, p. 251.

The adopted wording requires an aim to further the relevant criminal activity or purpose, not merely to support the group or its legitimate objectives.¹⁵⁶

59. The omission does not, however, convert subparagraph (i) into subparagraph (ii). The former addresses the aim of advancing criminal activity or purpose, while the latter expressly requires knowledge of the group's intention to commit the crime. Nor does removing "general" prescribe a degree of awareness concerning the charged crime. The CLRV nevertheless move from the absence of a requirement to aim at furthering the particular charged crime to the conclusion that the accused need not intend or know of that crime.¹⁵⁷ Those propositions concern different requirements. The Defence relies on the adopted wording to identify the criminal activity or purpose the accused must aim to further, and on Article 30 for the requisite mental elements concerning the charged crime.¹⁵⁸

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?

60. Both alternatives require an intentional contribution.¹⁵⁹ The accused must deliberately engage in the conduct constituting the contribution and be aware that it contributes to the group's activities.¹⁶⁰ That requirement concerns his own conduct; not his mental relationship to the charged crime.

61. Under subparagraph (i), the contribution must be made "with the aim of furthering" the group's criminal activity or criminal purpose. The accused must seek to advance that activity or purpose, not merely know that his contribution would do so. That aim entails awareness of the criminal activity or purpose advanced, as addressed under Question I, but it does not specify the accused's required mental elements concerning the charged crime. Article 30 supplies those elements.¹⁶¹

62. Under subparagraph (ii), the contribution must be made "in the knowledge of the intention of the group to commit the crime". The accused need not share that intention or aim to advance

¹⁵⁶ See *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, Dissenting Opinion of Judge Sanji Mmasenono Monageng, [ICC-01/04-01/10-465-Red](#), 16 December 2011 ("Mbarushimana Confirmation Decision, Dissenting Opinion of Judge Monageng"), para. 128, fn. 289 (invoking the antecedent treaty's "general criminal activity or purpose" without addressing the omission of "general"). See also Question J.

¹⁵⁷ [CLRV Additional Submissions](#), paras 61-62.

¹⁵⁸ See also Questions H and J.

¹⁵⁹ See Question G on the express requirement in the Terrorist Bombings Convention that the contribution be intentional.

¹⁶⁰ [Katanga TJ](#), paras 1638-1639; [Al Hassan TJ](#), paras 1245-1246.

¹⁶¹ [Response](#), paras 49-50, 54, 58. See Questions I and J on the respective objects of awareness and the applicable crime-related mental elements.

the group's criminal activity or purpose. *Katanga* defines the group's *intention* by reference to Article 30(2)(b), while the contributor's *knowledge* of that intention is interpreted by reference to Article 30(3).¹⁶² Knowledge must be established for each type of crime attributed to the accused; knowledge of a general criminal intention is insufficient.¹⁶³

ii. *Does article 30 of the Statute apply or is the mens rea "otherwise provided" for?*

63. Article 30 supplies the default requirements of intent and knowledge concerning the material elements unless another provision otherwise provides. The decisive question is therefore what different mental requirements Article 25(3)(d) prescribes, and concerning which material elements, not simply whether it contains express mental requirements or how detailed these requirements are.

64. Article 25(3)(d)(ii) expressly specifies the contributor's mental relationship to the charged crime: he must know that the group intends to commit that crime. To that extent, subparagraph (ii) "otherwise provides" within the meaning of Article 30. Article 30 still defines the group's intention (Article 30(2)(b)) and the contributor's knowledge of it (Article 30(3)). But once that knowledge is established, the provision does not additionally require the contributor himself to mean to cause the criminal consequence or know independently that it will occur in the ordinary course of events. That follows from the specific requirement in subparagraph (ii), not from a general exclusion of Article 30 from Article 25(3)(d).¹⁶⁴

