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Internationale**



**International  
Criminal  
Court**

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*No.: ICC-01/14-01/18*

**Date: 23 March 2026**

## **THE APPEALS CHAMBER**

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

## **SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

***IN THE CASE OF THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-  
EDOUARD NGAÏSSONA***

**Public**

**Public Redacted Version of the “Consolidated Victims’ Response  
to the Prosecution and Defence Appeals of the Judgment and Sentence  
against Mr Alfred Yekatom and Patrice-Edouard Ngaïssona”,  
No. ICC-01/14-01/18-2884-Conf, 27 February 2026**

**Source: Common Legal Representatives of Victims of Other Crimes**

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## I. INTRODUCTION

1. The Common Legal Representatives of the Victims of the Other Crimes (the “CLRv”) herewith file their consolidated response to the Prosecution appeal,<sup>1</sup> Mr Yekatom appeal<sup>2</sup> and Mr Ngaïssona appeal<sup>3</sup> against the Judgment and the Sentence issued by Trial Chamber V (the “Chamber”) on 24 July 2025 (the “Impugned Decision” or the “Judgment”).<sup>4</sup> The CLRv support the Prosecution Appeal and oppose both Defence Appeals in their entirety.

2. As instructed by the Appeals Chamber,<sup>5</sup> the CLRv also respond to the “Yekatom Defence Application to present additional evidence” (the “Request”),<sup>6</sup> and oppose it as it fails to meet the necessary requirements for additional evidence to be admitted on appeal.

## II. PRELIMINARY REMARKS

3. Before addressing the merits of the Appeals, the CLRv wish to convey the Victims’ concerns on two discrete issues relevant to these proceedings. First, Victims emphasise that sexual violence formed a central component of the harm they suffered, and that its proper legal characterisation is essential to their rights to truth, recognition,

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<sup>1</sup> See the “Prosecution Appeal Brief”, [No. ICC-01/14-01/18-2846-Conf A](#), 25 November 2025 (the “Prosecution Appeal”). A public redacted version [No. ICC-01/14-01/18-2846-Red A](#), was filed on 27 November 2025.

<sup>2</sup> See the “Corrected Version of the ‘Yekatom Defence Appeal against the Judgment’ ICC-01/14-01/18-2784-Conf, 24 July 2025”, ICC-01/14-01/18-2848-Conf 25 November 2025”, [No. ICC-01/14-01/18-2848-Conf-Corr A A3](#), 18 December 2025 (the “Yekatom Appeal”). A public redacted version [No. ICC-01/14-01/18-2848-Red- Corr A A3](#) was filed on 19 December 2025.

<sup>3</sup> See the “Corrigendum of the ‘Ngaïssona Defence Appeal Brief against the Trial Judgment’, 25 November 2025, ICC-01/14-01/18-2847-Conf, [No. ICC-01/14-01/18-2847-Conf-Corr A A2](#), 19 December 2025 (the “Ngaïssona Appeal”). A public redacted version [No. ICC-01/14-01/18-Red-Corr A A2](#) was filed on the same day.

<sup>4</sup> See the “Judgement” with public Annexes A and B (Trial Chamber V), No. ICC-01/14-01-18-2784-Conf, 24 July 2025 (the “Impugned Decision” or the “Judgement”). A public redacted version [No. ICC-01/14-01/18-2784-Red](#) was filed the same day.

<sup>5</sup> See the “Directions on the Yekatom Defence’s application under regulation 62 of the Regulations of the Court” (Appeals Chamber), [No. ICC-01/14-01/18-2835 A A2 A3](#), 5 November 2025, para. 2.

<sup>6</sup> See the “Yekatom Defence Application to present additional evidence”, [No. ICC-01/14-01/18-2830 A A3](#), 24 October 2025 (the “Request”).

and accountability. They express deep concern with the Chamber's restrictive approach of this issue, which declined to treat such crime as a foreseeable consequence of the Anti-Balaka attacks. In the Victims' view, this insufficiently reflects the gravity, nature, and role of sexual violence within the broader pattern of persecution and displacement inflicted upon the civilian population.

4. Victims consider that the Chamber's reasoning risks minimising the systemic character of sexual violence and its function as a tool of terror, degradation, and forced displacement. For Victims, recognition of sexual violence as an integral and foreseeable component of the attacks is not merely a legal question, but a matter of acknowledgment of their lived experiences and of ensuring full accountability for the harm inflicted upon them.

5. Second, the CLRV convey the Victims' profound disappointment with the sentences imposed, which they consider unduly lenient. In the Victims' view, the individual and joint sentences imposed do not adequately reflect the scale of the harm suffered. Thousands were uprooted, and forcibly displaced from their communities and country. Many lost family members whose homes and livelihoods were destroyed, were persecuted, or were brutally killed. The effects of these crimes have endured since 2013. Many Victims continue to live in grief and hardship, feeling that they bear a heavier burden than those responsible for the harm inflicted upon them.

6. It is a well-established principle in international criminal law that sentences must be individualised and reflect the personal circumstances of the convicted person. At the same time, due regard has to be given to the entirety of the case. Sentences must remain broadly consistent with penalties imposed for comparable crimes in similar circumstances. In this respect, the sentences imposed in the present case appear markedly lower than those handed down in other similar cases before this Court and other international tribunals.

7. While mindful of the limited procedural rights afforded to Victims on appeal, Victims regret that the Prosecution left unchallenged both the Chamber's refusal to treat rape as a foreseeable consequence of the Anti-Balaka attacks and the lenient penalties imposed on Messrs Yekatom and Ngaïssona.

### III. CONFIDENTIALITY

8. Pursuant to regulation 23bis(2) of the Regulations of the Court, the present submission is filed confidential following the classification chosen by the parties for their respective Appeals and because it contains information related to the Victims. A public redacted version will be filed in due course.

### IV. MR YEKATOM'S REQUEST TO PRESENT ADDITIONAL EVIDENCE

#### 1. Legal framework for the admission of additional evidence on appeal

9. The admission of additional evidence on appeal is exceptional and highly circumscribed. The Appeals Chamber has indicated the following requirements as relevant for the assessment of applications: *"(i) [a]dditional evidence on appeal will generally not be admitted unless such evidence was unavailable at trial or, with due diligence, could not have been produced; (ii) [i]t must be demonstrated that the additional evidence could have led the trial chamber to enter a different verdict, in whole or in part; (iii) [t]he criteria of relevance, probative value and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness under article 69(4) of the Statute also apply to the admission of evidence at the appellate stage of proceedings; and (iv) [i]t is within the Appeals Chamber's discretion to admit additional evidence on appeal despite a negative finding on one or more of the abovementioned criteria, if there are compelling reasons for doing so".*<sup>7</sup>

10. The distinct features of appellate proceedings warrant a restrictive interpretation of said requirements. A trial chamber is much better positioned to assess

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<sup>7</sup> See the "Decision on request for the admission of additional evidence on appeal of 22 October 2020 (ICC-01/04-02/06-2617-Conf)" (Appeals Chamber), [No. ICC-01/04-02/06-2617-Red A](#), 13 November 2020, para. 15 (the "Ntaganda Decision") (footnotes omitted).

a piece of evidence in light of all the other evidence presented at trial. Accordingly, evidence relevant to a decision pursuant to article 74(2) of the Statute should, with only limited exceptions, be presented before that decision is taken to avoid “*risk of litigation strategies that contemplate the presentation of evidence for the first time on appeal, even if such evidence was available at trial or, with due diligence, could have been produced*”.<sup>8</sup>

11. As a general rule, additional evidence on appeal will not be admitted “*unless there are convincing reasons why such evidence was not presented at trial, including whether there was a lack of due diligence*”.<sup>9</sup> The burden of proving that each of the applicable requirements is met rests on the party seeking to adduce the additional evidence.<sup>10</sup> In the present case, and as detailed *infra*, the Request fails to meet the requirements.

## **2. Assessment of the requirements for the admission of additional evidence in the present instance**

### ***a) The Application Form was available at trial***

12. The Defence acknowledges that the Application Form was available at trial and that it could have been submitted into evidence.<sup>11</sup> Nevertheless, it alleges that it was not submitted because the specific relevance of the document only became clear following the issuance of the Judgment,<sup>12</sup> and that it was not the result of a failure of due diligence.<sup>13</sup>

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<sup>8</sup> See the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), [No. ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, para. 57 (footnotes omitted, emphasis added) (the “*Lubanga* AJ”). See also, the “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’” (Appeals Chamber), [No. ICC-01/05-01/13-2275-Red A4 A5](#), 8 March 2018, para. 509 (the “*Bemba et al.* AJ”).

<sup>9</sup> See the *Lubanga* AJ, *supra* note 8, para. 58.

<sup>10</sup> See AMBOS (K.), “Article 83: Proceedings on appeal” in AMBOS (K.) (Ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4<sup>th</sup> ed., Beck/Hart Publishing, Munich, 2023, p. 2408.

<sup>11</sup> See the Request, *supra* note 6, para. 25.

<sup>12</sup> *Ibid*, para. 26.

<sup>13</sup> *Ibid*, para. 28.

13. The CLRV posit that the reasons advanced by the Defence are inapposite and unconvincing. During his testimony, following an open question from the Prosecution, P-1823 clearly stated that he undertook the travel from Bangui to Mbaïki after Djotodia's resignation (*i.e.* after 10 January 2014).<sup>14</sup> He repeated it while being questioned by the CLRV.<sup>15</sup> He was later questioned extensively by the Defence of Mr Yekatom on this specific issue. After several questions directed at the timing of his travel,<sup>16</sup> the witness gave an answer that appeared to suggest that he undertook the trip before 1 January 2014.<sup>17</sup>

14. However, contrary to the Defence's position,<sup>18</sup> the reading of the whole transcript of the testimony does not allow to conclude that P-1823 necessarily undertook the travel before the new year. Although P-1823 acknowledged difficulties in recalling the exact timing of events due to the passage of time and the trauma he had endured,<sup>19</sup> he gave clear evidence that his travel occurred after Djotodia's resignation.<sup>20</sup> The Defence should have tendered the Application Form into evidence, if its position was that the Witness's travel took place before 1 January 2014. Instead, the Defence made a strategic choice to rely on what it considered sufficient evidence to establish that the trip occurred before the new year. However, *"the defence has no right to assume what a Chamber will or will not accept in making its findings; it must put forward its best case in the first instance"*.<sup>21</sup>

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<sup>14</sup> See P-1823: [T-183-FRA](#), p. 11, lines 18-28; and P-1823: [T-183-ENG](#), p. 11, lines 15-22. See also, the Impugned Decision, *supra* note 4, paras. 3398, 3402-3403.

<sup>15</sup> See P-1823: [T-183-FRA](#), p. 45, lines 18-26; and P-1823: [T-183-ENG](#), p. 44, lines 6-14.

<sup>16</sup> See P-1823: [T-183-FRA](#), p. 57, line 23 to p. 60, line 6; and P-1823: [T-183-ENG](#), p. 55, line 21 to p. 57, line 23. See also, the Impugned Decision, *supra* note 4, para. 3403.

<sup>17</sup> See P-1823: [T-183-FRA](#), p. 59, line 26 to p. 60, line 4; and P-1823: [T-183-ENG](#), p. 57, lines 16-22.

<sup>18</sup> See the Request, *supra* note 6, paras. 15-18.

<sup>19</sup> See P-1823: [T-183-FRA](#), p. 59, lines 18-24; and P-1823: [T-183-ENG](#), p. 57, lines 11-15.

<sup>20</sup> See P-1823: [T-183-FRA](#), p. 11, lines 18-28 and; P-1823: [T-183-ENG](#), p. 11, lines 15-22.

<sup>21</sup> See ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, [Decision on Motions by Drago Josipović, Zoran Kupreškić, and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94\(B\)](#) (Appeals Chamber), 8 May 2001, para. 10 (the "*Kupreškić* Decision of 8 May 2001"); and *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, [Decision on the admission of additional evidence following hearing of 30 March 2001](#) (Appeals Chamber), 11 April 2001, paras. 11-12 (the "*Kupreškić* Decision of 11 April 2001").

15. Accordingly, the Defence failed to exercise due diligence in choosing not to tender the Application Form before the Chamber. Having made that strategic decision at trial, it cannot now seek to introduce the document on appeal.<sup>22</sup> Permitting its admission would run contrary to the principles governing appellate proceedings, as “*this would risk the appellate process being transformed into a trial de novo*”.<sup>23</sup>

***b) The proposed additional evidence could not have changed the verdict in whole or in part***

16. The CLRV submit that the additional evidence could not have led the Chamber to enter a different verdict, in of itself, or assessed with any other relevant considerations.<sup>24</sup>

17. First, the Chamber carefully evaluated P-1823’s evidence concerning the timing of his travel from Bangui to Mbaïki.<sup>25</sup> It took into account, *inter alia*, his clear and concise answer explaining his departure to Mbaïki after Djotodia’s resignation;<sup>26</sup> the witness’s hesitation in answering the Defence’s questions regarding the timing of the event;<sup>27</sup> his difficulty in remembering the timing of the event;<sup>28</sup> and, finally, his answers suggesting that he might have undertaken the trip before the new year.<sup>29</sup> All these elements led the Chamber to give more weight to the witness’s affirmation that he left Bangui after Djotodia’s resignation.<sup>30</sup> Therefore, the suggestion that P-1823 “*seemed to make reference to not wanting to stay in Bangui in the ‘new year’ rather than not spending New Year’s in Bangui*”<sup>31</sup> was only one of the elements considered by the Chamber in reaching its determination. This was a reasonable conclusion in the context of the witness’s testimony, and it does not constitute a misstatement of the evidence.<sup>32</sup>

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<sup>22</sup> See the *Lubanga* AJ, *supra* note 8, para. 75.

<sup>23</sup> *Ibid.*

<sup>24</sup> See *Contra*, the Request, *supra* note 6, paras. 31-32.

<sup>25</sup> See the Impugned Decision, *supra* note 4, paras. 3397-3405.

<sup>26</sup> *Ibid.*, para. 3403.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> See the Request, *supra* note 6, paras. 14-17.

18. Second, the Chamber relied on several other items of evidence to conclude that the purpose of the checkpoints manned by Mr Yekatom's elements was the search and identification of Muslims in the area.<sup>33</sup> Therefore, even assuming, *arguendo*, that the Chamber would have considered P-1823's evidence unreliable, it would still have reached the same conclusion on the purpose of the checkpoints.

19. Lastly, the CLRV emphasise that victims' application forms and witness statements arise from fundamentally distinct processes, which differ in purpose, methodology, and procedural safeguards. The information provided by the Victims in their application forms has the sole purpose of substantiating their requests to participate in the proceedings before the Court,<sup>34</sup> typically through standardised forms and without the evidentiary formalities that govern the taking of witness statements. By contrast, witness statements are obtained specifically for evidentiary purposes, following structured procedures designed to ensure accuracy and reliability. Accordingly, application forms cannot be regarded as evidence. In this light, any alleged inconsistencies between the accounts of dual status individuals in their application forms and in their witness statements, cannot be assessed as inconsistencies between evidentiary statements, as applying to participate cannot be equated with the giving of a witness statement.

20. In this regard, Trial Chamber III held that victims' applications, "[u]nlike evidence collected to support or challenge the substantive criminal charges in the case, [...] are administrative in nature and [...] are intended to serve a limited purpose: to provide the Chamber with a basis for determining whether individual victims should be permitted to participate in the proceedings".<sup>35</sup> Recent jurisprudence of the Court has also clarified that "the conditions of production of victim applications differ from those of formal witness statements, which are taken by a party, assisted by staff qualified to do so, and recorded after

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<sup>33</sup> See e.g. the Impugned Decision, *supra* note 4, paras. 3383-3416.

<sup>34</sup> See the "Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case" (Pre-Trial Chamber II, Single Judge), [No. ICC-01/09-01/11-169](#), 8 July 2011, para. 9.

<sup>35</sup> See the "Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011" (Trial Chamber III), [No. ICC-01/05-01/08-2012-Red](#), 9 February 2012, para. 100.

*having been read back to the witness. Accordingly, the Chamber has generally attributed less weight to inconsistencies between a witness's testimony and a victim application, than to inconsistencies with a formal witness statement. Major identified inconsistencies have been assessed on a case-by-case basis, considering, inter alia, the nature and scope of the inconsistencies, the explanations provided by the witness in this regard, and the conditions of production of the application, including, in particular, whether the form was completed with the assistance of an intermediary or individuals formally connected to the Court".<sup>36</sup>*

21. In conclusion, the Defence fails to show that the additional evidence is of sufficient importance and that it could have changed the verdict, in whole or in part.<sup>37</sup>

***c) The Defence fails to demonstrate compelling reasons to admit the Application Form as additional evidence***

22. The Defence claims that the Appeals Chamber should exercise its discretion to admit the Application Form as there are compelling reasons to do so.<sup>38</sup> In particular, the Defence argues that it could not have anticipated that the Chamber would interpret P-1823's testimony in a manner contrary to its plain language.<sup>39</sup>

23. As argued *supra*,<sup>40</sup> the Defence failed to exercise due diligence in deciding not to tender the Application Form at trial, therefore not presenting its best case in first instance.<sup>41</sup> Accordingly, there are no compelling reasons justifying the admission of the item in question on appeal. In this regard, the jurisprudence of the *ad hoc* tribunals – considered relevant by the Appeals Chamber in assessing requests for the admission of additional evidence on appeal –<sup>42</sup> refers to a stringent requirement for evidence that was available at trial. In particular, "*where the evidence is relevant and credible, but was*

<sup>36</sup> See the "Judgment", with public Annexes A, B, and C (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019, para. 85 and fn 346, (the *Ntaganda* TJ). (Emphasis added).

<sup>37</sup> See the *Lubanga* AJ, *supra* note 8, para. 59.

<sup>38</sup> See the Request, *supra* note 6, paras. 2, 24-34.

<sup>39</sup> *Ibid*, para. 3.

<sup>40</sup> See *supra*, paras. 14-15.

<sup>41</sup> See the *Kupreškić* Decision of 8 May 2001, *supra* note 21, para. 10; and the *Kupreškić* Decision of 11 April 2001, *supra* note 21, paras. 11-12. See also, the *Ntaganda* Decision, *supra* note 7, para. 20.

<sup>42</sup> See the *Lubanga* AJ, *supra* note 8, paras. 49-52, 53 and 63: "[w]here the criteria are similar, the Appeals Chamber considers it appropriate to seek guidance from this jurisprudence".

*available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party can establish that the exclusion of it would amount to a miscarriage of justice. That is, it must be demonstrated that had the additional evidence been adduced at trial, it would have had an impact on the verdict*".<sup>43</sup> The verification of this exceptional admissibility requirement is therefore of particular importance.<sup>44</sup>

24. The criterion developed in the jurisprudence of the *ad hoc* tribunals is applicable, *mutatis mutandis*, in the present case. The exception permitting the admission of additional evidence on appeal on the basis of compelling reasons must be interpreted strictly and remain truly exceptional. The Defence fails to demonstrate that the present circumstances satisfy this stringent requirement so as to justify the exercise of the Appeals Chamber's discretion. For these reasons, the CLRV respectfully request the Appeals Chamber to reject Mr Yekatom's Request to admit additional evidence on appeal.

## V. LEGAL STANDARDS FOR APPELLATE REVIEW

25. Under article 83(2) of the Statute, the Appeals Chamber shall reverse or amend a decision where the findings "*are materially affected by error of fact, law or procedure*". An error of law exists where a trial chamber applied an incorrect legal standard, failed to apply a required legal standard, or misinterpreted a legal provision in a manner inconsistent with the Statute.<sup>45</sup> Where an error of law is established, the Appeals Chamber does not defer to the Trial Chamber but "*must arrive at its own conclusions as*

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<sup>43</sup> *Ibid*, para. 51 referring to ICTR, *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, [Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence](#) (Appeals Chamber), 8 December 2006, para. 6; and ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, [Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115](#) (Appeals Chamber), 20 October 2011, para. 10.

<sup>44</sup> See AMBOS (K.), *op. cit. supra*, note 10, p. 2409.

<sup>45</sup> See the Public redacted version of "Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled 'Trial Judgment'", [No. ICC-02/04-01/15-2022-Red A](#), 15 December 2022, para. 76 (the "*Ongwen AJ*"). See also, the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'", [No. ICC-01/05-01/08-3636-Red A](#), 8 June 2018, para. 36 (the "*Bemba AJ*").

to the correct interpretation of the law”.<sup>46</sup> For an error of law to be “material,” it must be shown that the decision “would have been substantially different” had the correct legal standard been applied.<sup>47</sup>

26. An error of fact exists where it cannot be established that a reasonable trial chamber could have been satisfied beyond reasonable doubt as to the finding in question.<sup>48</sup> For an error of fact to be ‘material’, it must be shown that the trial chamber would have convicted rather than acquitted the person in whole or in part, had it not so erred.<sup>49</sup> Accordingly, where an error of fact is established, the material impact of the error must be considered in light of other relevant factual findings relied upon by the trial chamber for its decision on conviction or acquittal.<sup>50</sup>

27. Procedural errors may include errors committed in pre-trial and trial proceedings leading up to an impugned decision.<sup>51</sup> The material effect of a procedural error will depend on the specific argument raised, including the type of procedural error alleged.<sup>52</sup>

28. Regarding substantiation of arguments, an appellant has to present cogent arguments that set out the alleged error and explain how the trial chamber erred.<sup>53</sup> In

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<sup>46</sup> See the *Lubanga* AJ, *supra* note 8, paras. 17-18. See also, the “Judgment on the appeal of the State of Israel against Pre-Trial Chamber I’s ‘Decision on Israel’s challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute’” (Appeals Chamber), [No. ICC-01/18-422 OA2](#), 24 April 2025, para. 41.

<sup>47</sup> See the “Corrected version of the ‘Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’”, [No. ICC-01/04-02/12-271-Corr A](#), 7 April 2015, para. 20 (the “*Ngudjolo* AJ”); and the *Lubanga* AJ, *supra* note 8, para. 31.

<sup>48</sup> See the *Bemba* AJ, *supra* note 45, para. 38.

<sup>49</sup> See the “Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’” (Appeals Chamber), [No. ICC-01/04-02/06-2666-Red A A2](#), 30 March 2021, para. 43 (the “*Ntaganda* AJ”).

<sup>50</sup> *Ibid.*

<sup>51</sup> See the *Lubanga* AJ, *supra* note 8, para. 20.

<sup>52</sup> *Ibid.*, para. 32. In this respect, the Appeals Chamber held that to the extent that the appellant is arguing that a mandatory procedural provision was violated, this error will have to be substantiated in law and fact. Where a procedural error is alleged with respect to a trial chamber’s exercise of discretion, arguments must be tailored to the specific standard of review for such decisions.

<sup>53</sup> See the *Ntaganda* AJ, *supra* note 49, para. 48; the *Lubanga* AJ, *supra* note 8, para 30; and the “Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 (1) of the Statute” (Appeals Chamber), [No. ICC-02/04-01/05-408 OA3](#), 16 September 2009, para. 46.

alleging that a factual finding is unreasonable, an appellant must explain the reasons for such allegation, for example, by showing that it was contrary to logic, common sense, scientific knowledge and experience.<sup>54</sup> In the submissions on appeal, it will be for the parties and participants to draw the attention of the Appeals Chamber to all the relevant aspects of the case record or evidence in support of their respective submissions relating to the impugned factual findings.<sup>55</sup> Furthermore, an appellant is required to demonstrate how the error materially affected the decision.<sup>56</sup> When raising an appeal on the ground of unfairness under article 81(1)(b)(iv) of the Statute, the appellant is required to set out not only how the proceedings were unfair, but also how this fact affected the reliability of the conviction.<sup>57</sup>

## VI. SUBMISSIONS ON THE PROSECUTION APPEAL

### 1. Ground 1: The Chamber erred in law by failing to assess Mr Ngaïssona's responsibility under article 25(3)(d)(i) of the Statute

29. Victims support the Prosecution's position that the Chamber erred in law by failing to examine Mr Ngaïssona's responsibility under article 25(3)(d)(i) for rape charged under Counts 40 and 41, and rape as an underlying act of persecution under Count 42. This mode of liability was expressly confirmed in the alternative by the Pre-Trial Chamber.<sup>58</sup> Accordingly, the Chamber was legally required - upon finding that the elements of article 25(3)(c) were not satisfied - to consider whether Mr Ngaïssona's conduct met the requirements of article 25(3)(d)(i).

30. Instead, the Chamber declined to assess article 25(3)(d) on the basis that "*the primary alternative*" - article 25(3)(c) - had been established.<sup>59</sup> This approach was

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<sup>54</sup> See the *Ntaganda* AJ, *supra* note 49, para. 48.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> See the "Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona'" (Pre-Trial Chamber II), [No. ICC-01/14-01/18-403-Conf-Corr](#), 11 December 2019, para. 112. A corrected public redacted version [No. ICC-01/14-01/18-403-Corr-Red](#) was notified on 28 June 2021 (the "Confirmation Decision").

<sup>59</sup> See the Impugned Decision, *supra* note 4, para. 3886.

incorrect. The failure of the Chamber to assess Mr Ngaïssona liability under article 25(3)(d)(i) – having determined that article 25(3)(c) was not satisfied<sup>60</sup> – constitutes a material error of law under articles 81 and 83 of the Statute. A trial chamber commits an error of law when it fails to evaluate a confirmed alternative mode of liability, unless the accused has already been convicted under another applicable mode.<sup>61</sup> As the Prosecution recalls, the practice of alternative charging requires that trial chambers acquit only if none of the alternative charges are satisfied on the evidence.<sup>62</sup> By failing to assess article 25(3)(d), the Chamber also deprived Victims of an adjudication of the full scope of liability for the harm suffered and violated their right to an effective remedy.<sup>63</sup>

*(i) Applicable law under article 25(3)(d) of the Statute*

31. Liability under 25(3)(d) of the Statute<sup>64</sup> entails three objective elements and two subjective elements.<sup>65</sup> The objective elements are that (a) a crime within the jurisdiction of the Court was committed; (b) the persons who committed the crime belonged to a group acting with a common purpose that involves the commission of a crime; and (c) the accused contributed in any other way to the commission of the crime. The

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<sup>60</sup> *Ibid*, paras. 4126-4132, 4847.

<sup>61</sup> See the *Ntaganda* AJ, *supra* note 49, para. 325; the “Judgment and Sentence” (Trial Chamber VIII), [No. ICC-01/12-01/15-171](#), 27 September 2016, para. 20 (the “*Al Mahdi* TJ”); the Public Redacted Version of the “Trial Judgment” (Trial Chamber IX), [No. ICC-02/04-01/15-1762-Red](#), 4 February 2021, para. 2780 (the “*Ongwen* TJ”); and the public redacted version of the “Trial Judgment” with three public annexes (Trial Chamber X), [No. ICC-01/12-01/18-2594-Red](#), 26 June 2024, para. 1582 (the “*Al Hassan* TJ”).

<sup>62</sup> See the Prosecution Appeal, *supra* note 1, paras. 11-14; and [Chambers Practice Manual](#) (2024), para. 67.

<sup>63</sup> See the “Decision on the notices of discontinuances of the appeals” (Appeals Chamber), [No. ICC-01/12-01/18-2688 A A2](#), 7 March 2025, para. 24, *citing* the International Covenant on Civil and Political Rights, 16 December 1966, [999 United Nations Treaty Series 14668](#), article 2(3); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, [UN Doc. A/RES/40/34](#), article 4 (the “Declaration of Basic Principles of Justice”); American Convention on Human Rights, 22 November 1969, [1144 United Nations Treaty Series 17955](#), article 25(1); European Convention on Human Rights, 4 November 1950, [213 United Nations Treaty Series 2889](#), article 13; and the “Judgment pursuant to Article 74 of the Statute” with Public with annexes I, II, and A to F, (Trial Chamber III), [No. ICC-01/05-01/08-3343](#), 21 March 2016, para. 331 (the “*Bemba* TJ”), *citing* the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims; and Declaration of Basic Principles of Justice.

<sup>64</sup> See article 25(3)(d) of the Statute.

<sup>65</sup> See the Public redacted version of “Decision on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-01/04-01/10-465-Red](#), 16 December 2011, para. 269 (the “*Mbarushimana* Decision”).

subjective elements require that the accused's contribution (a) was intentional; and (b) was made either with (i) the aim of furthering the criminal activity or criminal purpose of the group, or (ii) in the knowledge of the intention of the group to commit the crime.

### Objective elements

32. The special and thus differentiating feature of article 25(3)(d) in comparison to article 25(3)(c) of the Statute is the collective nature of the criminality: the contribution must be to a crime committed or attempted "*by a group of persons acting with a common purpose*".<sup>66</sup> The provision is designed to address group criminality while not requiring that the contributor be a formal member of the group; non-members may also incur liability, provided their contribution meets the elements.<sup>67</sup>

33. Turning to the "*common purpose*" requirement, this notion has been distinguished from co-perpetration liability under article 25(3)(a) – which requires proof of a common plan to "*tie the co-perpetrators together*" and justify "*reciprocal imputation of their respective acts*".<sup>68</sup> By contrast, article 25(3)(d) does not result in such reciprocal accusation. It therefore does not require proof of a common *plan*, but only proof that the group shared a common *purpose*, namely a "*shared aim, goal or objective*"<sup>69</sup> to "*commit the crime or [...] its execution*".<sup>70</sup> To prove the common purpose, "*recourse may be had both to direct and to circumstantial evidence*".<sup>71</sup>

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<sup>66</sup> See AMBOS (K.), *op. cit. supra*, note 10, p. 1227.

<sup>67</sup> See the *Mbarushimana* Decision, *supra* note 65, para. 274; the "Judgment pursuant to article 74 of the Statute" (Trial Chamber II), [No. ICC-01/04-01/07-3436-tENG](#), 20 April 2015, para. 163 (the "*Katanga* TJ"); and the "Decision on the confirmation of charges against Charles Blé Goudé" (Pre-Trial Chamber I), [No. ICC-02/11-02/11-186](#), 11 December 2014, para. 176 (the "*Blé Goudé* Decision").

<sup>68</sup> See the *Al Hassan* TJ, *supra* note 61, paras. 1235-1236; and the *Lubanga* AJ, *supra* note 8, para. 445.

<sup>69</sup> See the *Al Hassan* TJ, *supra* note 61, paras. 1235-1236.

<sup>70</sup> See the *Katanga* TJ, *supra* note 67, para. 1627.

<sup>71</sup> See the "Decision on the Defence requests set forth in observations 3379 and 3389 of 3 and 17 June 2013" (Trial Chamber II), [No. ICC-01/04-01/07-3388-tENG](#), 26 June 2013, para. 28; and the *Katanga* TJ, *supra* note 67, para. 28.

34. The term ‘*in any other way*’ indicates that article 25(3)(d) is a catch-all form of liability, thus requiring the lowest objective threshold compared to the different modes of liability under article 25 of the Statute.<sup>72</sup> Although different approaches have been adopted regarding the level of contribution that satisfies this provision,<sup>73</sup> multiple Chambers have rejected the ‘*significant contribution*’ threshold for the fulfilment of article 25(3)(d).<sup>74</sup> The recent *Al Hassan* judgment offers a clear reading on the question, holding that “*no additional requirement for a certain level of contribution or threshold to be attained should be ‘read in’ to the statutory provision*”.<sup>75</sup> The Chamber grounded this reading in the obligation to apply “*an ordinary meaning to the text, and consistent with the intent of the drafters*”, which solely demands that “*the accused made a contribution*” and does not warrant the use of “*qualifying words*”.<sup>76</sup>

35. Accordingly, the accused’s contribution is not required to be significant, rather it must simply have “*a bearing on the occurrence of the crime and/or the manner of its commission*”.<sup>77</sup> Finally, it is neither required for the commission of the crime to be dependent on the accused’s contribution.<sup>78</sup>

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<sup>72</sup> See AMBOS (K.) (Ed.), *op. cit. supra* note 10, p. 1127; and the *Mbarushimana* Decision, *supra* note 65, para. 279.

<sup>73</sup> See the *Al Hassan* TJ, *supra* note 61, para. 1242, footnote 4024 citing the *Mbarushimana* Decision, *supra* note 65, paras. 277-280; the *Katanga* TJ, *supra* note 67, para. 1632 which upheld the ‘significant contribution’ criteria as opposed to the public redacted version of the “*Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*” (Pre-Trial Chamber I), [No. ICC-01/12-01/18-461-Corr-Red-tENG](#), 13 November 2019, para. 948 (“the *Al Hassan* Decision”); the “Decision on the confirmation of charges against Dominic Ongwen (Pre-Trial Chamber II), No. [ICC-02/04-01/15-422-Red](#), 23 March 2016, para. 44 (“*Ongwen* Decision”); and the public redacted version of the “Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi” (Pre-Trial Chamber I), [No. ICC-01/12-01/15-84-Red](#), 24 March 2016, para. 27 (the “*Al Mahdi* Decision”).

<sup>74</sup> See the *Al Hassan* Decision, *supra* note 73, para. 948; the *Ongwen* Decision, *supra* note 73, para. 44; the *Al Mahdi* Decision, *supra* note 73, para. 27; and the *Al Hassan* TJ, *supra* note 61, para. 1243.

<sup>75</sup> See the *Al Hassan* TJ, *supra* note 61, para. 1243.

<sup>76</sup> *Ibid.* See footnote 4027 of the *Al Hassan* TJ, *supra* note 61.

<sup>77</sup> See the *Al Hassan* TJ, *supra* note 61, paras. 1243-1244, citing the *Katanga* TJ, *supra* note 67, paras. 1633-1634.

<sup>78</sup> *Ibid.*

Subjective elements

36. Turning to the first *mens rea* element - namely, the contribution be intentional - the accused must intend to engage in the conduct which constitutes the contribution; their contribution must have been deliberate and made with awareness, which is in line with the criterion of article 30(2)(a) of the Statute. Therefore, proving that the accused shared the group's intention to commit the crime is not required:<sup>79</sup> *"in order for a person to incur 25(3)(d) liability, the person must both: (i) mean to engage in the relevant conduct that allegedly contributes to the crime and (ii) be at least aware that his or her conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear responsibility"*.<sup>80</sup>

37. In addition to being '*intentional*', the contribution needs to include one of the mental elements specified at paragraphs (i) and (ii). Article 25(3)(d) thus establishes a distinct *mens rea*, falling within the "*otherwise provided*" clause of article 30.<sup>81</sup> Nonetheless, a chamber may "*refer to and on draw the definitions of [article 30] in construing the terms "intention" and "knowledge" which appear in article 25(3)(d)"*.<sup>82</sup> The difference between the two mental elements at 25(3)(d)(i) and 25(3)(d)(ii) lies in the accused's required understanding of the common purpose. The first alternative mentions "*furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court*". The reference to "*a crime*" indicates that a more general understanding of the group's criminal purpose is enough to incur liability.<sup>83</sup> Article 25(3)(d)(i) does not require article 30 intent regarding the specific underlying crime,<sup>84</sup> as the accused must intend to further the group's criminal purpose as such, not each specific crime. Contributions may be political, organisational, symbolic, logistical, or otherwise non-operational,

<sup>79</sup> See the *Al Hassan* TJ, *supra* note 61, para. 1246; and the *Katanga* TJ, *supra* note 67, para. 1638.

<sup>80</sup> See the *Mbarushimana* Decision, *supra* note 65, para. 288.

<sup>81</sup> See the *Katanga* TJ, *supra* note 67, para. 1637.

<sup>82</sup> *Ibid.*

<sup>83</sup> See the "Minority Opinion of Judge Christine Van den Wyngaert" (Trial Chamber II), [No. ICC-01/04-01/07-3436-AnxI](#), 10 March 2014, para. 288; and the *Al Hassan* TJ, *supra* note 61, para. 1247.

<sup>84</sup> See the *Katanga* TJ, *supra* note 67, paras. 1620-1631.

provided they further the group's criminal purpose.<sup>85</sup> A contribution need not be 'decisive'; it must simply be intentional and of significance.

38. Conversely, article 25(3)(d)(ii) provides that the contribution shall be made "*in the knowledge of the intention of the group to commit the crime*", with reference to "*the crime*" implying that the accused "*must have knowledge of the specific crimes the group intends to commit*".<sup>86</sup> In other words, it would be insufficient to find that the accused only had a more generalised knowledge of a criminal purpose.<sup>87</sup> The cognitive threshold is therefore higher under subparagraph (ii) than under subparagraph (i).<sup>88</sup>

*a) The Chamber's own findings establish all elements of article 25(3)(d)(i) of the Statute*

39. As shown *infra*, all elements of article 25(3)(d)(i) are satisfied based on the Chamber's own factual findings, and the Appeals Chamber can apply the correct legal standard without making new factual determinations.

40. The Chamber found that the Anti-Balaka operated as a coordinated group pursuing a common criminal purpose to violently target, persecute, forcibly displace, and otherwise attack Muslim civilians in western CAR, including Bossangoa.<sup>89</sup> This squarely meets the definition of a "*group of persons acting with a common purpose*" under article 25(3)(d).<sup>90</sup> This common purpose lies at the core of the liability under this provision. Crucially, in paragraph 4108 of the Impugned Decision, the Chamber held that the Anti-Balaka's conduct in Bossangoa satisfied the requirements of several crimes under article 7(1), including rape, and that these crimes together formed the contextual basis for persecution:

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<sup>85</sup> See the Impugned Decision, *supra* note 4, *inter alia*, paras. 4116 and 4376.

<sup>86</sup> See the *Katanga* TJ, *supra* note 67, para. 1641; the *Al Hassan* TJ, *supra* note 61, para. 1248; the Impugned Decision, *supra* note 4, para. 4128; and the Prosecution Appeal, *supra* note 1, paras. 39-41, 54.

<sup>87</sup> See the *Al Hassan* TJ, *supra* note 61, para. 1248.

<sup>88</sup> *Ibid.* In light of article 30(3), article 25(3)(d)(ii) provides the accused needs to be aware of the intention of the group to commit *the crime* or know that the crime will occur in the ordinary course of events (requiring "*virtual certainty*").

<sup>89</sup> See the Impugned Decision, *supra* note 4, paras. 22, 451, 1296, 1319.

<sup>90</sup> As recognised in the *Katanga* TJ, *supra* note 67, paras. 1624-1631.

*“[...] the conduct of the Anti-Balaka in Bossangoa satisf[ies] the requirements of the crimes of murder, destruction of property, forcible transfer and deportation or displacement, imprisonment or other severe deprivation of liberty, and rape, as noted above”.<sup>91</sup>*

41. Rape therefore formed part of this persecutory campaign and the broader attack against the civilian population. This finding is decisive for article 25(3)(d)(i): the Chamber explicitly recognised rape as one of the crimes committed by the group in furtherance of its attack against the Muslim population. Rape therefore constituted part of the Anti-Balaka’s criminal activity and advanced its common purpose. Consistent with prior jurisprudence recognising that sexual violence committed during coordinated group attacks may form part of the group’s criminal activity,<sup>92</sup> the rapes underlying Counts 40, 41, and 42 satisfy the second and third elements of article 25(3)(d)(i).

42. The Chamber also established that Mr Ngaïssona acted as a national coordinator, financier, organiser, political representative, and legitimising authority for the Anti-Balaka.<sup>93</sup> His actions included strengthening the group’s organisational structure; providing political and symbolic authority; facilitating operational capacity;<sup>94</sup> sustaining and promoting the Anti-Balaka’s violent campaign.<sup>95</sup> These findings satisfy the requirement that the contribution be intentional, aligned with the group’s criminal activity, and of significance to the group’s criminal operations.<sup>96</sup>

43. Under the Court’s jurisprudence, this is sufficient to satisfy article 25(3)(d)(i), even without intent or knowledge directed at the specific crime of rape.<sup>97</sup> In fact, there

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<sup>91</sup> See the Impugned Decision, *supra* note 4, para. 4108.

<sup>92</sup> See the *Ntaganda* TJ, *supra* note 36, paras. 936-939.

<sup>93</sup> See the Impugned Decision, *supra* note 4, paras. 38 and 1563-1575.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, para. 4113, *citing* para. 38. Based on its findings on Mr Ngaïssona’s contributions, the Chamber convicted him under article 25(3)(c) for a range of crimes perpetrated by the Anti-Balaka during the Bossangoa Attack, including attacks against the civilian population, murder, destructing the adversary’s property, forcible transfer and deportation, displacement, imprisonment and other forms of severe deprivation of physical liberty, and persecution.

<sup>96</sup> See the *Katanga* TJ, *supra* note 67, paras. 1637-1639.

