

**ANNEX 4: Separate opinion of Judge Solomy Balungi Bossa  
on the Prosecutor's appeal**

## Separate Opinion of Judge Solomy Balungi Bossa on the Prosecutor's Appeal

1. I have read the separate opinion of Judges Morrison and Hofmański and the reasons they give for disallowing the Prosecutor's appeal. I have also had the opportunity of reading the separate opinion of my colleague Judge Eboe-Osuji and the reasons given by Judge Ibáñez, both of who disagree with the narrow interpretation put on the word "attack" in the context of article 8(2)(e)(iv) of the Statute.

2. For the reasons that follow, I agree with Judges Eboe-Osuji and Ibáñez, who consider that the interpretation assigned by the Trial Chamber to the meaning of the word "attack" is narrow, in the particular circumstances of this case. However, for the same reasons as Judge Eboe-Osuji, I too would acquit the appellant of the charges relating to the looting of the hospital in Mongbwalu. I also agree that the appellant should be acquitted on the count relating to the attack on the church in Sayo for the same reasons.

3. I have based my position first of all on the observations of the ALMA *amicus curiae* group, and second of all and more particularly, on the findings of the Trial Chamber in this regard. I will start with the ALMA's Observations on the concept of *ratissage* operation, in which the group states as follows:

If [a *ratissage* operation] constitutes a so-called mob-up [*sic*] operation, which forms part of the military operation to seize control over a certain location and may include the ensuring that any remaining enemy soldiers are disarmed and taken prisoner and weaponry of the opponent is seized, it might be considered an integral part of the conduct of hostilities. Acts conducted in the course of such operation qualify as attacks, are covered by article 8(2)(e)(iv), regardless of the level of control that the party to the conflict has over the town.<sup>1</sup>

4. On its part, the Trial Chamber found in paragraph 688 of the Conviction Decision that:

[...] the expression '*kupiga na kuchaji*' was commonly used within the UPC/FPLC, and was understood by the soldiers to mean attacking all the Lendu, including civilians, and to loot their property. UPC/FPLC troops generally acted following a certain *modus operandi*, characterised by an initial assault and the

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<sup>1</sup> [ALMA's Observations](#), para. 13.

taking of control over the town or village, followed by a *ratissage* operation, aimed at eliminating any survivors, including civilians, as well as looting. It was found that '*kupiga na kuchaji*' orders were given before the First and Second Operation and that the troops behaved as instructed; indeed, they committed different types of violent acts targeting the civilians specifically.<sup>2</sup>

5. The Trial Chamber also found that '[i]n the immediate aftermath of the takeover of Mongbwalu, members of the UPC/FLPC and Hema 'civilians' conducted a *ratissage* operation during which they searched from house to house for items to loot, abducting, intimidating, and killing people who resisted.<sup>3</sup> The Trial Chamber also found that 'the unfolding of its military operations demonstrate[d] how the UPC/FPLC was not only attempting to chase away the RCD-K/ML, but also the Lendu'.<sup>4</sup>

6. Moreover, the Trial Chamber noted that Hema civilians participated in military operations under the direction of the FPLC military commanders and they were mobilised specifically for the purpose of assisting during FPLC operations.<sup>5</sup> The civilians followed the orders of the UPC/FPLC leadership.<sup>6</sup>

7. It is clear from the Trial Chamber's finding that an attack started with heavy weaponry and continued with *ratissage* operations, in which all survivors, regardless of whether they were armed or civilians were attacked and most likely killed. After the initial assault carried out by soldiers armed with guns, 'who were supported by heavy weapons',<sup>7</sup> the UPC/FPLC had to overcome resistance and carry out mop-up operations in the form of *ratissage* operations. The Trial Chamber noted that Hema civilians armed with machetes and spears 'came as reinforcements [...] to provide support to the UPC/FPLC in the *ratissage* operation' in Mongbwalu.<sup>8</sup> The intention, as stated by the Trial Chamber, was to eliminate survivors and take over or destroy their property.<sup>9</sup> The survivors, be they armed or not, had clearly not been completely subjugated by the time the *ratissage* operations kicked in.

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<sup>2</sup> [Conviction Decision](#), para. 688 (emphasis added, footnotes omitted).

<sup>3</sup> [Conviction Decision](#), para. 512.

<sup>4</sup> [Conviction Decision](#), para. 688.

<sup>5</sup> [Conviction Decision](#), para. 333.

<sup>6</sup> [Conviction Decision](#), para. 512.

<sup>7</sup> [Conviction Decision](#), para. 486.

<sup>8</sup> See [Conviction Decision](#), para. 512.