65. Subparagraph (i), by contrast, prescribes an aim concerning the group's criminal activity or purpose. Article 30(1) supplies the default mental elements for the crime for which responsibility is sought; which under the chapeau of Article 25(3)(d) is the crime to whose commission the accused contributed. Subparagraph (i) adds a requirement about the purpose of that contribution; it does not prescribe an alternative mental standard for the charged crime. The two therefore operate cumulatively: Article 30 governs the charged crime, and subparagraph (i) requires that the contribution be directed at advancing the criminal activity or purpose.¹⁶⁵

66. The Prosecution and CLRV nevertheless treat the express requirements in Article 25(3)(d) as a complete regime that excludes Article 30's operative requirements.¹⁶⁶ The text does not justify

¹⁶² [Katanga TJ](#), para. 1641.

¹⁶³ [Katanga TJ](#), paras 1641-1642; [Al Hassan TJ](#), para. 1248.

¹⁶⁴ [Response](#), paras 59-60; [Katanga TJ](#), paras 1641-1642; [Mbarushimana Confirmation Decision](#), para. 289; [Al Hassan TJ](#), para. 1717, fn. 5200.

¹⁶⁵ [Response](#), paras 49-54, 58; [Katanga TJ](#), paras 1392-1393. See Question J for the textual analysis of subparagraph (i).

¹⁶⁶ [Prosecution Additional Submissions](#), paras 43-47, 56; [CLRV Additional Submissions](#), paras 70-72.

that conclusion. The alleged greater detail of Article 25(3)(d) compared with the other modes in Article 25 does not establish that its mental requirements are exhaustive. What matters is not how many subjective requirements Article 25(3)(d) contains, but whether they address the accused's intent concerning the charged crime.¹⁶⁷ A special purposive requirement can operate cumulatively with Article 30, as the comparison with Article 25(3)(c), addressed in Question J, shows. The comparison with Article 28 does not help the Prosecution's argument, because that provision expressly specifies the superior's required mental relationship to the subordinate's crimes.¹⁶⁸ The question under Article 25(3)(d)(i) remains whether its aim concerning the criminal activity or purpose likewise provides a different mental requirement concerning the charged crime. It does not.

67. *Katanga*, paragraph 1637, broadly treats both alternatives of Article 25(3)(d) as falling within Article 30's exception,¹⁶⁹ and *Mbarushimana*, paragraph 289, states that the contributor need not satisfy the mental element of the crimes charged because knowledge of the group's criminal intentions suffices.¹⁷⁰ However, *Katanga* only applied subparagraph (ii), and *Mbarushimana* based its reasoning on the sufficiency of knowledge of the group's criminal intentions, the requirement expressly specified in subparagraph (ii).¹⁷¹ That reasoning explains why, under subparagraph (ii), knowledge of the group's intention can suffice without the contributor intending the crime himself. It does not explain why an aim to further the criminal activity or purpose under subparagraph (i) should also exclude Article 30 requirements concerning the charged crime.

68. Moreover, the absence of an express reference to Article 30 in the decisions on which the Prosecution relies does not establish that it is excluded. A default requirement need not be expressly restated in every decision to apply.¹⁷² In fact, the cited *Gbagbo* confirmation decision expressly referred to Article 30 intent and knowledge under each mode of liability the Pre-Trial Chamber considered, including Article 25(3)(d).¹⁷³ In setting out the specific requirements of

¹⁶⁷ [Prosecution Additional Submissions](#), para. 44.

¹⁶⁸ [Rome Statute](#), Articles 28(a)(i) and (b)(i); [Prosecution Additional Submissions](#), paras 45, 47.

¹⁶⁹ [Katanga TJ](#), para. 1637. See also [Al Hassan Confirmation Decision](#), paras 952-953, reiterating a similarly broad formulation.

¹⁷⁰ [Mbarushimana Confirmation Decision](#), para. 289.

¹⁷¹ [Katanga TJ](#), paras 1640-1642; [Al Hassan Confirmation Decision](#), paras 1001-1009 (also applying subparagraph (ii) to the relevant analysis); [Mbarushimana Confirmation Decision](#), paras 289, 291-292, 312-315, 340. Having found the common-purpose and contribution requirements not established, the *Mbarushimana* majority did not complete a separate assessment of the two alternative mental requirements.