<sup>97</sup> *Ibid.* See the *Al Hassan* TJ, *supra* note 61, paras. 1245-1248; the *Katanga* TJ, *supra* note 67, paras. 1637-1639; the *Mbarushimana* Decision, *supra* note 65, para. 289; and the “Public redacted version of ‘Annex 1

is no requirement that Mr Ngaïssona intended or knew that the specific crime of rape would be committed. Article 25(3)(d)(i) does not require intent directed at each underlying crime, only intent directed at the conduct which constitutes the contribution furthering the group's criminal purpose.<sup>98</sup> The Chamber's own findings confirm that Mr Ngaïssona contributions were made with the aim of furthering the Anti-Balaka's criminal purpose, which involved the commission of multiple crimes under the Statute against Muslim civilians, including rape.<sup>99</sup>

44. The Chamber repeatedly found that the Appellant's contributions were purposeful, sustained, and directed at supporting the Anti-Balaka's criminal objectives, including: funding Anti-Balaka operations, legitimising the movement internationally, promoting the Anti-Balaka as a national resistance force, empowering commanders who perpetrated crimes, and coordinating operations.<sup>100</sup> This constitutes acting "*with the aim of furthering the criminal purpose of the group*" within the meaning of article 25(3)(d)(i) of the Statute.<sup>101</sup> The sexual violence committed by Anti-Balaka fighters occurred during the very operations that Mr Ngaïssona actively enabled.

45. Because the Chamber recognised that rape was committed as part of the Anti-Balaka's attack<sup>102</sup> and that rape formed part of the group's conduct relevant to persecution,<sup>103</sup> the only remaining question was Mr Ngaïssona's mode of liability. Once the Chamber found that his liability could not be established under article 25(3)(c) for counts 40-42, the Chamber was legally required to assess Mr Ngaïssona's liability under article 25(3)(d)(i). The Chamber's failure to do so resulted in an incomplete and legally defective Judgment. Had the Chamber applied

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- Prosecution's Consolidated Response to the Defence No Case to Answer' 10 September 2018, ICC-02/11-01/15-1207-Conf-Anx1", 28 September 2018, [No. ICC-02/11-01/15-1207-Anx1-Red](#), para. 1985.

<sup>98</sup> *Ibid.*

<sup>99</sup> See also the Prosecution Appeal, *supra* note 1, paras. 1-3, 59-63, 89-101.

<sup>100</sup> See the Impugned Decision, *supra* note 4, paras. 3864-3870.

<sup>101</sup> See the Public redacted version of the "Decision on the confirmation of charges against Laurent Gbagbo" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-656-Red](#), 12 June 2014, paras. 252, 257-258.

<sup>102</sup> See the Impugned Decision, *supra* note 4, paras. 4095-4098.

<sup>103</sup> *Ibid.*, para. 4108.

article 25(3)(d)(i), the only reasonable conclusion - based entirely on its own factual findings - would have been to convict Mr Ngaïssona for rape and rape as persecution.

46. Paragraph 4108 of the Impugned Decision, combined with the Chamber's extensive findings regarding Mr Ngaïssona's intentional contribution to the Anti-Balaka's criminal purpose, demonstrates that all elements of article 25(3)(d)(i) were satisfied. The failure to assess this confirmed mode of liability is a material error of law requiring correction.

## **2. Concerns about the Chamber's application of article 25(3)(c) of the Statute to the crime of rape**

47. The Victims further express their concerns regarding the overly restrictive interpretation of the mental element of aiding and abetting adopted by the Chamber in its application of article 25(3)(c) to the crimes of rape (Counts 40 and 41) and rape as an underlying act of persecution (Count 42). Although the Prosecution does not challenge this aspect of the Impugned Decision, it notes that the Chamber applied an unduly demanding foreseeability test to rape, while simultaneously finding that Mr Ngaïssona intended to facilitate other crimes – such as murder, torture and persecution – committed in the course of the same attack.<sup>104</sup>

### ***a) Applicable law under article 25(3)(c) of the Statute***

48. Under article 25(3)(c) of the Statute,<sup>105</sup> 'aiding', 'abetting' and 'otherwise assisting', whilst separate terms, are conceptualised as one "*single mode of liability*".<sup>106</sup> Ultimately, it covers any act – physical or psychological – which contributes to the commission or attempted commission of a crime.<sup>107</sup> Importantly, in engaging in such conduct, the accessory intends to facilitate the commission of the crime. In this respect, the contribution is directed toward the crime, and not the (main) perpetrator.<sup>108</sup>

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<sup>104</sup> See the Prosecution Appeal, *supra* note 1, paras. 66, 89 and 90.

<sup>105</sup> See article 25(3)(c) of the Statute.

<sup>106</sup> See the *Bemba et al.* AJ, *supra* note 8, paras. 1324-1325.

<sup>107</sup> See AMBOS (K.), *op. cit. supra* note 10, p. 1218.

<sup>108</sup> See the *Bemba et al.* AJ, *supra* note 8, para. 1329.

### Objective elements

49. From the plain wording of the provision, the *actus reus* under 25(3)(c) is fulfilled when the “*person’s assistance in the commission of the crime facilitates or furthers the commission of the crime, as the showing of such an effect indicates that the person indeed assisted in its commission*”.<sup>109</sup> However, where such an effect is *not* shown, determining whether a conduct still amounts to ‘assistance in the commission of the crime’ within the meaning of article 25(3)(c) will depend on the facts of each case.<sup>110</sup>

50. Additionally, the contribution under 25(3)(c) “*does not require the meeting of any specific threshold*”.<sup>111</sup> In other words, the contribution need not be “*substantial*” or qualified in any other way.<sup>112</sup> Moreover, it is not necessary that the assistance be a *conditio sine qua non* to the commission of the principal offence; nor is it necessary that the assistance be given before the offence occurs; it can be given during or after.<sup>113</sup> Similarly, under article 25(3)(c), it is not necessary that an accessory aids, abets, or otherwise assists a *specific person*.<sup>114</sup> Therefore, whether such person is considered ‘principal perpetrator’, ‘intermediary perpetrator’ or ‘otherwise’, and whether they are “*identified, charged or convicted*”, is immaterial.<sup>115</sup>

### Subjective elements

51. Turning to the subjective element, article 25(3)(c) requires that the accessory act “[f]or the purpose of facilitating the commission of such a crime”, thus requiring a higher *mens rea* than the one under article 30.<sup>116</sup> However, this purpose requirement “*only*

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<sup>109</sup> *Ibid*, para. 1327.

<sup>110</sup> *Ibid*.

<sup>111</sup> See the Public redacted version of the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber VII), [No. ICC-01/05-01/13-1989-Red](#), 19 October 2016, para. 93 (“*Bemba et al. TJ*”).

<sup>112</sup> *Ibid*, para. 133. See also, the *Ongwen* Decision, *supra* note 73, para. 43. See also, the *Al Mahdi* Decision, *supra* note 73, para. 26; and the *Blé Goudé* Decision, *supra* note 67, para. 167.

<sup>113</sup> See the *Bemba et al. TJ*, *supra* note 111, para. 96.

<sup>114</sup> See the *Bemba et al. AJ*, *supra* note 8, para. 1329.

<sup>115</sup> *Ibid*. See also, the *Al Hassan TJ*, *supra* note 61, para. 1220.

<sup>116</sup> See AMBOS (K.) (Ed.), *op. cit. supra* note 10, p. 1225.

*refers to the act of facilitation, not to the main crime*".<sup>117</sup> This means that the accessory must have acted with the *aim of facilitating* the crime; it is not enough that the accessory *"merely knows that his or her conduct will assist the principal in the commission of the crime"*.<sup>118</sup>

52. In this regard, the mental element is twofold. Therefore, in addition to the purpose requirement, it is also required that the accessory *"had intent with regard to the principle crime pursuant to article 30"*,<sup>119</sup> meaning that the accessory must at least be aware that the crime will occur in the ordinary course of events. Thus, the accessory does not require knowledge of all the details of the crime in which they assist. As the Appeals Chamber stated, *"a person may be said to be acting for the purpose of facilitating the commission of a crime, even if he or she does not know all the factual circumstances in which it is committed"*.<sup>120</sup>

#### **b) Submissions on the Chamber's foreseeability analysis**

53. Under article 25(3)(c) of the Statute, aiding or abetting requires that the accused act *"for the purpose of facilitating"* the commission of the crime and with *"intent and knowledge"* that his assistance would facilitate the crime. This *mens rea* may be satisfied where the accused is aware that, in the ordinary course of events, their assistance will facilitate the commission of the crime.<sup>121</sup> The Chamber applied this standard to crimes such as murder, torture, persecution, displacement, and destruction of property, finding that Mr Ngaïssona's awareness that the Anti-Balaka would *"target Muslim civilians in the ordinary course of events"* sufficed to establish his responsibility.<sup>122</sup> Yet for rape, the Chamber held that Mr Ngaïssona lacked the requisite awareness, concluding

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<sup>117</sup> *Ibid.*

<sup>118</sup> See the *Al Hassan* TJ, *supra* note 61, para. 1227.

<sup>119</sup> *Ibid*, para. 1228.

<sup>120</sup> See the *Bemba et al.* AJ, *supra* note 8, para. 1400. See also, the *Al Hassan* TJ, *supra* note 61, para. 1228.

<sup>121</sup> See, *inter alia*, the *Bemba et al.* AJ, *supra* note 8, para. 769.

<sup>122</sup> See the Impugned Decision, *supra* note 4, para. 4294.

that he did not know that rape would occur during the Bossangoa attack “*in the ordinary course of events*”.<sup>123</sup>

54. Therefore, it appears that the Chamber applied two foreseeability standards to conduct arising from the same criminal context - the Bossangoa attack, common purpose - targeting Muslim civilians, pattern of Anti-Balaka violence, and factual findings. Having established that the targeting of Muslim civilians predictably entailed murder, torture, persecution, and displacement, the Chamber provided no principled basis for treating rape differently. The Victims submit that the differentiated treatment of sexual violence is indicative of a deeper analytical approach, rooted in the implicit mischaracterisation of rape as an incidental or opportunistic crime, instead of a foreseeable and systematic component of attacks against civilian populations. This concern is further addressed below, in response to Ground 2(C) of Mr Ngaïssona Appeal.<sup>124</sup>

*c) Submissions on the Chamber's application of an unduly restrictive standard to sexual violence*

55. The Chamber found that the Anti-Balaka committed rape during the Bossangoa attack.<sup>125</sup> It further held that rape was among the acts that formed part of the persecutory conduct of the Anti-Balaka.<sup>126</sup> These findings establish that rape was committed: by Anti-Balaka elements, as part of the same attack, and as part of the same criminal campaign.

56. When an accused intentionally contributes to a violent campaign known to include multiple forms of criminality, they are liable under article 25(3)(c) of the Statute for all such crimes that occur in the ordinary course of the attack. Instead of applying this principle, the Chamber artificially isolated rape from the broader pattern of Anti-Balaka violence, despite the fact that sexual violence is a well-documented and

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<sup>123</sup> *Ibid*, paras. 4126-4132.

<sup>124</sup> See *infra*, paras. 142-150

<sup>125</sup> *Ibid*, paras. 4095-4098.

<sup>126</sup> *Ibid*, para. 4108.

recurrent feature of ethnically and religiously motivated attacks;<sup>127</sup> and the Chamber itself recognised rape as part of the Anti-Balaka's criminality during this very operation. The Chamber's reasoning appears to impose a higher threshold for attributing responsibility for sexual violence compared to other crimes such as murder, torture, and persecution. This approach stands in tension with the Chamber's view that sexual violence is not "*an 'exceptional' occurrence in the context of armed conflicts*".<sup>128</sup> It is also inconsistent with the relevant jurisprudence<sup>129</sup> and authoritative United Nations reporting which consistently recognise sexual violence as a recurrent and systemic feature of such contexts.<sup>130</sup> The Chamber's erroneous approach thereby draws an artificial distinction between forms of violence committed in the course of the same attack, without any principled basis.

57. Once an accused is aware that their assistance facilitates the group's violent attack, they need not foresee the precise modality.<sup>131</sup> In this sense, facilitating a violent campaign suffices for article 25(3)(c) liability for all crimes committed in its ordinary execution. Sexual violence must not be subjected to higher evidentiary or mental-element thresholds than other article 7 crimes<sup>132</sup> and patterns of sexual violence must be understood as part of group criminality, not as incidental anomalies.<sup>133</sup>

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<sup>127</sup> *Ibid*, para. 4130. See also, the "Report of the Secretary-General on Conflict-related sexual violence", [S/2025/389](#), Security Council, United Nations, 15 July 2025.

<sup>128</sup> See the Impugned Decision, *supra* note 4, para. 4130.

<sup>129</sup> See e.g., ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, [Judgment](#) (Trial Chamber I), 2 September 1998 (the "*Akayesu* TJ") - in this case rape and sexual violence were for the first time recognized as crimes that could amount to genocide. See also, ICTY, *Prosecutor v. Krstić*, [Judgment](#) (Trial Chamber ), Case No. IT-98-33-T, 2 August 2001, para. 616 – rape was found to be among the crimes that were natural and foreseeable consequences of the ethnic cleansing campaign.

<sup>130</sup> See e.g., the Report of the Secretary-General on Conflict-related sexual violence, *supra* note 127. See also, the Report of the Secretary-General on Conflict-related sexual violence, [S/2024/292](#), Security Council, United Nations, 4 April 2024.

<sup>131</sup> See the *Bemba et al.* AJ, *supra* note 8, para. 1400. See also, the *Al Hassan* TJ, *supra* note 61, para. 1228.

<sup>132</sup> In the same vein see, *inter alia*, SACOUTO (S.), SADAT (N. L.) and VISEUR (P.), '[Collective criminality and sexual violence: fixing a failed approach](#)' (2019) Leiden J Int'l L 1. See also INDER B., 'Expert Panel: Prosecuting sexual violence in conflict-Challenges and lessons learned. A critique of the Katanga judgement' (speech delivered at the Global summit to end sexual violence in conflict, 11 June 2014) < <http://iccwomen.org/documents/Global-Summit-Speech.pdf> > .

<sup>133</sup> See e.g., ICTR, the *Akayesu* TJ, *supra* note 129, para. 730 and ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, [Judgment](#) (Appeals Chamber), 15 July 1999, para. 190 (the "*Tadić* AJ"): "*Most of the time [international] crimes do not result from the criminal propensity of single individuals but constitute*

58. The Chamber's approach in this case risks reinforcing precisely the type of marginalisation of sexual violence that prior Chambers have expressly warned against. While accepting that rape occurred as part of the Anti-Balaka attack, the Chamber declined to attribute responsibility based on an overly narrow and legally erroneous foreseeability analysis. Applying the correct legal standard to the Chamber's own findings leads inexorably to the conclusion that rape was committed by the Anti-Balaka as part of their attack, Mr Ngaïssona knew that Anti-Balaka operations against Muslim civilians entailed a pattern of extreme violence, and his intentional contributions facilitated the attack in which the rape occurred.

59. Victims have an interest in ensuring that sexual violence is not subjected to an elevated or exceptional evidentiary threshold inconsistent with the Court's established jurisprudence. Recognition of rape as part of the "*ordinary course of events*" of the Anti-Balaka's targeted violence is essential to correcting harmful patterns that have historically led to the minimisation or marginalisation of sexual violence in international criminal proceedings. Victims regret that the Chamber's differentiated foreseeability analysis under article 25(3)(c) of the Statute perpetuates such patterns.

## VII. SUBMISSIONS ON MR NGAÏSSONA APPEAL

### 1. Ground 1: Mr Ngaïssona was convicted on the basis of the correct evidentiary framework

#### a) *Ground 1(A) - The Chamber correctly applied relevant evidentiary standards in its evaluation of the relevance, reliability and weight of the evidence*

60. The Defence argues that the Chamber "*systematically misapplied*" relevant evidentiary standards in its evaluation of the evidence,<sup>134</sup> in particular in relation to circumstantial and hearsay evidence, corroboration, rule 68(2) statements and testimonial evidence. It also contends that the Chamber did not apply the correct

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*manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design".*

<sup>134</sup> See the Ngaïssona Appeal, *supra* note 3, para. 10.

burden and standard of proof, resulting in critical findings of fact against the Appellant on an “*unsound evidentiary basis*” without a coherent and well-reasoned opinion.<sup>135</sup>

61. However, a careful analysis of the Judgment reveals that the Chamber correctly applied the relevant evidentiary standards in its evaluation of the relevance, reliability and weight of the evidence. In fact, the Defence merely disagrees with the Chamber’s use of discretion where it is warranted, or its final opinion, notwithstanding the clear and coherent reasons given.

### Circumstantial evidence

62. Circumstantial evidence is evidence “*which allows the Chamber to draw a reasonable inference about the existence [...] of a fact based on the evidence*”.<sup>136</sup> Accordingly previous jurisprudence has established that “*its cogency depends on the unlikelihood of coincidence*” hence requiring for the said fact to be “*explained rationally only by the existence of that fact*”.<sup>137</sup> Unlike direct evidence, which establishes the existence or non-existence of a fact on its own,<sup>138</sup> circumstantial evidence requires inferences to be drawn before it can establish the facts in regard to which it is adduced.<sup>139</sup> Settled jurisprudence holds that nothing prevents a conviction based on circumstantial evidence.<sup>140</sup> Where a factual finding is based on an inference drawn from

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<sup>135</sup> *Ibid.*

<sup>136</sup> See the “Trial Judgment” with public annexes A, C and D, and confidential and public redacted Annex B (Trial Chamber I), [No. ICC-02/05-01/20-1240](#), 6 October 2025, para. 173 (the “*Abd-Al-Rahman TJ*”).

<sup>137</sup> See ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, [Judgement](#) Trial Chamber, 1 September 2004, para. 35 citing Criminal Evidence (3rd Ed.), MAY (R.), London: Sweet & Maxwell, 1995; and ICTY, *Prosecutor v. Delić*, Case No. IT-04-83-T, [Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court](#) (Trial Chamber), 24 July 2007, para. 34, citing Criminal Evidence (5th ed.) Richard May & Stephen Powell, Sweet & Maxwell Ltd., 2004.

<sup>138</sup> See the *Abd-Al-Rahman TJ*, *supra* note 136, para. 173.

<sup>139</sup> *Ibid.* See also *Evidence Text & Materials*, ed. Durston, (Oxford), p. 56.

<sup>140</sup> See the *Bemba et al. AJ*, *supra* note 8, para. 868. See also, the *Abd-Al-Rahman TJ*, *supra* note 136, para. 174 and the *Ntaganda TJ*, *supra* note 36, para. 69, both judgments cite the general introduction to the Elements of Crimes which provides that “*existence of intent and knowledge can be inferred from the relevant facts and circumstances*”. See also, the *Katanga TJ*, *supra* note 67, para. 109, and the Public version of the “Judgment pursuant Article 74 of the Statute” (Trial Chamber I), [No. ICC-01/04-01/06-2842](#), 14 March 2012, para. 988 (the “*Lubanga TJ*”), para. 111. See also, ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, [Appeal Judgement](#) (Appeals Chamber), 23 October 2001, para. 303 ( the “*Kupreškić et al. AJ*”) and

circumstantial evidence, the finding is only established beyond reasonable doubt if it was the only reasonable conclusion that could be inferred.<sup>141</sup> However, each piece of circumstantial evidence need not be proven beyond a reasonable doubt.<sup>142</sup> Furthermore, a trial chamber is not required to articulate every step of its reasoning as long as it indicates the basis for its inference,<sup>143</sup> and that it is satisfied that retained inference was the only reasonable one.<sup>144</sup> Nevertheless, where it has “*made an essential finding based on an inference*”, a chamber is required to explain “*in detail how it reached the factual conclusion in question*”.<sup>145</sup> “Alternative” reasonable inferences may not be speculative and must arise from admitted evidence.<sup>146</sup>

63. In the case at hand, the Chamber correctly recalled that the statutory framework does not prevent it from drawing inferences based on circumstantial evidence, nor

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ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, [Judgement](#) (Appeals Chamber), 30 January 2015, para. 1233 (the “*Popović et al. AJ*”); ICTR, *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-A, [Judgement](#) (Appeals Chamber), 8 May 2012, para. 270 (the “*Hategekimana AJ*”); *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-A, [Judgement](#) (Appeals Chamber), 21 May 2007, para. 49.

<sup>141</sup> See the *Bemba et al. AJ*, *supra* note 8, paras. 868 and 1095; and the *Abd-Al-Rahman TJ*, *supra* note 136, para. 176 stating that: “*the Chamber has only made adverse findings [...] on the basis of circumstantial evidence, when it was convinced that it was the only reasonable conclusion that could be drawn from the relevant evidence*”. See also, STL, *In the case against Al Jadeed and Al Khayat*, Case No. STL-14-05/A/AP, F0028, [Judgment on Appeal](#) (Appeals Panel), 8 March 2016, paras. 104, 167, 169 (the “*Al Jadeed and Al Khayat AJ*”); *In the case against Akhbar Beirut S.A.L. and Al Amin*, Case No. STL-14-06/T/CJ, F0262, [Judgement](#) (Contempt Judge), 15 July 2016, para. 109; IRMCT, *Prosecutor v. Karadžić*, Case No. MICT-13-55-A, [Judgement](#) (Appeals Chamber), 20 March 2019, para. 559: “*where a fact on which a conviction relies is established on the basis of an inference, that inference must be the only reasonable one available on the evidence*”; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, [Judgement](#) (Appeals Chamber), 30 November 2006, para. 218 (the “*Galić AJ*”); *Prosecutor v. Delalic*, Case No. IT-96-21-A, [Judgement](#) (Appeals Chamber), 20 February 2001, para. 458 (the “*Čelebići AJ*”); ICTR, *Prosecutor v. Karemera*, Case No. ICTR-98-44-A, [Judgement](#) (Appeals Chamber), 29 September 2014, paras. 146, 535; and *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-A, [Judgement](#) (Appeals Chamber), 29 September 2014, para. 191 (the “*Nizeyimana AJ*”).

<sup>142</sup> See the *Bemba et al. AJ*, *supra* note 8, para. 868; and the *Galić AJ*, *supra* note 141, para. 218.

<sup>143</sup> See ICTY, *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-A, [Judgement](#) (Appeals Chamber), 30 June 2016, para. 867 (the “*Stanišić & Župljanin AJ*”); *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, [Judgement](#) (Appeals Chamber), 27 January 2014, para. 157 (the “*Đorđević AJ*”); and *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, [Judgement](#) (Appeals Chamber), 17 March 2009, para. 192.

<sup>144</sup> See ICTY, *Stanišić and Župljanin AJ*, *supra* note 143, para. 867; *Đorđević AJ*, *supra* note 143, para. 157; *Krajišnik AJ*, *supra* note 143, para. 192.

<sup>145</sup> See the Impugned Decision, *supra* note 4, para. 136 with reference to the *Al Hassan TJ*, *supra* note 61, para. 21, and the references cited therein.

<sup>146</sup> See the *Ngudjolo AJ*, *supra* note 47, paras. 57-63, 73-78, 86-88, 98-104, 109-118; the *Đorđević AJ*, *supra* note 143, paras. 728-729; ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, [Judgement](#) (Appeals Chamber), 17 July 2008, para. 109; (the “*Strugar AJ*”); the *Tadić AJ*, *supra* note 133, paras. 178-184. ICTR, *Prosecutor v. Bagosora*, Case No. ICTR-98-41-A, [Judgement](#) (Appeals Chamber), 14 December 2011, para. 562 (the “*Bagosora AJ*”).

does the standard of proof beyond reasonable doubt require that this evidence be excluded.<sup>147</sup> It further stated that, when making findings based on circumstantial evidence, it will reach a conclusion beyond reasonable doubt when convinced that was the *only* reasonable inference to be drawn from the relevant facts. Furthermore, the Chamber emphasised that it “*will assess all of the evidence before it holistically*” and in light of the Court’s jurisprudence.<sup>148</sup>

### Hearsay evidence

64. Hearsay is defined as “*the statement of a person made otherwise than in the proceedings in which it is tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what that person says*”.<sup>149</sup> A trial chamber may rely on evidence, including hearsay evidence, as long as it “*takes into account the context and conditions in which such evidence was obtained*” and provided it is reliable and credible.<sup>150</sup> Where an item of evidence is, in whole or in part, hearsay in nature may be a relevant consideration when assessing its weight or probative value, but does not render it inadmissible in the proceedings before this Court.<sup>151</sup> A trial chamber has thus a “*wide discretion as to the assessment of the weight and probative value of the hearsay evidence alongside with other factors relevant to the evaluation of the totality of the evidence*”.<sup>152</sup>

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<sup>147</sup> See the Impugned Decision, *supra* note 4, para. 136.

<sup>148</sup> *Ibid*, para. 137.

<sup>149</sup> See ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, [Judgement](#) (Appeals Chamber), 17 December 2004, para. 282; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, [Decision on Prosecutor’s Appeal on Admissibility of Evidence](#) (Appeals Chamber), 16 February 1999, para. 14.

<sup>150</sup> See the *Ntaganda* TJ, *supra* note 36, paras. 67- 68; the *Bemba* TJ, *supra* note 63, para. 238, and the *Ngudjolo* AJ, *supra* note 47, para. 226. See also, ICTY, the *Popović et al.* AJ, *supra* note 140, para. 1276; *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, [Judgement](#) (Appeals Chamber), 23 January 2014, para. 846 (the “*Šainović et al. AJ*”); *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-A, [Judgement](#) (Appeals Chamber), 4 December 2012, para. 577 (the “*Lukić and Lukić AJ*”), and the *Đorđević* AJ, *supra* note 143, paras. 229 and 397. ICTR, *Prosecutor v. Bizimungu*, Case No. ICTR-00-56B-A, [Judgement](#) (Appeals Chamber), 30 June 2014, paras. 180, 236; the *Nizeyimana* AJ, *supra* note 141, para. 95.

<sup>151</sup> See the *Bemba et al.* AJ, *supra* note 8, para. 680.

<sup>152</sup> See the *Lukić and Lukić* AJ, *supra* note 150, para. 577. See also *Prosecutor v. Milošević*, Case No. IT-98-29/1-A, [Judgement](#) (Appeals Chamber), 12 November 2009, fn. 731. See also, ICTR, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, [Judgement](#) (Appeals Chamber), 28 November 2007, para. 831; ICTR, *Prosecutor v. Karera*, Case No. ICTR-01-74-A, [Judgement](#) (Appeals Chamber), 2 February 2009, para. 39; ICTY, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, [Judgement](#) (Appeals Chamber), 3 May 2006, para. 217.

65. In the Impugned Decision, the Chamber correctly recalled that there is “no procedural bar to the introduction or reliance on hearsay evidence in the Court’s legal framework”.<sup>153</sup> The characterisation as hearsay does not necessarily deprive the evidence of its probative value.<sup>154</sup> Therefore, while the weight or probative value of such evidence may be lower, this will “depend upon the infinitely variable circumstances which surround hearsay evidence”, such as whether it is anonymous.<sup>155</sup>

Corroboration of specific types of items of evidence

66. As determined by the Appeals Chamber, “[d]epending on the circumstances, a single piece of evidence [...] may suffice to establish a specific fact”.<sup>156</sup> It has also indicated that there is no category of witness that is *per se* unreliable.<sup>157</sup> A trial chamber may find, in the specific circumstances of the case, that corroboration of a particular witness’s testimony – or part thereof – is needed for it to be convinced of its reliability and credibility; however, this does not mean that corroboration is required as a matter of law when evaluating the testimony of any witness.<sup>158</sup> Furthermore, “while corroboration is ‘an element that a reasonable trier of fact may consider in assessing the evidence’, the question of whether or not to consider it forms part of the Trial Chamber’s discretion”.<sup>159</sup>

67. In the Impugned Decision, the Chamber recalled that rule 63(4) of the Rules of Procedure and Evidence (the “Rules”) does not impose any legal requirement of corroboration to prove any crime within the jurisdiction of the Court.<sup>160</sup> It specifically addressed the Defence’s submissions that the Prosecution’s case was built on “uncorroborated insider evidence, prior recorded statements and impugned witnesses”, and

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<sup>153</sup> See the Impugned Decision, *supra* note 4, para. 135.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> See the *Lubanga* AJ, *supra* note 8, para. 218. See also, the *Ntaganda* TJ, *supra* note 36, para. 75.

<sup>157</sup> See the *Bemba* et al. AJ, *supra* note 8, para. 1081.

<sup>158</sup> *Ibid.*, para. 1084.

<sup>159</sup> See the *Ngudjolo* AJ, *supra* note 47, para. 148, referring to ICTY, *Prosecutor v. Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, [Judgment](#) (Appeals Chamber), 5 May 2009, para. 264 (the “*Mrkšić and Šljivančanin* AJ”) and referring to *Prosecutor v. Limaj* et al., Case No. IT-03-66-A, [Judgment](#) (Appeals Chamber), 27 September 2007, para. 203. See also, the *Ntaganda* TJ, *supra* note 36, para. 75.

<sup>160</sup> See the Impugned Decision, *supra* note 4, para. 138.

that it relied on “*contaminated testimonies of key witnesses*”.<sup>161</sup> It correctly considered these allegations to refer to the evidence weight and probative value - which are issues more appropriately discussed in the context of each witnesses’ credibility assessment, and in the Chamber’s evidentiary analysis for finding of facts.<sup>162</sup>

68. The Defence also challenges the use of P-2200, P-2269 and P-1847’s evidence, arguing that the Chamber could not rely on untested evidence, without corroboration, in making findings crucial to Mr Ngaïssona’s criminal responsibility.<sup>163</sup> These arguments are without merit. With regard to P-2200, the CLRV refer to their submissions *infra* showing that the Chamber did not rely on his evidence without corroboration.<sup>164</sup> With respect to P-1847, the Chamber expressly concluded that the Defence was put “*in a position to fully and meaningfully question the Witness*”.<sup>165</sup> This conclusion was subsequently confirmed by the Appeals Chamber.<sup>166</sup> Therefore, P-1847’s evidence cannot be characterised as untested evidence, as the Defence had a full and meaningful opportunity to question said witness.

*The Chamber provided a reasoned opinion*

69. Although a trial chamber has an obligation to provide a reasoned opinion,<sup>167</sup> it is not required to individually set out each and every factor that was before it as long as it indicates with sufficient clarity the basis of the decision.<sup>168</sup> Thus, a trial chamber enjoys a margin of discretion in determining which issues require express treatment

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<sup>161</sup> *Ibid*, para. 139.

<sup>162</sup> *Ibid*. See also, the *Bemba et al. AJ*, *supra* note 8, para. 1084.

<sup>163</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 17-19.

<sup>164</sup> See *infra* para. 105.

<sup>165</sup> See the Impugned Decision, *supra* note 4, para. 368, referring to the “Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules” (Trial Chamber V), No. [ICC-01/14-01/18-2126-Red](#), 6 October 2023, para. 103.

<sup>166</sup> See the Impugned Decision, *supra* note 4, para. 368, referring to the “Judgment on the appeal of Mr Patrice Edouard Ngaïssona against the decision of Trial Chamber V of 6 October 2023 entitled “Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules”” (Appeals Chamber), No. [ICC-01/14-01/18-2501-Red](#), 20 May 2024, paras. 78-79, 95-98, 102, 111-117.

<sup>167</sup> See the *Lubanga AJ*, *supra* note 8, para. 24, referring to the *Kupreškić et al. AJ*, *supra* note 140, para. 32.

<sup>168</sup> See the *Bemba et al. AJ*, *supra* note 8, para. 105.

in its reasoning. Not every alleged or perceived shortcoming in reasoning constitutes a violation of article 74(5) of the Statute.<sup>169</sup>

70. In assessing whether such a breach has occurred, the Appeals Chamber examines whether the chamber articulated reasoning in support of the impugned factual finding. Where particular items of evidence are not expressly addressed, the Appeals Chamber does not intervene merely because such evidence is, on its face, relevant.<sup>170</sup> Rather, it undertakes a further assessment as to whether the omitted evidence was of such *significance* that it required explicit consideration.<sup>171</sup> Only where both thresholds are met - relevance and material significance - may the absence of express reasoning give rise to a breach of article 74(5).

71. The Defence alleges that due to the Judgment's "*considerable length*", it "*suffers from major deficiencies in reasoning*" and that the factual findings are often "*extremely vague and general*" with a weak or missing evidentiary basis.<sup>172</sup> The CLRV observe, however, that in light of the complexity of the case involving two accused a detailed judgment was both expected and necessary. The length of the Judgment enabled the Chamber to conduct a holistic evaluation of the evidence and to reach reasoned and coherent conclusions, clearly setting out its findings in accordance with the established evidentiary framework.<sup>173</sup>

72. The Chamber evidently identified the evidentiary material upon which it relied, explained whether such evidence was corroborated, and set out the reasons for the weight it attributed to particular items of evidence. The Defence's disagreement with the outcome of the Chamber's factual findings does not, in itself, constitute a sufficient basis for appeal. Moreover, the Chamber addressed the Defence's contention that the Prosecution applied "*double standards*" to the evidence by allegedly "*wrongly labelling*" as incriminating evidence that was later disclosed as exculpatory in the "Mokom

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<sup>169</sup> *Ibid*, para. 106.

<sup>170</sup> *Ibid*.

<sup>171</sup> *Ibid*.

<sup>172</sup> See the Ngaissona Appeal, *supra* note 3, para. 22.

<sup>173</sup> See the Impugned Decision, *supra* note 4, para 127.

case”,<sup>174</sup> and correctly found this argument to be inapposite.<sup>175</sup> It reasoned that, even where there may be factual overlap between the two cases, the charges against the respective defendant are distinct, and the manner in which an item of evidence was characterised in the *Mokom* case does not require that it be characterised identically in the present proceedings.<sup>176</sup>

### Standard and Burden of Proof

73. A trial chamber is required to make findings of fact to the standard of proof of “*beyond reasonable doubt*” only in relation to those facts that are indispensable to enter a conviction, namely those constituting the elements of the crimes or mode of liability of the accused as charged.<sup>177</sup> The type of evidence, direct or circumstantial, does not change the standard of proof.<sup>178</sup> Reasonable doubt must be based on logic and common sense; and have a rational link to the evidence, lack of evidence or inconsistencies in

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<sup>174</sup> See the “Corrected Version of Ngaïssona Defence Closing Brief”, [No. ICC-01/14-01/18-2736-Conf-AnxA-Corr](#), 22 November 2024, paras. 131-134. A corrected public redacted version was notified on 11 December 2024, [No. ICC-01/14-01/18-2736-AnxA-Corr-Red](#) (the “Ngaïssona Closing Brief”).

<sup>175</sup> See the Impugned Decision, *supra* note 4, para. 142.

<sup>176</sup> *Ibid.*

<sup>177</sup> See the *Bemba* AJ, *supra* note 45, para. 42 and the *Lubanga* AJ, *supra* note 8, para. 22. See also, the *Abd-Al-Rahman* TJ, *supra* note 136, para. 167; the *Ongwen* AJ, *supra* note 45, para. 321; the *Ntaganda* AJ, *supra* note 49, para. 37; the *Bemba et al.* AJ, *supra* note 8, para. 868 and the *Ngudjolo* AJ, *supra* note 47, paras. 124-125. See also, the “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’” (Appeals Chamber), [No. ICC-01/04-01/06-2205 OA15 OA16](#), 8 December 2009, fn. 163, and the “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’” (Appeals Chamber), [No. ICC-01/04-01/07-3363 OA13](#), 27 March 2013, para. 50. See also, STL, the *Al Jadeed and Al Khayat* AJ, *supra* note 141, paras. 126 and 169. See also, ICTY, the *Dorđević* AJ, *supra* note 143, para. 296; *Prosecutor v. Milošević*, Case No. IT-98-29/1-A, [Judgment](#) (Appeals Chamber), 12 November 2009, para. 20 (the “*Milošević* AJ”); *Prosecutor v. Halilović*, Case No. IT-01-48-A, [Judgment](#) (Appeals Chamber), 16 October 2007, para. 125. See also, ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, [Judgment](#) (Appeals Chamber), 7 July 2006, fn. 356; SCSL, the *Taylor* AJ, *supra* note 140, para. 181 citing *inter alia* the *Milošević* AJ, para. 20.

<sup>178</sup> See the *Bemba et al.* AJ, *supra* note 8, paras. 1095, 1166, 1386. See also, ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, [Judgment](#) (Appeals Chamber), 22 March 2006, para. 219; the *Mrkšić and Šljivančanin* AJ, *supra* note 159, fn. 34; the *Strugar* AJ, *supra* note 146, fn. 35.

the evidence.<sup>179</sup> Thus, the “*beyond reasonable doubt*” standard cannot be contested invoking frivolous<sup>180</sup> doubt based on empathy or prejudice.<sup>181</sup>

74. The Defence argues that for several key findings that led to Mr Ngaïssona’s conviction the Chamber failed to apply the correct burden and standard of proof.<sup>182</sup> In particular, it “*lowered the evidentiary threshold for findings of fact by excessively relying on (anonymous) hearsay evidence, failing to properly assess corroboration and apply the proper legal standard to circumstantial evidence*”;<sup>183</sup> and, when presented with exculpatory evidence, it reached the conclusion that this failed to “*undermine*” findings that were key to the Appellant’s criminal responsibility, when it should have noted the reasonable doubts arising from such evidence.<sup>184</sup> The Defence’s allegations only illustrate its disagreement with the decision – regardless of the detailed reasoning provided by the Chamber within its power and discretion.

75. In conclusion, the Defence’s submissions that the Chamber systematically misapplied relevant evidentiary standards are fallacious. The examples provided *infra* illustrate the hollowness of these claims.

***b) Ground 1(B) – The Chamber properly assessed witness credibility***

*The Chamber correctly assessed the credibility of ‘accomplice witnesses’*

76. Whether a particular witness is considered reliable will depend on the circumstances of the case.<sup>185</sup> The status of a witness as an “*accomplice*” is a factor that must be carefully weighed when assessing the reliability of their evidence; however, it does not render the evidence inherently unreliable, nor does it, as a matter of law, require corroboration.<sup>186</sup>

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<sup>179</sup> See the *Ngudjolo* AJ, *supra* note 47, paras. 109 *et seq.* See also, ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, [Judgment](#) (Appeals Chamber), 26 May 2003, para. 488.

<sup>180</sup> See the *Ongwen* TJ, *supra* note 61, para. 228.

<sup>181</sup> See the *Ngudjolo* AJ, *supra* note 47, para. 109.

<sup>182</sup> See the *Ngaïssona* Appeal, *supra* note 3, para. 25.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> See the *Bemba et al.* AJ, *supra* note 8, para. 1531.

<sup>186</sup> *Ibid.*

77. The Defence alleges that the Chamber failed to properly identify and apply the relevant law,<sup>187</sup> to exercise the required degree of caution in substance,<sup>188</sup> and that this error materially affected the Judgment.<sup>189</sup>

78. However, the Chamber did not merely invoke “*great caution*” in a formulaic manner, nor did it fail to apply the legal framework articulated by the Appeals Chamber in the *Ntaganda* case. Rather, it expressly acknowledged the need for caution in assessing the testimony of witnesses who may have had motives or incentives to implicate Mr Ngaïssona and proceeded to apply that caution through a detailed, witness-specific assessment of credibility and reliability.<sup>190</sup> The Chamber set out its reasoning for relying on such testimony, including by addressing discrepancies, inconsistencies, and challenges raised by the Defence, and by evaluating the evidence in light of the case record as a whole.

79. In particular, the Chamber fully set out its reasoning on the evaluation of P-2027’s testimony, including any challenge to credibility.<sup>191</sup> A chamber is not required to formally characterise a witness as an “*accomplice witness*”, but a “*circumstance that needs to be carefully considered when assessing the reliability of his or her evidence, [...] does not make this evidence unreliable per se or in need of corroboration as a matter of law*”.<sup>192</sup>

80. The Defence conveniently omits to quote the second part of the reference that while the Chamber “*noted various discrepancies between the witness’s statement and the information he provided in court, [...] they did not go to such extent as to render his evidence fully unreliable*”.<sup>193</sup> Furthermore, the Chamber emphasised at various parts of the

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<sup>187</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 28-30.

<sup>188</sup> *Ibid*, paras. 26 and 30.

<sup>189</sup> *Ibid*, paras. 28-43.

<sup>190</sup> See the Impugned Decision, *supra* note 4, paras. 205, 206-218, 233-247, 308-314, 348-354, 390-399.

<sup>191</sup> *Ibid*, paras. 390-399.

<sup>192</sup> See the *Ntaganda* AJ, *supra* note 49, para. 655 referencing the *Bemba et al.* AJ, *supra* note 8, para. 1531.