<sup>9</sup> See [Conviction Decision](#), para. 688.

8. It follows that *ratissage* operations were carried out in combative fashion, in the immediate aftermath of an assault with heavy weaponry as part of the military operations against the enemy. Indeed the Trial Chamber describes the entire process as a military operation. It is therefore safe to conclude that the conduct of hostilities had not ceased when these violent actions took place.

9. This demonstrates that the take-over of the area was incomplete until all resistance was overcome, albeit with guns and machetes, even as some of the people killed were unarmed civilians. The fact that initially heavy weaponry was used to launch the initial assault but eventually evolved into using guns and machetes for *ratissage* operations does not diminish the fact that they were part and parcel of the attack launched against the population in the Mongbwalu area (the adversary) and its property (protected and unprotected), given the violent acts that occurred and the atmosphere in which they were carried out.

10. Concerning Mongbwalu, it is important to recall that the appellant was charged under Count 17 with attacking protected objects as a war crime.<sup>10</sup> On whether pillaging the hospital in Mongbwalu constituted an attack, the Trial Chamber acknowledged in the Conviction Decision that the hospital was pillaged.<sup>11</sup> The pillaging clearly happened before the area was pacified and smaller attacks by UPC/FPLC and Hema were still ongoing against the population and their property. I am in agreement with Judges Eboe-Osuji and Ibáñez, that it was unacceptable for the Trial Chamber to split the First Operation into the initial assault and *ratissage* operation phases based merely on the weapons used, when in reality this operation constituted one planned violent attack against the enemy.

11. I am persuaded by the opinion of the *amici* and the analysis of the evidence of the context by the Trial Chamber, that this was the case, although the Trial Chamber's conclusion is different.

12. However, I agree that the actions of the UPC/FPLC should have been more appropriately charged as a crime other than an attack under article 8(2)(e)(iv) of the Statute, to capture more properly the appellant's culpability. As I noted above, the Trial

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<sup>10</sup> [Conviction Decision](#), p. 501.

<sup>11</sup> [Conviction Decision](#), para. 514.

Chamber did consider these actions under the count of pillaging, but was unable to conclude that the appropriation of medical equipment was intended for private and personal use.<sup>12</sup>

13. For the above reasons, I would acquit the appellant of the charge relating to the hospital in Mongbwalu.

14. Regarding the church in Sayo, it was attacked by UPC/FLPC soldiers sometime after the initial assault.<sup>13</sup> The Trial Chamber accepted that the church was actually damaged, its doors were broken and furniture strewn all over the place, after being taken over by soldiers and turned into a kitchen.<sup>14</sup> However, it was not possible for the Trial Chamber to situate the attack in time, except that it occurred sometime after the initial assault.<sup>15</sup> Since it was not possible from the evidence to situate the attack in time, it is not possible to say whether it took place during the *ratissage* operation. I would therefore resolve this uncertainty in favour of the appellant and acquit him of the charge of attacking protected objects as a war crime, against the church in Sayo.

15. Regardless of the evidence, again, I consider that the most appropriate charge to capture the appellant's culpability should have been article 8(2)(e)(xii) of the Statute. Regulation 55 of the Regulations of the Court authorises a Trial Chamber to modify the legal characterisation of facts. It is not clear whether the Appeals Chamber has such powers. In any case, even if the Appeals Chamber had such powers, modifying the legal characterisation of the facts at this late stage would violate the due process principles laid down in regulation 55 of the Regulations of the Court.<sup>16</sup>

16. In this regard, I am in agreement with Judge Ibáñez that the Appeals Chamber should be careful in interpreting the Statute to ensure that it does not create an impunity gap.

17. Similarly, the Prosecutor should lay her charges properly to ensure that she does not create an impunity gap.

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<sup>12</sup> [Conviction Decision](#), para. 1041

<sup>13</sup> See [Conviction Decision](#), para. 526.

<sup>14</sup> See [Conviction Decision](#), para. 526.

<sup>15</sup> See [Conviction Decision](#), para. 1142.

18. In conclusion, it is my considered opinion that in the particular circumstances of this case, the Trial Chamber committed an error in narrowly defining the word “attack” in article 8(2)(e)(iv) of the Statute, given the context in which the First Operation was carried out. It was not open to the Trial Chamber to disconnect the *ratissage* operations from the attack because they were part and parcel of it.

19. However, for the reasons I have explained above, I would acquit the appellant of the charges relating to the hospital in Mongbwalu and the church in Sayo. I would therefore reject the Prosecutor’s appeal.

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



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**Judge Solomy Balungi Bossa**

Dated this 30<sup>th</sup> day of March 2021

At The Hague, The Netherlands