¹⁷² [Prosecution Additional Submissions](#), para. 38, fn. 102.

¹⁷³ [Gbagbo Confirmation Decision](#), para. 260, fn. 653, referring to paras 256-258 (finding that Gbagbo meant to contribute to the commission of the crimes, knew that his conduct contributed to their commission, and acted with the aim of furthering the group's criminal purpose). See [Prosecution Additional Submissions](#), fn. 102 (relying on this decision as supporting the exclusion of additional Article 30 requirements under Article 25(3)(d)).

subparagraph (d), the *Al Hassan* Trial Chamber did not adopt *Katanga*'s statement that Article 25(3)(d) "otherwise provides" the applicable *mens rea*.¹⁷⁴

69. A separate issue arises from *Al Hassan*, paragraph 1248, which uses two formulations of the mental requirement under subparagraph (ii): knowledge of the group's intention to commit the crime, and awareness that the crime would occur in the ordinary course of events.¹⁷⁵ The Prosecution considers this distinction largely theoretical because the evidence may establish both.¹⁷⁶ But the statutory requirement under subparagraph (ii) is knowledge of the group's intention to commit the crime. Evidence that the accused knew the crime would occur may establish that knowledge, but the finding must concern the group's intention, as the provision requires. That the same evidence may support both formulations does not change the object of knowledge fixed by the text. In any event, *Al Hassan*'s paragraph 1248 concerns subparagraph (ii); it does not determine whether the aim required under subparagraph (i) excludes Article 30 concerning the charged crime.
70. Applying Article 30 to subparagraph (i) does not render the two alternatives under Article 25(3)(d) redundant. An aim to advance the criminal activity or purpose and knowledge of the group's intention to commit the charged crime are different requirements. Under subparagraph (i), the accused need not additionally know the group's intention; under (ii), he need not aim to advance the criminal activity or purpose.¹⁷⁷ Each alternative therefore keeps a distinct function, without subparagraph (i) lowering the degree of awareness required of the charged crime or dispensing with awareness of that crime altogether. The preservation of two distinct alternatives in the drafting history does not establish that each exhaustively regulates the accused's mental state concerning the charged crime. As developed under Question G, the drafting history does not establish that preserving their separate functions requires excluding Article 30 under subparagraph (i).¹⁷⁸
71. Finally, the Prosecution's proposed "substantial risk" standard requires a further justification it does not supply.¹⁷⁹ Its proposed recourse to other sources under Article 21 depends first on establishing that Article 30 does not supply the applicable standard, and the existence of lower mental standards elsewhere does not establish that exception. The comparative authorities cited by the Prosecution, moreover, concern particular forms of responsibility, each governed by their

¹⁷⁴ [Al Hassan TJ](#), paras 1245-1248; compare [Katanga TJ](#), para. 1637.

¹⁷⁵ [Al Hassan TJ](#), para. 1248.

¹⁷⁶ [Prosecution Additional Submissions](#), para. 40.

¹⁷⁷ [Response](#), paras 58-60.

¹⁷⁸ *Contra* [Prosecution Additional Submissions](#), para. 46; [CLRV Additional Submissions](#), para. 70. See Questions G and J.

¹⁷⁹ [Prosecution Additional Submissions](#), paras 32-38.

own legal requirements. Applying such borrowed awareness standards to Article 25(3)(d)(i) requires an explanation of why those standards can be transposed to that provision; the Prosecution’s disclaimer that it is not importing JCE III as a mode of liability does not supply that explanation.¹⁸⁰ The authorities concerning knowledge of a perpetrator’s specific intent, cited by the Prosecution, do not resolve the separate question of the alleged probability standard governing commission of the charged crime.¹⁸¹