<sup>193</sup> See the Impugned Decision, *supra* note 4, para. 392.

Impugned Decision that it assessed with “great caution” the veracity of P-2027’s claims in light of other evidence received.<sup>194</sup>

81. Similarly, with respect to the assessment of the credibility of D30-4504 and D30-4848, the Chamber correctly applied the relevant law and provided sufficient reasoning, in engaging in a detailed examination of the challenges raised to each witness’s credibility and clearly explaining the reasons underpinning its conclusions.<sup>195</sup>

82. Concerning the assessment of the credibility of P-0801, P-0306, and P-0965, the Defence claims that the Chamber failed to provide sufficient reasoning, alleging “*a combination of failures to give weight or sufficient weight to relevant considerations, a misappreciation of facts that led to conclusions not based on evidence, logic, reason or common sense, and a lack of reasoning*”.<sup>196</sup> However, a reading of the relevant portions of the Impugned Decision allows to conclude that the Chamber provided sufficient reasoning to support its credibility findings. As an example, it provided a detailed analysis on the complexities of P-0801’s evidence and credibility.<sup>197</sup> It noted the Defence’s arguments on his involvement in a scheme to incriminate Mr Ngaïssona,<sup>198</sup> and concluded that the testimony is still generally credible<sup>199</sup> and that the scheme allegations were “*pure speculation*”.<sup>200</sup>

83. Lastly, the CLRV recalls that the Chamber’s mandate is to assess the evidence on the case record in accordance with the applicable legal and evidentiary framework, not by reference to subjective notions of “*adequate scepticism*”.<sup>201</sup>

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<sup>194</sup> *Ibid*, para. 399. (Emphasis added).

<sup>195</sup> For D30-4504, see the Impugned Decision, *supra* note 4, paras. 446-456; for D30-4848, see the Impugned Decision, *supra* note 4, paras. 463-468.

<sup>196</sup> See the Ngaïssona Appeal, *supra* note 3, para. 33.

<sup>197</sup> See the Impugned Decision, *supra* note 4, paras. 233-247.

<sup>198</sup> *Ibid*, paras. 239 and 245.

<sup>199</sup> *Ibid*, para. 237.

<sup>200</sup> *Ibid*, paras. 244-245.

<sup>201</sup> See the Ngaïssona Appeal, *supra* note 3, para. 38.

*The Chamber correctly considered reliability and credibility*

84. The Defence brings a further challenge in relation to the testimony of P-0801, P-0965, P-0306 and P-2625.<sup>202</sup> In essence, it alleges unequal treatment of similar witnesses at the expense of a finding of guilt against the Appellant.<sup>203</sup> The Defence claims that any reasonable person would view said witnesses as untruthful, which should amount to a serious flaw in credibility and potential perjury.<sup>204</sup>

85. These arguments are further examples of a mere disagreement with the findings of the Chamber simply because they are unfavourable to the Defence. The Chamber conducted a fair and objective assessment of each witness on an individual basis and provided a reasoned explanation in support of its factual and credibility findings. The fact that this reasoning does not align with the Defence's preferred interpretation of the evidence, or with an outcome favourable to the Appellant, does not undermine its legal sufficiency and does not disclose an appealable ground.

86. As also noted by the Defence briefly,<sup>205</sup> a trial chamber is not mandated to corroborate witness testimony, but it may do so should the circumstances require it according to its discretion. In this context, deference must be accorded to the Chamber's assessment of witness testimony and its characterisation of the issues. Accordingly, no abuse of discretion or legal error in the assessment of the testimony of P-0801, P-0965, P-0306, and P-2625 can be identified.

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<sup>202</sup> *Ibid*, para. 49.

<sup>203</sup> *Ibid*, para. 57: "The failure to make adverse credibility findings and to assess testimony as 'accomplice testimony' are distinct but overlapping errors. However, the broad impacts on the Judgment in the evaluation of testimony for [P-0801, P-0965, P-0306 and P-2625] both resulted in inadequate scrutiny and a confirmation bias that downplayed inconsistencies and anomalies, leading to unreasonable incriminatory conclusions described through this brief". See also, para. 51: "Moreover, concluding that the witness was merely inaccurate - as opposed to wilfully untruthful - is not a reasonable conclusion to draw from the very reasoning of the Judgment". See also, para. 52: "By refusing to characterise these instances as lies, the Chamber failed to weight the evidence with all relevant factors and omitted a crucial overarching factor: the scepticism that should reasonably attach to an individual who has lied to a judge".

<sup>204</sup> *Ibid*, paras. 44 and 51.

<sup>205</sup> *Ibid*, para. 58.

87. The Defence also conflates unfavourable findings with a purported incorrect assessment of [REDACTED].<sup>206</sup> In this regard, the main argument relates to an alleged “scheme to falsely incriminate Mr Ngaïssona affected the credibility of testifying witnesses”.<sup>207</sup> However, the Chamber afforded [REDACTED].<sup>208</sup>

88. The Chamber explained that the “possibility that unavailable evidence may include exculpatory information is too hypothetical, without more, to qualify as a reasonable doubt. Accepting such a proposition is akin to requiring proof beyond all doubt, while what is required is instead proof beyond reasonable doubt”.<sup>209</sup> Accordingly, it committed no error in the assessment of [REDACTED].

89. The Defence further advances allegations of “tunnel vision” and “cognitive bias” on the part of the Chamber<sup>210</sup> without pursuing the appropriate procedural mechanism for raising judicial bias under the Statute. The Defence’s indirect allegations of bias, raised without identifying any appealable error or pursuing the proper procedural avenue for judicial disqualification under the Statute, amount to no more than disagreement with the Chamber’s findings and should be dismissed.

*The Chamber correctly weighed CDR evidence*

90. The Defence alleges that the Chamber erred in its evaluation of the call data records (the “CDR”) evidence by applying it inconsistently in assessing the credibility of different witnesses.<sup>211</sup> In essence, it would have improperly relied on CDR evidence to undermine the credibility of D30-4505. In light of the page-limit, the CLRV only make few considerations.

91. As the Chamber made clear, it assessed CDR and cell site material on a case-by-case basis, depending on the inference advanced by the parties and in light of the

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<sup>206</sup> See the Ngaïssona Appeal, *supra* note 3, para. [REDACTED].

<sup>207</sup> *Ibid*, para. 68 referring to the Impugned Decision, *supra* note 4, para. 431 [REDACTED].

<sup>208</sup> See the Impugned Decision, *supra* note 4, [REDACTED].

<sup>209</sup> *Ibid*, para. 129 referring to the Ongwen TJ, *supra* note 61, para. 229; Al Hassan TJ, *supra* note 61, para. 20.

<sup>210</sup> See the Ngaïssona Appeal, *supra* note 3, para. 76.

<sup>211</sup> *Ibid*, para. 81.

totality of the evidence.<sup>212</sup> This evidence generally carries low probative value and would only be relied upon within a holistic evaluation of the evidentiary record.<sup>213</sup> On the basis of expert telecommunications evidence presented by both parties, the Chamber correctly concluded that “*CDR alone are insufficient to conclusively attribute a phone number to an individual*”, that “*additional extrinsic evidence is necessary to demonstrate attribution*”, and that “*CDR alone are not conclusive as to whether a communication occurred between specific individuals*”.<sup>214</sup>

92. The Chamber did not rely on CDR evidence in isolation, but considered it alongside other material, including D30-4505’s own statements and testimony.<sup>215</sup> Accordingly, no error materially affected the Chamber’s credibility assessments or factual findings.

*The Chamber correctly weighed speculation and inferences*

93. The Defence further claims that Defence’s witnesses were subjected to a stricter probative standard compared to the Prosecution’s witnesses,<sup>216</sup> resulting in an alleged “*unequal scrutiny*” materially affecting credibility and factual findings.<sup>217</sup> In advancing this claim, the Defence argues that exculpatory evidence was not properly considered.<sup>218</sup>

94. However, a review of the Judgment demonstrates that the Chamber applied the same evidentiary standards to all witnesses, assessing credibility and probative value in light of the totality of the evidence and the specific circumstances of each testimony. The Defence’s submissions do not identify any legal or factual error, but instead reiterate dissatisfaction with the Chamber’s reasoned conclusions.

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<sup>212</sup> See the Impugned Decision, *supra* note 4, para. 193.

<sup>213</sup> *Ibid*, paras. 158-193.

<sup>214</sup> *Ibid*, paras. 187-189.

<sup>215</sup> See the Impugned Decision, *supra* note 4, paras. 449-456. *Contra* the Ngaïssona Appeal, *supra* note 3, paras. 86-89.

<sup>216</sup> See the Ngaïssona Appeal, *supra* note 3, para. 105 in which the Defence refers to the Chamber’s evaluation of D30-4914 and D30-4917 versus P-1719.

<sup>217</sup> *Ibid*, para. 102.

<sup>218</sup> The Defence refers in particular to the assessment of [REDACTED].

*c) Ground 1(C) - The Chamber properly applied the relevant evidentiary standards, and the factual findings were reasonable*

95. In Ground 1.C, the Defence develops several arguments alleging that the Chamber misapplied the relevant evidentiary standards and erred in relation to key findings<sup>219</sup> on: (i) the object of the attack on Bossangoa and its indiscriminate nature (Ground 1.C.1); (ii) the attribution of crimes to the Anti-Balaka during said attack (Ground 1.C.2); (iii) the funding and other contributions from Mr Ngaïssona to the Anti-Balaka (Grounds 1.C.3, 1.C.4, and 1.C.5); (iv) the assessment of his designation as the Anti-Balaka general coordinator in January 2014 as an indicator of his prior involvement (Ground 1.C.6); and (v) Mr Ngaïssona's involvement in inflammatory rhetoric against the Muslim civilians (Ground 1.C.7).

96. As shown *infra*, the Defence either ignores the fundamental conclusions of the Chamber, or simply presents its own interpretation of the evidence.<sup>220</sup> Considering the page-limit, the CLRV address only the Defence's arguments in sub-grounds 1, 2 and 7 directly linked to the targeting of the Muslim civilian population.

*The Bossangoa attack was aimed at expelling Muslim civilians*

97. In Ground 1.C.1, the Defence argues that the Chamber erred in concluding that the Bossangoa attack was aimed at chasing away the Seleka and all Muslims from the town, and that the Anti-Balaka indiscriminately targeted Muslim civilians.<sup>221</sup> In support of this claim, it contends that the Chamber mischaracterised P-0966's ("Dana") evidence, failed to give sufficient weight to the insider witnesses, and that no reasonable trier of fact could have concluded that the Anti-Balaka's objectives included expelling Muslim civilians.<sup>222</sup>

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<sup>219</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 106-261.

<sup>220</sup> See the *Ntaganda* AJ, *supra* note 49, para. 738. See e.g., ICTY, *Prosecutor v. Vasiljević*, [Judgment](#), Case No. IT-98-32-A, 25 February 2004, para. 12 (the "*Vasiljević* AJ").

<sup>221</sup> See the Ngaïssona Appeal, *supra* note 3, para. 110

<sup>222</sup> *Ibid*, paras. 111-115.

98. The Defence misrepresents the Judgment. The Chamber explicitly analysed the Dana's testimony,<sup>223</sup> and determined that *"rather than denying the liberation of Christians in Bossangoa being one of the reasons for their attack, the witness denied that specifically the alleged burning of Christian houses by the Seleka in the aftermath of their first attack was one of the reasons for their renewed attack"*.<sup>224</sup>

99. Furthermore, contrary to the Defence's claim,<sup>225</sup> no reasonable trier of fact could have concluded that the Anti-Balaka's objectives did not include expelling Muslim civilians.<sup>226</sup> The nature of the attack left no doubt as to the Anti-Balaka's intentions and objectives. The Bossangoa attack was not directed at military targets:<sup>227</sup> rapes were committed,<sup>228</sup> civilians seeking refuge had their throats slit,<sup>229</sup> others were shot and struck with machetes,<sup>230</sup> including an elderly lady who was hit on the head and left for dead.<sup>231</sup> The evidence on the record establishes beyond reasonable doubt that the Anti-Balaka carried out an indiscriminate attack whose primary object was the targeting of the Muslim civilians, as correctly found by the Chamber.<sup>232</sup>

100. A significant body of evidence supports this findings, including that: (i) the Anti-Balaka attacked residential areas, including the Boro neighbourhood, generally known as the Muslim neighbourhood in Bossangoa;<sup>233</sup> (ii) the Anti-Balaka did not distinguish between the Seleka and the Muslim civilians;<sup>234</sup> (iii) the Anti-Balaka attacked Muslim areas in pursuit of unarmed individuals who were identifiable as

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<sup>223</sup> See the Impugned Decision, *supra* note 4, para. 2778 (footnote 6841). *Contra* the Ngaïssona Appeal, *supra* note 3, para. 111.

<sup>224</sup> *Ibid.*

<sup>225</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 111-114 referring only to paragraphs 2771 to 2781 of the Impugned Decision and the evidence cited therein as basis for the conclusion of the Chamber.

<sup>226</sup> *Ibid.*, paras. 112-115.

<sup>227</sup> *Contra* the Ngaïssona Appeal, *supra* note 3, paras. 111-112, 114-115.

<sup>228</sup> See the Impugned Decision, *supra* note 4, paras. 2832-2857.

<sup>229</sup> *Ibid.*, paras. 2872, 2874, 2887, 4747.

<sup>230</sup> *Ibid.*, paras. 2829-2831, 4742.

<sup>231</sup> *Ibid.*, paras. 2828, 4742. See also P-2657: [T-104-ENG](#), p. 18, line 24 to p. 19, line 11, p. 25, lines 3-6, p. 36, lines 9-22, and p. 40, lines 9-11; P-2049: [T-100-ENG](#), p. 72, lines 14-24.

<sup>232</sup> *Ibid.*, paras. 2777-2789, 2811-2814, 4051-4055.

<sup>233</sup> *Ibid.*, paras. 4051, 4055; see also, paras. 2918-2938.

<sup>234</sup> *Ibid.*, paras. 4051, 4055; see also, para. 2811.

Muslims;<sup>235</sup> (iv) several civilians were injured and killed during the attack, P-2462 was raped;<sup>236</sup> (v) the Muslim civilian population fled the attacked neighbourhoods *en masse* and took shelter at the *École de la Liberté*, where their number rose to several thousands;<sup>237</sup> and, finally, (vi) Muslim civilians were confined to the school premises as a result of the Anti-Balaka's actions and threats.<sup>238</sup>

101. Taken together, these elements led the Chamber to conclude that the primary object of the attack on Bossangoa was the Muslim civilian population as such.<sup>239</sup> Read in conjunction with substantial aspects of the Chamber's broader findings - including the testimony of dual-status individuals P-2049 and P-2657 - these factors establish that the Anti-Balaka intended to expel the Muslim population from the region.

*The Anti-Balaka carried out killings of Muslims during the Bossangoa attack*

102. In Ground 1.C.2, the Defence first alleges that the Chamber erred in attributing the murders committed during the Bossangoa attack to the Anti-Balaka,<sup>240</sup> failing to apply the correct legal standards.<sup>241</sup>

103. A multitude of elements evaluated by the Chambers support the conclusion that the relevant crimes were committed by the group, namely: (i) the Anti-Balaka led an attack on Bossangoa on that day;<sup>242</sup> (ii) their goal was to expel the Seleka but also all Muslims from the town;<sup>243</sup> (iii) no distinction was made between the Seleka and the Muslim civilians during the attack;<sup>244</sup> (iv) P-2462 identified the attackers as Anti-Balaka;<sup>245</sup> (v) P-2657 indicated that the attackers that day were the Anti-Balaka as they

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<sup>235</sup> *Ibid*, para. 2861 referring to paras. 2815-2831.

<sup>236</sup> *Ibid*, paras. 4051, 4055; see also, paras. 2857, 2865-2895.

<sup>237</sup> *Ibid*, paras. 4051, 4055; see also, paras. 2956-2980.

<sup>238</sup> *Ibid*, paras. 4051, 4055; see also, paras. 2981-3016.

<sup>239</sup> *Ibid*, para. 4055.

<sup>240</sup> See the Ngaiissona Appeal, *supra* note 3, paras. 123-145.

<sup>241</sup> *Ibid*, para. 124.

<sup>242</sup> See the Impugned Decision, *supra* note 4, paras. 2767-2776.

<sup>243</sup> *Ibid*, paras. 2777-2789.

<sup>244</sup> *Ibid*, para. 2811.

<sup>245</sup> *Ibid*, paras. 2824, 2828, 2833-2836, 2875.

were the ones “*cracking down on Muslims*”;<sup>246</sup> (vi) both P-2462 and P-2657 were able to distinguish between members of the Seleka and Anti-Balaka and consequently identified their respective assailants as Anti-Balaka elements;<sup>247</sup> (vii) P-2453 was told that Anti-Balaka were the ones shooting at them while fleeing to the *École de la Liberté*;<sup>248</sup> (viii) a man told P-1577 that he was attacked by the Anti-Balaka;<sup>249</sup> and finally, (ix) there was no fighting between the Seleka and the Anti-Balaka in the vicinity of the imam’s residence.<sup>250</sup> The Chamber also reasonably rejected the Defence’s contention regarding the possibility that the victims died as a result of cross or friendly fire;<sup>251</sup> being satisfied beyond reasonable doubt that these killings were committed by Anti-Balaka elements.<sup>252</sup>

104. These factors were amply sufficient to justify the finding that all murders of the relevant victims were committed by the Anti-Balaka, particularly in light of the principle that a chamber is not required to set out every step of its reasoning.<sup>253</sup>

105. The Defence further argues that the Chamber erred in finding liability for the murders of Abdallah Mahamat, Abdelkhadir, Mariam Yamwha and Amadou Oumarou on the sole basis of P-2200’s evidence.<sup>254</sup> This allegation is misplaced. The Chamber conducted a holistic assessment of the totality of the evidence,<sup>255</sup> including the evidence of dual-status individuals.<sup>256</sup> While the name of the victims might have only been found in P-2200’s statement, P-2049 [REDACTED] estimated that 19 victims

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<sup>246</sup> *Ibid*, paras. 2825-2826, 2868, 2882.

<sup>247</sup> *Ibid*, paras. 2855-2857.

<sup>248</sup> *Ibid*, paras. 2830, 2883.

<sup>249</sup> *Ibid*, para. 2831.

<sup>250</sup> *Ibid*, paras. 2862, 2884-2887.

<sup>251</sup> *Ibid*, paras. 4058-4059.

<sup>252</sup> *Ibid*, para. 4060.

<sup>253</sup> See ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, [Judgement](#) (Appeals Chamber), 28 February 2005, para. 23. See also, the *Bemba* AJ, *supra* note 45, paras. 53-54; and the *Bemba* et al. AJ, *supra* note 8, paras. 106-107 (the “*Kvočka* et al. AJ”).

<sup>254</sup> See the Ngaissona Appeal, *supra* note 3, paras. 127-129.

<sup>255</sup> See the *Stanišić & Župljanin* AJ, *supra* note 143, para. 138; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, [Judgement](#) (Appeals Chamber), 3 July 2008, para. 38 (the “*Orić* AJ”); the *Lubanga* AJ, *supra* note 8, para. 373.

<sup>256</sup> See the Impugned Decision, *supra* note 4, paras. 2878-2882. In particular referring to P-2049 and P-2657, P-2453 and P-1577.

were killed during the Bossangoa attack and likewise provided a list of names.<sup>257</sup> P-2453 also gave a list of victims found in the vicinity of the imam's residence,<sup>258</sup> while P-1577 received information from the person who collected the bodies that at least 11 victims were killed during the attack.<sup>259</sup> Moreover, P-2200, [REDACTED] 18 bodies at the *École de la Liberté* and [REDACTED] in their burial,<sup>260</sup> a fact corroborated by the evidence of P-2657, P-2462 and P-2658.<sup>261</sup>

106. Lastly, the Defence's claim that the Chamber erred in finding that no fighting took place in the vicinity of the imam's house rests on a mischaracterisation of both the evidence and the Judgment.<sup>262</sup> First, dual status individual P-2049 clearly stated there were no Seleka bases in the Arabe and Fulbe neighbourhoods.<sup>263</sup> Dual status individual P-2657, a direct witness of the events that took place close to the imam's residence, likewise testified that she did not see any Seleka troops present in the area.<sup>264</sup> Second, the Defence wrongly assumes that the Chamber had to apply the beyond reasonable doubt standard to its finding that no fighting occurred in the vicinity of the imam's house. To the contrary, this finding did not require the application of said standard, as it does not represent a fact indispensable for the conviction.<sup>265</sup> Third, the Chamber reasonably concluded that the suggestion that victims were killed in cross or friendly fire was, in the absence of any supporting evidence, "*purely speculative*".<sup>266</sup> In this regard, it is also indicative how the murders were perpetrated - including by machete and throat slitting<sup>267</sup> - which clearly contradict the hypothesis that victims were killed by cross or friendly fire.<sup>268</sup>

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<sup>257</sup> *Ibid*, para. 2879.

<sup>258</sup> *Ibid*, para. 2880.

<sup>259</sup> *Ibid*, para. 2881. See also, [CAR-OTP-2001-2043](#), at 2055-2056.

<sup>260</sup> REDACTED.

<sup>261</sup> *Ibid*, para. 2882.

<sup>262</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 132-133.

<sup>263</sup> P-2049: [T-103-ENG](#), p. 66, lines 1-10.

<sup>264</sup> P-2657: [T-105-ENG](#), p. 27, lines 4-6.

<sup>265</sup> See *supra*, para. 73. See also, the *Lubanga* AJ, *supra* note 8, para. 22; the *Ngudjolo* AJ, *supra* note 47, paras. 123-125; the *Bemba et al.* AJ, *supra* note 8, paras. 96, 868; the *Ongwen* AJ, *supra* note 45, para. 321.

<sup>266</sup> See the Impugned Decision, *supra* note 4, para. 2862.

<sup>267</sup> See *supra*, para. 65.

<sup>268</sup> See the Impugned Decision, *supra* note 4, para. 2862.

*The Anti-Balaka destroyed adversary's properties in Bossangoa*

107. The Defence also alleges that the Chamber attributed liability of the destruction of adversary's properties in Bossangoa to the Anti-Balaka based on hearsay evidence.<sup>269</sup> As recalled *supra*,<sup>270</sup> there is no procedural bar to the reliance on hearsay evidence in the Court's legal framework, even when the information comes from unidentified or loosely identified sources.<sup>271</sup> In fact, "*the fact that evidence is hearsay does not necessarily deprive it of probative value, but does indicate that the weight or probative value afforded to it may be less, 'although even this will depend upon the infinitely variable circumstances which surround hearsay evidence'*".<sup>272</sup>

108. In any case, the Chamber did not solely rely on hearsay evidence.<sup>273</sup> Instead, it relied, *inter alia*, on the CAR Panel Interim Report of 2014 which described waves of destruction, including one that was related to the attack of Anti-Balaka groups<sup>274</sup> and on the inscription of the words "anti-balaka" captured via satellite on destroyed houses owned by members of the Muslim community in the Boro neighbourhood.<sup>275</sup> Furthermore, the Chamber considered the totality of the relevant evidence, including the Anti-Balaka's objective to expel Muslim civilians from Bossangoa,<sup>276</sup> and the specific targeting of the Muslim civilians during the attack of 5 December.<sup>277</sup> In this holistic perspective, the Chamber's conclusion that the Anti-Balaka burned and destroyed residential structures between 5 and 8 December 2013 was entirely reasonable.<sup>278</sup>

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<sup>269</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 146-153.

<sup>270</sup> See *supra*, para. 65.

<sup>271</sup> See the Ngudjolo AJ, *supra* note 47, para. 226; and the Ntaganda TJ, *supra* note 36, para. 67.

<sup>272</sup> *Ibid.*

<sup>273</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 150-153.

<sup>274</sup> See the Impugned Decision, *supra* note 4, para. 2919.

<sup>275</sup> *Ibid.*, para. 2927.

<sup>276</sup> *Ibid.*, paras. 2777-2789, 4051, 4055.

<sup>277</sup> *Ibid.*, paras. 4100, 4103-4107.

<sup>278</sup> *Ibid.*, para. 4064. See also, the Confirmation Decision, *supra* note 58, p. 108. *Contra* the Ngaïssona Appeal, *supra* note 3, para. 152.

Mr Ngaïssona engaged in inflammatory rhetoric against Muslim civilians

109. In Ground 1.C.7, the Defence argues that the Chamber erred in finding that the Appellant engaged in inflammatory rhetoric - which ultimately incited vigilance against Muslim civilians<sup>279</sup> - basing its conclusions on inferential leaps not supported by the evidence or that the meaning of Mr Ngaïssona's speeches were distorted.<sup>280</sup>

110. The Defence merely repeats arguments that were rejected at trial and should be dismissed on this basis alone.<sup>281</sup> For instance, the arguments regarding Mr Bozizé's speech – namely, that it did not conflate the Seleka with CAR Muslims<sup>282</sup> – were reasonably dismissed by finding that the content of the speech “*cannot be interpreted in the manner suggested by the Ngaïssona Defence*”.<sup>283</sup>

111. The Chamber's conclusions are based on solid evidence and a reasonable and fair assessment of the totality of said evidence. It found that the rhetoric used by Mr Bozizé, Mr Ngaïssona and others has to be seen in the context of the emergence of the Anti-Balaka and the specific targeting of Muslim civilian population in the west of the CAR during their advance towards Bangui from September 2013 onwards.<sup>284</sup> This context included the assimilation by the Anti-Balaka of the Muslim civilian population to the Seleka and its actions,<sup>285</sup> a perception influenced by the level of education among the elements of the Anti-Balaka.<sup>286</sup>

112. Moreover, the assessment of the evidence on how the Muslim community understood the relevant speech was also reasonable,<sup>287</sup> ultimately leading the Chamber to dismiss the Defence's arguments and conclude that several speeches were not

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<sup>279</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 251-261.

<sup>280</sup> *Ibid*, paras. 251-253, 257-258.

<sup>281</sup> See Bemba AJ *supra* note 45, para. 65.

<sup>282</sup> See the Impugned Decision, *supra* note 4, para. 1246 (referring to the Defence's arguments).

<sup>283</sup> *Ibid*, para. 1247.

<sup>284</sup> *Ibid*, para. 1240 referring to paras. 1210-1239.

<sup>285</sup> *Ibid*.

<sup>286</sup> *Ibid*, paras. 1235-1238.

<sup>287</sup> *Ibid*, paras. 1256-1261.

innocent calls for peaceful demonstrations.<sup>288</sup> The assertion that these speeches and radio statements merely denounced Seleka violence, encouraged dialogue, and discouraged violence, were considered unconvincing<sup>289</sup> and amounting to an “*overly trivialised reading of the messages given*”.<sup>290</sup>

## **2. Ground 2: The Chamber’s interpretation of article 25(3)(c) of the Statute was not overly broad**

113. The CLRV recall their observations in response to the Prosecution appeal on the Chamber’s overly restrictive interpretation of the mental element under article 25(3)(c) in relation to the crimes of rape (Counts 40 and 41) and rape as an underlying act of persecution (Count 42).<sup>291</sup> By contrast, the Defence’s Grounds 2(B) and (C) challenge the findings of purpose and knowledge where convictions were entered, asserting that the Chamber applied standards that were impermissibly broad. The CLRV submit that the Chamber correctly articulated and applied the legal framework governing purpose under article 25(3)(c) and knowledge under article 30 of the Statute for the crimes of which Mr Ngaïssona was convicted, while simultaneously erring, in a distinct and more restrictive manner, in its assessment of foreseeability of the crime of rape. The Defence’s attempt to characterise the Chamber’s approach as uniformly expansive is therefore unfounded.

### ***a) Ground 2(A) - The Chamber correctly interpreted the objective elements of aiding and abetting under article 25(3)(c) of the Statute***

114. The Defence’s submission that the Chamber adopted an overly broad interpretation of the objective elements of aiding and abetting liability under article 25(3)(c) of the Statute rests on the premise that this provision requires proof of a strict causal link or a legally defined ‘substantial contribution’ threshold in every

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<sup>288</sup> *Ibid*, paras. 1262, 1283.

<sup>289</sup> *Ibid*, para. 1287.

<sup>290</sup> *Ibid*, para. 1288.

<sup>291</sup> See *supra*, paras. 28-58.

case. That premise is not supported by the text of the Statute or by the Court's jurisprudence.

*The Chamber did not err in expanding liability under article 25(3)(c)*

115. The Defence asserts that the Chamber improperly expanded liability by attributing responsibility on the basis of generalised support to the Anti-Balaka, rather than demonstrating a specific nexus between Mr Ngaïssona's conduct and the crimes charged.<sup>292</sup> This argument mischaracterises both the law and the Impugned Decision.

116. Article 25(3)(c) of the Statute requires that an accused "*aids, abets or otherwise assists*" in the commission of a crime, including by providing assistance that facilitates or furthers its commission, and that such assistance be provided for the purpose of facilitating the crime.<sup>293</sup> The provision does not prescribe a particular formula for establishing assistance, nor does it require proof of a strict causal effect in all cases.<sup>294</sup> The plain wording of article 25(3)(c) does not indicate whether a causal effect must be demonstrated, and whether proof of an effect is necessary depends on the facts of the case. Proof of effect may be probative, but it is not a legal requirement *per se*.<sup>295</sup>

117. The Defence's reliance on selective language from the *Bemba et al.* case to argue that a causal requirement is "*undisputed*"<sup>296</sup> ignores the Appeals Chamber's clarification in the same case that the Statute does not resolve this question categorically.<sup>297</sup> Furthermore, in the *Al Hassan* case, also cited by the Defence, the Chamber concluded that the showing of an effect is not a necessary requirement.<sup>298</sup> In its Appeal Brief, the Defence itself acknowledged that "*the Chamber did not err in concluding that a causal effect is not legally required*".<sup>299</sup>

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<sup>292</sup> See the Ngaïssona Appeal, *supra* note 3, pp. 108-112.

<sup>293</sup> See e.g., *Bemba et al.* AJ, *supra* note 8, para. 1327.

<sup>294</sup> See the *Bemba et al.* TJ, *supra* note 111, para. 94. Accordingly, the Chamber established that "*the assistance must have furthered, advanced, or facilitated the commission of the principal offence*".

<sup>295</sup> See e.g., *Bemba et al.* AJ, *supra* note 8, para. 1327.

<sup>296</sup> See the Ngaïssona Appeal, *supra* note 3, para. 265. See also, the *Bemba et al.* TJ, *supra* note 111, para. 90.

<sup>297</sup> See the *Bemba et al.* AJ, *supra* note 8, para. 1327.

<sup>298</sup> See the *Al Hassan* TJ, *supra* note 61, para. 1225.

<sup>299</sup> See the Ngaïssona Appeal, *supra* note 3, para. 277.

118. The Chamber therefore did not err in law by declining to treat causal effect as a mandatory, stand-alone requirement. Nor did it rely on mere association with a criminal organisation. Instead, it assessed the nature, context, and impact of Mr Ngaïssona's conduct in light of the evidence across the charged locations.<sup>300</sup>

*The Chamber properly established assistance under article 25(3)(c)*

119. The Defence further claims that the Chamber failed to establish that Mr Ngaïssona's conduct constituted assistance because it did not demonstrate that his acts facilitated or furthered the crimes.<sup>301</sup> This claim is contradicted by the Judgment.

120. The Chamber expressly found, on the basis of the evidence, that the Appellant's conduct had a "*positive effect on the commission of the crimes*".<sup>302</sup> It evaluated his role in mobilising, legitimising, financing, and politically supporting the Anti-Balaka, and concluded that this conduct contributed to the group's ability to carry out the crimes charged.<sup>303</sup> This constitutes a factual finding that satisfies the *actus reus* of article 25(3)(c) even on the Defence's preferred approach.

121. The argument that the Chamber failed to apply any threshold for assistance likewise lacks merit. Article 25(3)(c) does not contain a 'substantial contribution' requirement, and the Court's jurisprudence has not crystallised such a threshold for aiding and abetting.<sup>304</sup> Where the Defence relies on comparative or customary law to argue for a heightened threshold,<sup>305</sup> it overlooks that those frameworks often operate with a lower *mens rea* than article 25(3)(c).<sup>306</sup> The Statute's higher "*purpose*"

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<sup>300</sup> See the Impugned Decision, *supra* note 4, paras. 4028-4033, 4110-4115, 4279-4281, 4371-4373.

<sup>301</sup> See the Ngaïssona Appeal, *supra* note 3, para. 276.

<sup>302</sup> See the Impugned Decision, *supra* note 4, para. 4037.

<sup>303</sup> *Ibid*, paras. 4028-4031.

<sup>304</sup> See *Bemba et al.* TJ, *supra* note 111, paras. 91-93; and *Bemba et al.* AJ, *supra* note 8, para. 1327.

<sup>305</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 267-269.

<sup>306</sup> Several ICTY Chambers renounced the causal relationship requirement. See ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, [Judgement](#) (Trial Chamber), 25 June 1999, para. 61; *Prosecutor v. Blaškić*, Case No. IT-95-14-T, [Judgement](#) (Trial Chamber), 3 March 2000, para. 284; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, [Judgement](#) (Trial Chamber II), 15 March 2002, para. 88; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, [Judgement](#) (Trial Chamber), 31 March 2003, para. 63; *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, [Judgement](#) (Trial Chamber II), 29 November 2002, para. 70; *Prosecutor v.*

requirement<sup>307</sup> performs the limiting function that the Defence seeks to reintroduce through an additional *actus reus* threshold.

***b) Ground 2(B) - The Chamber correctly concluded that Mr Ngaïssona acted for the purpose of facilitating the commission of the crimes***

122. The CLRV also oppose the Defence's claim that the Chamber erred in law and fact by concluding that Mr Ngaïssona acted for the purpose of facilitating the crimes without establishing that his conduct was purposefully directed toward their commission.<sup>308</sup>

123. The Chamber correctly identified the applicable legal standard. Article 25(3)(c) of the Statute requires that the defendant engage in conduct that assists the commission of a crime and that, in engaging in that conduct, they act for the purpose of facilitating the commission of that crime. The Chamber further recognised that purpose, like other mental elements, may be established through direct or circumstantial evidence, including the nature of the accused's conduct, its context, its duration, and the accused's awareness of the criminal activity it supports.<sup>309</sup>

*The Chamber did not conflate knowledge under article 30 with purpose under article 25(3)(c) and correctly determined the relevant mens rea*

124. The Defence argues that the Chamber conflated the knowledge requirement under article 30 with the "*purpose*" requirement under article 25(3)(c).<sup>310</sup>

125. The Chamber clearly distinguished between the mental elements applicable to aiding and abetting and those applicable to the crimes themselves.<sup>311</sup> It correctly identified that article 25(3)(c) requires that the defendant engage in the assisting

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*Blaškić*, No. IT-95-14-A, [Judgement](#) (Appeals Chamber), 29 July 2004, para. 48; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, [Judgement](#) (Trial Chamber I, Section A), 17 January 2005, para. 726.

<sup>307</sup> See the *Bemba et al.* TJ, *supra* note 111, para. 95. See AMBOS (K.), *op. cit. supra* note 10, p.1125 stating "*in sum, formulation confirms the general assessment that subpara. (c) provides for a higher subjective than objective threshold (in any case higher than the ordinary mens rea requirement according to Article 30)*".

<sup>308</sup> See the Ngaïssona Appeal, *supra* note 3, para. 296.

<sup>309</sup> See the Impugned Decision, *supra* note 4, paras. 4037, 4294 and 4376.

<sup>310</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 304-305.

<sup>311</sup> See the Impugned Decision, *supra* note 4, paras. 3882, 4035, 4116, 4282, 4374, 3845 and 3885.

conduct with the aim of facilitating the commission of the crime, and that this purpose may be inferred from the nature of the conduct, its context, and the accused's awareness of the broader criminal activity.<sup>312</sup>

126. The Chamber did not replace purpose with mere knowledge. Rather, it assessed purpose finding that Mr Ngaïssona's sustained and deliberate conduct was directed at enabling the Anti-Balaka's criminal campaign, which included the crimes charged.<sup>313</sup> This finding was drawn from the fact that the Appellant provided financial and psychological assistance knowing that the Anti-Balaka would commit crimes in the ordinary course of events.<sup>314</sup> Against that background, the Chamber was entitled to conclude that Mr Ngaïssona's sustained contributions - made with awareness of the nature of the Anti-Balaka's operations - were purposive. Continued assistance in the face of known criminal activity is a well-recognised basis for establishing purpose under article 25(3)(c), particularly where the assistance is deliberate, coordinated, and continued over time.<sup>315</sup>

127. Importantly, the Chamber did not hold that knowledge of crimes alone sufficed to establish purpose. Rather, Mr Ngaïssona's knowledge of the Anti-Balaka's criminal activity against Muslim civilians assisted the Chamber in concluding that *"Mr Ngaïssona's assistance was such that it could only have been provided intentionally with the aim of facilitating the concerned crimes"* as his assistance was provided despite knowing that the Anti-Balaka were actively targeting Muslim civilians, property and objects dedicated to religion.<sup>316</sup> The Defence's attempt to characterise this as a conflation of articles 25(3)(c) and 30 collapses two distinct analytical steps that the Chamber itself treated separately.

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<sup>312</sup> *Ibid*, paras. 3882, 4035 and 4294.

<sup>313</sup> See the Impugned Decision, *supra* note 4, paras. 4037-4041, 4119, 4291, 4376.

<sup>314</sup> *Ibid*, paras. 4037-4038, 4040, 4041-4044, 4046-4048.

<sup>315</sup> See the Ngaïssona Appeal, *supra* note 3, para. 268 citing Taylor TJ, *supra* note 140, paras. 6905, 6936-6937.

<sup>316</sup> See the Impugned Decision, *supra* note 4, paras. 4041-4043, 4118-4119, 4291-4292, 4377-4378.

128. Even if one were to set aside the findings concerning the Appellant's awareness of ongoing crimes - issues addressed more fully in Ground 2(C)<sup>317</sup> - the Chamber made additional findings that independently support the conclusion that his conduct was purposive. In particular, the fact that Mr Ngaïssona viewed Muslims as collectively responsible for Seleka abuses.<sup>318</sup> This finding is central to the assessment of purpose. It demonstrates that the Appellant's support for the Anti-Balaka was not ideologically neutral, peace-oriented, or incidental. When assessed together with his continued political, organisational, and symbolic support to the Anti-Balaka, this conclusion provides a compelling basis to determine that his assistance was directed at facilitating crimes targeting Muslim civilians.

129. The Defence also argues that the Chamber failed to consider alternative motives for the Appellant's conduct, including alleged peace-building efforts.<sup>319</sup> The argument is without merit. The Chamber expressly considered and rejected claims that Mr Ngaïssona's conduct was peace-oriented, concluding that such explanations were incompatible with the evidence of his sustained support to the Anti-Balaka during periods of active criminality.<sup>320</sup>

130. Accordingly, the Chamber's conclusion on purpose does not stand or fall on article 30 knowledge. It rests on the direction of Mr Ngaïssona's conduct and the objectives it sought to advance.

*The Chamber correctly determined that mens rea and assistance coincided*

131. The Defence further claims that the Chamber failed to ensure that purpose coincided with the alleged assistance.<sup>321</sup> This claim is unfounded. The Chamber's findings show that Mr Ngaïssona's assistance was sustained and contemporaneous with the Anti-Balaka's criminal operations.<sup>322</sup> His intent accompanied his conduct; it

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<sup>317</sup> See *infra*, paras. 79-93.

<sup>318</sup> See the Impugned Decision, *supra* note 4, paras. 1289, 1292, 1297-1299, 1301-1304.

<sup>319</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 322-323 and 327.

<sup>320</sup> See the Impugned Decision, *supra* note 4, paras. 1855-1886 and 4687.

<sup>321</sup> See the Ngaïssona Appeal, *supra* note 3, para. 328.

<sup>322</sup> See the Impugned Decision, *supra* note 4, paras. 35, 1695, 4373.

was not retrospective or incidental. The Defence does not identify any instance in which the Chamber found assistance without a corresponding purposive mental element. It is also well established that the timing of the relevant assistance is irrelevant. It is in fact not necessary that the assistance was provided before the offence occurs; it can be given during or after.<sup>323</sup>

132. To the extent that the Defence argues that the Chamber failed to find knowledge of specific attacks, such as the Bossangoa attack on 5 December, this contention again conflates purpose under article 25(3)(c) with the knowledge analysis under article 30. The Chamber's findings on coordination and operational overlap provided a sufficient evidentiary basis for its conclusions regarding the direction of Mr Ngaïssona's conduct.<sup>324</sup>

133. In conclusion, Ground 2(B) concerns whether Mr Ngaïssona's conduct was *directed* at facilitating crimes, a question governed by article 25(3)(c). The Defence's attempts to reframe this inquiry as one of foreseeability or pattern-based knowledge improperly import article 30 considerations into the purpose analysis. Those arguments are addressed, and refuted, *infra*.

*c) Ground 2(C) - The Chamber correctly applied article 30 of the Statute*

134. The Chamber did not err in law and fact in its interpretation and application of articles 30(2) and (3) of the Statute by relying, *inter alia*, on a "*clear pattern of criminal conduct*" to infer that Mr Ngaïssona possessed the requisite knowledge for the crimes charged.<sup>325</sup> This ground rests on a mischaracterisation of the Chamber's reasoning and on an artificial separation between permissible evidentiary inference and the legal standards governing knowledge under article 30.

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<sup>323</sup> See the *Bemba et al.* TJ, *supra* note 111, para. 96.

<sup>324</sup> See the Impugned Decision, *supra* note 4, paras. 4042 and 4119 referencing factual finding in paras. 50-53 established by the Chamber's assessment of evidence in paras. 1306-1495.

<sup>325</sup> See the Ngaïssona Appeal, *supra* note 3, para. 340.

135. Article 30 requires that the accused act with intent and knowledge in relation to the material elements of the crimes. With respect to consequences, article 30(2)(b) and (3) provide that knowledge may be established where the accused is aware that a consequence “*will occur in the ordinary course of events*”, a standard consistently understood as requiring virtual certainty.<sup>326</sup> The Chamber correctly articulated this standard and did not purport to replace it with a lower or alternative test.<sup>327</sup>

*The Chamber correctly relied on patterns of criminal conduct as evidence of knowledge*

136. The Defence argues that the Chamber committed a legal error by inferring knowledge from a “*pattern-based standard*”, thereby broadening article 30 beyond its permissible scope.<sup>328</sup> This argument blends evidentiary reasoning with legal standards.

137. The Chamber did not adopt a ‘*pattern-based standard*’ as a substitute for article 30. Rather, it relied on patterns of conduct as one component of the evidentiary matrix from which Mr Ngaïssona knowledge could be inferred.<sup>329</sup> This is neither novel nor impermissible. Patterns of criminal conduct may legitimately inform the assessment of whether a defendant was aware that crimes would occur in the ordinary course of events - particularly where crimes are repeated, widespread, and carried out by a group whose activities the defendant supports and facilitates.

138. This reasoning is not contradicted by the jurisprudence in *Sesay*, relied upon by the Defence.<sup>330</sup> In *Sesay*, the Trial Chamber - while providing that knowledge may be inferred from “*all relevant circumstances*”<sup>331</sup> - also cautioned against assuming knowledge from prior criminal conduct that occurred years before the charged events, in geographically limited areas, and outside the effective control or operational sphere

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<sup>326</sup> See e.g., *Lubanga AJ*, *supra* note 8, para. 447.

<sup>327</sup> See the Impugned Decision, *supra* note 4, paras. 3787, 3883, 4038, 4128-4129 and 4375.

<sup>328</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 341-343.

<sup>329</sup> See the Impugned Decision, *supra* note 4, *inter alia*, paras. 1429 and 4131.

<sup>330</sup> See the Ngaïssona Appeal, *supra* note 3, para. 345.

<sup>331</sup> See SCSL, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, [Judgement](#) (Trial Chamber I), 2 March 2009, para. 2047.

of the accused.<sup>332</sup> However, the circumstances of the present case are different. The Chamber assessed contemporaneous violence committed during the Anti-Balaka's coordinated advance, in circumstances where Mr Ngaïssona occupied a senior leadership role,<sup>333</sup> liaised with Anti-Balaka elements involved in ongoing hostilities,<sup>334</sup> received direct information about it, and continued to make contributions that sustained the group's operations.<sup>335</sup> The Chamber's reliance on patterns of conduct was therefore firmly grounded in temporal proximity, contextual relevance and did not amount to an impermissible lowering or replacement of the article 30 standard.

139. Crucially, the Chamber did not hold that the mere existence of a pattern automatically establishes knowledge. Instead, it assessed Mr Ngaïssona's awareness of that pattern in light of his position, access to information, and continued involvement.<sup>336</sup> As the Defence concedes,<sup>337</sup> those patterns were factors among others that the Chamber considered in its assessment. The Defence's characterisation of the Chamber's approach as replacing article 30 with a 'pattern-based' test is therefore inaccurate.

*The Chamber applied the correct standard for knowledge*

140. The Defence further submits that the Chamber committed mixed errors by applying this alleged '*pattern-based*' approach inconsistently across counts.<sup>338</sup> This argument again reflects mere disagreement with the Chamber's fact-intensive assessment rather than the identification of a legal or factual error.

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<sup>332</sup> *Ibid*, para. 280.

<sup>333</sup> See the Impugned Decision, *supra* note 4, para. 1819.

<sup>334</sup> *Ibid*, paras. 914-923, 992, 1012-1013.

<sup>335</sup> *Ibid*, paras. 828- 863, 1011, 4042, 4119, 4377.

<sup>336</sup> *Ibid*, paras. 60-61, 52-53, 70, 1495, 1618, 4042, 4119, 4377.

<sup>337</sup> See the Ngaïssona Appeal, *supra* note 3, p. 135: the very heading of Ground 2(C) reads as follows "*The Trial Chamber erred in law and fact in its interpretation and application of Articles 30(2) and (3) of the Statute by relying, inter alia, on a 'clear pattern of criminal conduct' to infer that Mr Ngaïssona possessed the requisite knowledge for the crimes charged*". (Emphasis added).

<sup>338</sup> *Ibid*, para. 348.

141. The Chamber articulated a single, consistent legal standard for knowledge under article 30 and applied it to the facts of each charge. Where the Defence alleges inconsistency,<sup>339</sup> it does not demonstrate that the Chamber applied different legal thresholds; rather, it challenges the evaluation of whether the evidence met the same threshold in different factual contexts. Such disagreement does not amount to an error. The Defence mischaracterises the Chamber's reasoning by portraying it as relying exclusively on patterns of criminal conduct. Patterns formed only one element of a broader evidentiary matrix, which also included Mr Ngaïssona's leadership role, access to operational information, and awareness of coordinated attacks.<sup>340</sup>

142. Against this background, the Defence's attempt to analogise torture and rape is misplaced.<sup>341</sup> The Chamber did not infer the Appellant's knowledge of torture merely because prior crimes had occurred against Muslim civilians. Rather, it relied on his established awareness of ongoing violence, the nature of the attacks, and his position within the movement, from which it was reasonable to conclude that serious physical abuse of civilians would occur in the ordinary course of events.<sup>342</sup> The absence of documented prior incidents of torture did not preclude such an inference in light of the overall context.

143. In the CLRV's view, the Chamber's error lies not in its treatment of torture, but in its isolated and unduly restrictive approach to sexual violence.<sup>343</sup> While even acknowledging that rape occurred during the Bossangoa attack and that sexual violence is not "*exceptional*" in armed conflict,<sup>344</sup> the Chamber nevertheless declined to draw the same inference of foreseeability.

144. However, the Chamber's differentiated treatment of sexual violence appears to reflect a deeper analytical error rooted in the implicit characterisation of rape as an

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<sup>339</sup> *Ibid*, para. 353.

<sup>340</sup> See the Impugned Decision, *supra* note 4, paras. 4035, 4116, 4282, and 4374.

<sup>341</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 349-353.

<sup>342</sup> See the Impugned Decision, *supra* note 4, paras. 4119, 4284, 4288, 4292, 4376, 4377, 4378.

<sup>343</sup> See *supra*, paras. 36-59.

<sup>344</sup> *Ibid*, para. 4130.

opportunistic or incidental crime. Such an approach fails to fully recognise sexual violence as a systematic tool of war and persecution, aimed at terrorising, degrading, and displacing civilian populations and producing long-term social harm.<sup>345</sup> The Chamber's reluctance to treat rape as foreseeable in the ordinary course of the Anti-Balaka attacks thus stems not from the evidentiary record, but from an unduly narrow legal understanding of the nature and function of sexual violence in armed conflict and attacks against the civilian population.

145. The Chamber erred only in relation to its treatment of rape, by failing to recognise that sexual violence formed part of the ordinary course of the attacks Mr Ngaïssona knew were occurring and was facilitating. The Defence's argument therefore does not disclose an overextension of liability, but rather confirms the Chamber's overly restrictive foreseeability analysis only with respect to sexual violence.

146. Moreover, the Defence's general claim that the Chamber failed to contextualise foreseeability in relation to all counts<sup>346</sup> is contradicted by the Judgment. The Chamber explicitly distinguished between general awareness of violence and knowledge that specific crimes would occur in the ordinary course of events, and assessed Mr Ngaïssona's knowledge in light of the nature of the crimes, their repetition, and his proximity - both informational and operational - to the Anti-Balaka's activities.<sup>347</sup>

147. The Chamber's findings under article 30 were analytically distinct from, but complementary to, its findings on purpose under article 25(3)(c). As explained *supra*,<sup>348</sup> purpose concerns the direction of Mr Ngaïssona's assistance. Article 30, by contrast, concerns his awareness of the consequences of that assistance. The Defence's attempt

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<sup>345</sup> See SMITH (S.L.), "*Beyond the Weapon of War: Rethinking Gendered Narratives of Conflict-Related Sexual Violence*", Journal of Public and International Affairs, Princeton University, 23 April 2025, available at <https://jpia.princeton.edu/news/beyond-weapon-war-rethinking-gendered-narratives-conflict-related-sexual-violence>. See *supra*, note 132.

<sup>346</sup> *Ibid*, paras. 380-381

<sup>347</sup> See the Impugned Decision, *supra* note 4, paras. 4035, 4116, 4282, 4374.

<sup>348</sup> See *supra*, paras. 124-130.

to collapse these inquiries - by suggesting that the Chamber improperly relied on knowledge to establish purpose, or *vice versa*<sup>349</sup> - misrepresents the Impugned Decision. The Chamber assessed knowledge under article 30 by examining whether Mr Ngaïssona was aware that crimes of the charged kind would occur in the ordinary course of events, based on his knowledge of the Anti-Balaka's operations, coordination, and prior conduct.<sup>350</sup> This analysis did not relieve the Prosecution of its burden of proof, nor did it dilute the '*virtual certainty*' requirement.

148. In the alternative, the Defence argues that even if the correct legal standard were applied, the Chamber erred in fact in concluding that Mr Ngaïssona possessed the requisite knowledge for certain counts.<sup>351</sup> This argument is insufficiently substantiated. The Defence identifies a list of counts but does not demonstrate that the Chamber's findings were unreasonable, internally inconsistent, or based on a misapprehension of evidence.<sup>352</sup> The Chamber's conclusions on knowledge were grounded on a comprehensive assessment of the evidence, including the Appellant's role, communications, awareness of coordination between attacks, and the repeated commission of crimes against Muslim civilians.<sup>353</sup> Mere disagreement with the Chamber's weighing of that evidence does not establish an error of fact on appeal.

149. Finally, the Defence asserts that the alleged errors under article 30 materially affected the outcome of the trial.<sup>354</sup> This claim necessarily fails because no legal or factual error has been established. In the absence of such an error, there can be no material effect. Even assuming, *arguendo*, that a marginal factual error could be identified in relation to one or more counts, the Defence has not demonstrated how this would vitiate the overall findings on knowledge, nor how it would undermine the convictions as a whole. The Chamber's reasoning reflects a careful and structured application of article 30 to the facts, and appellate intervention is unwarranted.

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<sup>349</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 304-305.

<sup>350</sup> See the Impugned Decision, *supra* note 4, paras. 4035, 4116, 4282, 4374.

<sup>351</sup> See the Ngaïssona Appeal, *supra* note 3, para. 362.

<sup>352</sup> *Ibid*, paras. 363-373.

<sup>353</sup> See the Impugned Decision, *supra* note 4, paras. 4035, 4116, 4282, and 4374.

<sup>354</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 382-384.

150. The Chamber applied a coherent and legally correct framework: it assessed purpose under article 25(3)(c) by examining the direction of Mr Ngaïssona's assistance, and it assessed knowledge under article 30 by evaluating whether he was aware that the charged crimes would occur in the ordinary course of events. The Defence's attempt to fragment and conflate these analyses does not disclose any error of law or fact.

*d) Ground 2(D) - The Chamber correctly identified the Anti-Balaka organisational structure*

151. The CLRV also oppose the Defence's assertion that the Chamber erred in its legal interpretation of the Anti-Balaka's organisational structure.<sup>355</sup> In particular, the Defence argues that the Chamber mischaracterised the Anti-Balaka as a single, cohesive organisation, wrongly including loosely affiliated groups and misapplying the criteria for organisational identity under article 7 of the Statute.<sup>356</sup>

152. The Chamber's conclusions are sound and in full conformity with international criminal jurisprudence. Article 7(2)(a) requires that an attack against a civilian population be carried out pursuant to or in furtherance of a State or organisational policy. The notion of '*organisation*' has been consistently interpreted in a functional and contextual manner.<sup>357</sup> An organisation need not exhibit a rigid hierarchical structure, formal membership, or State-like characteristics.<sup>358</sup> Rather, the assessment focuses on whether the group possesses sufficient capacity, coordination, and continuity to pursue a policy of attack against civilians.<sup>359</sup> The Chamber explicitly adopted this approach and did not equate the Anti-Balaka with a monolithic or static entity. Instead,

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<sup>355</sup> *Ibid*, para. 385.

<sup>356</sup> *Ibid*, paras. 386-388.

<sup>357</sup> See the *Katanga* TJ, *supra* note 67, para. 1121.

<sup>358</sup> *Ibid*, paras. 1118, 1120 and 1122. See also, the Public redacted version of "Dissenting Opinion Judge Herrera Carbuccia" (Trial Chamber I), [No. ICC-02/11-01/15-1263-AnxC-Red](#), 16 July 2019, para. 60 (the "Dissenting Opinion of Judge Herrera Carbuccia"); and the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Pre-Trial Chamber II), [No. ICC-01/09-01/11-373](#), para. 185.

<sup>359</sup> *Katanga* TJ, *supra* note 67, para. 1119. See also, the Al Hassan TJ, *supra* note 61, paras.69 and 1111; and the Dissenting Opinion Judge Herrera Carbuccia, *supra* note 358, para. 60. See also the Impugned Decision, *supra* note 4, paras. 1207-1209, 1729, 3768 and 3774.

it conducted a temporally sensitive and evidence-based analysis of the group's evolution and capacity.

*The Chamber correctly applied the article 7 standard*

153. The Defence, first, alleges that the Chamber erred in law by adopting an overly broad interpretation of 'organisation' and by treating distinct, loosely affiliated groups as a single movement.<sup>360</sup> This claim is unfounded. The Chamber did not lower the article 7 threshold nor dispense with the legal criteria for organisational identity. On the contrary, it correctly assessed whether the Anti-Balaka, notwithstanding its decentralised nature, had sufficient organisational features to implement a policy of attack.<sup>361</sup>

154. The Anti-Balaka consisted of multiple groups that shared a common identity, objectives, and enemy, and that were capable of coordinated action.<sup>362</sup> The Chamber's reasoning reflects the accepted understanding that decentralisation and internal diversity do not preclude organisational status where a group can mobilise violence in a coordinated and sustained manner.<sup>363</sup> The Defence's argument would effectively require a level of formalisation that neither the Statute nor the Court's jurisprudence demands. No error of law arises from the Chamber's application of the correct functional standard.

*The Chamber correctly found that an organisation existed prior and after the 5 December 2013 and in early 2014-June 2014*

155. The Defence next contends that the Chamber erred in fact by finding that an organisation existed prior to the 5 December 2013 attack.<sup>364</sup> The Chamber did not conclude that the Anti-Balaka was already fully formalised before that date. Rather, it found that, prior to 5 December 2013, Anti-Balaka groups were already linked by a

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<sup>360</sup> See the Ngaiissona Appeal, *supra* note 3, paras. 387-388.

<sup>361</sup> See the Impugned Decision, *supra* note 4, paras. 3925-3932.

<sup>362</sup> *Ibid*, paras. 1207-1209, 3894-3897 and 3913-3916.

<sup>363</sup> See the *Katanga* TJ, *supra* note 67, paras. 1119-1120.

<sup>364</sup> See the Ngaiissona Appeal, *supra* note 3, para. 390.

shared purpose and were capable of coordination, as evidenced by the attack itself.<sup>365</sup> The Chamber considered the 5 December attack as proof of organisational capacity, instead of an isolated or spontaneous event. The ability to mount coordinated attacks is a recognised indicator of organisational existence in international criminal law.<sup>366</sup> The Defence submission amounts to a disagreement with the inferences drawn by the Chamber, which is insufficient to establish an error of fact on appeal.

156. The Defence further alleges that the Chamber erred in finding that an organisation continued to exist after the 5 December attack.<sup>367</sup> This claim ignores the careful analysis of continuity and evolution. The Chamber found that, following 5 December 2013, Anti-Balaka violence continued in a coordinated manner and that shared objectives and targeting patterns persisted.<sup>368</sup> The existence of internal tensions or variations in local command does not negate organisational existence where the group retains the capacity to pursue a common policy of attack.<sup>369</sup> The organisational structures need not remain static or centrally controlled at all times.<sup>370</sup> The Defence again fails to demonstrate that the Chamber's factual conclusions were unreasonable or unsupported by the evidence.

157. Finally, the Defence challenges the Chamber's conclusion that an organisation existed in the period from early 2014 to June 2014, criticising its reliance on the emergence of coordination structures and political representation.<sup>371</sup> The Defence faults the Chamber for relying on precisely those indicators - coordination mechanisms, leadership roles, and external representation - that the relevant jurisprudence recognises as evidence of organisational consolidation.<sup>372</sup>

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<sup>365</sup> See the Impugned Decision, *supra* note 4, paras. 1208-1209.

<sup>366</sup> See the *Katanga* TJ, *supra* note 67, para. 1119. See also, the *Al Hassan* TJ, *supra* note 61, para. 1111. See also the Dissenting Opinion Judge Herrera Carbuccion, *supra* note 358, para. 60.

<sup>367</sup> See the *Ngaïssona* Appeal, *supra* note 3, para. 393.

<sup>368</sup> See the Impugned Decision, *supra* note 4, para. 3921.

<sup>369</sup> See the *Katanga* TJ, *supra* note 67, para. 1119. See also, the *Al Hassan* TJ, *supra* note 61, para. 1111; and the Dissenting Opinion Judge Herrera Carbuccion, *supra* note 358, para. 60.

<sup>370</sup> See the *Katanga* TJ, *supra* note 67, para. 1118.

<sup>371</sup> See the *Ngaïssona* Appeal, *supra* note 3, paras. 396-397.

<sup>372</sup> See *Katanga* TJ, *supra* note 67, paras. 1119-1120.

158. The Chamber explained that Mr Ngaïssona's role as a coordinator and representative of the Anti-Balaka, and the formalisation of structures in early 2014, demonstrated increased organisational coherence.<sup>373</sup> These findings are supported by the evidence and were reached by assessing the group's capacity over time. The Defence fails to identify any procedural irregularity.

159. Even assuming, *arguendo*, that an error could be identified, the Defence has failed to demonstrate materiality. It does not explain how a narrower interpretation of '*organisation*' would negate the existence of a policy of attack, sever the Appellant's connection to Anti-Balaka crimes, or undermine the convictions entered. The Chamber's findings on Mr Ngaïssona's responsibility were grounded in his leadership role, his facilitation and support of Anti-Balaka activities, and his contribution to crimes committed against civilians.<sup>374</sup> These conclusions do not hinge on an unduly formal or static conception of organisational structure. In the absence of such a showing, appellate intervention is unwarranted.

### **3. Ground 3: Mr Ngaïssona was convicted on the basis of trial proceedings that were fair and reliable**

160. Ground 3 centres on the Defence's claim that the withdrawal of charges against Mr Mokom - based on the unavailability of certain Prosecution's witnesses who also testified in the *Yekatom and Ngaïssona* case (the "overlapping witnesses") - allegedly triggered disclosure obligations that were denied, thereby rendering Mr Ngaïssona's trial manifestly unfair.<sup>375</sup>

161. This argument conflates distinct proceedings, distinct procedural contexts, and distinct evidentiary assessments, and does not demonstrate a violation of the Appellant's fair trial rights. Fairness must be assessed within the specific procedural and factual framework of the case under appeal, not by reference to developments in

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<sup>373</sup> See the Impugned Decision, *supra* note 4, paras. 62, 1563, 1648 and 4372.

<sup>374</sup> *Ibid*, paras. 4028, 4034, 4110 and 4372.

<sup>375</sup> See the Ngaïssona Appeal, *supra* note 3, para. 411.

parallel or subsequent proceedings involving other defendants.<sup>376</sup> Following the withdrawal of the charges against Mr Mokom, the Defence sought disclosure concerning the unavailability of certain Prosecution's witnesses,<sup>377</sup> arguing that such information might have affected its trial strategy.<sup>378</sup> The Chamber rejected these requests as speculative, finding that the Defence had failed to demonstrate a concrete link between the sought material and the reliability of the evidence against Mr Ngaïssona.

162. This approach is fully consistent with the Appeals Chamber's jurisprudence, which makes clear that disclosure obligations do not extend to open-ended or hypothetical inquiries aimed at exploring possible weaknesses in the Prosecution's case, absent a showing of materiality.<sup>379</sup> The Defence's characterisation of its requests as necessary to understand *why* witnesses were unavailable does not overcome the speculative nature of the claim. Under the Court's legal framework, the right to disclosure is confined to information that is relevant and material to the preparation of the defence or the adjudication of the charges. It does not extend to information sought solely on the speculative basis that it could have advised alternative trial strategies.

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<sup>376</sup> See the "Decision on the 'Defence request for disclosure(1)'" (Pre-Trial Chamber II), [No. ICC-01/09-01/13-23](#), 29 October 2013, para. 12: "*By the same token, the Single Judge underscores that the Defence right to disclosure is shaped and limited by the need to adequately exercise its rights and discharge its duties in the context of a specific procedural context [...]*".

<sup>377</sup> See the Ngaïssona Appeal, *supra* note 3, para. 412.

<sup>378</sup> *Ibid*, para. 425.

<sup>379</sup> See, *inter alia*, the "Decision concerning the 'Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki'" and the "Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019"" with two public annexes (The Presidency), [No. ICC-01/04-02/06-2336](#), 18 April 2019, para. 3, footnote 6: "*Exercises in the form of fishing expeditions have been rejected by international tribunals, even in the context of litigation between parties in criminal cases: Prosecutor v. Kordic & Cerkez, Order on Pasko Ljubicic's Motion for Access to Confidential Supporting Materials, Transcripts and Exhibits in the Kordic and Cerkez Case, 19 July 2002 [ICTY Appeals Chamber]; Prosecutor v. Karemera, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para 8 [ICTR Trial Chamber]; and Prosecutor v. Ayyash, Decision on Prosecution Witness Expenses, 9 May 2014, para 11 [STL Trial Chamber]*".

163. Contrary to the Defence's assertion,<sup>380</sup> the Chamber did not deny Mr Ngaïssona the opportunity to be heard or to challenge the Prosecution's evidence. The Defence extensively cross-examined the overlapping witnesses who testified in this case, challenged their credibility, motives, and consistency, and advanced submissions on the weight to be accorded to their testimony. The Judgment itself reflects a careful and critical assessment of witness evidence, including credibility findings, corroboration analysis, and explicit consideration of Defence's challenges. Where the Defence has had a genuine opportunity to confront and test the evidence relied upon for conviction, the absence of additional contextual material does not, in itself, amount to unfairness.<sup>381</sup>

164. The Defence further argues that the alleged breach was disproportionate because it was deprived of information that "*would have informed [its] trial strategy*".<sup>382</sup> This argument misstates the applicable standard. The Defence does not identify any exculpatory material that was withheld; any inconsistency in the testimony of overlapping witnesses that could not be explored through cross-examination; or any concrete way in which the absence of the requested information rendered the convictions unsafe. The suggestion that disclosure might have altered defence strategy is, without more, insufficient to establish a violation of articles 67 or 81 of the Statute.

165. Even assuming, *arguendo*, that additional information concerning witness unavailability in the *Mokom* case had been disclosed, the Defence has not shown how such information would have undermined the Chamber's findings in the present case. The convictions are based on a convergent body of evidence, including multiple witnesses, documentary material, and contextual findings, not on the uncritical acceptance of testimony from any single individual. Accordingly, Ground 3 rests on speculative assertions arising from developments in a separate case and fails to establish any denial of Mr Ngaïssona's rights to disclosure, to be heard, or to challenge

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<sup>380</sup> See the Ngaïssona Appeal, *supra* note 3, paras. 411, 413 and 418.

<sup>381</sup> See article 67(1)(e) of the Statute.

<sup>382</sup> See the Ngaïssona Appeal, *supra* note 3, para. 425.

the evidence. The Chamber acted within its discretion in rejecting speculative disclosure requests, ensured an adversarial and balanced process, and rendered convictions grounded in a reliable evidentiary record.

166. The CLRV recalls that a conviction will be overturned on fairness grounds only where the alleged violation undermines confidence in the reliability of the verdict.<sup>383</sup> That threshold is not met in the present appeal.

#### **4. Grounds 4 and 5 - The Chamber correctly applied rule 145(2)(a)(ii) of the Rules**

167. The CLRV address Grounds 4 and 5 together due to their interconnection.

168. Under the fourth ground of appeal, the Defence submits that the Chamber erred in law and in fact by applying an unduly restrictive interpretation of rule 145(2)(a)(ii) of the Rules.<sup>384</sup> It argues that the provision expressly allows the Chamber to give weight to a convicted person's conduct after the act, including efforts to repair harm or promote peace, provided such efforts are established on the balance of probabilities.<sup>385</sup> The Defence contends that, had the Chamber applied the correct test, it would have found that the evidence demonstrated genuine, peace-conducive actions warranting tangible mitigating weight.<sup>386</sup>

169. Under the fifth ground of appeal, the Defence argues that the Chamber erred in law and in fact in failing to consider Mr Ngaïssona's DDR efforts, issuance of Anti-Balaka badges, and proposal to create a military police in mitigation,<sup>387</sup> erroneously '*demand[ing] results*' and '*motive purity*'.<sup>388</sup>

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<sup>383</sup> See the *Bemba* AJ, *supra* note 45, paras. 60-62. See also, the *Lubanga* AJ, *supra* note 8, para. 28; and the *Ntaganda* AJ, *supra* note 49, para. 49.

<sup>384</sup> See the Ngaïssona Appeal, *supra* note 3, para. 433.

<sup>385</sup> *Ibid*, para. 433.

<sup>386</sup> *Ibid*.

<sup>387</sup> *Ibid*, para. 458.

<sup>388</sup> *Ibid*.

170. Chambers enjoy broad discretion in determining the appropriate sentence<sup>389</sup> and the Defence fails to show that the Chamber disregarded a relevant factor in considering mitigating circumstances when deciding on Mr Ngaïssona's sentencing. The Chamber considered at length the Defence's submissions on the purported efforts in peace building and reconciliation. It separated the Appellant's alleged efforts *during* and *after* the period of the charged offences and analysed them in turn. The Chamber acknowledged that Mr Ngaïssona engaged in efforts towards the conclusion of the Brazzaville agreement and a peace process for the CAR,<sup>390</sup> *after* the period relevant to the charges. Nevertheless, it concluded that a relevant statement to this effect was only signed under the immediate pressure resulting from the issuance of an arrest warrant against Mr Ngaïssona by the CAR authorities.<sup>391</sup> The Chamber carefully weighed all the identified efforts allegedly undertaken by the Appellant in their context, and analysed them in detail.<sup>392</sup> It pointed to the fact that these were undertaken in the context of governmental and international efforts, rather than originating from Mr Ngaïssona and his voluntary initiative.<sup>393</sup>

171. The Chamber also noted that the statements '*not to disturb Muslim brothers*' during Ramadan were substantially disingenuous as they were made after the Anti-Balaka had effectively forced out the Muslim population and once hostilities had stopped.<sup>394</sup> Moreover, against the background of Mr Ngaïssona's efforts to have Anti-Balaka elements included within the government, the Chamber was further unpersuaded that his efforts were genuine.<sup>395</sup> It concluded that those actions were primarily self-serving and, therefore, undeserving of significant recognition in

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<sup>389</sup> See the Public Redacted version of "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'", [No. ICC-01/05-01/13-2276-Red](#), 8 March 2018, para. 22.

<sup>390</sup> See the Impugned Decision, *supra* note 4, para. 4688.

<sup>391</sup> *Ibid*, para. 4690.

<sup>392</sup> *Ibid*, para. 4692.

<sup>393</sup> *Ibid*.

<sup>394</sup> *Ibid*, paras. 4691-4692.

<sup>395</sup> *Ibid*, para. 4693.

mitigation.<sup>396</sup> The Chamber acted squarely within its discretion in affording said acts limited weight.<sup>397</sup>

172. Similarly, the Chamber carefully explained how the DDR initiative was undertaken for reasons of personal benefit – political and financial – rather than out of a genuine motivation to bring about reconciliation and peace.<sup>398</sup> It determined that the badges had a two-fold purpose, namely distinguishing ‘real’ from ‘fake’ Anti-Balaka, as well as eventual DDR.<sup>399</sup> Accordingly, they were not produced in furtherance of a purely peaceful purpose.<sup>400</sup> The Defence merely advances and repeats arguments,<sup>401</sup> as to the ostensible purpose of issuing badges so as to ‘*identify criminal opportunists*’, that were already rejected in relation to the conviction decision.<sup>402</sup>

173. Lastly, the argument that the Chamber demanded ‘*motive purity*’ is misguided. In order to qualify as mitigating circumstances, actions taken require conscious decisions and active steps to take measures towards the purported peaceful outcome; they cannot simply be incidental to an otherwise unlawful motive, such as the badge issue. The Chamber correctly found that Mr Ngaïssona did not engage in these matters for peaceful motives, thus negating any significant mitigating effect.

174. In this regard, “[w]hether mitigating circumstances exist is considered on a balance of probabilities”;<sup>403</sup> not is the Chamber obliged to assess the Defence’s interpretation against this burden.<sup>404</sup> In addition, “[t]he existence of mitigating factors does not automatically imply a reduction, of sentence or preclude the imposition of a particular

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<sup>396</sup> *Ibid*, paras. 4693-4699.

<sup>397</sup> *Ibid*, para. 4699.

<sup>398</sup> *Ibid*, paras. 4695-4699.

<sup>399</sup> *Ibid*, paras. 1805, 4695.

<sup>400</sup> *Ibid*, para. 4695.

<sup>401</sup> See the “Ngaïssona Defence Written Submissions on Potential Sentencing”, [No. ICC-01/14-01/18-2748](#), 13 December 2024, paras. 33-36.

<sup>402</sup> See the Impugned Decision, *supra* note 4, paras. 1805-1807.

<sup>403</sup> See the “Sentencing Judgment” with public Annex A (Trial Chamber X), [No. ICC-01/12-01/18-2662](#), 20 November 2024, para. 28. (Emphasis added).

<sup>404</sup> *Contra* the Ngaïssona Appeal, *supra* note 3, para. 434 *et seq.*

sentence”.<sup>405</sup> Rather, what constitutes a mitigating circumstance is a matter for the trial chamber to determine in the exercise of its discretion. In fact, “[t]he Trial Chamber is endowed with a considerable degree of discretion in making this determination, as well as in deciding how much weight, if any, to be accorded to the mitigating circumstances identified”.<sup>406</sup>

175. The Chamber was guided by the correct legal standard,<sup>407</sup> and, relied on an abundance of evidence when reviewing the Mr Ngaïssona alleged peace efforts. The Chamber also gave significant consideration to and discussed the Defence’s claims. As such, the Defence fails to demonstrate that the Chamber erroneously failed to take relevant considerations into account or considered irrelevant considerations when concluding that Mr Ngaïssona’s engagement in peace efforts were not genuine and motivated by peace building efforts. The Defence’s submissions do not show any error in the Chamber’s methodology or consideration of the facts, thus they do not rise beyond mere disagreement with the final weight accorded to these matters.

## **5. Ground 6 - The Chamber properly assessed the degree of participation and intent**

176. Under the sixth ground of appeal, the Defence submits that the Chamber erred in assessing Mr Ngaïssona’s degree of participation, failing to meet the requirements of rule 145(1)(c) of the Rules, passing a disproportionate sentence and frustrating meaningful appellate review.<sup>408</sup> It avers that the Chamber’s findings on degree of participation and intent were too general to permit proportional sentence review.<sup>409</sup> Specifically, the Defence argues that “[b]eyond using indeterminate phrases, the Chamber did not link his alleged acts to the specific criminality in Bangui, Bossangoa, Yamwara, or along the PK9-Mbaïki axis”.<sup>410</sup> In the Defence’s view, this “omission prevents verification that the

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<sup>405</sup> See MICT, *Prosecutor v. Karadžić*, Case No. MICT-13-55-A, [Judgement](#) (Appeals Chamber), 20 March 2019, para. 753 (the “Karadžić AJ”).

<sup>406</sup> See ICTR, *Prosecutor v. Bikindi*, Case No. ICTR-01-72-A, [Judgement](#) (Appeals Chamber), 18 March 2010, para. 158.

<sup>407</sup> See the Impugned Decision, *supra* note 4, para. 4410.

<sup>408</sup> See the Ngaïssona Appeal, *supra* note 3, para. 491.

<sup>409</sup> *Ibid*, para. 486.

<sup>410</sup> *Ibid*, para. 491.

*sentences – both individual and joint – reflect a properly individualised assessment of culpability and are proportionate”*.<sup>411</sup> Finally, the Defence contends that the sentence lacks transparency and is disproportionate to Mr Ngaïssona’s proven level of involvement.<sup>412</sup>

177. The Chamber articulated in a clear manner the relevant considerations that informed its exercise of discretion when imposing the individual and joint sentences. A chamber is under no obligation to spell out every step of its reasoning.<sup>413</sup> The Defence is seeking detailed, individual findings in relation to matters that do not require such kind of conclusions, given the nature of the Appellant’s role in the realization of the crimes. Mr Ngaïssona provided financial support to the Anti-Balaka, thereby aiding, abetting or otherwise assisting in the commission of crimes.<sup>414</sup> The evaluation of the degree of individual culpability of a convicted person is a general assessment of the overall degree of contribution, not a statistical assessment in relation to all crimes individually. It would be over-exigent and absurd to require the Chamber to assess and rule on the degree of contribution this financial assistance had in relation to individual crimes.

178. Similarly, the Defence’s nit-picking approach to a location-specific analysis is unwarranted in light of the nature of Mr Ngaïssona’s conviction. While the accessory liability of a foot soldier may be relevantly assessed in relation to specific killing incidents, such analysis is entirely obsolete in a case such as that of the Appellant, where his contribution was organizational at a higher, more removed level, but essential to bring about the commission of the crimes on the ground in the first place.<sup>415</sup>

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<sup>411</sup> *Ibid.*

<sup>412</sup> *Ibid.*, para. 511.

<sup>413</sup> See the *Bemba et al.* AJ, *supra* note 8, para. 870. See also, the “Judgment on the ‘appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’” (Appeals Chamber), [No. ICC-01/11-01/11-547-Red OA4](#), 21 May 2014, para. 89: “*the extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out*”.

<sup>414</sup> See the Impugned Decision, *supra* note 4, paras. 4027, 4034-4037.

<sup>415</sup> See e.g., the “Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo” (Trial Chamber VII), [No. ICC-01/05-01/13-2312](#), 17 September

179. The “*undifferentiated description of participation*”<sup>416</sup> alleged by the Defence was entirely appropriate. While the evidence demonstrated Mr Ngaïssona’s higher and more direct involvement in some aspects, but less in others, it was reasonable for the Chamber to conclude that his overall contribution was “*not particularly high or low*”.<sup>417</sup> It reached this conclusion considering Mr Ngaïssona’s provision of financial aid, organizational assistance and psychological support to the Anti-Balaka and the fact that he made these contributions for the purpose of facilitating the commission of the criminal acts.<sup>418</sup> His financial support made it possible for at least some of the elements to participate in the Bangui attack; he knew and was fully informed of the attack in advance, and nevertheless continued to provide funds to the Anti-Balaka involved in the attack.<sup>419</sup> The Chamber further noted that the attack were not spontaneous but planned and that the Appellant specifically provided the funds to elements participating in said attack.<sup>420</sup>

180. The Defence’s submissions demonstrate no more than mere disagreement with the Chamber’s findings and should be summarily dismissed.<sup>421</sup>

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2018, para. 45: “*people can have varying degrees of participation in the execution of the offences even while all of them are making essential contributions to the common plan.*” The decision was upheld on appeal.

<sup>416</sup> See the Ngaïssona Appeal, *supra* note 3, para. 494.

<sup>417</sup> See the Impugned Decision, *supra* note 4, para. 4711.

<sup>418</sup> *Ibid*, para. 4709.

<sup>419</sup> *Ibid*, para. 4710.

<sup>420</sup> *Ibid*.

<sup>421</sup> See the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” (Appeals Chamber), [No. ICC-02/11-01/15-208 OA6](#), 8 September 2015, para. 73: “*mere disagreement with the conclusions that the first-instance Chamber drew from the available information or the weight it accorded to particular factors does not suffice to establish an error*”. See also, the MICT, *Prosecutor v. Karadžić*, [Judgment](#), MICT-13-55-A, 20 March 2019, para. 376.

## VIII. SUBMISSIONS ON MR YEKATOM APPEAL

### 1. Ground 1 – The Chamber’s findings remained within the scope of the confirmed charges

181. In Ground 1, the Defence submits that the Chamber erred in law by exceeding the facts and circumstances as confirmed in the charges and thereby rendered Mr Yekatom’s convictions on Counts 1-6 and 24-28 unsafe.<sup>422</sup>

#### a) Ground 1.1 - The Chamber adhered to the charged factual framework

182. The Defence claims that the Chamber improperly expanded the factual basis beyond the charges as confirmed by relying on “*an assortment of material facts*” not properly pleaded at trial including the “*5 December Operation Material Facts*”, the “*Count 4-5 Material Facts*”, and the “*Axis Mens Rea Facts*” (collectively, the “*Unpleaded Material Facts*”),<sup>423</sup> thereby violating Mr Yekatom’s rights and failing to inform him that the *Unpleaded Material Facts* would constitute the basis for his criminal liability.<sup>424</sup>

183. Specifically, the Defence argues that (i) the evidence of P-1339 and P-2475 was irreconcilable – notably in respect of Mr Yekatom’s conduct and presence during the Boeing Market events; and (ii) the Prosecution’s decision not to rely on P-2475’s account contaminates the Chamber’s assessment of the evidence on the 5 December operation.<sup>425</sup> In this regard, the Chamber comprehensively assessed the evidence concerning P-2475 and found his account *unreliable on his involvement within Mr Yekatom’s group*.<sup>426</sup> Therefore, whether P-2475’s evidence is allegedly irreconcilable with that of P-1339 is inconsequential for the purposes of the present appeal. Furthermore, the Defence fails to explain how the Chamber’s dismissal of P-2475’s evidence has contaminated its legal and factual findings, since the Chamber did not rely on his evidence in entering the conviction against the Appellant.

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<sup>422</sup> See the Yekatom Appeal, *supra* note 2, paras. 4-24.

<sup>423</sup> *Ibid*, para. 9.

<sup>424</sup> *Ibid*, paras. 10-11.

<sup>425</sup> See the Yekatom Appeal, *supra* note 2, para. 11.

<sup>426</sup> See the Impugned Decision, *supra* note 4, paras. 506 to 521.