72. The Prosecution further argues that the heightened aim to advance the criminal activity or purpose justifies requiring only awareness of a substantial risk that the charged crime will occur.¹⁸² That is a proposed justification for a lower awareness standard, not a demonstration that the Statute adopts it. The special aim requirement of subparagraph (i) restricts liability to contributions directed towards advancing the criminal activity or purpose. It therefore serves an independent function alongside Article 30’s requirements concerning the charged crime: the accused must possess the applicable mental elements concerning that crime *and* contribute with the prescribed aim. Requiring that special aim provides no statutory basis for reducing the mental requirements concerning the charged crime, nor does the objective of combating impunity.¹⁸³ The CLRV go further, arguing that subparagraph (i) requires no awareness of the charged crime at all.¹⁸⁴ That reading also treats the special aim requirement concerning the criminal activity or purpose as a substitute for the mental elements concerning the crime, although the two concern different objects and operate cumulatively. For the reasons above, Article 30 supplies the mental requirements concerning the charged crime under (i), while (ii) expressly requires knowledge of the group’s intention to commit it.

¹⁸⁰ *Prosecutor v. Blaškić*, Appeal Judgment, [IT-95-14-A](#), 29 July 2004 (“Blaškić AJ”), paras 34-42 (addresses ordering); *Prosecutor v. Tadić*, Appeal Judgement, [IT-94-1-A](#), 15 July 1999 (“Tadić AJ”), paras 220 and 228, and *Prosecutor v. Karadžić*, Decision on Prosecution’s Motion Appealing Trial Chamber’s Decision on JCW III Foreseeability, [T-95-5/18-AR72.4](#), 25 June 2009 (“Karadžić, Decision on JCE III Foreseeability”), paras 15-18 (addresses extended JCE, including acceptance of the risk). *Ayyash et al.*, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, [STL-11-01/1](#), Special Tribunal for Lebanon, 16 February 2011, paras 239-252 (expressly seeking to reconcile the group-contribution provision with JCE III; not interpreting that provision within the Rome Statute’s Article 30 framework, which has no equivalent in the STL Statute). See Questions C.

¹⁸¹ [Prosecution Additional Submissions](#), fn. 97.

¹⁸² [Prosecution Additional Submissions](#), para. 38.

¹⁸³ [Prosecution Additional Submissions](#), paras 36, 38. The passage from Jackson, p. 79, reproduced in Prosecution fn. 101 concerns certainty that an international crime within an envisaged set will occur, despite uncertainty as to which crime. Although Jackson acknowledges possible recklessness concerning the particular crime ultimately committed, his justification rests on practical certainty of assisting an international crime, rather than a general standard of substantial-risk awareness under (i). The preceding discussion expressly criticises the dilution of knowledge into recklessness and advocates a test closer to practical certainty than substantial likelihood. See M. Jackson, *Complicity in International Law* (Oxford: OUP, 2015), pp. 77-78.

¹⁸⁴ [CLRv Additional Submissions](#), paras 70-73.

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?

73. Article 25(3)(d)(i) requires the accused to have actual knowledge of the criminal activity or criminal purpose he aims to further. This cognitive requirement follows from the aim itself: an aim to further the group’s criminal activity or purpose presupposes knowledge of that activity or purpose.¹⁸⁵ Mere awareness that the group might pursue such an activity or purpose is insufficient to establish that knowledge. The Prosecution likewise accepts that the aim requirement necessarily carries a cognitive element.¹⁸⁶ That knowledge must concern the criminal activity or criminal purpose the accused seeks to advance. Knowledge of the group’s broader political or strategic objective, or of criminal conduct by some of its members, does not by itself establish that understanding.¹⁸⁷
74. The Prosecution suggests that knowledge of the group’s history of criminal behaviour may, depending on the circumstances, establish that the accused’s aim was informed.¹⁸⁸ Such evidence may be relevant, but the inference must concern the criminal activity or purpose which the accused sought to further. Knowledge of past criminal behaviour cannot substitute for establishing that the accused understood that activity or purpose and aimed to advance it. Knowledge may support an inference of aim, but the finding required is that the accused sought to further the criminal activity or purpose, not simply that he understood it or knew of the group’s past criminal conduct.
75. As to specificity, the accused must understand the conduct or objective that gives the activity or purpose he seeks to advance its criminal character. General awareness that the group engages in wrongdoing is insufficient, but exhaustive understanding of every crime encompassed by the common purpose is not required.¹⁸⁹ The Prosecution similarly distinguishes awareness of the criminal activity or purpose from knowledge of the group’s wider criminality beyond the charged crimes.¹⁹⁰

¹⁸⁵ See Ambos, [‘The Subjective Requirements of International Crimes’](#), p. 371, fn. 72 (observing that intention implies awareness).