184. The arguments in Ground 1.1 should be summarily dismissed as they fail to meet the requirements for substantiation in appeals under article 82 of the Statute.<sup>427</sup> The Defence does not identify the nature of the alleged error. Rather, it relies on various parts of the Judgment compounding them together as one error without any elaboration on how the challenged parts of the Impugned Decision are in fact contrary to logic, common sense, and experience or the Chamber did not consider all relevant and connected evidence. As recalled *supra*,<sup>428</sup> it is incumbent upon the appellant to present cogent arguments setting out the alleged error and explaining how the trial chamber erred.<sup>429</sup>

***b) Ground 1.2 – The Chamber properly characterised the facts in entering the conviction***

185. The Defence submits that the Chamber convicted Mr Yekatom under Counts 1, 4, 5, and 8 for direct perpetration – a mode of liability allegedly not confirmed by the Pre-Trial Chamber,<sup>430</sup> thereby entering a conviction on the basis of an unlawful re-characterisation of the facts without providing notice under regulation 55 of the Regulations and receiving relevant submissions.<sup>431</sup>

186. The Defence mispresents the Confirmation Decision and the Judgment. In relation to Counts 1, 4, 5, and 8, the Pre-Trial Chamber considered that Mr Yekatom's conduct in the course of the attack on Bangui on 5 December 2013 amounted to: (i) intentionally directing an attack against the civilian population as such under article 8(2)(e)(i) of the Statute; (ii) deportation or forcible transfer of population and

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<sup>427</sup> See the *Lubanga* AJ, *supra* note 8, paras. 29-30; the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'" (Appeals Chamber), [No. ICC-01/05-01/08-962 OA3](#), 19 October 2010, paras. 103-104; and the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'" (Appeals Chamber), [No. ICC-01/05-01/08-1019 OA4](#), 19 November 2010, paras. 69-71.

<sup>428</sup> See *supra*, para. 27.

<sup>429</sup> See the *Ntaganda* AJ, *supra* note 49, para. 48. See also, the "Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions" (Appeals Chamber), [No. ICC-02/11-01/15-1400 A](#), 31 March 2021, para. 74 (the "*Gbagbo and Blé Goudé* AJ").

<sup>430</sup> See the Confirmation Decision, *supra* note 58, p. 103.

<sup>431</sup> See the Yekatom Appeal, *supra* note 2, paras. 12-15.

displacement of the civilian population under articles 7(1)(d) and 8(2)(e)(viii) of the Statute, and (iii) persecution under article 7(1)(h) of the Statute.<sup>432</sup> On this basis, the Pre-Trial Chamber considered that there were reasonable grounds to conclude that Mr Yekatom committed said crimes jointly with others or through other persons under article 25(3)(a) of the Statute or, in the alternative, ordered the commission of said crimes pursuant to article 25(3)(b) of the Statute.<sup>433</sup>

187. In the Judgment, the Chamber correctly treated the modes of liability for the Appellant, and entered convictions on the basis of the primary alternative – namely, liability under article 25(3)(a) of the Statute as indirect perpetrator, or direct or indirect co-perpetrator.<sup>434</sup> The Chamber did not consider the further subsidiary modes of liability under article 25(3)(b) and (d) of the Statute.<sup>435</sup> Mr Yekatom’s conviction falls within the parameters of the facts and circumstances described in the Confirmation Decision. Therefore, the question of re-characterisation of facts never arose and there was no notice to be provided pursuant to regulation 55 of the Regulations.

*c) Ground 1.3 - The Chamber adhered to the defined scope of co-perpetration concerning Mr Yekatom*

188. The Defence claims that the Chamber erroneously moulded the material facts of Mr Yekatom’s co-perpetration liability for the PK9-Mbaiki axis charges, by convicting the Appellant on the basis of a fundamentally altered co-perpetration theory that differed sharply from the factual framework it had previously defined and on which it prepared its case.<sup>436</sup> The Defence submits that the confirmed common plan originally encompassed multiple locations over several months, involved several co-perpetrators, and relied on twelve alleged essential contributions by Mr Yekatom.<sup>437</sup> It

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<sup>432</sup> See the Confirmation Decision, *supra* note 58, para. 97.

<sup>433</sup> *Ibid*, para. 99.

<sup>434</sup> *Ibid*.

<sup>435</sup> *Ibid*.

<sup>436</sup> See the “Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial (Trial Chamber V), [No. ICC-01/14-01/18-703-Conf](#), 29 October 2020. A public redacted version was notified on 30 October 2020, [No. ICC-01/14-01/18-703-Red](#) (the “Decision on Motions on Scope and Evidence”).

<sup>437</sup> See the Yekatom Appeal, *supra* note 2, paras. 18-19.

contends that the Chamber ultimately narrowed the case to a later, geographically confined agreement involving only two co-perpetrators and reduced Mr Yekatom's alleged contributions to just two acts. According to the Defence, this shift effectively reshaped the Prosecution's case, deprived Mr Yekatom of adequate notice and undermined his ability to prepare an effective defence, thereby violating his fair trial rights.<sup>438</sup>

189. The Defence misrepresents the decision rejecting its motion for dismissal of the confirmed mode of co-perpetration.<sup>439</sup> The Chamber did not reshape the parameters of the co-perpetration theory concerning Mr Yekatom. Rather, it recalled the factual findings in the Confirmation Decision and correctly found that the Appellant had been sufficiently informed of the contours of the common plan and the identities of his alleged co-perpetrators.<sup>440</sup>

190. In relation to the co-perpetrators, the Chamber observed that according to the Confirmation Decision: (i) around August 2013, Mr Yekatom, together with Ouandjio and Beina, was already organising, training and equipping Anti-Balaka elements with the purpose of killing Muslims and Seleka's and, during the 5 December 2013 attack, Mr Yekatom was at the front of the group and shooting, together with Ouandjio and Beina,<sup>441</sup> (ii) following the 5 December 2013 Attack, Mr Yekatom and his Anti-Balaka group established a base at the Yamwara School where they provided military training to Anti-Balaka elements,<sup>442</sup> (iii) before establishing another base at PK9,<sup>443</sup> and (iv) from on or around 10 January 2014, took over a number of villages in the Lobaye Prefecture.<sup>444</sup>

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<sup>438</sup> *Ibid*, paras. 18-19.

<sup>439</sup> *Ibid*, paras. 17-20; and the Decision on Motions on Scope and Evidence, *supra* note 436.

<sup>440</sup> *Ibid*, para. 32.

<sup>441</sup> *Ibid*, para. 30.

<sup>442</sup> *Ibid*, para.113.

<sup>443</sup> *Ibid*, para. 129.

<sup>444</sup> *Ibid*, para. 31.

191. In the Judgment, the Chamber identified *Coeur de Lion* and Alkanto as Mr Yekatom's co-perpetrators of the crimes under Counts 24 to 28 based on the evidence presented at trial.<sup>445</sup> For this reason, the Chamber found that the Appellant committed said crimes jointly with and through others, under article 25(3)(a) of the Statute.<sup>446</sup> Moreover, on the twelve charged essential contributions underpinning Mr Yekatom's liability which - in the Defence's contention - were then reduced to only two in the Judgment,<sup>447</sup> the Defence acknowledges that those included a range of conducts undertaken over ten months in 2013 and 2014 in Zongo, Kalangoi in DRC, in the Lobaye prefecture; in Bangui; and later in Lobaye again.<sup>448</sup>

192. In fact, the conviction under Counts 24 to 28 was entered only in relation to the crimes committed on the PK9-Mbaïki axis. The Chamber identified numerous forms of such contributions: (i) Mr Yekatom and elements under his control entering Mbaïki on 30 January 2014; (ii) he took part in the meeting at *St Jeanne d'Arc* Church in Mbaïki, at which time the removal of the Muslim civilian population from Mbaïki was a foregone conclusion; (iii) he retained and exercised control over an active group of elements which was seen as and understood to be part of the Anti-Balaka; (iv) Mr Yekatom was the uncontested leader of the group which first set up at Yamwara in Boeing after 5 December 2013, and moved down the PK9-Mbaïki axis; (v) at the time of the advance along the PK9-Mbaïki axis, an agreement existed between Mr Yekatom, *Coeur de Lion* and Alkanto to establish control over the area, as well as to remove all Muslims therefrom, including by killing them.<sup>449</sup> Most importantly, these findings were squarely within the facts and circumstances described in the Confirmation Decision. In conclusion, the Defence's submissions that the Chamber convicted Mr Yekatom under Counts 24-28 "*on the basis of a radically transformed, if not entirely new, co-perpetration case*" are without any merit.

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<sup>445</sup> See the Impugned Decision, *supra* note 4, paras. 4344-4368.

<sup>446</sup> *Ibid*, para. 4369.

<sup>447</sup> See the Yekatom Appeal, *supra* note 2, para. 19.

<sup>448</sup> *Ibid*, para. 18.

<sup>449</sup> See the Impugned Decision, *supra* note 4, paras. 4348-4356.

## 2. Ground 2 - The Chamber properly attributed liability to Mr Yekatom

193. The Defence alleges several errors related to the attribution of criminal liability to Mr Yekatom.

*a) Ground 2.1 and 2.2 – The Chamber correctly found the Anti-Balaka was one movement and considered Mr Yekatom’s liability on the basis of his membership therein*

194. The Defence contends that the Chamber erred in treating the Anti-Balaka as “one movement” and in grounding Mr Yekatom’s liability primarily on his alleged membership therein. According to the Defence, the Chamber relied on contextual findings rather than his individual conduct, thereby improperly imputing the group’s motives and patterns of conduct to him under article 25(3)(a) of the Statute.<sup>450</sup> The Defence further argues that the same flawed reasoning tainted the Chamber’s findings on *mens rea*, in that it concluded Mr Yekatom shared the Anti-Balaka policy of targeting Muslim civilians solely on the basis of his alleged membership in the movement,<sup>451</sup> as purportedly illustrated by its analysis of the 5 December 2013 operation.<sup>452</sup>

195. The Defence mispresents the Judgment and fails to substantiate its arguments. In assessing the level of coordination and planning of the Bangui Attack, the Chamber harkened at multiple indicators, namely: (i) the existence of a plan to attack prior to 5 December 2013; (ii) the movement of Anti-Balaka elements and groups from the provinces arriving close to Bangui before 5 December 2013; (iii) the level of communication between the Anti-Balaka chiefs across the various groups during their advance to Bangui; (iv) the keeping of records of elements prior to the Bangui Attack; (v) waiting at common locations and preparing; (vi) the number of elements estimated to be involved; (vii) financing, arming and efforts to obtain weapons and ammunition along the way to Bangui; (viii) the circulation of information, prior to 5 December 2013, about an impending attack; (ix) the order to attack Bangui; (x) the goal of the Bangui

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<sup>450</sup> See the Yekatom Appeal, *supra* note 2, para. 25.

<sup>451</sup> *Ibid*, para. 40.

<sup>452</sup> *Ibid*, para. 38.

Attack; (xi) common leaders; (xii) the assignment of specific locations and time to attack in advance; (xiii) the unfolding of the attack and retreat; and (xiv) its aftermath and retaliation by the Seleka.<sup>453</sup>

196. Having assessed the evidence proving each of these indicators, the Chamber found that the 5 December 2013 Attack was highly coordinated<sup>454</sup> and then proceeded to conduct a comprehensive and detailed examination of the involvement of Mr Yekatom.

197. Based on the testimonies of numerous witnesses and audio-visual evidence, the Chamber found, *inter alia*, that: (i) Mr Yekatom returned to the CAR from Zongo, grouping with his group in locations close to Bangui, and arming prior to the Bangui Attack;<sup>455</sup> (ii) after having crossed over from Zongo, he established a base in Gbangba in the CAR composed of, at least, 1500 civilians and FACA members who were armed and trained;<sup>456</sup> (iii) as part of the training, they were instructed to kill all Muslims as they were assimilated to the Seleka, and to head towards Bangui to fight the Seleka and the Muslims;<sup>457</sup> (iv) Mr Yekatom personally told the elements to destroy the houses of the Muslims;<sup>458</sup> (v) he was aware that his elements would understand his instructions to target Muslims not only the Seleka as referring to Muslim civilians;<sup>459</sup> (vi) Mr Yekatom was aware that his elements - including long-standing and high-ranking FACA members in his group - would not distinguish between the Seleka and Muslim civilians during combat. In particular, *Cœur de Lion*, Beina, Maidanda and Bodios, who also trained civilian elements, bore strong anti-Muslim sentiments and targeted Muslim civilians;<sup>460</sup> and (vii) Mr Yekatom's group was designated to attack PK5, a predominantly Muslim neighbourhood. Therefore, the possibility that

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<sup>453</sup> See the Impugned Decision, *supra* note 4, para. 2123.

<sup>454</sup> *Ibid*, para. 2394.

<sup>455</sup> *Ibid*, para. 2426.

<sup>456</sup> *Ibid*, paras. 2427, 2433.

<sup>457</sup> *Ibid*, paras. 2437, 2439.

<sup>458</sup> *Ibid*, paras. 2441, 2442, 2446.

<sup>459</sup> *Ibid*, para. 2447.

<sup>460</sup> *Ibid*, para. 2452.

Mr Yekatom's elements would target Muslim civilians in the upcoming attack was high. Despite this, the Appellant did not signal to his elements the principles of distinction or its significance during their preparations and in advance of the attack. Accordingly, he failed to instruct his elements to apply the principle of distinction;<sup>461</sup> personally (viii) interacted and coordinated with other Anti-Balaka groups during the preparation and launching of the attack on Bangui;<sup>462</sup> (ix) conducted reconnaissance to assess the precise geographical location of the Boeing Market;<sup>463</sup> and instructed his elements (x) to attack the Muslims and Seleka present at Boeing Market;<sup>464</sup> (xi) to target Seleka positions along the Boeing-Cattin-PK5 direction, including attacking the Muslims traders at the Boeing Market before moving along the route to PK5;<sup>465</sup> (xii) when his group reached the Boeing Market, Mr Yekatom launched the attack by firing an automatic pistol in the air with the armed elements to continue and advance together;<sup>466</sup> (xiii) his group fired at the Muslim traders who were present at the Boeing Market;<sup>467</sup> (xiv) Muslim civilians were killed;<sup>468</sup> following Mr Yekatom's instructions, his elements (xv) destroyed the mosque in Boeing;<sup>469</sup> and (xvi) killed at least one Muslim civilian man in Cattin;<sup>470</sup> (xvii) in the context of these attacks on Boeing and Cattin, the majority of Muslims fled to PK5.<sup>471</sup>

198. Consequently, the Chamber's findings in relation to the crimes committed in Bangui - including Boeing and Cattin - are based on a substantial body of evidence and directly attributable to the conduct of the Appellant. The Defence does not challenge the reliability of this evidence and factual findings which amply demonstrate Mr Yekatom's personal intent and individual acts in relation to the 5 December 2013

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<sup>461</sup> *Ibid*, para. 2453.

<sup>462</sup> *Ibid*, paras. 2476, 2502, 2523.

<sup>463</sup> *Ibid*, paras. 75, 2529, 3950, 4010, 4017.

<sup>464</sup> *Ibid*, para. 2531.

<sup>465</sup> *Ibid*, para. 2533.

<sup>466</sup> *Ibid*, para. 2537.

<sup>467</sup> *Ibid*, para. 2538.

<sup>468</sup> *Ibid*, paras. 2552, 2586.

<sup>469</sup> *Ibid*, para. 2629.

<sup>470</sup> *Ibid*, para. 2662.

<sup>471</sup> *Ibid*, para. 2747.

Attack. His liability is proven beyond reasonable doubt based on his personal animus towards Muslims and independently of the collective conduct of the Anti-Balaka movement. Therefore, the Defence's claim is without merit.

199. The Defence similarly argues that the mass displacement along the PK9-Mbaïki axis and persecution were attributed to Mr Yekatom because of his association with the Anti-Balaka.<sup>472</sup> However, many findings refute this contention: (i) starting on 10 January 2014, Mr Yekatom and his elements left Yamwara and advanced from Bangui towards Mbaïki;<sup>473</sup> (ii) Mr Yekatom himself informed a journalist that he had 3,000 men on the ground;<sup>474</sup> (iii) when on the Mbaïki road, Mr Yekatom and others instructed the elements to kill all the Muslims in their area;<sup>475</sup> (iv) as a consequence, Muslim civilians living in towns and villages along and around the PK9-Mbaïki axis fled out of fear;<sup>476</sup> (v) Mr Yekatom entered Mbaïki with his elements on 30 January 2014. That day, a meeting was held at the *St Jeanne d'Arc* Church, between the Appellant and representatives of the Mbaïki community and the removal of the Muslim civilian population from Mbaïki was decided;<sup>477</sup> (vi) Mr Yekatom's group then settled in Mbaïki threatening and harassing Muslim civilians so that they would leave the area; and (vii) Muslim civilians from Mbaïki eventually leave out of fear.<sup>478</sup>

200. These findings are based on a substantial body of evidence proving Mr Yekatom's personal intent and individual acts. The Defence fails to challenge the reliability of the evidence and the correctness of these factual findings.

201. Lastly, the Defence claims that the Chamber erred in finding that Mr Yekatom was an 'Anti-Balaka'. It argues that the RFACPP was an independently formed, FACA-based movement distinct from the Anti-Balaka<sup>479</sup> and was not coordinated with other

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<sup>472</sup> See the Yekatom Appeal, *supra* note 2, para. 39.

<sup>473</sup> See the Impugned Decision, *supra* note 4, para. 3300.

<sup>474</sup> *Ibid*, para. 3337.

<sup>475</sup> *Ibid*, para. 3300.

<sup>476</sup> *Ibid*, paras. 3417, 3423.

<sup>477</sup> *Ibid*, paras. 3466, 3477.

<sup>478</sup> *Ibid*, paras. 3565, 3568, 3610.

<sup>479</sup> See the Yekatom Appeal, *supra* note 2, para. 50.

Anti-Balaka groups during the attack on Bangui on 5 December 2013, as there was no communication between Mr Yekatom and those groups.<sup>480</sup> The Defence further submits that a clear division existed between the Anti-Balaka South – aligned with Mr Yekatom and the RFACPP – and the Anti-Balaka North, whose groups fell under the National Coordination led by Mr Ngaïssona.<sup>481</sup> According to the Defence, the RFACPP never formally joined the National Coordination and merely used it as a political channel to convey non-violent proposals to the international community.<sup>482</sup> It maintains that the Chamber conflated North and South Anti-Balaka and treated Mr Ngaïssona as representing Mr Yekatom.<sup>483</sup> Finally, the Defence argues that Mr Yekatom could not exercise control through Yagouzou over the detention of the seven captives at the M'Poko base, asserting that Yagouzou – not Mr Yekatom – was in charge of the base and the elements stationed there.<sup>484</sup>

*Mr Yekatom was a leader of the Anti-Balaka*

202. The Chamber rightly concluded that Mr Yekatom was a leader of the Anti-Balaka. In this regard, the most incriminating evidence is his own statement on his status. As the Chamber recalled,<sup>485</sup> the Appellant introduced himself as the head of the Anti-Balaka of the South and explained that he created the Anti-Balaka movement in Zongo.<sup>486</sup> Mr Yekatom also publicly introduced himself as the person in charge of the Anti-Balaka in Mbaïki.<sup>487</sup> In addition, (i) numerous witnesses unambiguously identified him as the leader of the Anti-Balaka group,<sup>488</sup> (ii) given the nature of Mr Yekatom's public statements, they could have only been made by a leader and a

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<sup>480</sup> *Ibid*, paras. 59-60.

<sup>481</sup> *Ibid*, para. 73.

<sup>482</sup> *Ibid*, paras. 75-76.

<sup>483</sup> *Ibid*, para. 77.

<sup>484</sup> See the Yekatom Appeal, *supra* note 2, paras. 79-80.

<sup>485</sup> See the Impugned Decision, *supra* note 4, paras. 987-988.

<sup>486</sup> See CAR-OTP-2118-0415 (video). In CAR-OTP-2065-0716 (video), Mr Yekatom also makes a similar admission.

<sup>487</sup> See the Impugned Decision, *supra* note 4, paras. 988 and 3455.

<sup>488</sup> *Ibid*, para. 3481.

representative of the Anti-Balaka with sufficient authority to speak and make commitments on its behalf.<sup>489</sup>

203. Nonetheless, the Chamber made the distinction between the group led by Mr Yekatom and the Anti-Balaka in general, finding that: (i) the fact that there were different streams within the Anti-Balaka, had no impact on the groups acting in a coordinated fashion in pursuit of their core objective to drive out Djotodia and the Seleka;<sup>490</sup> (ii) the Anti-Balaka coalesced around this core objective, which was superimposed by varying personal and political ambitions that evolved over time; and (iii) Mr Yekatom's purported objective not to fight for Mr Bozize's return did not mean that his group was not Anti-Balaka or did not share the mentioned core objective.<sup>491</sup>

204. The Chamber conducted a lengthy examination of the evidence and found that the Appellant had control over his group during - and personally participated in - the Bangui Attack, at Yamwara, and during the advance along the PK9-Mbaïki axis.<sup>492</sup> Accordingly, had the Chamber found that Mr Yekatom only belonged to the RFACPP, the Impugned Decision would not have been materially affected. The Chamber did not convict the Appellant on the basis of an alleged broader membership in the Anti-Balaka movement. On the contrary, he was convicted for crimes he personally committed with his co-perpetrators, who formed their own group - whether characterised as the Anti-Balaka of the South or the RFACPP.

*Mr Yekatom' coordination with other Anti-Balaka groups in the 5 December attack*

205. The Chamber also did not commit any error in finding that Mr Yekatom's group coordinated with other Anti-Balaka groups during the Bangui Attack.<sup>493</sup> Regardless of its claimed independence, the group presented itself on the same day, at the same time, armed, and from a location that closed the circle around Bangui, and attacked known

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<sup>489</sup> *Ibid.*

<sup>490</sup> *Ibid*, para. 1525.

<sup>491</sup> *Ibid*, para. 1624.

<sup>492</sup> See the Impugned Decision, *supra* note 4, paras. 1628, 1629-1640.

<sup>493</sup> See the Yekatom Appeal, *supra* note 2, paras. 59-60.

locations of the Seleka and Muslim civilians, on Ngremangou's instructions.<sup>494</sup> The Defence concedes that (i) a hierarchical relationship and a reporting line existed between Ngremangou and Mr Yekatom; (ii) Mr Yekatom armed his group; and (iii) with his group participated in the attack on Bangui.<sup>495</sup> Nonetheless, it fails to engage with the Chamber's core findings on coordination and to explain how those are in fact contrary to logic, common sense, and experience or how the Chamber failed to consider all relevant evidence.

206. The question on whether Mr Yekatom's group coordinated with other Anti-Balaka groups prior to and during the attack on Bangui is immaterial to the correctness of the Chamber's finding on the Appellant's liability. He is convicted for the crimes he personally committed under article 25(3)(a) of the Statute during the attack on Bangui on 5 December 2013, not for his coordination with other Anti-Balaka groups. The Chamber established said coordination to ascertain the factual backgrounds of the events leading up to the attack. It specifically found that Ngremangou instructed Mr Yekatom and his group to advance to participate in the Bangui Attack.<sup>496</sup> Accordingly, whether and to what extent Ngremangou conveyed complete details about the broader operation to Mr Yekatom is immaterial insofar as his responsibility for what unfolded during the attack is concerned.<sup>497</sup>

207. Moreover, coordinating with other Anti-Balaka groups does not form part of the contextual elements or of the constitutive elements of the charged crimes. Hence, the alleged lack of coordination with other Anti-Balaka groups prior to and during the attack is irrelevant for Mr Yekatom's conviction. The Chamber would have still reached the same conclusion on the legal characterisation of his conduct, convicting him for the crimes he committed during the attack on Bangui.

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<sup>494</sup> See the Impugned Decision, *supra* note 4, paras. 2502, 2525.

<sup>495</sup> See the Yekatom Appeal, *supra* note 2, para. 67.

<sup>496</sup> See the Impugned Decision, *supra* note 4, paras. 2502, 2508, 2520.

<sup>497</sup> *Ibid*, para. 2520.

*Mr Yekatom was part of the National Coordination*

208. The fact that Mr Yekatom was part of the National Coordination is also proven by the comprehensive analysis of the leadership structure of the Anti-Balaka, through which the Chamber reached the following conclusions: (i) over time, the structure and positions within the Anti-Balaka evolved; (ii) when the structure of the Anti-Balaka formalised following Mr Ngaïssona's return to Bangui after Djotodia's resignation, the National Coordination of the Anti-Balaka was composed of various individuals at various times including Maxime Mokom, Wenezoui as spokesperson, and later deputy to Mr Ngaïssona; (iii) in 2014, a leadership tussle emerged at the National Coordination with various individuals superimposing different personal and political ambitions on the group; and (iv) the person who eventually prevailed in leading the Anti-Balaka was Mr Ngaïssona, and the Anti-Balaka were represented as one movement at peace negotiations and in contacts with the national authorities and international community.<sup>498</sup> The Chamber stressed that these developments about leadership happened after the charged events took place and thus any discussion of a possible split within the Anti-Balaka was, at best, of indirect relevance to its determinations.<sup>499</sup>

209. Indeed, the Chamber merely acknowledged that Mr Yekatom's involvement with the National Coordination was limited and that he was represented by general secretary Vomitiande, general treasurer Beina, and mediation advisor Nzilabo.<sup>500</sup> Given the charged mode of liability, the Chamber correctly convicted Mr Yekatom based on its legal and factual findings regarding his control over the group during the Bangui Attack, at Yamwara, and during the advance along the PK9-Mbaïki axis.<sup>501</sup> His connection with the National Coordination is immaterial for the purpose of his

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<sup>498</sup> *Ibid*, para. 1717.

<sup>499</sup> *Ibid*.

<sup>500</sup> *Ibid*.

<sup>501</sup> *Ibid*, para. 1628.

conviction. The Chamber would still have reached the same conclusion on the legal characterisation of his conduct.

*Mr Yekatom's role in the Yamwara events*

210. Contrary to the Defence's submissions,<sup>502</sup> there is no '*mischaracterisation*' of the Anti-Balaka or the Appellant's in relation to the individuals detained at the base near the M'Poko airport. In this regard, the Chamber explained the basis of its finding on how Mr Yekatom "*used*" Yagouzou. In particular, it examined all the relevant evidence and found that Mr Yekatom's group coordinated with Wenezoui and Yagouzou for the transfer and detention of the seven captives at the Anti-Balaka base behind the M'Poko airport.<sup>503</sup> The Chamber recalled that Boeing - where Yamwara is situated - was under Wenezoui's control and Mr Yekatom's group would 'act together' and coordinate with Wenezoui and elements stationed behind the airport.<sup>504</sup>

211. The Chamber also found that Mr Yekatom was aware that Yagouzou would detain the captives in a location close to the M'Poko airport surrounded by Anti-Balaka elements.<sup>505</sup> In this regard, it recalled that Mr Yekatom met the captives on 25 December 2013 at the Anti-Balaka base and told them that he would release them in the presence of an "*international opinion*".<sup>506</sup> This shows that Mr Yekatom still maintained control over them.

212. The Chamber considered that Mr Yekatom's transfer of the victims from Yamwara to the Anti-Balaka base behind the M'Poko airport, and his coordination with Yagouzou to maintain them in detention, constituted acts of commission under article 25(3)(a) of the Statute.<sup>507</sup> It therefore correctly concluded that Mr Yekatom committed these crimes through Yagouzou during both the transfer and the victims'

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<sup>502</sup> See the Yekatom Appeal, *supra* note 2, paras. 79, 83.

<sup>503</sup> See the Impugned Decision, *supra* note 4, para. 3276.

<sup>504</sup> *Ibid*, para. 3292 referring to witnesses P-1858 and P-1786.

<sup>505</sup> *Ibid*, para. 4238.

<sup>506</sup> *Ibid*, para. 3268 referring to witnesses to P-1811 and P-1705.

<sup>507</sup> Article 25(3)(a) of the Statute.

subsequent captivity. This finding was based not only on the testimony of [REDACTED], but also on the corroborating evidence of P-1858, P-1786, P-1811, and P-1705.<sup>508</sup>

213. In assessing the evidence of P-0884, the Chamber acknowledged certain inherent inaccuracies, and the fact that he received some of the information from the captives [REDACTED].<sup>509</sup> Yet, the Chamber found P-0884's evidence credible as it showed that Mr Yekatom had the authority to release hostages kept at Yamwara and would hand them over to the people sent by Ngremangou.<sup>510</sup> Hence, the Chamber did not treat the evidence provided by P-0884 as the central pillar of its conclusion.<sup>511</sup> Rather, its finding was rooted in the holistic assessment of all available evidence.<sup>512</sup> Lastly, even if the Chamber had agreed with the Defence's arguments in this regard, the Impugned Decision would not have been materially affected. Indeed, Mr Yekatom was convicted of several crimes related to the Yamwara incident. His actions involving the transfer of the victims and their detention at Yagouzou base constitute only part of his overall criminal responsibility arising from the incident.

214. Under Count 11, the Chamber concluded that Mr Yekatom's elements inflicted suffering upon the victims by means of inhumane acts, including: deprivation of liberty, death threats, beatings, subjecting a family member or friend to mistreatment within hearing distance, undressing of the female captives for searches, confinement without information as to whether and when they would be released, and providing no information on the state and whereabouts of the victims.<sup>513</sup> The Chamber reached essentially the same conclusion with regard to Counts 13,<sup>514</sup> 14<sup>515</sup> and 17<sup>516</sup> after having

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<sup>508</sup> See the Impugned Decision, *supra* note 4, paras. 109-110 and *Contra* the Yekatom Appeal, *supra* note 2, para. 81.

<sup>509</sup> *Ibid*, [REDACTED].

<sup>510</sup> *Ibid*.

<sup>511</sup> *Contra* the Yekatom Appeal, *supra* note 2, para. 81.

<sup>512</sup> *Ibid*, *contra* para. 82.

<sup>513</sup> See the Impugned Decision, *supra* note 4, paras. 4148-4152.

<sup>514</sup> *Ibid*, paras. 4155-4185.

<sup>515</sup> *Ibid*, paras. 4186-4205.

<sup>516</sup> *Ibid*, paras. 4222-4232.

considered the totality of the specific acts enumerated above. Consequently, even if the Defence's arguments succeed in relation to Mr Yekatom's acts concerning the transfer of the victims and maintaining them in captivity at Yagouzou's base, he would have still been convicted for his comparatively more severe of criminal conducts under Counts 11, 13, 14 and 17. Hence, the Defence also fails to demonstrate that the Judgment is materially affected due to this alleged error.

*The commission of the crimes is linked to the personal acts of Mr Yekatom*

215. The Defence further argues that, due to the misperception that Mr Yekatom was chief of all Anti-Balaka in the region, the Chamber erroneously attributed conduct of other Anti-Balaka groups to Mr Yekatom's group in Mbaïki and failed to exclude reasonable alternative inferences as to perpetrators' identities or group membership.<sup>517</sup>

216. On the contrary, the Chamber correctly linked the commission of the crimes to the personal acts of Mr Yekatom by comprehensively examining the movement of the Anti-Balaka group led by Mr Yekatom from his Yamwara base towards Mbaïki. Based on the evidence of an overwhelming number of witnesses who took part in the advance of Mr Yekatom's group along the PK9-Mbaïki axis, the Chamber found that: (i) starting on 10 January 2014 - or following Djotodia's resignation – Mr Yekatom with his elements left Yamwara and advanced from Bangui on the road towards Mbaïki, taking over a number of villages in the Lobaye prefecture, located in the south-west part of the country, including Sekia, Ndangala, Bimon, Kapou, Bossongo and Pissa;<sup>518</sup> (ii) Mr Yekatom had already deployed some elements from Yamwara to PK9 on or around 4, 5 or 6 January 2014<sup>519</sup> and was in control of many locations.<sup>520</sup> Having

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<sup>517</sup> See the Yekatom Appeal, *supra* note 2, para. 88.

<sup>518</sup> See the Impugned Decision, *supra* note 4, paras. 3309-3314, including testimonies of P-0888, P-1839, P-0954, P-1858, P-1786, P-1647, P-1558, and P-1339.

<sup>519</sup> *Ibid*, paras. 3312 and 3314. The Chamber also relied on video evidence CAR-OTP-2065-3412 where Mr Yekatom indicates that there were elements at PK9 when his group was still based in Yamwara.

<sup>520</sup> *Ibid* paras. 3328–3334. Based on the evidence of P-1839, P-1786, P-0954, P-0888, P-1193, P-1838, P-2084, P-1558 and P-1974, including the following locations: PK9, Bimbo, Bimon, Carmel, Pissa, Pissmiss, Bozongo, Boda, Centrapalm, Sekia, Zila, Lesse, Mbata, Moboma, Kapou, Bossongo, Bogogoganza, Nola, Ndangala, Bouchia, Batalimo, Palmex, Palme d'Or, Mongoumba and Mbaïki.

examined in detail the leadership structure of the Mr Yekatom's group, the Chamber also found that (iii) with *Coeur de Lion* as deputy, Mr Yekatom was the undisputed leader of the Anti-Balaka group along the PK9-Mbaïki axis, which comprised at least 1,000 elements at the time;<sup>521</sup> (iv) this group took over checkpoints at PK9, Sekia, Bimon, Bossongo and Pissa in their advance towards Mbaïki and set up new bases at PK9 and Sekia;<sup>522</sup> (v) checkpoints aimed at searching and identifying Muslims in the area and raising money to finance the group and its needs;<sup>523</sup> (vi) a significant proportion of the Muslim civilian population fled their towns and villages along the PK9-Mbaïki axis due to the advance of Mr Yekatom's group.<sup>524</sup> To reach this conclusion, the Chamber relied not only on the witnesses who testified about the arrival of the Anti-Balaka in general,<sup>525</sup> but also on the evidence of the witnesses who personally heard of or saw Mr Yekatom;<sup>526</sup> and (vii) the arrival of Mr Yekatom and his group in Mbaïki coincided with the mass fleeing of the Muslim population.<sup>527</sup> The Muslim population was evacuated to Mbaïki in January 2014 which is consistent with the timing of Mr Yekatom's group's advance towards Mbaïki;<sup>528</sup> (viii) Mr Yekatom publicly identified himself as being in charge of the Anti-Balaka advancing to Mbaïki.<sup>529</sup> The Chamber also recalled that witnesses unambiguously identified

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<sup>521</sup> *Ibid*, paras. 3337-3358, referring to P-1839, P-2084, P-0954, P-1647, P-0888, P-1786, P-1858, P-0446, P-0884, P-2232, P-1962, P-2353, and D29-5012. The Chamber also relied on video evidence CAR-OTP-2055-2610 where Mr Yekatom tells a journalist that he had 3,000 men on the ground.

<sup>522</sup> *Ibid*, paras. 3361-3416. Based on the evidence of P-1839, P-0888, P-0954, P-1193, P-1558, P-1647, P-1858, P-1974, P-1823, P-2084, P-0446, P-1786, P-1838 and P-1813.

<sup>523</sup> *Ibid*, paras. 3394-3382. By relying on the evidence of P-1838, P-1823, P-1839, P-2419, D29-5015, P-1558, P-0954, P-1962, P-1647, P-2084.

<sup>524</sup> *Ibid*, para. 3424.

<sup>525</sup> *Ibid*, paras. 3418-3422.

<sup>526</sup> *Ibid*, e.g. para. 3423: the Chamber recalled that P-2389, a Muslim inhabitant of Pissa, explained that he left Pissa after hearing from others the Anti-Balaka were coming to Pissa and Mr Yekatom was only five kilometres away from Pissa; paras. 3426-3427: P-2419, a Muslim inhabitant of Bimon, also explained that he saw with his own eyes how Mr Yekatom arrived in Bimon with his men prior to fleeing to the bush; para. 3430. P-1595 also left Mbaïki after having heard from others that violent crimes were being committed by the elements of Mr Yekatom.

<sup>527</sup> *Ibid*, para. 3429. See the evidence of P-1813. In particular, the Chamber recalled that the departure of Muslims from Mbata to Mbaïki occurred at the time Mr Yekatom's group advanced along the axis.

<sup>528</sup> *Ibid*, paras. 3431-3435. See the evidence of P-1595, P-2354 and P-2353.

<sup>529</sup> *Ibid*, para. 3455. For example, according to P-1813, Mr Yekatom introduced himself to him as the person in charge of the Anti-Balaka in the area and he wanted to go to Mbaïki.

Mr Yekatom as the leader of the Anti-Balaka group on the PK9-Mbaïki axis,<sup>530</sup> and that he gave a speech twice in front of the local population of Mbaïki, on behalf of the Anti-Balaka;<sup>531</sup> (ix) Anti-Balaka elements threatened and mistreated the Muslim population in Mbaïki in the presence of Mr Yekatom.<sup>532</sup> Eye-witness P-1838 saw Mr Yekatom accompanying his elements around Mbaïki and installing them in the houses abandoned by the Muslims.<sup>533</sup>

217. In light of these findings, the Chamber could not possibly have misattributed the conduct of some other Anti-Balaka elements to Mr Yekatom and his group. The Defence challenges none of this specific and detailed evidence linking the events with the Appellant's actions. Based on the copious evidence, there are no alternative inferences as to perpetrators' identities or group membership.

***b) Ground 2.3 – The Chamber correctly found that Mr Yekatom targeted the Muslim population***

218. Turning to Ground 2.3 in relation to the targeting of the Muslim population, the Defence argues that the Chamber erred in fact and in law in finding that Mr Yekatom knew that the Anti-Balaka perceived the Muslims as collectively responsible for the violence and abuses committed by the Seleka and thus attributing the criminal responsibility in relation to the charged crimes to him.<sup>534</sup> It adds that the Chamber failed to establish when the Appellant acquired this knowledge.<sup>535</sup>

*Mr Yekatom perceived Muslim civilians as collectively responsible for the actions of the Seleka and was aware of said perception within the Anti-Balaka*

219. The Chamber correctly found that Mr Yekatom perceived Muslim civilians as collectively responsible for the actions of the Seleka and was aware of said perception.

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<sup>530</sup> *Ibid*, paras. 3345-3347.

<sup>531</sup> *Ibid*, paras. 3497-3514. See the evidence of D29-5013, D29-5015, P-1839, P-1666, P-1595, P-1813, P-2041, P-1838, P-2354, and D29-5012.

<sup>532</sup> *Ibid*, para. 3542. See the evidence of P-1839.

<sup>533</sup> *Ibid*, para. 3578.

<sup>534</sup> See the Yekatom Appeal, *supra* note 2, para. 97.

<sup>535</sup> *Ibid*, para. 98.

In the Impugned Decision, the Chamber made a factual finding about the exact time frame during which the Appellant must have become aware of the tendencies of the Anti-Balaka which equated the Muslim population with the Seleka.<sup>536</sup>

220. In particular, based on the evidence the Chamber correctly found that the Anti-Balaka groups - which engaged in hostilities against the Seleka from September 2013 onwards - associated the Seleka with the Muslim civilian population. The Chamber found that Anti-Balaka groups perceived Muslim civilians as collectively responsible for the crimes committed by, or as complicit with, or supportive of, the Seleka.<sup>537</sup> This was public knowledge since September 2013 and, therefore, Mr Yekatom knew about the context and how members of his group did not distinguish between Muslim civilians and the Seleka since that time.<sup>538</sup> Yet, the Appellant, as the group leader, did not emphasise the need for such distinction in preparation for the attack on Bangui on 5 December 2013, in Yamwara, or when his group advanced along the PK9-Mbaïki axis.<sup>539</sup>

221. Mr Yekatom not only expressly instructed the elements under his command to attack Muslim civilians but also personally participated in related attacks which targeted not only Seleka members, but also Muslim civilians.<sup>540</sup> Therefore, the Chamber committed no error in finding that the Appellant must have been aware of the statements against Muslims made by elements and leaders of his group.<sup>541</sup> There exists unequivocal video evidence in the case record showing – in the context of the 5 December operation – (i) the elements of Mr Yekatom’s group expressing anti-Muslim sentiments, conflating the Seleka with Muslims; (ii) Beina talking to the

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<sup>536</sup> See the Impugned Decision, *supra* note 4, paras. 1210-1298. The Chamber relied on a significant body of evidence, including the evidence of P-0952, P-2232, P-2027, P-0965, P-2269, P-2841, P-2673, P-0475, P-2324, P-2328, P-0287, P-0876, P-1193, P-0808, P-0889, P-1847, D30-4720, P-0967, P-0461, and P-2625.

<sup>537</sup> *Ibid*, para. 1297.

<sup>538</sup> *Ibid*, paras. 1298-1299.

<sup>539</sup> *Ibid*, para. 1299.

<sup>540</sup> *Ibid*. The Chamber relied on the evidence provided by P-0952, P-2232, P-2027, P-0965, P-2269, P-2841, P-2673, P-0475, P-2324, P-2328, P-0287, P-0876, P-1193, P-0808, P-0889, P-1847, D30-4720, P-0967, P-0461, and P-2625.

<sup>541</sup> *Ibid*, paras. 1298-1299 and 1305. *Contra* Yekatom Appeal, *supra* note 2, para. 117.

camera and saying, *inter alia*, that if Djotodia does not step down, there will be a *genocide* in the CAR; (iii) Maidanda saying that he does not want to see Muslims and threatening to kill Muslim children.<sup>542</sup> Based on such convincing evidence, the Chamber concluded that Mr Yekatom was aware that his elements would not distinguish between the Seleka and Muslim civilians during combat, and that *Cœur de Lion*, Beina, Maidanda and Bodios bore strong anti-Muslim sentiments, targeting Muslim civilians.<sup>543</sup>

222. The Defence fails to show how the Chamber did not conduct a holistic evaluation of the evidence and how its factual findings were unreasonable. Therefore, the argument that the Chamber failed to establish when Mr Yekatom learned about the perception of the Anti-Balaka towards the Muslim population is without merit.

*Mr Yekatom perceived Muslim civilians as collectively responsible*

223. Equally without merit is the Defence's assertions that the Chamber did not provide a clear reasoning and identify any evidence that Mr Yekatom himself perceived Muslim civilians as collectively responsible for the Seleka exactions.<sup>544</sup> The same goes for the Defence's claim that the Chamber did not provide clear reasoning and explanation on how any inference from the crimes demonstrated the Appellant's personal discriminatory perception to ground persecution.<sup>545</sup>

224. In fact, the Chamber held that Mr Yekatom's conduct in the context of the Bangui Attack *could have only been intentional* since he (i) intended to carry out an attack against the Muslim civilian population of Boeing and Cattin; and (ii) his elements intended to murder Muslim traders at the Boeing Market, including Hassan Mahamat and two unnamed Muslim traders; he knew that his elements (iii) would kill Muslim

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<sup>542</sup> *Ibid*, paras. 2448-2450.

<sup>543</sup> *Ibid*, para. 2452.

<sup>544</sup> See the Yekatom Appeal, *supra* note 2, para. 103.

<sup>545</sup> *Ibid*.

civilians in Cattin, and (iv) would attack the Boeing Mosque; and (v) that launching the attack would cause the Muslims from Boeing and Cattin to flee.<sup>546</sup>

225. The Chamber also found that Mr Yekatom perceived - and knew that his elements perceived - the Muslims in the CAR as collectively responsible for the violence and abuses committed by the Seleka and that the Anti-Balaka targeted the Muslim civilian population on this basis. Mr Yekatom meant for the Muslim civilian population in Boeing and Cattin to be severely deprived of its rights on the basis of their religious and ethnic commonalities with the Seleka within the meaning of the specific intent requirement applicable to the crime against humanity of persecution, pursuant to article 7(1)(h) of the Statute.<sup>547</sup> Yet, the Defence fails to challenge any of the evidence upon which these factual findings are based.

226. The Defence's further argument that the Chamber ignored exculpatory evidence of D29-5014, according to which Mr Yekatom came to save him is also meritless.<sup>548</sup> The Chamber examined the evidence in question and found that the Appellant did not generally assist victims during or after the period relevant to the charges,<sup>549</sup> and his alleged efforts to assist the Muslim population were disingenuous as they stood in stark contrast to his criminal conduct against this group.<sup>550</sup> The evidence that the Defence references in this regard only shows an extremely isolated and selective act<sup>551</sup> compared to the enormous body of incriminating evidence demonstrating a clear pattern of intentional conduct under article 7(1)(h) of the Statute.

227. The Defence also claims that the Chamber erred in finding that Mr Yekatom did not provide the elements under his control with training in international humanitarian law in preparation of the attack on Bangui on 5 December 2013, in Yamwara, or while

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<sup>546</sup> See the Impugned Decision, *supra* note 4, para. 4015.

<sup>547</sup> *Ibid*, para. 4024.

<sup>548</sup> See the Yekatom Appeal, *supra* note 2, para. 104.

<sup>549</sup> See the Impugned Decision, *supra* note 4, para. 4479.

<sup>550</sup> *Ibid*, para. 4478.

<sup>551</sup> *Ibid*.

advancing along the PK9-Mbaïki axis.<sup>552</sup> The allegations in this regard are misplaced. In analysing the evidence on the matter, the Chamber found that on and around 24 December 2013 Mr Yekatom's elements, including civilian, were provided with trainings of military nature at Yamwara, but not in international humanitarian law.<sup>553</sup> Yet, it is not disputed by either the Prosecution or the Defence that FACA members of Mr Yekatom's group would have had training in humanitarian law prior to the events.<sup>554</sup>

228. The issue in dispute concerns Mr Yekatom's criminal liability, particularly his *mens rea* in relation to the crimes committed at Yamwara. The Appellant is not prosecuted for failing to provide training to civilian members of his group, but for his responsibility under article 25(3)(a) of the Statute and the specific elements of the crimes charged. In convicting him under Counts 11 and 14, the Chamber found, *inter alia*, that Mr Yekatom, as a FACA member, was aware of the applicable international humanitarian law and the relevant domestic legal framework in the CAR, and knew that neither he nor his subordinates had legal basis to capture the victims at Yamwara or mistreat them while in captivity.<sup>555</sup>

229. Consequently, the Defence's arguments in this regard have no material effect on the correctness of the Judgment. The Chamber would still have convicted Mr Yekatom on said Counts based on the evidence presented at trial.

230. The Defence's further allegation that the Chamber failed to consider that Mr Yekatom continued to serve the FACA under the Seleka regime for several months are irrelevant to the correctness of the Impugned Decision regarding Mr Yekatom's animus towards the Muslim population which was amply evidenced by his personal conduct constituting the charged crimes. Therefore, these arguments must also be dismissed due to the lack of material effect.

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<sup>552</sup> See the Yekatom Appeal, *supra* note 2, paras. 105-115.

<sup>553</sup> See the Impugned Decision, *supra* note 4, paras. 3087 and 3097.

<sup>554</sup> *Ibid*, para. 3096.

<sup>555</sup> *Ibid*, paras. 4256 and 4274.

231. The episode related to the treatment of the Lapo N’Gomat family<sup>556</sup> also does not alter the Chamber’s conclusion on the targeting of the Muslim population. The Defence refers to this incident to show that there was no policy of targeting the Muslim population. According to the Defence, the incident arose from the discovery of a Seleka card in Saint-Cyr’s possession; the fact that [REDACTED],<sup>557</sup> and Alkanto’s personal grievances towards her and the men.<sup>558</sup>

232. This interpretation misrepresents the Judgment. The Chamber did not find that the seven persons in question were arrested only because of their ethnicity.<sup>559</sup> Instead, it considered that it was a *combination* of Alkanto’s negative feelings towards P-1811 and P-0967 because they were [REDACTED], and Muslims.<sup>560</sup> This finding was based on the following facts which amply demonstrate Mr Yekatom’s group identification of all the seven persons as Muslims : (i) Alkanto used racially motivated insults toward P-0967;<sup>561</sup> (ii) the elements beat P-1704 and P-1716 for being traitors and spies;<sup>562</sup> and (iii) ignored P-1705 explaining that they were not Muslims; (iv) Bojos interrogated P-1704 accusing him of being of Goula descent, a Muslim ethnic group;<sup>563</sup> (v) *Coeur de Lion* observed Saint Cyr’s mistreatment and ordered the assailants to continue as the victims were Muslims and Seleka.<sup>564</sup>

233. The Chamber acknowledged that Saint Cyr was searched at the checkpoint where the purported ‘Seleka card’ was discovered.<sup>565</sup> Yet, the Defence argues that the Chamber was required to address the card’s role and to explain why it attributed the arrest and transfer to a supposed perception of the Muslim identity.<sup>566</sup>

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<sup>556</sup> See the Yekatom Appeal, *supra* note 2, paras. 118-119.

<sup>557</sup> *Ibid*, [REDACTED].

<sup>558</sup> *Ibid*, para. 120.

<sup>559</sup> See the Impugned Decision, *supra* note 4, para. 3139. In fact, the Chamber found that Alkanto [REDACTED] and P-0967 [REDACTED].

<sup>560</sup> *Ibid*, para. 3142.

<sup>561</sup> *Ibid*, para. 3139.

<sup>562</sup> *Ibid*, paras. 3148-3149.

<sup>563</sup> *Ibid*, para. 3161.

<sup>564</sup> *Ibid*, para. 3172.

<sup>565</sup> *Ibid*, para. 3147.

<sup>566</sup> See the Yekatom Appeal, *supra* note 2, para. 123.

234. The Chamber had no obligation to do so. As mentioned *supra*,<sup>567</sup> the Chamber already found that it was a *combination* of factors that led the elements of Mr Yekatom's group to stop and capture the victims. The existence of the purported 'Seleka card' was only one of these factors. Moreover, this element has no material effect on the correctness of the Judgment. The Chamber would still have convicted Mr Yekatom on said Counts based on the evidence presented at trial. Indeed, Saint Cyr was not just interrogated because of the card but also was tortured, maimed, and eventually killed by the elements. There are no justifications for these criminal acts.<sup>568</sup>

*Mr Yekatom's instructions to kill Muslim civilians*

235. P-1339 accounts on Mr Yekatom's instructions to kill Muslims during the 5 December attack were straightforward on the most important matters, clearly distinguishing the Seleka and Muslim civilians and pointing directly to the culpability of Mr Yekatom.<sup>569</sup> In particular, P-1339 testified that: (i) as part of the training, the elements received the instruction to kill all Muslims because they were Seleka; their instructions were (ii) to kill the "Muslims", including those captured; with (iii) any witness present on the scene; and (iv) these instructions came from Mr Yekatom, *Coeur de Lion*, and Beina.<sup>570</sup>

236. P-1339 further testified that, in the afternoon of 4 December 2013, Mr Yekatom gave a speech in the presence of Beina and *Coeur de Lion*, saying that, on the following day, they would leave to head towards Bangui, and they would fight *both* the Seleka elements and the Muslims.<sup>571</sup> During his testimony, P-1339 clearly indicated that it would be untrue to say that the Appellant did not give the order to kill Muslim civilians in light of the instructions he gave and because the bullets they were shooting could have struck Muslim civilians.<sup>572</sup> He also clarified that Mr Yekatom essentially

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<sup>567</sup> See *supra*, para. 232.

<sup>568</sup> See the Impugned Decision, *supra* note 4, paras. 4155-4232.

<sup>569</sup> *Contra* the Yekatom Appeal, *supra* note 2, paras. 125-132.

<sup>570</sup> See the Impugned Decision, *supra* note 4, para. 2437.

<sup>571</sup> *Ibid*, paras. 2438-2439.

<sup>572</sup> *Ibid*, paras. 2442, 2444.

instructed the elements to kill both armed enemies and any present relative.<sup>573</sup> Therefore, the Chamber's conclusion - that Mr Yekatom's instructions to his elements meant to target the Seleka *as well as Muslim civilians*<sup>574</sup> - is logical, reasonable and unassailable.

237. Moreover, the Defence's allegation that the Chamber solely relied on the evidence of P-1339 is misplaced. In fact, the Chamber also relied on the evidence of P-2232,<sup>575</sup> and, as already noted *supra*,<sup>576</sup> on video evidence showing Mr Yekatom's elements expressing anti-Muslim sentiments.

238. As for the attack at Boeing Market, P-1339 testified that (i) Mr Yekatom gave the instruction to attack both the Muslims and Seleka present there; and (ii) he understood that they would attack the market because of the presence of Muslims.<sup>577</sup> Furthermore, the Chamber considered Mr Yekatom's acts before and during the attack, including that he: (i) personally conducted reconnaissance the night before the attack during which he instructed his elements to target Seleka positions and Muslim traders;<sup>578</sup> (ii) launched the attack by firing in the air; and (iii) fired at the Muslim traders.<sup>579</sup> Unsurprisingly, the Chamber found that a number of unarmed Muslim civilians were killed as an unavoidable result.<sup>580</sup>

239. Lastly, the Chamber also found that, based on P-1339's evidence, Mr Yekatom's group attacked Boeing after he gave instruction in the presence of Beina and *Coeur de Lion*.<sup>581</sup> The evidence of P-1339 in this regard was clear, credible and reliable.<sup>582</sup> There is nothing suggesting that the Chamber did not consider all relevant evidence in

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<sup>573</sup> *Ibid*, para. 2443.

<sup>574</sup> *Ibid*, para. 2446.

<sup>575</sup> *Ibid*, para. 2428. P-2232 testified that he believed that Mr Yekatom crossed over from Zongo and started attacking Muslims in small villages even before arriving at Bangui.

<sup>576</sup> See *supra*, para. 221.

<sup>577</sup> *Ibid*, paras. 2532-2534.

<sup>578</sup> *Ibid*, paras. 75, 3950.

<sup>579</sup> *Ibid*, paras. 2537, 2538. Based on the evidence of P-1339.

<sup>580</sup> *Ibid*, paras. 2571, 2577, 2579, 2581-2584.

<sup>581</sup> *Ibid*, paras. 2626, 2629.

<sup>582</sup> *Ibid*, para. 2640.

relation to the 5 December attack on Bangui or that its factual findings on Mr Yekatom's culpability were unreasonable, illogical or against common sense.

240. The same reasoning is applicable to the testimony of P-1839's in the context of the instructions on the PK9-Mbaïki axis.<sup>583</sup> In fact, the Chamber considered some discrepancies in P-1839's recollection about the instructions by the chiefs<sup>584</sup> to the Anti-Balaka elements to kill all the Muslims and the lack of distinction between armed and unarmed Muslims.<sup>585</sup> It then proceeded to assess the rest of the testimony with the totality of the evidence concerning the Anti-Balaka's advance through and takeover of villages along the PK9-Mbaïki axis, reaching the conclusion that P-1839 unambiguously testified that Mr Yekatom and other leaders instructed the elements to indistinctively kill all the Muslims on the Mbaïki road.<sup>586</sup> In doing so, the Chamber further relied on the testimony of other witnesses, including P-2084, P-1786, P-1647, and P-0888.<sup>587</sup>

241. According to the jurisprudence of the Court, a trial chamber has the primary responsibility to evaluate the connections and fairly resolve any inconsistencies between the items of evidence presented at trial.<sup>588</sup> The Defence fails to demonstrate that the Chamber's evaluation of the totality of the pertinent evidence on the matter was unreasonable or inconsistent with logic, common sense and experience, or that the Chamber did not consider all relevant and connected evidence.

*Mr Yekatom's instructions on the PK9-Mbaïki axis*

242. As for the Defence's argument about error in finding that RFACPP operations targeted Muslims on religious grounds,<sup>589</sup> the Chamber fulfilled its responsibility to

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<sup>583</sup> See the Yekatom Appeal, *supra* note 2, paras. 135-143.

<sup>584</sup> Referring to Mr Yekatom, *Coeur de Lion* and Alkanto.

<sup>585</sup> See the Impugned Decision, *supra* note 4, paras. 3300, 3301, 3303.

<sup>586</sup> *Ibid*, para. 3304.

<sup>587</sup> *Ibid*, para. 3304, footnote 8103 and 3307.

<sup>588</sup> See the *Ntaganda* AJ, *supra* note 49, para. 806; the *Bemba et al.* AJ, *supra* note 8, para. 95; the *Lubanga* AJ, *supra* note 8, para. 23; and the *Kupreškić et al.* AJ, *supra* note 140, para. 31.

<sup>589</sup> See the Yekatom Appeal, *supra* note 2, para. 134.

evaluate and fairly resolve any inconsistencies between the items of evidence presented at trial on the matter. For instance, it recalled that there exists evidence which suggested that, in some instances, Mr Yekatom and his group cooperated with the CAR authorities and international forces.<sup>590</sup>

243. The evidence shows that said cooperation took place only *after* Mr Yekatom had gained effective control of the PK9-Mbaïki axis and, especially, *after* a significant proportion of the Muslim civilian population along the axis had fled their towns and villages - and subsequently Mbaïki - because of the advance of his group.<sup>591</sup> The Chamber correctly found that, while some evidence indicates that the Appellant allowed the *gendarmerie* and the national staff to go back to their stations in the PK9 and Sekia checkpoints, the same evidence also shows that he did not give them any effective power back.<sup>592</sup>

244. Therefore, it was reasonable for the Chamber to conclude that Mr Yekatom did not aim to liberate the PK9-Mbaïki road but actually instrumentalised the checkpoints in the villages along the axis to search and identify Muslims and raised money to finance the group and its needs.<sup>593</sup> In doing so, the Chamber relied on an abundance of evidence, including the testimonies of P-1823, P-2419, D29-5015, P-1558, P-0954, P-1962, and P-1839. The Defence again fails to demonstrate that the Chamber's evaluation of the totality of the pertinent evidence on the matter was unreasonable, or that the Chamber did not consider all relevant and connected evidence.

245. As for the Defence's claim that the Chamber failed to assess the fact that the killing of Saleh was the result of the suspicion harboured towards him by Mbaïki locals and ignored Mbafolo's punishment for her involvement in the killing,<sup>594</sup> the Defence again misrepresents the Judgment. In fact, the Chamber examined all the evidence, including those that suggested that Saleh had some dealings with the Seleka.

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<sup>590</sup> See the Impugned Decision, *supra* note 4, paras. 3387-3392.

<sup>591</sup> *Ibid*, para. 3393.

<sup>592</sup> *Ibid*, para. 3394.

<sup>593</sup> *Ibid*, paras. 3398-3415.

<sup>594</sup> See the Yekatom Appeal, *supra* note 2, para. 134.

However, the Chamber could not conclude that he was a member of, or otherwise affiliated with, the Seleka at the time of his death.<sup>595</sup>

246. Most importantly, the Chamber found that Saleh: (i) was not armed or taking part in hostilities at the relevant time; (ii) tried to defend himself with a bow and arrow; and (iii) by using necessary and proportionate force against a group of individuals, did not lose protection as a civilian.<sup>596</sup> The Chamber also considered all relevant evidence and was not able to conclude whether the perpetrators of Saleh's killing, including Mbafolo, were in fact sanctioned for their actions.<sup>597</sup>

247. Consequently, the Defence's arguments have no material effect on the correctness of the Impugned Decision. The Chamber would still have convicted Mr Yekatom on said Counts regardless of whether the anger of the local population contributed to the killing of Saleh or whether his killers were arrested and punished afterwards.

*c) Ground 2.4 – The Chamber correctly found that Mr Yekatom exercised control over his group*

248. The Defence argues that the Chamber erred by (i) not making findings on the organised nature of the apparatus allegedly controlled by Mr Yekatom;<sup>598</sup> (ii) finding that there existed a military hierarchy with Mr Yekatom at the apex and *Coeur de Lion* as his deputy, failing to meet the threshold for a superior/subordinate relationship;<sup>599</sup> (iii) finding that Mr Yekatom exercised control over his group by equating purported control over the organisation with control over the crimes;<sup>600</sup> and (iv) failing to determine whether Mr Yekatom's orders were executed with almost automatic

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<sup>595</sup> See the Impugned Decision, *supra* note 4, paras. 3638-3639.

<sup>596</sup> *Ibid*, para. 4335.

<sup>597</sup> *Ibid*, para. 3678.

<sup>598</sup> See the Yekatom Appeal, *supra* note 2, paras. 151-157.

<sup>599</sup> *Ibid*, paras. 158-159.

<sup>600</sup> *Ibid*, paras. 173-174.

compliance by members of his group, when applying the “control over the organisation” theory.<sup>601</sup>

249. On the finding **about the apparatus controlled by Mr Yekatom**, the Chamber strictly followed the Appeals Chamber’s guidance on the matter.<sup>602</sup> It was under no obligation to make findings on the organised nature of the apparatus controlled by Mr Yekatom, as it is not a legal requirement to establish indirect perpetration under article 25(3)(a) of the Statute. What is crucial is “*the perpetrator’s control of the action of another person or persons to such a degree that the will of that person becomes irrelevant, such that their action must be attributed to the perpetrator as if it were his or her own*”.<sup>603</sup> Yet, the Defence fails to challenge the correctness of the Judgment regarding Mr Yekatom’s control over the elements he led during the charged period.

250. On the finding **about the existence of a military hierarchy**, the Defence expresses a mere disagreement with the Chamber’s determination. In fact, the Chamber found that the structure at Yamwara resembled a military hierarchy based on an overwhelming amount of evidence showing that: (i) approximately 1,000 elements were present in December 2013; (ii) divided in 10 companies, each composed of four sections of approximately 30 men; (iii) company gatherings were held every morning and evening to verify attendance; (iv) all companies convened weekly gather on the school grounds, and were were attended by the Company Adjutants, the Deputy, and Mr Yekatom who addressed the soldiers and warned them not to go against his orders; (v) Mr Yekatom exercised overall authority on matters of punishment and discipline at Yamwara, while section chiefs also had a responsibility to discipline elements; (vi) *Coeur de Lion* was Mr Yekatom’s deputy at Yamwara in December 2013; (vii) Mr Yekatom maintained overall control over the activities in

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<sup>601</sup> *Ibid*, paras. 188-195.

<sup>602</sup> See the Impugned Decision, *supra* note 4, paras. 3869-3870. See also, the *Ongwen* AJ, *supra* note 45, para. 630.

<sup>603</sup> See the *Ntaganda* TJ, *supra* note 36, para. 777; the *Blé Goudé* Decision, *supra* note 67, para. 136; and the *Ongwen* Decision, *supra* note 73, para. 39.

Yamwara at all times, including through *Coeur de Lion*, demonstrating directional flow of authority.<sup>604</sup>

251. In particular, the Chamber relied on the evidence of P-1839 and P-1339 which detailed examples demonstrating directional flow of authority between *Coeur de Lion* and Mr Yekatom.<sup>605</sup> Thus, it was correct in relying upon the overwhelming evidence on the record showing that at the time of the charges Mr Yekatom had undisputed authority over *Coeur de Lion*, Alkanto, and Bojos among others, and that *Coeur de Lion* was his deputy.<sup>606</sup>

252. It is also important to note that, in concluding that Mr Yekatom had undisputed authority over *Coeur de Lion*, Alkanto, Bojos and the elements gathered at Yamwara,<sup>607</sup> the Chamber based its determination on direct evidence provided by members of Mr Yekatom's group, with civilian and military background, and who were themselves present at Yamwara.<sup>608</sup> Therefore, the Defence's contention that Mr Yekatom, *Coeur de Lion*, and Beina all had the same military rank and created the group together in Zongo cannot reverse the finding that Mr Yekatom alone possessed a hierarchical, command-style control apparatus from its inception.<sup>609</sup>

253. The Chamber also considered ample evidence in concluding that the Appellant took charge in creating his own Anti-Balaka group.<sup>610</sup> Thus, the Defence merely disagrees with the assessment concerning the creation of the group. In addition, establishing who initially created the group at Yamwara is inconsequential. The Chamber's analysis of the evidence focussed on the constitutive elements of indirect perpetration under article 25(3)(a) of the Statute, namely who exercised effective control over the Anti-Balaka elements gathered at Yamwara in December 2013.

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<sup>604</sup> See the Impugned Decision, *supra* note 4, paras. 3048-3068.

<sup>605</sup> *Ibid*, para. 3069.

<sup>606</sup> *Ibid*, paras. 3071, 3077-3078.

<sup>607</sup> See the Impugned Decision, *supra* note 4, paras. 3065-3066.

<sup>608</sup> Reference is to the testimony of P-1786, P-1647 and P-1839 and video evidence CAR-OTP-2065-3424.

<sup>609</sup> See the Yekatom Appeal, *supra* note 2, para. 175.

<sup>610</sup> See the Impugned Decision, *supra* note 4, paras. 952-979.

254. Direct evidence provided by members of Mr Yekatom's group, with civilian and military background, who were present at Yamwara<sup>611</sup> also establishes that the Appellant enforced discipline and was feared. The Defence again expresses its mere disagreement with the assessment of evidence.<sup>612</sup> In particular, in relation to Yamwara, the Chamber found that Mr Yekatom was also the overall chief on matters of punishment and enforcing discipline.<sup>613</sup> Therefore, the Defence fails to demonstrate that the Chamber's evaluation of the totality of the relevant evidence was unreasonable, inconsistent with logic, common sense, or experience, or that the Chamber failed to consider all relevant and connected evidence.

255. On the alleged error **concerning the execution of crimes by (almost) automatic compliance**, the Chamber did not exclusively apply the so-called "*control over the organisation theory*" in determining the Appellant's liability. The use of an organisation is a factual consideration and not a requirement for establishing responsibility under article 25(3)(a) of the Statute.<sup>614</sup> The Chamber correctly outlined the applicable law in relation to Mr Yekatom's liability.<sup>615</sup> Ultimately, it entered convictions as follows: for Counts 1, 4, 5 and 8 as a joint-perpetrator; for Counts 2, 3 and 6 as an indirect perpetrator; for Counts 11 to 17 as an indirect perpetrator; and for Counts 24 to 28 as a joint-perpetrator and an indirect perpetrator within the meaning of article 25(3)(a) of the Statute.<sup>616</sup>

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<sup>611</sup> *Ibid*, para. 1631. In particular, the Chamber found that Mr Yekatom enforced discipline within his group based on the evidence of: (i) P-1193 who stated that Mr Yekatom disciplined his men and that he never saw anyone opposing him; (ii) P-1558 who stated that Mr Yekatom's elements listened to him and those who did not were disciplined by him; (iii) P-0888 who testified that Mr Yekatom's group was very well structured, there was military discipline and his group included civilians who were all subject to the same discipline; (iv) P-1858 who testified that he had seen Mr Yekatom giving orders and threats and his elements, even FACA officers were afraid of him and his orders were obeyed without question, and they would be killed if disobeyed; (v) P-0992 who stated that Mr Yekatom led his group with an iron hand and disciplined as necessary; and (vi) P-2084 who stated Mr Yekatom maintained discipline within his elements.

<sup>612</sup> See the Yekatom Appeal, *supra* note 2, paras. 178-179.

<sup>613</sup> See the Impugned Decision, *supra* note 4, paras. 3059, 3061, based on the evidence of P-1786, P-1839 and P-1647.

<sup>614</sup> See the *Ongwen* TJ, *supra* note 61, para. 2784.

<sup>615</sup> See the Impugned Decision, *supra* note 4, paras. 3869-3875.

<sup>616</sup> *Ibid*, paras. 4025-4369.

256. Furthermore, the Defence's claim that: (i) members joined the RFACPP voluntarily; (ii) the elements under Mr Yekatom allegedly received rudimentary, defensive training rather than violent indoctrination; (iii) said training was not controlled by Mr Yekatom and did not involve the use of live ammunition; and (iv) there was no pattern of violent punishment for disobedience of the elements<sup>617</sup>. Even assuming that the Chamber agreed with the Defence on these matters, it would nevertheless have convicted Mr Yekatom on said Counts based on the evidence presented at trial.

***d) Ground 2.5 – The Chamber correctly considered that Mr Yekatom entered into a common plan with Coeur de Lion and Alkanto***

257. The Defence challenges the Chamber's determination (i) on the common plan, arguing that there was no direct evidence of any agreement between Mr Yekatom, *Coeur de Lion*, and Alkanto in the absence of any identification of any meeting, minutes or documents recording their joint decision;<sup>618</sup> and (ii) that no specific actions by either *Coeur de Lion* or Alkanto along the PK9-Mbaïki axis demonstrate a shared criminal agreement.<sup>619</sup>

258. As for the first claim, the jurisprudence of the Court does not require direct evidence of the existence of a common plan. In fact, a chamber may infer the existence of a common plan from the wider circumstances, including the events on the ground.<sup>620</sup> In this regard, the Chamber correctly found that: (i) starting on 10 January 2014, Mr Yekatom and elements under his control by virtue of an agreement between the Appellant, *Coeur de Lion* and Alkanto to establish control over the area, left Yamwara and advanced from Bangui on the road towards Mbaïki, taking over a number of villages and checkpoints in the Lobaye prefecture; (ii) following his instructions, the group threatened or killed Muslims in their area; (iii) creating the conditions leading

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<sup>617</sup> See the Yekatom Appeal, *supra* note 2, paras. 198 and 201.

<sup>618</sup> *Ibid*, para. 211.

<sup>619</sup> *Ibid*, para. 210.

<sup>620</sup> See the Impugned Decision, *supra* note 4, para. 3674 and 3874 citing the *Ntaganda* AJ, *supra* note 49, para. 918. See also the *Lubanga* TJ, *supra* note 140, para. 988.

to the dislocation of a significant proportion of the Muslim civilian population along the Axis; (iv) Mr Yekatom and elements under his control entered Mbaïki on 30 January 2014; (v) Mr Yekatom's group threatened and harassed Muslim civilians in Mbaïki, causing their escape and displacement.<sup>621</sup>

259. In reaching its conclusion, the Chamber relied on the testimony of several witnesses, including P-2084, P-1786, P-1647, and P-0888.<sup>622</sup> The CLRV recall their arguments *supra*<sup>623</sup> in response to the Defence's contention that the Chamber relied only on the direct evidence provided by P-1839 to prove the alleged instructions to kill Muslims.<sup>624</sup> The Chamber fairly resolved the relevant inconsistencies between the items of evidence presented at trial. The Defence fails to demonstrate that the Chamber's evaluation of the totality of the pertinent evidence was unreasonable or inconsistent with logic, common sense, experience, or the Chamber did not consider all relevant and connected evidence.

260. In relation to the argument that no specific actions by either *Coeur de Lion* or Alkanto along the PK9-Mbaïki axis demonstrated a shared criminal agreement, no proof of such specific action is necessary to find that a common plan existed among the co-perpetrators.<sup>625</sup> In this regard, while some concerted action may be a relevant consideration, it is not - in the absence of direct evidence of the agreement - the only basis on which a chamber may infer the existence of a common plan.<sup>626</sup>

261. The Defence also claims that the Chamber erred in conflating a legitimate military objective with criminal intent, by failing to explain how a plan to secure a strategic road necessarily implied for all three alleged co-perpetrators the virtual

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<sup>621</sup> *Ibid*, paras. 4345-4350, 4356.

<sup>622</sup> *Ibid*, para. 3304, footnotes 8103 and 3307.

<sup>623</sup> See *supra*, para. 240.

<sup>624</sup> See the Yekatom Appeal, *supra* note 2, para. 212.

<sup>625</sup> See *Abd-Al-Rahman* TJ, *supra* note 136, para. 795 recalling the Court's case law on how a common plan may be inferred. Chambers have never held that specific actions must be listed in order to establish the existence of a common plan. See also, the *Ntaganda* AJ, *supra* note 49, para. 918; and ICTY, the *Tadić* AJ, *supra* note 133, para. 227; the *Šainović et al.* AJ, *supra* note 150, para. 611; and the *Đorđević* AJ, *supra* note 143, para. 138.

<sup>626</sup> See the Impugned Decision, *supra* note 4, para. 3874. See also, the *Ntaganda* AJ, *supra* note 49, para. 918.

certainty that the crimes of forcible transfer, deportation, persecution, and murder would be committed in the execution of said plan.<sup>627</sup> The ample evidence on record shows that an agreement existed between Mr Yekatom, *Coeur de Lion* and Alkanto to establish control over the area, as well as to remove all Muslims therefrom, including by killing them and creating the conditions leading to the displacement of Muslim civilians specifically along the PK9-Mbaïki axis.<sup>628</sup> Thus, the common plan fully demonstrated the co-perpetrators' criminal intent. In this sense, the Chamber's characterization of the murder of Saleh in Mbaïki as a crime against humanity and as a war crime<sup>629</sup> exemplified the targeting of Muslim civilians by Mr Yekatom's elements as part of the attacks conducted by the Anti-Balaka in the course of its advance from Yamwara to Mbaïki.<sup>630</sup>

262. Finally, the Defence claims that the Chamber failed to establish that each alleged co-perpetrator - namely *Coeur de Lion* or Alkanto - exercised joint control over the crime through an organised apparatus of power and that each made an essential contribution.<sup>631</sup> The subsequent concerted action of the co-perpetrators is not required to establish the existence of a common plan. In this regard, the Appeals Chamber explained that: (i) while the contribution of other co-perpetrators may be of assistance in assessing whether an accused retained control over the crimes, the determination of any such contribution is not a legal prerequisite to determining whether they had the power to frustrate the commission of the crimes; and (ii) the determination of whether an accused retained control over the crimes is focused on their power to frustrate the crimes.<sup>632</sup>

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<sup>627</sup> See the Yekatom Appeal, *supra* note 2, para. 214.

<sup>628</sup> *Ibid*, para. 4356.

<sup>629</sup> See the Impugned Decision, *supra* note 4, paras. 3628-3682.

<sup>630</sup> *Ibid*, para. 4339. *Contra* Yekatom Appeal, *supra* note 2, para. 213, arguing that the Chamber did not find a single instance of a Muslim being killed in the context of the RFACPP's advance.

<sup>631</sup> See the Yekatom Appeal, *supra* note 2, para. 215.

<sup>632</sup> See the *Ongwen* AJ, *supra* note 45, para. 673; the *Ntaganda* AJ, *supra* note 49, para. 1041.

e) *Ground 2.6 – The Chamber correctly found that Mr Yekatom made an essential contribution to the crimes*

263. The Defence alleges several errors related to the finding that Mr Yekatom made an essential contribution to the crimes.

*Mr Yekatom's essential contribution in the 5 December attack*

264. The Defence argues that, for Counts 1-6 and 8, the Chamber characterised Mr Yekatom's responsibility as "*commission*" under article 25(3)(a) of the Statute, relying on all three modalities "*directly*", "*through another person*", and "*jointly with another*", and convicted him as a direct perpetrator, yet presenting him as someone acting through others for the same factual conduct.<sup>633</sup> The Defence misunderstands the Impugned Decision.

265. Under Counts 1, 4, 5, and 8, the Chamber found that the Appellant *committed jointly with others*: (i) an attack against the civilian population as a war crime pursuant to article 8(2)(e)(i) of the Statute (Count 1); (ii) forcible transport and deportation as a crime against humanity pursuant to article 7(1)(d) of the Statute (Count 4); (iii) displacement as a war crime pursuant to article 8(2)(e)(viii) of the Statute, (Count 5); and (iv) persecution as a crime against humanity pursuant to article 7(1)(h) of the Statute (Count 8).<sup>634</sup>

266. Under Counts 2 and 3, the Chamber found that Mr Yekatom *committed through others*, within the meaning of article 25(3)(a) of the Statute, the crimes of murder as a crime against humanity, pursuant to article 7(1)(a) of the Statute (Count 2), and a war crime, pursuant to article 8(2)(c)(i) of the Statute (Count 3).<sup>635</sup> As regards Count 6, the Chamber found that Mr Yekatom *committed through others*, within the meaning of

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<sup>633</sup> See the Yekatom Appeal, *supra* note 2, para. 224.

<sup>634</sup> See the Impugned Decision, *supra* note 4, para. 4025.

<sup>635</sup> *Ibid*, para. 4026.

article 25(3)(a) of the Statute, the war crime of attacking a building dedicated to religion, pursuant to article 8(2)(e)(iv) of the Statute.<sup>636</sup>

267. If any, the validity of the Chamber's application of the concept of indirect perpetration could theoretically be raised only in relation to Counts 2, 3 and 6. In accordance with the jurisprudence of the Court, the Chamber correctly recalled that indirect co-perpetration requires the following objective elements: (i) the existence of an agreement or common plan, between the accused and one or more other persons, to commit the crimes or to engage in conduct which, in the ordinary course of events, would result in the commission of the crimes; and (ii) the control of the members of the common plan over a person or persons who execute the material elements of the crimes by subjugating the will of the direct perpetrators; (iii) the accused, though not required to carry out the criminal conduct directly, and personally, must have control over the crime by virtue of his or her essential contribution to it and the resulting power to frustrate its commission.<sup>637</sup>

268. The Chamber assessed the available evidence against these standards and found that: (i) a common plan between Anti-Balaka groups, including Mr Yekatom's group, including *Coeur de Lion* and Beina, was formed as of 30 November 2013 at least;<sup>638</sup> (ii) Mr Yekatom had control over the crimes committed by the elements in his group because of his role as the founder and chief thereof, providing instructions and personally participating in the attack;<sup>639</sup> (iii) Mr Yekatom exercised control over the commission of the crime through his essential contribution, which included conducting reconnaissance prior to the attack, providing instructions to attack Muslim traders and launching the attack by firing an automatic pistol in the air.<sup>640</sup>

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<sup>636</sup> *Ibid.*

<sup>637</sup> See the Impugned Decision, *supra* note 4, para. 3873. See also, the *Ntaganda* AJ, *supra* note 49, paras. 1036 and 1041 and the *Lubanga* AJ, *supra* note 8, paras. 434 and 473.

<sup>638</sup> *Ibid.*, paras. 3915, 3926, 3938.

<sup>639</sup> *Ibid.*, para. 4012.

<sup>640</sup> *Ibid.*, para. 4010.

269. These findings correctly support the Chamber's conclusion that Mr Yekatom *committed through others*, within the meaning of article 25(3)(a) of the Statute, the crimes of murder as a crime against humanity and a war crime, and the war crime of attacking a building dedicated to religion.<sup>641</sup>

*Mr Yekatom's essential contribution in the Yamwara incident*

270. In relation to Counts 11–17, the Defence argues that the Chamber's conviction of Mr Yekatom as an indirect perpetrator does not meet the essential contribution standard, since (i) Alkanto along with his elements stopped, searched and beat the victims at the checkpoint on suspicion of links to the Seleka; (ii) by the time Mr Yekatom encountered the Lapo family in the evening, the core acts of violence, including the torture of Saint-Cyr Lapo, had already been inflicted; (iii) any ability Mr Yekatom may have had to end the detention or prevent further harm goes to a failure to intervene in an ongoing situation created by others; and (iv) said conduct would be relevant to omission-based or superior responsibility, not an essential contribution to bringing about the crimes.<sup>642</sup>

271. The Defence misconstrues the facts about the Yamwara incident. The crimes charged under Counts 11 to 17 were not committed in a vacuum and detached from the context within which the perpetrators operated at Yamwara. Indeed, the Chamber rightly held that, as the founder and the uncontested leader of the Anti-Balaka group based at Yamwara, Mr Yekatom retained control over the actions and will of his elements at the moment of the capture of the seven persons and at least until their respective death or release.<sup>643</sup>

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<sup>641</sup> *Ibid*, paras. 4012-4013 where the Chamber also considered that Mr Yekatom: (i) had an agreement with others to commit the crimes; (ii) had control of his elements who executed the material elements of the crimes by subjugating their will; and (iii) had control over the commission of the crimes by virtue of his active and personal contribution to them and the resulting power to frustrate their commission due to his leadership position.

<sup>642</sup> See the Yekatom Appeal, *supra* note 2, paras. 227-230.

<sup>643</sup> See the Impugned Decision, *supra* note 4, para. 4242. It is not, as argued by the Defence, that Mr Yekatom's control over Alkanto along with his elements commenced only after the completion of the concrete acts of the charged crimes.

272. Hence, the Chamber concluded that through his deputy *Coeur de Lion*, Mr Yekatom instrumentalised his elements, to beat, interrogate, break legs, tie up, and maim Saint Cyr based on the following findings: (i) the element who cut off Saint Cyr's body parts felt that there was no choice but to do it; (ii) this element was replaceable at the time of the incident; and (iii) the Appellant also praise the element's actions concerning Saint Cyr.<sup>644</sup>

273. These findings inevitably led to the conclusion that Mr Yekatom: (i) had the sole power to end the deprivation of the physical liberty and the mistreatment of the victims during their captivity by his elements; (ii) had the authority to order his elements how to treat the captives; (iii) did not take any steps to ensure that the seven persons were treated with dignity and released; and (iv) continued to maintain control over the term of their captivity, its conditions and their treatment even after transferring them to another location.<sup>645</sup>

274. The Chamber's conclusion on Mr Yekatom's liability strictly fits the legal definition of indirect perpetration under article 25(3)(a) of the Statute since he was alone able to control *Coeur de Lion*, Alkanto and his elements who executed the material elements of the crimes and thus had power to frustrate the commission of the crimes ensuing from the Yamwara incident.

*Mr Yekatom's essential contribution in the events of PK9-Mbaïki axis*

275. The Defence argues that the Chamber erred in finding that (i) the instruction to kill the Muslims originated from Mr Yekatom; (ii) the deportation, forcible transfer and persecution of Muslim civilians depended on his will; and (iii) the life-threatening conditions in Mbaïki, such as overcrowding or hunger were consequences of his personal actions.<sup>646</sup>

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<sup>644</sup> *Ibid*, para. 4244.

<sup>645</sup> *Ibid*, para. 4248

<sup>646</sup> See the Yekatom Appeal, *supra* note 2, paras. 234-236.