¹⁸⁶ [Prosecution Additional Submissions](#), para. 50; [Prosecution Appeal Brief](#), paras 36-37.

¹⁸⁷ See [Katanga TJ](#), paras 1626-1627; [Al Hassan TJ](#), paras 1235-1237. Compare [Katanga TJ, Minority Opinion of Judge van den Wyngaert](#), paras 191-192 (distinguishing the common purpose group from the broader organisation), and para. 286 (concerning awareness of contributing to the group’s criminal activities). See also [Al Hassan TJ](#), paras 1688-1689.

¹⁸⁸ [Prosecution Additional Submissions](#), paras 51-52, 54. See [Response](#), paras 92-101.

¹⁸⁹ [Response](#), para. 56, read with paras 57-58 (the Defence’s reference to the accused possessing the “same understanding of what crimes will occur” concerns the contrast between ordinary-course awareness and substantial-risk awareness regarding the crime at issue; it does not require exhaustive knowledge of every crime encompassed by the common purpose).

¹⁹⁰ [Prosecution Additional Submissions](#), paras 49 and fn. 124, 51, 54.

76. Responsibility for a particular charged crime additionally requires the accused's applicable Article 30 mental elements concerning that crime be established, for the reasons developed under Questions H and J.¹⁹¹ Evidence that the accused understood the criminal activity or purpose to involve conduct constituting the charged crime may support a finding of intent in relation to that crime. The two findings may therefore rest on the same evidence, but neither follows automatically from the crime's mere inclusion in the common purpose.¹⁹²
77. For example, if the criminal activity the accused aims to further is a campaign of violent attacks against Muslim civilians, awareness that the campaign involves such attacks is inherent in understanding that activity. The same inference does not automatically extend to rape. The CLRV's contention that such awareness of rape is unnecessary depends on excluding Article 30's requirements concerning the charged crime under subparagraph (i), contrary to the interpretation developed under Questions H and J.¹⁹³ Even assuming rape objectively formed part of the common purpose, the accused's understanding of the activity as a campaign of violent attacks would not, by itself, establish his awareness that rape was among the crimes through which the common purpose was being implemented. Nor would that general understanding alone establish awareness of all the essential elements of the other crimes attributed to the accused. The evidence must establish the applicable mental elements concerning each charged crime under subparagraph (i).

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 ?

78. The language of Article 25(3)(d)(i) does not provide for a different level of awareness concerning the charged crime than Article 25(3)(d)(ii) or any other mode of liability under Article 25(3). The Prosecution acknowledges that subparagraph (i) prescribes no express level of awareness concerning the charged crime, but contends that a lower standard arises *implicitly*.¹⁹⁴ Nothing in the text supports that inference: the aim to further the group's criminal activity or purpose specifies what the accused seeks to advance, not what he must intend or know concerning the material elements of the crime. It supplements Article 30 and does not replace it, for the reasons given under Question H.¹⁹⁵

¹⁹¹ [Response](#), paras 49-50, 54, 57-58.

¹⁹² See e.g. [Al Hassan TJ](#), paras 1688-1689.

¹⁹³ [CLRV Additional Submissions](#), paras 75-77.

¹⁹⁴ [Prosecution Additional Submissions](#), para. 55.

¹⁹⁵ [Response](#), paras 49-54, 58-60; *contra* [CLRV Additional Submissions](#), paras 57-58, 70. See Question H, including why the two alternatives remain distinct.