276. The Defence merely disagrees with the Chamber's factual findings. In this regard, the CLRV refer to their arguments in relation to the targeting of the Muslim civilian population and in particular about the murder of Saleh in Mbaïki;<sup>647</sup> as well as to the Chamber's conclusions about the reasons causing the forcible displacement of the Muslim population first along the PK9-Mbaïki axis, and then from Mbaïki – where Muslims took refuge.<sup>648</sup> A voluminous set of evidence shows unequivocally that the Muslim civilian population fled their towns and villages *en masse*,<sup>649</sup> threatened and harassed Muslims faced the devastating decision of fleeing and losing their societal and economic stability or staying and facing massacre.<sup>650</sup> The evidence also shows unequivocally that the Muslims in Mbaïki at the time were living in conditions of overcrowding, hunger and fear of death because of the Anti-Balaka.<sup>651</sup>

277. Therefore, the Chamber correctly found that Muslim civilians fled in thousands from their towns and villages along the PK9-Mbaïki axis, arrived in Mbaïki, lived in life-threatening conditions, and then fled due to Mr Yekatom's personal actions.<sup>652</sup> In light of the abundant evidence supporting these factual findings, the Chamber could not have resorted to any other alternative conclusion.

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<sup>647</sup> See *supra*, paras. 218-240; 242-246.

<sup>648</sup> See the Impugned Decision, *supra* note 4, paras. 4303-4305.

<sup>649</sup> P-1666 testified that around 15,000 or 16,000 people arrived in Mbaïki from neighbouring villages,<sup>649</sup> and were accommodated mainly in the concessions or houses of other Muslim families or with imams. See [T-231 \[ENG\]](#), p. 24, lines 19-23 and p. 26, line 18 to p. 27, line 2. See also, P-2353 testifying that the Muslims evacuated from the neighbouring villages were numerous: [T-161 \[ENG\]](#), p. 17, line 19 to p. 19, line 14 (Conf).

<sup>650</sup> P-1666: [T-231 \[ENG\]](#), p. 25, line 25 to p. 26, line 3. P-2682: [T-017 \[ENG\]](#), p. 26, line 24 to p. 27, line 10. See also a/15307/20 ([CAR-V44-00000020](#)) in which the victim explains she left her home in fear: "[REDACTED]". See also a/66166/19 ([CAR-V44-00000057](#)) in which the victim narrates fleeing Bangui: "[REDACTED]". Additionally, see a/66186/19 ([CAR-V44-00000062](#)) narrates fleeing after having been accused of being close to the Seleka because of her family relationship: "[REDACTED]". P-2049: [T-100 \[ENG\]](#), p. 62, line 21 to p. 63, line 6. See also a/15286/20 ([CAR-V44-00000009](#)) in which the victim describes being threatened and how he escaped: "[REDACTED]". See also a/15288/20 ([CAR-V44-00000010](#)) in which the victim describes what led him to flee: "[REDACTED]".

<sup>651</sup> P-2353: [T-161 \[ENG\]](#), p. 23, lines 3-12. See also a/20078/21 ([CAR-V44-00000036](#)) in which the victim states having to flee towards the Central Mosque de Mbaïki when the Anti-Balaka arrived and the hardships endured: "[REDACTED]". See also, P-2049: [REDACTED].

<sup>652</sup> See the Impugned Decision, *supra* note 4, paras. 118-119, 4611.

278. The Defence also argues that the Chamber erred in failing to articulate the essential contributions of *Coeur de Lion* and Alkanto, how those contributions were coordinated with Mr Yekatom and how they exercised control over executors of the crimes.<sup>653</sup> The Defence again misrepresents the Judgment. The Chamber clearly identified *Coeur de Lion* and Alkanto as co-perpetrators of the crimes committed along the PK9-Mbaïki axis and defined their essential contributions. More specifically, the Chamber found that *Coeur de Lion* was Mr Yekatom's deputy at Yamwara in December 2013, where he controlled at least 1,000 elements.<sup>654</sup> In this regard, the CLRV recall their developments *supra*<sup>655</sup> on the military hierarchy at Yamwara and Mr Yekatom's role.

279. As for Alkanto, the Chamber found that he was a member of Mr Yekatom's group at Yamwara and led his own section under the overall command of *Coeur de Lion* and the Appellant.<sup>656</sup> Consequently, the Chamber correctly concluded that at the time of the advance along the PK9-Mbaïki axis, (i) an agreement existed between Mr Yekatom, *Coeur de Lion* and Alkanto to control the area, as well as to remove all Muslims from there, including by killing them; (ii) this agreement was established through their instructions to kill all Muslims in the area, and the subsequent implementation of these instructions, including the creation of conditions leading to the displacement of Muslims specifically along the PK9-Mbaïki axis; and (iii) this shows that the relevant meeting of minds existed in substance.<sup>657</sup>

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<sup>653</sup> See the Yekatom Appeal, *supra* note 2, paras. 237-238.

<sup>654</sup> See the Impugned Decision, *supra* note 4, paras. 3337-3358. See the evidence of P-1839, P-2084, P-0954, P-1647, P-0888, P-1786, P-1858, P-0446, P-0884, P-2232, P-1962, P-2353, and D29-5012.

<sup>655</sup> See *supra*, paras. 249-252, 254.

<sup>656</sup> See the Impugned Decision, *supra* note 4, paras. 3074-3077, based on the evidence of P-1786 and P-1839.

<sup>657</sup> *Ibid*, para. 4356.

f) ***Ground 2.7 – The Chamber correctly established Mr Yekatom’s mens rea***

*Mr Yekatom’s mens rea concerning the 5 December attack*

280. The Defence argues that the Chamber erred in finding that Mr Yekatom’s instructions to his elements to fight the Seleka - including targeting sectors where Muslims were to be found - establish his intention to target the civilian population.<sup>658</sup>

281. The totality of the evidence presented at trial demonstrates that the Appellant’s conduct in the context of the Bangui Attack was intentional and attacking Muslim civilians a direct consequence of his instructions.<sup>659</sup> In fact, Mr Yekatom’s instructions to target sectors where Muslims were to be found meant that the Boeing Mosque would inevitably also be attacked, leading the Chamber to correctly conclude that he intended the mosque to be the object of that attack.<sup>660</sup>

282. As already mentioned *supra*,<sup>661</sup> Mr Yekatom also knew that unarmed Muslim traders at the Boeing Market enjoyed civilian protection and Hassan was employing force in self-defence.<sup>662</sup> In the same vein, the Defence’s claim that the Appellant held the suspicion or an inaccurate assumption that Muslim traders were Seleka<sup>663</sup> is inapposite. The evidence demonstrates that Mr Yekatom and his elements conducted reconnaissance the night before the attack on Bangui, hence showing that they were cognisant that Muslim traders would be present on the morning of 5 December 2013.<sup>664</sup>

283. Lastly, the Defence argues that the Chamber erred in establishing Mr Yekatom’s *mens rea* since the anti-Muslim animus held by his colleagues or subordinates does not meet the specific discriminatory intent required for Count 8.<sup>665</sup> As discussed *supra*,<sup>666</sup>

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<sup>658</sup> See the Yekatom Appeal, *supra* note 2, para. 242.

<sup>659</sup> See the Impugned Decision, *supra* note 4, para. 4015.

<sup>660</sup> *Ibid*, para. 4023. *Contra* the Yekatom Appeal, *supra* note 2, para. 247.

<sup>661</sup> See *supra*, para. 224.

<sup>662</sup> *Contra* the Yekatom Appeal, *supra* note 2, para. 244.

<sup>663</sup> See the Yekatom Appeal, *supra* note 2, para. 245.

<sup>664</sup> See the Impugned Decision, *supra* note 4, para. 4017.

<sup>665</sup> See the Yekatom Appeal, *supra* note 2, paras. 248-249.

<sup>666</sup> See *supra*, paras. 218-220, 225.

the Chamber found that Mr Yekatom personally perceived the Muslims as collectively responsible for the violence and abuses committed by the Seleka and thus, intended the Muslim civilian population in Boeing and Cattin to be deprived of several fundamental rights for this reason.<sup>667</sup>

Mr Yekatom's mens rea concerning the Yamwara events

284. The Defence argues that the Chamber erred in finding that Mr Yekatom possessed the requisite *mens rea* for the crimes committed, despite the fact that he was not present when the criminal acts were carried out and only became aware of these facts afterwards.<sup>668</sup> It submits that endorsement or awareness after the fact cannot substitute for contemporaneous intent or knowledge under article 30 of the Statute.<sup>669</sup>

285. The mere absence of the perpetrator from the crime scene does not negate their *mens rea*. The intent and knowledge under article 30 of the Statute may be established from the actions of the perpetrator even when they are physically removed from the crime scene.<sup>670</sup> In addition, Mr Yekatom was only physically absent during the beginning of the events as he gained knowledge of the arrest, interrogation, detention of the seven victims and the torture and killing of Saint Cyr soon after or in the evening of 24 December 2013.<sup>671</sup>

286. Consequently, the Chamber's findings on the Yamwara incident<sup>672</sup> and the assessment of P-1654, P-1839, P-0954, and P-1716 evidence<sup>673</sup>- as addressed *supra* -<sup>674</sup> are entirely correct.

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<sup>667</sup> See the Impugned Decision, *supra* note 4, para. 4024.

<sup>668</sup> See the Yekatom Appeal, *supra* note 2, para. 252.

<sup>669</sup> *Ibid*, para. 253-258.

<sup>670</sup> See the *Lubanga* TJ, *supra* note 140, paras. 1003, 1005; and the *Bemba et al.* TJ, *supra* note 111, para. 96. See also, the *Katanga* TJ, *supra* note 67, para. 752 and 1682-1691: the Chamber was unable to conclude that Germain Katanga was present in Bogoro on 24 February 2003. Nevertheless, this did not prevent the Chamber from finding that he possessed the requisite *mens rea* and, accordingly, from convicting him for the crimes committed during the attack.

<sup>671</sup> See the Impugned Decision, *supra* note 4, para. 4251.

<sup>672</sup> *Ibid*, paras. 4248-4249.

<sup>673</sup> *Ibid*, paras. 3104, 3106, 3184, 3193-3195. *Contra* the Yekatom Appeal, *supra* note 2, paras. 259-272.

<sup>674</sup> See *supra*, paras. 211211, 231-234.

Mr Yekatom's mens rea concerning the events on the PK9-Mbaïki axis

287. The Defence argues that the Chamber erred in law and in fact in finding that Mr Yekatom had the requisite *mens rea* as an indirect co-perpetrator.<sup>675</sup> In particular, in finding that Mr Yekatom, with *Coeur de Lion*, and Alkanto issued specific instructions to their elements without an explanation of their nature and content,<sup>676</sup> and that there is no evidence that Mr Yekatom was aware of unlawful instructions given by *Coeur de Lion* or Alkanto.<sup>677</sup> The Defence also argues that none of the Chamber's findings support a conclusion that Mr Yekatom was aware that the removal of Muslims from Mbaïki was a foregone conclusion,<sup>678</sup> claiming that the Muslims' progressive departures had commenced months prior to the RFACPP advance triggered by anti-Muslim violence.<sup>679</sup>

288. The CLRV recall their submissions *supra*,<sup>680</sup> on the existence of an agreement between Mr Yekatom, *Coeur de Lion* and Alkanto to establish control over the area, as well as to remove all Muslims therefrom, including by killing them. These instructions were given to and implemented by their elements, thereby creating the conditions that led to the dislocation of Muslims specifically along the PK9-Mbaïki axis.

289. The evidence shows that the relevant meeting of minds existed in substance.<sup>681</sup> Therefore, the Chamber rightly concluded that Mr Yekatom, *together* with *Coeur de Lion* and Alkanto issued specific instructions to kill Muslim civilians. Yet again, the Defence fails to demonstrate that the Chamber did not consider all relevant and connected evidence or that the contested findings are unreasonable, illogical or against common sense.

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<sup>675</sup> See the Yekatom Appeal, *supra* note 2, para. 274.

<sup>676</sup> *Ibid*, para. 275.

<sup>677</sup> *Ibid*.

<sup>678</sup> See the Yekatom Appeal, *supra* note 2, paras. 276-277.

<sup>679</sup> *Ibid*, para. 279.

<sup>680</sup> See *supra*, paras. 258-259.

<sup>681</sup> See the Impugned Decision, *supra* note 4, para. 4356.

### 3. Ground 3 - The Chamber properly considered all circumstances of the case, including the ongoing non-international armed conflict

290. The Defence alleges that the Chamber erred in law and in fact by failing to situate Mr Yekatom's conduct within the realities of the ongoing non-international armed conflict (the "NIAC") in the CAR.<sup>682</sup>

291. However, the Chamber was acutely aware of the NIAC, and properly considered its context in the entirety of its conclusions. Following a detailed analysis of the protracted violence between the Seleka and the Anti-Balaka groups, the Chamber correctly concluded that "*from September 2013 until at least February 2014 there existed an armed conflict not of an international character ongoing in the territory of the CAR between the Seleka and the Anti-Balaka, including Mr Yekatom's group*";<sup>683</sup> and that Mr Yekatom was aware of the factual circumstances that established the existence of the armed conflict.<sup>684</sup>

292. The Defence's assertion that the Chamber exhibited a "*tendency*" to assess the incidents as though they had occurred in a peacetime context<sup>685</sup> is misplaced, particularly when the judgment is "*read as a whole*".<sup>686</sup>

#### *Ground 3.1 – The Chamber properly considered the security and operational context at Yamwara*

293. The Defence argues that the Chamber failed to consider the security and operational context at Yamwara,<sup>687</sup> and thus erred in finding that the checkpoints and related searches had no legal basis.<sup>688</sup> In considering the possibility that Mr Yekatom had a legal basis to occupy and use the checkpoints, the Chamber found that "[e]ven if

<sup>682</sup> See the Yekatom Appeal, *supra* note 2, paras. 283-359.

<sup>683</sup> See the Impugned Decision, *supra* note 4, paras. 3898-3904.

<sup>684</sup> *Ibid*, para. 3906.

<sup>685</sup> See the Yekatom Appeal, *supra* note 2, para. 283.

<sup>686</sup> See ICTY, *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-A, [Judgement](#) (Appeals Chamber), 30 June 2016, para. 138; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, [Judgement](#) (Appeals Chamber), 3 July 2008, para. 38 (the "*Orić* Appeals Judgement"); the *Lubanga* AJ, *supra* note 8, para. 373.

<sup>687</sup> See the Yekatom Appeal, *supra* note 2, paras. 286-301.

<sup>688</sup> See the Impugned Decision, *supra* note 4, paras. 286-290.

*such legal basis existed, Mr Yekatom had further no legal authority to subject the seven persons to the mistreatment that accompanied their captivity*".<sup>689</sup> The mistreatment of the seven individuals was undoubtedly unlawful, resulting in death, beatings, inhuman acts, and cruel treatment.<sup>690</sup> Accordingly, the alleged error would have had no material effect on the Judgment.<sup>691</sup>

294. The Defence further argues that the Chamber erred in fact and in law in finding that the search that led to the detention of the victims was "*neither 'routine' nor lawful*".<sup>692</sup> In particular, in failing to assess suspicions arising from the Lapo family's links with the Seleka or to properly address the discovery of the Seleka card.<sup>693</sup>

295. The CLRV recalls their submissions *supra*.<sup>694</sup> The Chamber acted well within its discretion in its conclusions regarding the Yamwara Incident. It considered the Defence's arguments that the group was arrested due to reasonable suspicions linked to their [REDACTED],<sup>695</sup> the Seleka card<sup>696</sup> and the SIM card,<sup>697</sup> and rejected them. The Chamber correctly found that the manner in which the group was apprehended, searched, and threatened "*bore no resemblance whatsoever to any 'investigative' act legally carried out*".<sup>698</sup> Consequently, it determined that the acts committed by Mr Yekatom's group "*did not have the characteristics of a lawful action, regardless of whether it would have been, otherwise, lawfully sanctioned*".<sup>699</sup> None of the civilians involved in the incident was found to "*be armed or posed a threat to the security of the elements at Yamwara*".<sup>700</sup> The Defence merely advances its own interpretation of the evidence, and fails to show how the Chamber erred in its conclusions, thereby not discharging its burden on appeal.<sup>701</sup>

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<sup>689</sup> *Ibid*, para. 4209.

<sup>690</sup> *Ibid*, e.g., paras. 95-108, 3143-3296, 4134-4277.

<sup>691</sup> See e.g., *Ntaganda AJ*, *supra* note 49, para. 36; *Lubanga AJ*, *supra* note 8, paras. 17-19.

<sup>692</sup> See the Yekatom Appeal, *supra* note 2, para. 291.

<sup>693</sup> See the Impugned Decision, *supra* note 4, paras. 292-295.

<sup>694</sup> See *supra*, paras. 231-233.

<sup>695</sup> See the Impugned Decision, [REDACTED].

<sup>696</sup> *Ibid*, paras. 4162-4163, 4170, 4211.

<sup>697</sup> *Ibid*, paras. 4162-4163, 4210.

<sup>698</sup> *Ibid*, para. 4163.

<sup>699</sup> *Ibid*. (Emphasis added).

<sup>700</sup> *Ibid*.

<sup>701</sup> See e.g., ICTY, the *Vasiljević AJ*, *supra* note 220, para. 12.

*a) Ground 3.2 – The Chamber properly considered the security and operational context for the PK9-Mbaïki axis*

296. The Defence alleges that the Chamber failed to consider the security and operational context along the PK9-Mbaïki axis.<sup>702</sup> It challenges the finding that Mr Yekatom and his group were searching for and identifying Muslims at checkpoints,<sup>703</sup> arguing that the Chamber relied insufficiently cautiously on P-1823's identification of the Appellant<sup>704</sup> and reiterating its claim that this witness's evidence was irreconcilable.<sup>705</sup> The Defence further disputes the finding that the Sangaris compelled Mr Yekatom to deliver a peace message in Mbaïki and prevented his group from attacking the Muslim population,<sup>706</sup> alleging mischaracterisation of P-1666's testimony and improper reliance on P-2389 and P-2041.<sup>707</sup> Lastly, it challenges the Chamber's conclusion that members of Mr Yekatom's group demanded money from certain Muslim inhabitants of Mbaïki, or that some inhabitants offered them money,<sup>708</sup> asserting that this finding ignored evidence suggesting that the local population voluntarily provided money and goods to the group.<sup>709</sup>

297. The Chamber acted reasonably and within its discretion in assessing P-1823's identification of Mr Yekatom at the checkpoint. Having considered the Defence's submissions, it found that the witness's recognition was neither contradictory nor inconsistent with his broader testimony.<sup>710</sup> This approach falls squarely within a trial chamber's discretion to evaluate inconsistencies, assess credibility, and accept or reject

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<sup>702</sup> See the Yekatom Appeal, *supra* note 2, paras. 302-339.

<sup>703</sup> *Ibid*, paras. 312-314.

<sup>704</sup> *Ibid*, paras. 312-313.

<sup>705</sup> See the Yekatom Appeal, *supra* note 2, para. 312. These arguments were already advanced at trial: see the "Corrected Version of the 'Yekatom Defence Final Trial Brief', ICC-01/14-01/18- 2737-Conf, 15 November 2024", [No. ICC-01/14-01/18-2737-Conf-Corr](#), 6 December 2024, para. 489. A corrected public redacted version [No. ICC-01/14-01/18-2737-Corr-Red](#) was notified on 6 December 2024.

<sup>706</sup> See the Yekatom Appeal, *supra* note 2, para. 325.

<sup>707</sup> *Ibid*.

<sup>708</sup> See the Yekatom Appeal, *supra* note 2, para. 328.

<sup>709</sup> *Ibid*, para. 328.

<sup>710</sup> See the Impugned Decision, *supra* note 4, para. 3404.

aspects of evidence in light of the record as a whole.<sup>711</sup> The Chamber was not required to articulate every step of its reasoning, as it is presumed to have considered all evidence before it.<sup>712</sup>

298. In challenging the Chamber's decision to accord greater weight to P-1823's affirmation that he left Bangui after Michel Djotodia's resignation,<sup>713</sup> the Defence merely reiterates arguments already advanced at trial.<sup>714</sup> The weighing of evidence lies within the Chamber's discretion,<sup>715</sup> and the Defence has failed to demonstrate any error in this assessment. As to the proposed additional evidence, the CLRV refer to their submissions above.<sup>716</sup> Regarding the location of the barrier,<sup>717</sup> the Chamber reasonably concluded that P-1823 may have erred as to the precise location while remaining credible on the material aspects of his account.<sup>718</sup> A chamber may "*rely on certain aspects of a witness's evidence and consider other aspects unreliable*",<sup>719</sup> and "*two reasonable triers of facts may reach different but equally reasonable conclusions when assessing the reliability of a witness and determining the probative value of the evidence*".<sup>720</sup> An appellant who simply proposes an alternative interpretation of the evidence, without demonstrating unreasonableness, does not discharge the burden on appeal.<sup>721</sup>

299. The Chamber also reasonably concluded that the presence and actions of the Sangaris and FOMAC affected Mr Yekatom's conduct in Mbaïki. The Chamber properly relied on P-1666's testimony to establish that the Anti-Balaka did not attack

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<sup>711</sup> See the *Ongwen* AJ, *supra* note 45, para. 524, and the *Ntaganda* AJ, *supra* note 49, para. 806.

<sup>712</sup> See the *Bemba* AJ, *supra* note 45, paras. 53-54; the *Bemba et al.* AJ, *supra* note 8, paras. 106-107; and the *Kvočka et al.* AJ, *supra* note 253, para. 23.

<sup>713</sup> See the Yekatom Appeal, *supra* note 2, para. 312.

<sup>714</sup> See the "Corrected Version of the 'Yekatom Defence Final Trial Brief', ICC-01/14-01/18- 2737-Conf, 15 November 2024", [No. ICC-01/14-01/18-2737-Conf-Corr](#), 6 December 2024, para. 489. A corrected public redacted version [No. ICC-01/14-01/18-2737-Corr-Red](#) was notified on 6 December 2024.

<sup>715</sup> See e.g., the *Ongwen* AJ, *supra* note 45, para. 524.

<sup>716</sup> See *supra*, paras. 28-46.

<sup>717</sup> See the Yekatom Appeal, *supra* note 2, para. 312.

<sup>718</sup> See the Impugned Decision, *supra* note 4, para. 3405.

<sup>719</sup> See the *Ongwen* AJ, *supra* note 45, para. 524.

<sup>720</sup> See ICTY, *Lukić and Lukić* AJ, *supra* note 150, para. 396.

<sup>721</sup> See e.g., ICTY, *Vasiljević* AJ, *supra* note 220, para. 12.

the Muslims, *inter alia*, because of the presence of the FOMAC and the Sangaris.<sup>722</sup> Furthermore, it correctly relied on P-2389's evidence that the Anti-Balaka would have attacked and killed Muslims in Mbaïki had the Sangaris not been there.<sup>723</sup> The witness' evidence was based on his personal account of the situation in Mbaïki at the time, and not solely on his impression.<sup>724</sup> Similarly, the Chamber reasonably relied on P-2041 to show that the presence and actions of the Sangaris had a direct effect on Mr Yekatom's actions.<sup>725</sup> These findings were grounded in direct testimony concerning the situation on the ground and fall within the Chamber's prerogative to assess probative value.

300. The Chamber further found that Muslim [REDACTED] collected money from the civilian population in Mbaïki and handed it over to Mr Yekatom and his elements as "*a way of getting good will from them*" and as "*a form of insurance*" for peace and not to be harmed.<sup>726</sup> Despite *Coeur de Lion* assurances to intervene if the Anti-Balaka assaulted or forcibly took people's possessions<sup>727</sup> and the those given by Mr Yekatom himself in this regard<sup>728</sup> - members of the group continued to threaten and harass the Muslim population, prompting flight *en masse* from Mbaïki,<sup>729</sup> with devastating effects on the Muslim civilian population.<sup>730</sup> The Chamber was entitled to conclude that any alleged efforts by Mr Yekatom were inconsequential,<sup>731</sup> in light of the continuing coercive environment created by his group.<sup>732</sup>

301. The conduct of Mr Yekatom's elements also caused the departure of the Muslim civilian population along the PK9-Mbaïki axis. On this aspect, the Chamber devoted

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<sup>722</sup> P-1666: [T-232-ENG](#), p. 42, lines 13-22: "*I believe that those things taken together [...] ensured that no attack occurred*".

<sup>723</sup> See the Impugned Decision, *supra* note 4, para. 3515.

<sup>724</sup> *Contra* Yekatom Appeal, *supra* note 2, para. 325.

<sup>725</sup> See the Impugned Decision, *supra* note 4, paras. 3501, 3518-3519.

<sup>726</sup> See the Impugned Decision, *supra* note 4, paras. 3523-3526. See P-1666: [T-230-ENG](#), p. 50, lines 20-24 (Conf); P-2041: [T-229-ENG](#), p. 92, lines 12-20; [CAR-OTP-2104-0003-R02](#), at 0013, para. 57; P-2354: [CAR-OTP-2105-0991-R03](#), at 1001, para. 55.

<sup>727</sup> [REDACTED].

<sup>728</sup> [REDACTED].

<sup>729</sup> See e.g., the Impugned Decision, *supra* note 4, para. 3608.

<sup>730</sup> As described by dual status individuals P-1666, P-2389, P-2353, and P-2354. See the CLRV2 Closing Brief, *supra* note 830, paras. 234-239, 243-248, 254-256, 262-264, 270-273, 280-284.

<sup>731</sup> See the Impugned Decision, *supra* note 4, para. 3522.

<sup>732</sup> *Ibid*, para. 3563.

more than 12 pages to analyse the evidence holistically and relied on several witnesses.<sup>733</sup> Therefore, the contention that it did not provide a reasoned opinion in concluding that a significant proportion of the Muslim civilian population fled due to and in fear of Mr Yekatom's group advance on the axis<sup>734</sup> is baseless.

302. Lastly, the claims that the Chamber failed to engage with a key Defence's argument that the Muslim civilian population would fled due to the withdrawal of the Seleka<sup>735</sup> is also without merit. The Chamber properly found that the existence of others factors simply added to the context, but were inapt by and of themselves to impact its conclusion that the forcible transfer and deportation took place as a result of the fear of violence that was set in motion by Mr Yekatom's acts and those of his group.<sup>736</sup>

***b) Ground 3.3 – The Chamber properly considered the security and operational context for the 5 December attack***

303. The Defence, first, argues that the Chamber failed to assess whether the market traders had assumed a continuous combat function.<sup>737</sup>

304. The CLRV note that the Defence has not raised this argument during the trial. Therefore, it is prevented from presenting it for the first time on appeal, considering that "[i]n the absence of special circumstances, a party cannot raise arguments for the first time on appeal where it could have reasonably done so in the first instance".<sup>738</sup> In any event, the Chamber correctly analysed the entirety of the evidence in relation to the status [REDACTED],<sup>739</sup> finding that the [REDACTED] were not members of, or otherwise

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<sup>733</sup> *Ibid*, paras. 3417-3445. The Chamber relied on several witnesses to conclude that the departure of the Muslim civilian population was associated to the arrival and advance of Mr Yekatom and his group along the axis including dual status P-2389, P-2353 and P-2354.

<sup>734</sup> See the Yekatom Appeal, *supra* note 2, paras. 333-339.

<sup>735</sup> *Ibid*, para. 338.

<sup>736</sup> See the Impugned Decision, *supra* note 4, paras. 3439-3445, 4306-4308, 4314-4315.

<sup>737</sup> See the Yekatom Appeal, *supra* note 2, paras. 340-346.

<sup>738</sup> See e.g., MICT, *Oric*, Case No. MICT-14-79, [Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015](#) (Appeals Chamber), para. 14. See also ICTY, *Boškoski & Tarčulovski*, Case No. IT-04-82-A, [Judgement](#) (Appeals Chamber), para. 244.

<sup>739</sup> See the Impugned Decision, *supra* note 4, [REDACTED].

affiliated with, the Seleka and were not engaged in combat during the attack on the Boeing Market.<sup>740</sup> The CLRV also note the Defence's lack of reference to jurisprudence in which the concept of continuous combat function has been applied.

305. Second, the Defence alleges that the Chamber erred in finding that Hassan Mahamat and the other Muslim [REDACTED] were protected civilians not directly participating in the hostilities.<sup>741</sup> The Chamber properly cited the law on this issue,<sup>742</sup> and was reasonable in its conclusions.<sup>743</sup> The Defence reiterates several arguments made at trial that were fully taken into consideration by the Chamber, and rejected.<sup>744</sup> The mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection constituted an error warrants the summary dismissal of the arguments.<sup>745</sup> In noting the entirety of the parties' arguments on the relevant issues,<sup>746</sup> the Chamber reasonably concluded that the market traders were all protected civilians during the 5 December attack.<sup>747</sup>

306. Lastly, the Defence alleges that the Chamber erred by treating Hassan's actions as self-defence and solely assessing his conduct through that lens, rather than through the proper legal framework of IHL.<sup>748</sup> In this regard, "[i]t is not considered taking active part in the hostilities when persons otherwise protected under international humanitarian law

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<sup>740</sup> See e.g., the Impugned Decision, *supra* note 4, paras. 2557, 2590, 2606.

<sup>741</sup> See the Yekatom Appeal, *supra* note 2, paras. 347-356.

<sup>742</sup> See the Impugned Decision, *supra* note 4, para. 3968.

<sup>743</sup> *Ibid*, paras. 2554-2571, 2586-2606, 3966-3971.

<sup>744</sup> As an example, it submits that Hassan and the Muslim traders were taking preparatory measures that night. See the Yekatom Appeal, *supra* note 2, para. 347, fn 1232, and the Impugned Decision, *supra* note 4, para. 2554 both referring to the "Corrected Version of the 'Yekatom Defence Final Trial Brief', ICC-01/14-01/18-2737-Conf, 15 November 2024" With Confidential Annexes A, B, C and D, [No. ICC-01/14-01/18-2737-Conf-Corr](#), 6 December 2024, paras. 396-397 (the "Yekatom Closing Brief"). A corrected public redacted version [No. ICC-01/14-01/18-2737-Corr-Red](#) was notified on the same day. See also, the Impugned Decision, *supra* note 4, para. 2567, concluding that "*Muslim traders at the Boeing Market were sleeping in their shops in fear of 'rumours' about an imminent attack on Bangui*".

<sup>745</sup> See e.g., ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, [Judgement](#) (Appeals Chamber), 12 November 2009, para. 17.

<sup>746</sup> *Contra* the Yekatom Appeal, *supra* note 2, paras. 348-350. See the Impugned Decision, *supra* note 4, paras. 2354-2355.

<sup>747</sup> See the Impugned Decision, *supra* note 4, paras. 2554-2571, 2586-2606, 3966-3971.

<sup>748</sup> See the Yekatom Appeal, *supra* note 2, para. 356.

*exercise their right to individual self-defence”.<sup>749</sup> Furthermore, “[t]he causation of harm in individual self-defence or defence of others against violence prohibited under IHL lacks belligerent nexus. For example, although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another. If individual self-defence against prohibited violence were to entail loss of protection against direct attack, this would have the absurd consequence of legitimizing a previously unlawful attack. Therefore, the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities”.<sup>750</sup>*

307. Accordingly, the Chamber properly established that IHL was the applicable framework and correctly found that the shots fired by Hassan were made as self-defence, rather than as a direct participation in hostilities.

#### **4. Ground 4 – The Chamber properly assessed the totality of the evidence**

308. The Defence alleges that the Chamber failed to apply the relevant assessment criteria, thereby committing several errors which, cumulatively, give rise to a reasonable apprehension that it did not bring a genuinely open and impartial mind to the trial record.<sup>751</sup> Ultimately, the Defence argues that a reasonable apprehension of bias is firmly established and that a reasonable observer would conclude that Mr Yekatom’s conviction was not the result of an open-minded and impartial assessment of the trial record or application of the law.<sup>752</sup>

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<sup>749</sup> See Ongwen TJ, *supra* note 61, para. 2697 referring to ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, [Opinion and Judgment](#) (Trial Chamber), 7 May 1997, para. 640; the *Mbarushimana* Decision, *supra* note 65, para. 148; and MELZER (N.), [Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law](#), International Committee of the Red Cross (ICRC), May 2009, p. 61.

<sup>750</sup> See MELZER (N.), [Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law](#), International Committee of the Red Cross (ICRC), May 2009, p. 61. (Emphasis added).

<sup>751</sup> See the Yekatom Appeal, *supra* note 2, para. 360.

<sup>752</sup> *Ibid*, paras. 361-371.

309. These arguments should be rejected. First, the Defence refers to the applicable standard for the disqualification of a judge, pursuant to article 41 of the Statute, and decisions pertaining to it.<sup>753</sup> It is however, unclear, how it should be applicable at this stage, considering that the Defence did not request the disqualification of the judges. In any event, should the Appeals Chamber be minded to consider said contentions, the Defence does not rebut the strong presumption of impartiality afforded to judges of the Court.<sup>754</sup> Indeed, as professional judges, they are “*by virtue of their experience and training, capable of deciding on the issues before them while relying solely and exclusively on the evidence adduced in the particular case*”.<sup>755</sup> It falls on the party alleging a lack of impartiality to produce evidence which is material to establish actual bias or the appearance thereof.<sup>756</sup> Circumstantial facts may also inform the existence of a reasonable appearance of bias. However, it is then expected that temporal and substantive elements be established to a high degree of certainty.<sup>757</sup>

310. The Defence does not provide any evidence which would rebut the ordinary presumption of judicial impartiality. All the facts alleged to demonstrate an apprehension of bias, including the references in Annex 5, do not meet the criteria. None of these facts, taken in isolation or cumulatively, show that the Chamber misstated the evidence, overlooked exculpatory evidence, or ruled on the basis of discrepancies in the English transcripts, either of which would demonstrate an

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<sup>753</sup> *Ibid*, paras. 368, fns 1309-1315, 370, fn 1324.

<sup>754</sup> See the “Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*” (Plenary of Judges), No. [ICC-01/04-01/06-3154-AnxI](#), 3 August 2015, para. 29 (the “*Lubanga Disqualification Decision*”); and the “Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*”, No. [ICC-01/05-01/13-511-Anx](#), 20 June 2014, para. 18.

<sup>755</sup> See the *Lubanga Disqualification Decision*, *supra* note 754, para. 29 and fn. 50; and the “Decision of the Plenary of Judges on the Defence Application for the Disqualification of judges of Pre-Trial Chamber I from the case *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*” (Plenary of Judges), No. [ICC-01/12-01/18-458-AnxI-Red](#), 12 September 2019, para. 23.

<sup>756</sup> See the “Public redacted version of ‘Reasons for the Decision on the ‘Request for the Disqualification of Judge Miatta Maria Samba’ dated 17 September 2021 (ICC-01/09-01/20-173-Conf)’” (Plenary of Judges), No. [ICC-01/09-01/20-205-Red](#), 1 November 2021, para. 23 (the “*Gicheru Disqualification Decision*”).

<sup>757</sup> See the *Gicheru Disqualification Decision*, *supra* note 756, para. 25.

appearance of bias. On the contrary, the Chamber acted reasonably and well within its discretion, analysing the evidence holistically with impartiality and independence. Therefore, a fair-minded and informed observer, having examined the totality of the relevant facts and possessing an understanding of the nature of a judge's duties, would not reasonably apprehend bias on part of the judges of this case.<sup>758</sup>

311. Across **Grounds 4.1 to 4.7**, which are examined together because interconnected, the Defence raises several challenges to the Chamber's assessment of the credibility of P-1339. It alleges, *inter alia*, that the Chamber failed to apply the requisite caution,<sup>759</sup> to engage with Defence's arguments,<sup>760</sup> and to provide a reasoned opinion including in relation to contradictions.<sup>761</sup> It further contends that the Chamber failed to assess the evidence holistically,<sup>762</sup> ignored contradictory evidence,<sup>763</sup> and generally failed in its assessment of the witness's credibility.<sup>764</sup> The Defence makes similar claims in relation to P-1528's testimony regarding the destruction of the Boeing Mosque and the displacement from Boeing and Cattin,<sup>765</sup> and in relation to P-1838's testimony on the murder of Djido Saleh.<sup>766</sup>

312. The task of weighing and assessing evidence lies primarily with the trial chamber,<sup>767</sup> which is best placed to hear, evaluate, and balance the evidence presented at trial.<sup>768</sup> In turn, this entails that a trial chamber has the primary responsibility to evaluate the connections and fairly resolve any inconsistencies between the different

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<sup>758</sup> *Ibid*, para. 23.

<sup>759</sup> See the Yekatom Appeal, *supra* note 2, para. 372.

<sup>760</sup> *Ibid*, paras. 373, 374-375, 379.

<sup>761</sup> *Ibid*, paras. 373-374, 379, 382, 397-398.

<sup>762</sup> *Ibid*, paras. 380, 385.

<sup>763</sup> *Ibid*, paras. 383-386.

<sup>764</sup> *Ibid*, paras. 375-378, 380-383, 397.

<sup>765</sup> *Ibid*, paras. 387-395.

<sup>766</sup> *Ibid*, paras. 399-402.

<sup>767</sup> See the *Ongwen* AJ, *supra* note 45, para. 80 referring to *Ntaganda* AJ, *supra* note 49, para. 40; and the *Gbagbo and Blé Goudé* AJ, *supra* note 429, para. 69.

<sup>768</sup> See ICTR, *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-A, [Judgment \(Reasons\)](#) (Appeals Chamber), 1 June 2001, para. 187; ICTY, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, [Judgement](#) (Appeals Chamber), 24 March 2000, para. 63.

items of evidence received at trial.<sup>769</sup> Due to the chamber's function of conducting the trial, there is a presumption that it has properly exercised these responsibilities, "*unless and until the contrary is shown*".<sup>770</sup> A trial chamber has full discretionary authority in assessing witness credibility and determining the weight to be accorded to testimonies, and the Appeals Chamber must give some deference to the assessment of evidence made.<sup>771</sup>

313. Furthermore, a trial chamber has discretion to decide in the circumstances of each case whether corroboration is necessary and whether to rely on uncorroborated, but otherwise credible, witness testimony.<sup>772</sup> This discretion equally applies to the evidence of accomplice witnesses, such as P-1339, as long as the trial chamber carefully considers the condition of a witness as an "accomplice" when assessing the reliability of their evidence.<sup>773</sup>

314. Concerning the allegations that the Chamber failed to engage with the Defence's arguments or provide a reasoned opinion addressing the contradictions raised,<sup>774</sup> the Chamber's obligation to provide a reasoned opinion does not include the articulation of every step of its reasoning for its findings.<sup>775</sup> Moreover, the obligation to provide a reasoned opinion relates to the judgment as a whole rather than each submission made at trial,<sup>776</sup> and there is no need for a chamber to address every argument raised by the parties or to refer to all the evidence considered in reaching its

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<sup>769</sup> See the *Ongwen* AJ, *supra* note 45, para. 80 referring to the *Ntaganda* AJ, *supra* note 49, para. 40; and the *Gbagbo and Blé Goudé* AJ, *supra* note 429, para. 69.

<sup>770</sup> See the *Ntaganda* AJ, *supra* note 49, para. 40.

<sup>771</sup> See the *Ongwen* AJ, *supra* note 45, para. 82; *Lubanga* AJ, *supra* note 8, paras. 22-25.

<sup>772</sup> See the *Ngudjolo* AJ, *supra* note 47, para. 148; the *Lubanga* AJ, *supra* note 8, para. 218; and ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, [Judgement](#) (Appeals Chamber), 27 September 2007, para. 203.

<sup>773</sup> See the *Ntaganda* AJ, *supra* note 49, para. 734.

<sup>774</sup> See the *Yekatom* Appeal, *supra* note 2, paras. 373-375, 379, 382-383, 385-386, 391, 397-398, 402.

<sup>775</sup> See e.g., the *Bemba* AJ, *supra* note 45, paras. 51 and 53.