79. The Prosecution's comparison confuses the object of knowledge with its degree. It argues that, had the drafters intended the same knowledge concerning the charged crime under (i) as under (ii), they would have said so expressly.¹⁹⁶ But subparagraph (ii) expressly requires knowledge "of the intention of the group to commit the crime". That fixes the object of knowledge, not an independent degree of foresight by the accused concerning the crime's occurrence.¹⁹⁷ The absence of that requirement in (i) shows only that knowledge of the group's intention is not required there, not that a lower degree of awareness applies.¹⁹⁸
80. The other modes of liability support this interpretation. Chambers have consistently applied Article 30 to the accused's mental state concerning the crime under the other modes of Article 25(3), and have treated any additional subjective requirement specific to a mode as cumulative with Article 30, not as a substitute for it.¹⁹⁹ In *Katanga*, the Chamber rejected an approach distinguishing perpetrators from accessories solely by their mental state, reasoning that Article 30 applies both to perpetrators under Article 25(3)(a) and to certain forms of accessory liability, where the relevant mental element is unspecified.²⁰⁰ A difference in mode of liability therefore does not, in itself, justify a different mental standard in relation to the crime.
81. Article 25(3)(c) offers a further comparison. *Bemba et al.* distinguishes the special purpose of facilitating the crime from the Article 30 mental element concerning the principal offence, and *Al Hassan* adopts the same distinction,²⁰¹ which the CLRV accept.²⁰² The Prosecution acknowledges Article 30's application under (c), but asserts that the mental elements of Article 25(3)(d) are instead "self-contained".²⁰³ That assertion does not explain the claimed difference. Subparagraph (c) directs the accused's purpose towards facilitating the crime; subparagraph (d)(i) directs his aim towards furthering the group's criminal activity or purpose. The distinction therefore concerns what the accused aims to further through his contribution. Article 30 separately supplies the mental elements concerning the charged crime. Reading the two

¹⁹⁶ [Prosecution Additional Submissions](#), para. 56; see also [Prosecution Appeal Brief](#), paras 39-40.

¹⁹⁷ [Katanga TJ](#), paras 1641-1642. See also [Al Hassan TJ](#), para. 1248, and Question H, addressing the paragraph's formulation and the relationship between subparagraph (ii) and Article 30.

¹⁹⁸ [Response](#), paras 58-60.

¹⁹⁹ With respect to Article 25(3)(a), see [Bemba et al TJ](#), paras 70, 817; [Katanga TJ](#), para. 1413; *Prosecutor v. Banda*, Corrigendum of the "Decision on the Confirmation of Charges", [ICC-02/05-03/09-121-Corr-Red](#), 7 March 2011, para. 150. With respect to Article 25(3)(b), see [Bemba et al. TJ](#), para. 82; *Prosecutor v. Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, [ICC-01/04-02/06](#), 9 June 2014, para. 145.

²⁰⁰ [Katanga TJ](#), paras 1392-1393.

²⁰¹ [Bemba et al. TJ](#), paras 97-98; [Al Hassan TJ](#), paras 1227-1228; [CLRv Additional Submissions](#), paras 51-52.

²⁰² [CLRv Additional Submissions](#), para. 51.

²⁰³ [Prosecution Additional Submissions](#), para. 56, fns 131-132.

cumulatively gives effect both to the purposive language of each provision and to Article 30's general rule.

82. The Prosecution relies on Judge Van den Wyngaert's minority opinion and Judge Monageng's dissent for the position that no additional Article 30 mental element concerning the charged crime is required for subparagraph (i).²⁰⁴ These are separate opinions, not holdings of the Chamber, and neither establishes that position. In her *Katanga* minority opinion, Judge Van den Wyngaert relied on "a crime" in subparagraph (i), as opposed to "the crime" in subparagraph (ii), to conclude that a more general understanding of the group's criminal purpose suffices for liability under (i).²⁰⁵ That interpretation wrongly treats what the accused must understand about the group's purpose as also determining whether he must possess the applicable Article 30 mental elements concerning the charged crime. She also relied on Judge Monageng's view that an aim to further the group's general criminal activity or purpose suffices, a view the latter expressed in the alternative, in the context of contributions made before and after crimes, including their subsequent knowing concealment. Judge Monageng's formulation also relies on the group's "general criminal activity or purpose", reflecting the antecedent treaty wording, although "general" was omitted from Article 25(3)(d)(i). Her reasoning does not address that difference or explain why the broader formulation should govern the adopted text.²⁰⁶ More importantly, neither opinion supports the Prosecution's lowered substantial-risk standard, as addressed under Question H.²⁰⁷ The CLRV also invoke Judge Van den Wyngaert's interpretation to distinguish awareness of the criminal activity or purpose from awareness of the particular crime,²⁰⁸ and relies on the words "a crime" to argue that the crime which the accused understands the criminal activity or purpose to involve need not be the crime attributed to him.²⁰⁹

83. By relying on the purported contrast between "a crime" and "the crime", Judge Van den Wyngaert and the CLRV draw a conclusion about the accused's mental state from language defining the activity or purpose. In subparagraph (i), "a crime" appears in the clause describing what the criminal activity or purpose must involve. In subparagraph (ii), "the crime" identifies the crime which the accused must know the group intends to commit. The clauses perform different functions and the CLRV themselves recognise that the former primarily defines an

²⁰⁴ [Prosecution Additional Submissions](#), para. 38, fn. 102, incorporated by reference in paras 55-56, fn. 130. See Question H.

²⁰⁵ [Katanga, Minority Opinion of Judge Van den Wyngaert](#), para. 288, fn. 407.

²⁰⁶ [Mbarushimana, Dissenting Opinion of Judge Monageng](#), paras 127-128, fn. 289; [Terrorist Bombings Convention](#), Article 2(3)(c)(i). See Question G.

²⁰⁷ [Prosecution Additional Submissions](#), paras 38 and fn. 102, 55-56.

²⁰⁸ [CLRV Additional Submissions](#), paras 67, 75, fns 80, 88.

²⁰⁹ [CLRV Additional Submissions](#), paras 60-62, 80-81.

objective characteristic of the activity or purpose.²¹⁰ Even if that qualification could be satisfied by an ICC crime other than the charged crime, as the CLRV contend, it would not follow that Article 30 ceases to govern the accused's mental state concerning the charged crime. Nor does the absence of a requirement to aim to further that particular crime exclude intent concerning that crime. The CLRV move between those distinct propositions without establishing the necessary link.²¹¹ The chapeau of Article 25(3)(d) requires a contribution to the charged crime, and Article 30 supplies the applicable mental elements concerning that crime unless otherwise provided. The reference to "a crime" in the qualification of the criminal activity or purpose creates no exception. The "where" clause is addressed further under Question K.

84. Accordingly, neither the special aim in subparagraph (i), its formulation as an alternative to (ii), nor the difference between "a crime" and "the crime" creates an exception to Article 30 concerning the charged crime. Those textual distinctions keep their function without introducing either a lower degree of awareness under (i) or liability based solely on an aim to further the criminal activity or purpose.

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?

85. The phrase "where such activity or purpose involves the commission of a crime" provides an objective qualification to the criminal activity or criminal purpose the accused aims to further: that activity or purpose must, as a matter of fact, involve the commission of a crime within the jurisdiction of the Court.²¹² The accused's subjective relationship to it is supplied by the preceding requirement that the contribution be made "with the aim of furthering" it.
86. This interpretation follows first from the structure and ordinary meaning of Article 25(3)(d)(i), which distinguishes the accused's state of mind from the characteristics of the object towards which that state of mind is directed. The words "with the aim of furthering" prescribe the accused's subjective orientation. The ensuing clause, "where such activity or purpose involves the commission of a crime within the jurisdiction of the Court", describes what the relevant criminal activity or purpose must involve, and uses no language of knowledge, awareness or

²¹⁰ [CLRV Additional Submissions](#), paras 78-80 (the CLRV derive awareness of the relevant factual circumstances from the aim requirement; it does not identify the "where" clause as itself prescribing a separate mental standard). See Question K.