<sup>776</sup> See ICTR, *Renzaho v. Prosecutor*, Case No. ICTR-97-31-A, [Judgement](#) (Appeals Chamber), 1 April 2011, para. 405 (the "*Renzaho* AJ"); *Kalimanzira v. Prosecutor*, Case No. ICTR-05-88-A, [Judgement](#) (Appeals Chamber), 20 October 2010, paras. 96 and 121 (the "*Kalimanzira* AJ"); *Ntabakuze v. Prosecutor*, Case No. ICTR-98-41A-A, [Judgement](#) (Appeals Chamber), 8 May 2012, para. 161 (the "*Ntabakuze* AJ"). ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, [Judgement](#) (Appeals Chamber), 28 February 2005, para. 23 (the "*Kvočka* AJ").

findings.<sup>777</sup> It is indeed within the discretion of a chamber to evaluate the evidence holistically and ultimately to determine whether it is credible, without explaining its decision in every detail.<sup>778</sup>

315. In light of these principles, the Chamber acted well within its discretion and reasonably assessed the evidence of P-1339, P-1528, and P-1838. For all these witnesses, the Chamber carefully evaluated the totality of the evidence,<sup>779</sup> highlighted the inconsistencies in the testimonies when necessary,<sup>780</sup> and analysed the Defence's arguments.<sup>781</sup> Furthermore, it repeatedly noted and properly considered, across the Judgment, P-1339's status of accomplice.<sup>782</sup> This shows, contrary to the Defence's contention,<sup>783</sup> that the Chamber applied the correct caution.<sup>784</sup>

316. In **Ground 4.5**, the Defence argues that the Chamber erred in finding that dual status individual P-2682's continued stay in PK5 after 5 December 2013 [REDACTED], and that she fled to Chad in the context of the attack on the Boeing Market.<sup>785</sup> These arguments are unfounded and insufficiently developed.<sup>786</sup> Although the Chamber specifically noted that P-2682 left to PK5 on 3 December 2013, prior to the events,<sup>787</sup> the evidence at hand shows that her continued stay in PK5 was [REDACTED],<sup>788</sup> [REDACTED],<sup>789</sup> and (iii) the overall context of the attack on Bangui.<sup>790</sup> Accordingly,

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<sup>777</sup> See e.g., ICTR, *Musema v. Prosecutor*, Case No. ICTR-96-13-A, [Judgement](#) (Appeals Chamber), 16 November 2001, para. 20; and the *Bemba* AJ, *supra* note 45, para. 53.

<sup>778</sup> See ICTY, the *Čelebići* AJ, *supra* note 141, para. 498.

<sup>779</sup> See the Impugned Decision, *supra* note 4, paras. 205, 330-337, 661, 2476, 2759.

<sup>780</sup> *Ibid*, paras. 332-333, 335-336, 2440-2445, 2456, 2558, 2639-2640, 2663, 3654.

<sup>781</sup> *Ibid*, paras. 331-332, 335-336, 2451, 2622-2629, 2637, 2677, 3658 (for P-1339); paras. 2661-2663, 2667, 2750-2752 (for P-1528); and paras. 3670, 3682 (for P-1838).

<sup>782</sup> *Ibid*, paras. 330, 2122, 2410, 2430, 2437, 2480, 2529-2530, 2544, 2618, 2634-2636.

<sup>783</sup> See the Yekatom Appeal, *supra* note 2, para. 372.

<sup>784</sup> See the *Ntaganda* AJ, *supra* note 49, paras. 734-738.

<sup>785</sup> See the Yekatom Appeal, *supra* note 2, para. 393.

<sup>786</sup> See *Lubanga* AJ, *supra* note 8, para. 33.

<sup>787</sup> See the Impugned Decision, *supra* note 4, paras. 2545, 2697-2698.

<sup>788</sup> [REDACTED].

<sup>789</sup> [REDACTED].

<sup>790</sup> *Ibid*, para. 2703.

the link between P-2682's continued stay in PK5 and her eventual departure to Chad can only be seen as directly related to the acts of Mr Yekatom and his group.<sup>791</sup>

317. In **Ground 4.7**, the Defence argues that the Chamber failed to render a reasoned opinion when it found dual status individuals P-1705, P-1704, P-1811, P-1716 and P-0967 generally credible and reliable regarding the Yamwara incident, while finding that some of them were unreliable with respect to other parts of their testimonies.<sup>792</sup> Contrary to the Defence's allegations, it is not unreasonable for a trier of fact to accept some but reject other parts of a witness's testimony.<sup>793</sup> It is well within a trial chamber's discretion to "*evaluate the credibility of separate portions of a witness's testimony differently if the circumstances of the case so require*".<sup>794</sup> The Defence fails to meet its burden on appeal in claiming that the Chamber could not coherently maintain that the witnesses were generally reliable and credible.<sup>795</sup>

318. The Defence also contends that the Chamber failed to provide adequate reasoning, assess the evidence holistically, or engage with the Defence's argument concerning P-1654's Letter and the alleged contamination of the relevant witnesses.<sup>796</sup> These arguments are unfounded, especially considering that the Chamber devoted more than six pages of the Impugned Decision to this issue.<sup>797</sup> Ultimately, it properly assessed the totality of the evidence and found no contamination of the witnesses' evidence.<sup>798</sup> The Defence fails to show any error in these conclusions, and simply repeats arguments advanced at first instance, thereby representing a mere disagreement with the Judgment.<sup>799</sup>

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<sup>791</sup> *Contra* Yekatom Appeal, *supra* note 2, paras. 393-394.

<sup>792</sup> See the Yekatom Appeal, *supra* note 2, paras. 406-407.

<sup>793</sup> See e.g., ICTY, the *Popović et al* AJ, *supra* note 140, para. 132; *Lubanga* AJ, *supra* note 8, paras. 23 and 27; *Ngudjolo* AJ, *supra* note 47, para. 168; *Ongwen* AJ, *supra* note 45, para. 524.

<sup>794</sup> See ICTR, *Bagosora* AJ, *supra* note 146, para. 253.

<sup>795</sup> See the Yekatom Appeal, *supra* note 2, para. 406.

<sup>796</sup> *Ibid*, para. 409.

<sup>797</sup> See the Impugned Decision, *supra* note 4, paras. 3108-3129.

<sup>798</sup> *Ibid*, paras. 3112, 3114, 3118, 3124, 3128.

<sup>799</sup> See *Ntaganda* AJ, *supra* note 49, para. 738.

## 5. Ground 5 - The Chamber correctly applied the law to each crime

### a) *Ground 5.1 - The Chamber correctly interpreted the definition of “attack” pursuant to article 8(2)(e)(i) of the Statute*

319. The Defence argues that the Chamber misinterpreted the notion of ‘attack’ under article 8(2)(e)(i) of the Statute.<sup>800</sup> In particular, the Chamber failed to engage with the argument that the correct legal question was whether the force was directed against civilians.<sup>801</sup> The Defence further claims that the Chamber relied on an isolated number of casualties arising from a combat operation as proof that civilians were the intended target in Boeing and Cattin.<sup>802</sup>

320. The Chamber correctly interpreted the notion of ‘attack’,<sup>803</sup> as it recalled that “*the civilian population or individual civilians must have been the primary object of the ‘attack’; directing the attack against military objects that affect civilians incidentally does not suffice*”.<sup>804</sup> In noting the Defence’s arguments in that regard,<sup>805</sup> it engaged with the submissions by applying the correct standard.<sup>806</sup> The Chamber also considered the following elements: (i) the non-military nature of the targets of the attack – namely the market, mosque and unarmed civilians;<sup>807</sup> (ii) the absence of any indication that Mr Yekatom and/or his elements took any measures to remove civilians;<sup>808</sup> and (iii) Mr Yekatom’s conduct together with his instructions before the attack.<sup>809</sup> In the view of the Chamber, this made it “*clear to [Mr Yekatom’s] elements that the primary aim of the attack was not a*

<sup>800</sup> See the Yekatom Appeal, *supra* note 2, paras. 416-419.

<sup>801</sup> *Ibid*, para. 416.

<sup>802</sup> See the Yekatom Appeal, *supra* note 2, para. 416.

<sup>803</sup> See the Impugned Decision, *supra* note 4, paras. 3788-3791.

<sup>804</sup> *Ibid*, para. 3790 referring to the Ongwen TJ, *supra* note 61, para. 2760 and the Ntaganda TJ, *supra* note 36, para. 802.

<sup>805</sup> See the Impugned Decision, *supra* note 4, paras. 3952-3954.

<sup>806</sup> *Contra* Yekatom Appeal, *supra* note 2, para. 416.

<sup>807</sup> See the Impugned Decision, *supra* note 4, para. 3956.

<sup>808</sup> *Ibid*, para. 3958 *considering* that attacks pursuant to article 8(2)(e)(i) of the Statute may also include attacks that are launched without taking the necessary precautions to spare the civilian population, the Chamber correctly noted this element in its conclusions: see Ntaganda TJ, *supra* note 36, para. 921; and the the Abd-Al-Rahman TJ, *supra* note 136, para. 714.

<sup>809</sup> See the Impugned Decision, *supra* note 4, paras. 2427-2454, 3959.

*military target or persons actively participating in hostilities”.*<sup>810</sup> This is a reasonable conclusion based on the totality of the evidence and in light of the correct legal test, especially considering the fact that “*depending on the circumstances, the civilian population can still qualify as the primary object of an attack in a situation where everyone is targeted at a mixed military-civilian position*”.<sup>811</sup>

321. Lastly, the CLRV recall that no particular harm to civilians needs to be caused, and that the crime is directing the attack as such.<sup>812</sup> On this basis, the Defence’s argument that the casualties were insufficient to characterise the operation as an attack against the civilian population must be rejected.

***b) Ground 5.2 - The Chamber properly interpreted article 8(2)(e)(viii) of the Statute***

322. The Defence submits that the Chamber erred in its interpretation of article 8(2)(e)(viii) of the Statute by holding that conduct alone may amount to an “order”, and that an order can consist of instructing another person, in any form, to perform an act or omission resulting in displacement. According to the Defence, the provision would be satisfied only where the order is expressly directed at removing a civilian population.<sup>813</sup>

323. The Defence disregards relevant case law. The Court has previously held that an order may take “any form” and may be conveyed through “a variety of means, to be determined on a case-by-case basis” including instructions to “perform an act of omission as a result of which such a displacement would occur”.<sup>814</sup> The Court has also recognised that the conduct by which perpetrators force civilians to leave an area is not limited to the

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<sup>810</sup> *Ibid*, para. 3959.

<sup>811</sup> See the Impugned Decision, *supra* note 4, para. 3790 referring to *Ongwen* TJ, *supra* note 61, para. 2760; *Ntaganda* TJ, *supra* note 36, paras. 921, 923; and *Katanga* TJ, *supra* note 67, para. 802. See *contra* the *Yekatom* Appeal, *supra* note 2, para. 417.

<sup>812</sup> See the Impugned Decision, *supra* note 4, para. 3788. In the same vein, see the *Ongwen* TJ, *supra* note 61, para. 2758; the *Ntaganda* TJ, *supra* note 36, para. 904; and the *Abd-Al-Rahman* TJ, *supra* note 136, para. 690.

<sup>813</sup> *Ibid*, paras. 420-424.

<sup>814</sup> See the *Ntaganda* TJ, *supra* note 36, paras. 1081-1082.

issuance of a formal order; to hold otherwise would unduly restrict the circumstances in which civilian displacement may occur during armed conflict.<sup>815</sup>

324. The Defence's restrictive interpretation of article 8(2)(e)(viii) of the Statute is untenable and inconsistent with the requirement that treaties be interpreted in good faith in light of their object and purpose.<sup>816</sup> This provision seeks to protect the right of civilians to remain in their homes and communities and not to be displaced without justification during armed conflict.<sup>817</sup> Limiting its application to situations involving an express order would undermine that purpose and lead to absurd results, excluding from protection civilians coerced to leave an area absent a formal order, notwithstanding the substantive reality of their forced displacement.<sup>818</sup>

325. In the present case, such a restrictive interpretation would mean that an accused who fired his pistol in the air to launch an attack, instructed his elements to target sectors where Muslims were to be found - hence creating a physically, materially and psychologically unsafe environment for Muslims - could not be found guilty of forced displacement in the absence of an express order to displace the civilian population.

326. In this sense, the CLRV submit that the Defence misunderstood article 17 of the *Additional Protocol to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (the "AP II") and its drafting history.<sup>819</sup> Contrary to the Defence's arguments, article 17(1) AP II "*prohibits forced displacement regardless of whether it was ordered or not*".<sup>820</sup> Similarly, the Defence's

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<sup>815</sup> See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-309](#), 9 June 2014, para. 64.

<sup>816</sup> Article 31(1) of the Vienna Convention on the Law of Treaties. See also, the *Katanga* TJ, *supra* note 67, paras. 43-45.

<sup>817</sup> See the Public Version with one public annex of the "Sentencing Judgment" (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2019, para. 163 (the "*Ntaganda* Sentencing TJ").

<sup>818</sup> See WILLMS (J.), "Without order, anything goes? The prohibition of forced displacement in non-international armed conflict", *International Review of the Red Cross*, Vol. 91, Number 875, September 2009, pp. 553-554, 564 ("WILLMS (J.)"). See also the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-309](#), 14 June 2014, para. 64.

<sup>819</sup> See the Yekatom Appeal, *supra* note 2, para. 423.

<sup>820</sup> See WILLMS (J.), *supra* note 818, pp. 556-558, 564. (Emphasis added).

argument that a distinction was intended between article 17(1) AP II and article 17(2) AP II - *i.e.* compelled versus ordered - is unsupported.<sup>821</sup>

327. The Defence also misunderstands the Judgment in relation to the finding that Mr Yekatom's conduct need not have been the sole reason the Muslim civilian population fled; and in arguing that the Chamber diluted the notion of ordering a displacement.<sup>822</sup> The Chamber found that there was a direct link between Mr Yekatom's act of launching an attack on Boeing and the displacement of the Muslim civilian population from Boeing and Cattin,<sup>823</sup> and that the link is not affected even if additional or compounding factors accounting for the displacement existed.<sup>824</sup> These conclusions are reasonable and in accordance with the law on ordering displacement pursuant to article 8(2)(viii) of the Statute.

*c) Ground 5.3 - The Chamber correctly found that the actions of Mr Yekatom's group were unlawful*

328. The Defence argues that the operations of Mr Yekatom's group were lawful, justified by military necessity, aimed at ensuring the security of all civilians in the area, and that the Chamber's conclusions to the contrary were insufficiently reasoned and unreasonable.<sup>825</sup>

329. The Defence merely advances its interpretation of the evidence, and ignores the Chamber's fundamental findings. The operations of Mr Yekatom's group were aimed at targeting the Muslim civilians,<sup>826</sup> ultimately forcing them to flee the areas under attack<sup>827</sup> - as such, the displacement was not justified by the protection of civilians.<sup>828</sup>

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<sup>821</sup> *Ibid*, p. 558. According to the author, this distinction has to be dismissed "*as the majority of States have not retained that distinction in their national implementation, nor have they taken it into consideration in public condemnations of cases of forced displacement*".

<sup>822</sup> See the Yekatom Appeal, *supra* note 2, para. 424 referring to the Impugned Decision, *supra* note 4, para. 3988.

<sup>823</sup> See the Impugned Decision, *supra* note 4, para. 3988.

<sup>824</sup> *Ibid*, para. 3988 (fn 9642).

<sup>825</sup> See the Yekatom Appeal, *supra* note 2, paras. 425-426, 432.

<sup>826</sup> See the Impugned Decision, *supra* note 4, paras. 2446-2454, 3980.

<sup>827</sup> *Ibid*, paras. 2747-2757 (for Boeing and Cattin), 3443-3444, 4310-4316, 4326 (for PK9-Mbaiki).

<sup>828</sup> See the Ntaganda TJ, *supra* note 36, para. 1099.

In particular, the displacement along the PK9–Mbaiki axis occurred after Seleka forces had left the area and before the arrival of Mr Yekatom’s group.<sup>829</sup> A significant number of victims - including dual status individuals P-2353,<sup>830</sup> P-1666,<sup>831</sup> and P-2354,<sup>832</sup> - remain unable to return to their homes more than ten years later.<sup>833</sup>

330. Under international law, the lawful displacement of civilians is strictly limited to situations justified by the security of the civilians concerned or by imperative military reasons.<sup>834</sup> Even then, the displacement must be temporary and “*carried out in such a manner to ensure that displaced persons are returned to their homes as soon as the situation allows*”.<sup>835</sup> Crucially, “*it is the absence of choice that makes the displacement unlawful*” and “*displacement is not permissible where the humanitarian crisis that caused the displacement is the result of the accused’s own unlawful activity*”.<sup>836</sup>

331. In light of the Chamber’s findings, the displacement in the present case cannot be justified under these limited exceptions and was therefore unlawful.

***d) Ground 5.4 - The Chamber correctly assessed the severity threshold finding concerning the victims of the Yamwara incident***

332. The Defence argues that the Chamber erred in its assessment of the gravity of the acts suffered by the victims during the Yamwara incident.<sup>837</sup> It submits that a proper individualised assessment would have demonstrated that the harm did not

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<sup>829</sup> See the Impugned Decision, *supra* note 4, paras. 3335, 3462.

<sup>830</sup> See the “Closing Brief on behalf of Victims of Other Crimes”, [No. ICC-01/14-01/18-2734-Conf](#), 15 November 2024, paras. 44, 280. A public redacted version [No. ICC-01/14-01/18-2734-Red](#) was notified on 22 November 2024 (the “CLRV2 Closing Brief”).

<sup>831</sup> *Ibid*, para. 43.

<sup>832</sup> *Ibid*, para. 45.

<sup>833</sup> See the Impugned Decision, *supra* note 4, paras. 4526, 4530, 4620, 4623-4625; and the CLRV2 Closing Brief, *supra* note 830, para. 28.

<sup>834</sup> See the *Ntaganda* TJ, *supra* note 36, para. 1098; and MICT, *Prosecutor v. Mladić*, Case No. MICT-13-56-A, [Judgement](#) (Appeals Chamber), 8 June 2021, para. 356 (the “*Mladić* AJ”).

<sup>835</sup> See ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, [Judgement](#) (Trial Chamber I), 27 September 2006, para. 725; the *Mladić* AJ, *supra* note 834, para. 356; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, [Judgement Vol. I](#) (Trial Chamber II), 10 June 2010, para. 901.

<sup>836</sup> See the *Mladić* AJ, *supra* note 834, para. 356.

<sup>837</sup> See the Yekatom Appeal, *supra* note 2, paras. 426-428.

reach the threshold required for cruel treatment or other inhuman acts.<sup>838</sup> The Defence further argues that, in the absence of specific findings as to how the individuals experienced the threats, the Chamber could not conclude that they suffered severe harm.<sup>839</sup> Finally, it maintains that the acts in question - namely beatings, mental suffering, and being forced to undress - did not cause suffering of sufficient gravity to qualify as cruel treatment or other inhuman acts.<sup>840</sup>

333. These arguments are unfounded and diminish the seriousness of the harm suffered by the victims. In the factual findings, the Chamber specifically noted “*that the Yamwara Incident impacted several individuals*” and referred to its conclusions in the sentencing section.<sup>841</sup> There, it evaluated the extent of victimisation for each victim - in some instances addressing them collectively where they endured the same events - and set out the physical, emotional, and psychological harm suffered.<sup>842</sup> It cannot, therefore, be maintained that the Chamber failed to assess the suffering on an individual basis.<sup>843</sup> In any event, the Chamber was not required to conduct a strictly atomised assessment where victims experienced the same events and sustained similar harm.

334. The Chamber further found that the death threats inflicted severe suffering.<sup>844</sup> It recalled, in particular, the cruelty of showing P-1716 the location where the Anti-Balaka had previously buried other victims.<sup>845</sup> It also cited P-0967’ statement that “[i]t was horrible. It was very difficult. We didn’t think we were going to survive”.<sup>846</sup> Dual status individual P-1704 also provided a description of the trauma he endured, including his belief that [REDACTED].<sup>847</sup>

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<sup>838</sup> *Ibid*, para. 426.

<sup>839</sup> See Yekatom Appeal, *supra* note 2, para. 427.

<sup>840</sup> *Ibid*, paras. 427-428.

<sup>841</sup> See the Impugned Decision, *supra* note 4, para. 3296 referring to paras. 4571, 4580, 4592, 4597-4598.

<sup>842</sup> *Ibid*, paras. 4570-4572, 4580-4583, 4591-4592, 4594, 4597-4598.

<sup>843</sup> *Contra* Yekatom Appeal, *supra* note 2, para. 426.

<sup>844</sup> See the Impugned Decision, *supra* note 4, para. 4571, noting, *inter alia*, that “P-1716 testified that he was ‘at the point of death, so [he] cannot forget what was happening’ and that the events ‘haunt’ him until today”.

<sup>845</sup> See the Impugned Decision, *supra* note 4, para. 4582.

<sup>846</sup> *Ibid*, para. 4571.

<sup>847</sup> See the CLRV2 Closing Brief, *supra* note 830, [REDACTED].

335. In assessing severity, a Chamber must consider the conduct as a whole and in light of all relevant circumstances.<sup>848</sup> The Chamber properly evaluated the treatment of the six individuals in its totality and was entitled to conclude that the threshold of severity was met.<sup>849</sup>

*e) Ground 5.5 – The Chamber correctly found Mr Yekatom and his group responsible for the forcible transfer of Muslims along the PK9–Mbaiki axis*

336. The Defence argues that the Chamber erred in establishing a causal link between the acts of Mr Yekatom and his group and the displacement of Muslim civilians along the PK9–Mbaiki axis, asserting that it failed to examine in detail the reasons for their departure or to exclude reasonable alternative inferences.<sup>850</sup> The Defence further argues - relying on a single passage from the Gotovina case - that the departure of civilians along the Axis, prompted by fear of the Anti-Balaka's imminent arrival or by a general climate of dread, cannot be characterised as forcible transfer or deportation.<sup>851</sup>

337. The Defence ignores substantial parts of the Judgement and, in doing so, misrepresents it. As already argued *supra*,<sup>852</sup> the Chamber conducted a thorough analysis of the specific reasons the Muslim civilians fled their villages and towns along the Axis, and ultimately from Mbaiki.<sup>853</sup> In doing so, the Chamber relied on several witnesses - including dual status individuals P-1666, P-2353, P-2354, P-2389 and P-2419 - who all testified to the reasons of their and other Muslim civilians' departure from their homes.<sup>854</sup> The Chamber correctly assessed the evidence and rejected the Defence's arguments on the absence of a causal link between Mr Yekatom's acts and the

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<sup>848</sup> See ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, [Judgment](#) (Trial Chamber II), 15 March 2002, para. 131; ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, [Judgment Vol. 1](#) (Trial Chamber III), 29 May 2013, para. 78. See also the *Ongwen* TJ, *supra* note 61, para. 2701 - for torture, which has a similar severity threshold.

<sup>849</sup> See the Impugned Decision, *supra* note 4, para. 4147.

<sup>850</sup> See the Yekatom Appeal, *supra* note 2, para. 429.

<sup>851</sup> *Ibid*, para. 430.

<sup>852</sup> See *supra*, paras. 243-244; 276-276; 287.

<sup>853</sup> See the Impugned Decision, *supra* note 4, paras. 3417-3445, 3565-3609.

<sup>854</sup> *Ibid*, paras. 3418-3419, 3421-3422, 3424-3428, 3433-3435, 3441-3442, 3595, 3598, 3600, 3602-3603.

departure of Muslim civilians,<sup>855</sup> ultimately concluding that “*while there may have been other factors that compounded or added to the reasons for displacement, they did not sever the link between Mr Yekatom’s acts and the dislocation of Muslims*”.<sup>856</sup> The Chamber therefore correctly excluded all reasonable alternative inferences.<sup>857</sup>

338. Moreover, the Defence’s allegation of an unduly restrictive interpretation of forcible displacement,<sup>858</sup> was already advanced at trial,<sup>859</sup> duly noted by the Chamber,<sup>860</sup> and correctly rejected. The Chamber found that the Muslim civilians left “*as a result of Mr Yekatom’s acts*”,<sup>861</sup> and not merely “*as a result of a fear of violence commonly associated with armed conflict*”.<sup>862</sup> In any event, the present case is distinguishable from Gotovina, particularly given the finding of a clear geographical and temporal link between Mr Yekatom’s conduct and the departure of the Muslim population.<sup>863</sup>

## 6. Grounds 6 – The Chamber correctly determined the sentence

339. The Defence challenges the determination of Mr Yekatom’s sentence on various grounds, alleging that the Chamber committed errors of law, fact and in the exercise of its discretion.<sup>864</sup> It contends that the Chamber’s decision to issue a joint article 74 and 76 decision constitutes an error of law denying the Defence an opportunity to be heard on a possible sentence after the extent and particulars of Mr Yekatom’s conviction were known.<sup>865</sup> In addition, the Defence submits that the Chamber erroneously

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<sup>855</sup> See the Impugned Decision, *supra* note 4, paras. 4306-4318.

<sup>856</sup> *Ibid*, para. 4314.

<sup>857</sup> *Contra* the Yekatom Appeal, *supra* note 2, para. 429.

<sup>858</sup> *Ibid*, para. 430.

<sup>859</sup> See the Yekatom Closing Brief, *supra* note 744, para. 655, fn 2165.

<sup>860</sup> See the Impugned Decision, *supra* note 4, para. 4307.

<sup>861</sup> *Ibid*, para. 4315.

<sup>862</sup> *Ibid*.

<sup>863</sup> Compare ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, [Judgement](#) (Trial Chamber I), 15 April 2011, para. 1762 with the Judgment, *supra* note 4, paras. 4310-4315.

<sup>864</sup> See the Yekatom Appeal, *supra* note 2, para. 437.

<sup>865</sup> *Ibid*, para. 438

assessed aggravating factors and individual circumstances, and took an arbitrary approach with respect to determining the gravity of the crimes.<sup>866</sup>

*a) Ground 6.1 – The Chamber correctly applied article 76 of the Statute*

340. The Defence argues that the Chamber erred in law in disregarding both the ordinary meaning and context of article 76 of the Statute, averring that article 76(2) hearings are “*clearly intended to occur in the event of a conviction*”, similar to reparations hearings.<sup>867</sup> Holding a hearing *after* a conviction, in the Defence’s submissions, gives effect to article 76(2)’s purpose to “*allow parties to make targeted submissions to assist the Chamber in imposing a fair and proportionate sentence*”,<sup>868</sup> as well as the opportunity to address specific findings made against the convicted person.<sup>869</sup>

341. Nothing in the statutory framework prevented the Chamber from issuing the conviction and sentence simultaneously. On 18 July 2024, it decided to render any sentence under Article 76 together with its judgment under article 74.<sup>870</sup> The Defence sought partial reconsideration, requesting a ten-day delay to make further submissions,<sup>871</sup> but endorsed the Chamber’s reasoning on the bifurcated approach.<sup>872</sup> It now attempts to re-litigate an issue that was settled and, in doing so, contradicts its

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<sup>866</sup> *Ibid*, para. 437.

<sup>867</sup> *Ibid*, paras. 440-441.

<sup>868</sup> *Ibid*, para. 441.

<sup>869</sup> *Ibid*, paras. 441, 443.

<sup>870</sup> See the “Decision on the Sentencing Procedure and Amended Directions on the Conduct of the Proceedings” (Trial Chamber V), [No. ICC-01/14-01/18-2600](#), 18 July 2024 (the “Decision on Sentencing Procedure”), footnote 5 referring to the “Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled ‘Sentence’” (Appeals Chamber), [No. ICC-02/04-01/15-2023 A2](#), 15 December 2022, para. 56 which confirmed that the Statute permits such a bifurcated procedure.

<sup>871</sup> See the “Yekatom Defence Request for Partial Reconsideration of ‘Decision on the Sentencing Procedure and Amended Directions on the Conduct of the Proceedings’ (ICC-01/14-01/18-2600)”, [No. ICC-01/14-01/18-2614](#), 2 August 2024 (the “Yekatom Reconsideration Request”).

<sup>872</sup> See the Yekatom Reconsideration Request, *supra* note 871, para. 2: “*Whilst the Defence acknowledges that the Chamber is correct, in that the simultaneous issuance of a decision under Article 76 and a judgment under Article 74 is a possible avenue within the statutory framework, this possibility hits a roadblock where either the Prosecution or Defence request to provide additional evidence or submissions relevant to the sentence in the event of a conviction in accordance with sub-paragraphs (1) and (2) of Article 76*”. (Emphasis added).

prior position.<sup>873</sup> The argument that a joint conviction and sentence are contrary to due process is baseless, as there is a plethora of jurisprudence in international criminal cases establishing that mitigating and aggravating circumstances must be plead during the proceedings.<sup>874</sup> This aspect of the Defence's appeal reflects mere disagreement with the sentence imposed rather than any legal error.

342. Moreover, the Defence's claim that it was unfairly deprived of the opportunity to make targeted sentencing submissions is unfounded. The Chamber undertook concrete measures to safeguard the Appellant's rights. In light of the imminent expiration of the judges' mandates, it adopted the bifurcated approach electing to address sentencing together with the judgment rather than defer the matter to a newly constituted Chamber in the event of a conviction under article 74.<sup>875</sup> It then provided the parties with a dedicated procedure, including both written and oral stages, to present submissions on sentencing in the event of conviction.<sup>876</sup> Although the Defence sought an additional opportunity to make submissions after conviction, it cannot now plausibly argue that it was prevented from presenting tailored arguments. Having been given notice and two separate opportunities to address sentencing comprehensively,<sup>877</sup> any decision to withhold submissions lies with the Defence itself and cannot be attributed to any curtailment of its rights.

***b) Ground 6.2 – The Chamber correctly assessed the aggravating factors***

343. The Defence submits that the Chamber erroneously assessed aggravating factors, such as double-counting the '*discriminatory motive*' for counts where

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<sup>873</sup> *Ibid*, para. 4: "Defence is mindful of the overarching objectives addressed by the Chamber, namely that any potential decision under Article 76 is issued by the same composition of judges in a timely manner. Mr. Yekatom shares these very same objectives".

<sup>874</sup> See e.g., *Dorđević* AJ, *supra* note 143, para. 945 referring to the *Kupreškić* et al. AJ, *supra* note 140, para. 414. See also ICTY, *Prosecutor v. Kvočka et al.*, [Appeal Judgement](#), Case No. IT-98-30/I-A, 28 February 2005, para. 674. The *ad hoc* Tribunals as a matter of course issued convictions and sentences simultaneously.

<sup>875</sup> See the Decision on Sentencing Procedure, *supra* note 870, para. 2, footnote 5.

<sup>876</sup> *Ibid*, para. 5.

<sup>877</sup> See the Decision on Sentencing Procedure, *supra* note 870.

discrimination forms part of the legal elements of the crimes, such as Counts 2, 4, 11, 12, 14, 15, and 24-27.<sup>878</sup>

344. However, the Chamber explicitly stated that it “d[id] not consider this aggravating factor in the context of the crime against humanity of persecution, and the war crime of torture, which include this ‘discriminatory dimension’ as one of their constitutive elements”.<sup>879</sup> Furthermore, the Chamber explicitly addressed and rejected the Defence’s argument that the alleged discriminatory intent against the Muslim population cannot be considered an aggravating factor as it coincides with the underlying conduct for the alleged common purpose.<sup>880</sup> The Chamber considered that Mr Yekatom acted with a discriminatory intent in the commission of crimes directed against the Muslim population, with the exception of the crime of persecution and the war crime of torture.<sup>881</sup>

345. The Defence’s contention that consideration of discriminatory motive at sentencing amounted to impermissible double counting conflates the constitutive intent required for the crime against humanity of persecution with the broader concept of motive relevant to sentencing. The Chamber correctly distinguished these notions. Discriminatory intent was not considered to be an aggravating circumstance for the crime of persecution as it constitutes an element of the said crime.<sup>882</sup> However, the Chamber was entitled to consider discriminatory intent as an aggravating circumstance under rule 145(2)(b) when it is not a legal element of a crime.<sup>883</sup> This approach is consistent with the prohibition of double counting, which only relates to the constitutive legal elements of the crimes.<sup>884</sup> By focusing on the objective

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<sup>878</sup> See the Yekatom Appeal, *supra* note 2, paras. 444-446.

<sup>879</sup> See the Impugned Decision, *supra* note 4, para. 4425.

<sup>880</sup> *Ibid*, paras. 4420, 4422-4424.

<sup>881</sup> *Ibid*, para. 4424.

<sup>882</sup> *Ibid*, paras. 1474-1475, 1502.

<sup>883</sup> *Ibid*, paras. 1473-1475.

<sup>884</sup> *Ibid*, para. 4425. See the Public Version of “Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled “Sentence”” (Appeals Chamber), [No. ICC-02/04-01/15-2023 A2](#), 15 December 2022, para. 319; 341-344 (the “Ongwen Sentencing Appeals Judgment”); the “Public Redacted Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle

discriminatory purpose of the conduct - rather than requiring proof of personal animus - the Chamber applied the correct legal standard and committed no error in its sentencing methodology.

*c) Ground 6.3 – The Chamber correctly assessed the mitigating factors*

346. The Defence claims that the Chamber erred in law and fact by failing to accord sufficient weight to mitigating factors, namely Mr Yekatom's involvement in peace and reconciliation efforts after the period of the relevant charges.<sup>885</sup> The Defence relies on jurisprudence of the ICTY that such efforts do not directly have to alleviate the suffering of victims.<sup>886</sup> It claims that Chamber erred in considering Mr Yekatom's efforts only as part of a wider government-driven initiative;<sup>887</sup> in erroneously introducing a '*results-oriented perspective*' when the legal criterion should have been the genuineness of peacebuilding efforts undertaken;<sup>888</sup> in finding Mr Yekatom's role in the building of schools and a health centre '*irrelevant*';<sup>889</sup> in finding that Mr Yekatom's contributions to peace efforts during the charged period were '*inconcrete and disingenuous*'.<sup>890</sup>

347. The Defence fails to point to discernible errors in the Chamber's exercise of its discretion in assessing the mitigating factors. The Chamber offered a detailed explanation as to why Mr Yekatom's efforts did not meet the requirements of genuineness and concreteness,<sup>891</sup> considering that: (i) he did not intervene or condemn his elements' actions throughout the period relevant to the charges;<sup>892</sup> (ii) he rewarded

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Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Decision on Sentence pursuant to Article 76 of the Statute' (Appeals Chamber), [No. ICC-01/05-01/13-2276-Red A6 A7 A8 A9](#), 8 March 2018 para. 128; the "Sentencing Judgment" with public Annex A (Trial Chamber X), [No. ICC-01/12-01/18-2662](#), 20 November 2024 para. 25; and the Public Redacted Version of "Sentence" (Trial Chamber IX), [No. ICC-02/04-01/15-1819-Red](#), 6 May 2021, para. 53.

<sup>885</sup> See the Yekatom Appeal, *supra* note 2, para. 447.

<sup>886</sup> *Ibid*, para. 447, fn. 1700.

<sup>887</sup> *Ibid*, para. 448.

<sup>888</sup> *Ibid*, para. 449.

<sup>889</sup> *Ibid*, para. 450.

<sup>890</sup> *Ibid*, para. 451.

<sup>891</sup> See the Impugned Decision, *supra* note 4, paras. 4466-4486.

<sup>892</sup> *Ibid*, para. 4468.

an element for criminal acts;<sup>893</sup> (iii) it was not established to the required standard that he generally and actively worked or cooperated with relevant actors;<sup>894</sup> (iv) his peace message in Mbaïki was untimely and compelled by the presence of the Sangaris;<sup>895</sup> (v) peace initiatives in which the Appellant participated were situated within a broader political context;<sup>896</sup> and Mr Yekatom's selective efforts (vi) were motivated by personal interests, notably upcoming parliamentary elections;<sup>897</sup> and, (vii) did not aim to minimise harm.<sup>898</sup>

348. The appellate review does not constitute a *de novo* assessment of the sentence.<sup>899</sup> It is limited to reviewing whether the Chamber properly exercised its discretion. In this regard, an appellant must demonstrate that the trial chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that its decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the trial chamber failed to properly exercise its discretion.<sup>900</sup> The Defence fails to demonstrate any of these factors. Rather, it merely disagrees with the weight afforded by Chamber to individual mitigating factors and offers its own interpretation of Mr Yekatom's actions.

*d) Ground 6.4 – The Chamber correctly assessed the gravity of the crimes*

349. The Defence submits that the Chamber abused its discretion in assessing the gravity of the crimes when it failed to “*articulat[e] any hierarchy*” between the

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<sup>893</sup> *Ibid*, para. 4468.

<sup>894</sup> *Ibid*, para. 4469.

<sup>895</sup> *Ibid*, para. 4470.

<sup>896</sup> *Ibid*, para. 4473.

<sup>897</sup> *Ibid*, para. 4474, 4479, 4480.

<sup>898</sup> *Ibid*, para. 4482 and 4485.

<sup>899</sup> See the Public Redacted version of “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’” (Appeals Chamber), [No. ICC-01/05-01/13-2276-Red A8 A9](#), 8 March 2018, para. 21; MICT, *Prosecutor v. Karadžić*, [Judgement](#) (Appeals Chamber), Case No. MICT-13-55-A, 20 March 2019, para. 749; the *Čelebići* AJ, *supra* note 141, para. 717; and the *Dorđević* AJ, *supra* note 143, para. 932.

<sup>900</sup> See the *Mladić* AJ, *supra* note 834, para. 539.

individual sentences and arbitrarily assessed theoretical factors *in abstracto*, such as “victims’ reasonable expectations of safety”, rather than actual harm.<sup>901</sup> The Defence also argues that the identified errors materially affect the decision. It alleges that a reasonable trial chamber would have imposed different and lower sentences, and that the Chamber would likewise have done so had it permitted the Appellant to adduce targeted mitigation evidence and to make focused sentencing submissions.<sup>902</sup> In addition, the Defence avers that the Chamber engaged in double-counting discriminatory intent, which also materially affected the individual and joint sentences pronounced.<sup>903</sup> Accordingly, the Defence seeks revision of the sentences, particularly the joint sentence of 15 years, in the event any convictions are upheld on appeal.<sup>904</sup>

350. The Defence’s claim that the Chamber abused its discretion by failing to articulate a hierarchy between the individual sentences and relying on “*abstract*” gravity considerations, misconceives the governing sentencing framework. Under articles 76–78 of the Statute and rule 145 of the Rules, gravity is assessed holistically - taking into account not only quantifiable harm, but also the nature of the protected interests violated, the manner and context of commission, and the foreseeable impact of the crimes. There is no hierarchy of offences, save for the distinction between crimes against property and crimes against persons.<sup>905</sup> Accordingly, international sentencing jurisprudence does not impose an obligation on a trial chamber to establish a rigid comparative hierarchy among offences. Rather, it requires the Chamber to exercise its discretion so as to arrive at a sentence that takes into account the relevant factors, is proportionate, and reflects the culpability of the convicted person.<sup>906</sup> In this regard, civilians’ reasonable expectations of safety reflects the normative gravity of attacks against protected persons and does not substitute abstract theorising for concrete

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<sup>901</sup> See the Yekatom Appeal, *supra* note 2, paras. 453–454.

<sup>902</sup> *Ibid*, para. 455.

<sup>903</sup> *Ibid*, para. 456.

<sup>904</sup> *Ibid*.

<sup>905</sup> See the *Ntaganda* Sentencing TJ, *supra* note 817, para. 14.

<sup>906</sup> See the Public Version of the “Decision on Sentence pursuant to article 76 of the Statute” (Trial Chamber II), [No. ICC-01/04-01/07-3484-tENG](#), 23 May 2014, para. 40.

harm. The Chamber's reasoning, therefore, fell within the broad margin of discretion afforded to trial chambers in sentencing.

351. The Defence also failed to demonstrate any alleged procedural error materially affecting the sentences. Trial chambers retain wide discretion in regulating sentencing submissions and in evaluating mitigating evidence, provided the parties are afforded a meaningful opportunity to be heard. Disagreement with the weight accorded to mitigating circumstances does not suffice to establish unfairness or abuse of discretion. Likewise – as addressed *supra*<sup>907</sup> - the Chamber's treatment of discriminatory motive adhered to the prohibition against double counting by excluding it as an aggravating factor where it constituted a legal element of the offence, while permissibly considering it in relation to crimes where it did not constitute a legal element. Absent the demonstration that the sentencing exercise was unreasonable, legally erroneous, or manifestly disproportionate, the Defence's claim that a different chamber would have imposed lower sentences amounts to no more than a challenge to discretionary judgment, which does not warrant appellate intervention.

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<sup>907</sup> See *supra*, para. 345.

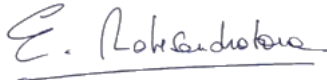
## IX. CONCLUSION

352. For all the foregoing reasons, the CLRV respectfully request the Appeals Chamber

- To reject Mr Yekatom's request to present additional evidence;
- To grant the Prosecution's appeal and reverse the findings material to the error;
- To reject Mr Ngaïssona and Mr Yekatom Appeals and confirm the Impugned Decision.



Paolina Massidda



Elisabeth Rebesandratana



Yaré Fall



Abdou Dangabo Moussa



Marie Edith Douzima-Lawson

Common Legal Representatives Victims of Other Crimes

Dated this 23<sup>rd</sup> day of March 2026

At The Hague (The Netherlands), La Rochelle (France), Bangui (Central African Republic and Dakar (Senegal)