²¹¹ [CLRV Additional Submissions](#), paras 61-62, 75. See also [Response](#), paras 49-54. See Questions H and I.

²¹² On the clause's jurisdictional function, see Ambos, [Article-by-Article Commentary](#), p. 1231, mn. 41. See also [Prosecution Additional Submissions](#), paras 57-58; [CLRV Additional Submissions](#), para. 78. The Prosecution's jurisdictional explanation is consistent with this interpretation, but does not establish the historical reason for omitting "general", see [Prosecution Additional Submissions](#), paras 23-28. See also Question G.

belief. Subparagraph (ii), by contrast, expressly makes the accused's "knowledge of the intention of the group to commit the crime" the subjective requirement under that alternative. The "where" clause therefore defines what the relevant criminal activity or purpose must involve, not what the accused must know.

87. This reading also gives distinct meaning to the group's "common purpose" and its "criminal activity or criminal purpose". The former defines the shared aim or objective that links the group's members. The latter identifies the criminal dimension of that broader group activity or purpose, which is the object of the accused's aim under subparagraph (i). The two need not coincide: a group may pursue a broader political, strategic, religious or military common purpose which is not itself exclusively criminal, while implementing it through criminal activity.²¹³ The charged crime must nevertheless be encompassed by that common purpose, as addressed under Question C. Subparagraph (i) thus imposes two related requirements: the accused must aim to further the criminal activity or purpose, and that activity or purpose must involve the commission of a crime within the Court's jurisdiction. Seeking to further only a legitimate aspect of the group's broader project is insufficient; as is seeking to further criminal activity which does not involve an ICC crime.²¹⁴

88. *Al Hassan* supports the distinction between what the common purpose must encompass and the accused's subjective relationship to it. It requires the common purpose either to be directed at committing a crime within the Court's jurisdiction or "involve the commission of such a crime", in which case, the crime or crimes committed must form part of the common purpose.²¹⁵ It then defines the accused's subjective requirement under subparagraph (i) separately: the contribution must be made "with the aim of furthering the criminal activity or criminal purpose of the group".²¹⁶

89. Treating the "where" clause as objective does not mean that the accused need not be aware of the criminal activity or purpose that satisfies it. As addressed under Question I, the aim to further that activity or purpose necessarily requires awareness of it, and the CLRV likewise derive that awareness from the aim requirement.²¹⁷ Its concern to preserve awareness of the circumstances giving the activity or purpose its criminal character is therefore compatible with treating the "where" clause as an objective qualification; it does not require attributing a

²¹³ See Question A.

²¹⁴ [Katanga TJ](#), paras 1626-1627, 1630; [Al Hassan TJ](#), paras 1236-1237, 1247; [Response](#), paras 55-56. See also Questions A and C.

²¹⁵ [Al Hassan TJ](#), para. 1237.

²¹⁶ [Al Hassan TJ](#), para. 1247.

²¹⁷ [CLRV Additional Submissions](#), para. 79.

separate subjective requirement to that clause. The CLRV's further reliance on the reference to "a crime" is addressed under Question J.²¹⁸ The "where" clause defines what the criminal activity or purpose must involve. It neither supplies nor removes the accused's mental elements concerning the charged crimes, which Article 30 supplies for the reasons given under Questions H and J.

III. CONCLUSION

90. The Defence respectfully submits these responses to the Appeals Chamber's Order and the submissions of the Prosecution and the CLRV, and requests the Appeals Chamber to reject the Prosecution's appeal against Mr Ngaïssona's acquittal.



G. J. Alexander Knoops
on behalf of
Patrice-Edouard Ngaïssona

Dated this 14 October 2026

At The Hague, the Netherlands

²¹⁸ [CLRV Additional Submissions](#), paras 80-81. See Question J on the distinction between "a crime" and "the crime".