

# CAN WAR CRIMES BE COMMITTED BY MILITARY PERSONNEL AGAINST MEMBERS OF NON-OPPOSING FORCES?

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## ABSTRACT

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There is a commonly held view that international humanitarian law (IHL) exists to regulate the behaviour of adverse parties against each other during times of armed conflict, and that it does not concern itself with harm inflicted by one party to a conflict upon its own, or other non-opposing, forces. If a situation occurs where a crime is committed by a member of a military force against a member of a non-opposing military force, this is not a violation of IHL and consequently cannot constitute a war crime. This Brief challenges the traditional position, arguing that several important IHL provisions protect those involved in an armed conflict regardless of their affiliation, and that breaches of these provisions constitute war crimes. It then considers the terms of the Statute of the International Criminal Court (ICC Statute) and explores when the International Criminal Court (ICC) has jurisdiction over such crimes, and whether its jurisdiction differs depending upon whether the conflict in question is classified as an international or a non-international armed conflict.

## I. INTRODUCTION

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We are all familiar with accounts of atrocities being committed by military personnel against enemy military personnel, whether it be the countless stories of ill-treatment and murder of prisoners of war during World War Two, or more recent examples, such as reports of captured Shia soldiers being massacred by Islamic State fighters and buried in mass graves.<sup>1</sup> These acts are clearly war crimes and some have been prosecuted as such. More uncommonly, military personnel may maltreat or kill other military personnel who have been fighting on the same side as them,<sup>2</sup> and the question arises as to whether or not such crimes constitute war crimes. The traditional view is that they cannot. Cassese, for example, writes that, 'Crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes.'<sup>3</sup> He reaches his conclusion based upon two cases dating from the post-World War Two period, both decided before national courts, which held this to be

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<sup>1</sup> See, <http://www.theguardian.com/world/2015/apr/07/isis-bodies-soldiers-exhumed-mass-grave-tikrit>.

<sup>2</sup> There were several examples of this during the Arab Spring. For example, one report told of ten soldiers in Libya, who refused orders from their military superiors to fire on protesters marching against the regime. They were disarmed, beaten by their comrades and incarcerated, before being shot and their bodies burned, see: <http://www.independent.co.uk/news/world/africa/body-bags-reveal-fate-of-soldiers-who-refused-to-fire-on-their-own-people-2228512.html>. There were also similar stories from Syria, see: <http://www.guardian.co.uk/world/2011/apr/12/syrian-soldiers-shot-protest>.

<sup>3</sup> Antonio Cassese, *International Criminal Law* (Oxford University Press, 2008), p. 82.

the position,<sup>4</sup> begging the question as to whether these cases represent the final word on the matter.

This Brief addresses the issue of whether or not the traditional view, that crimes perpetrated against members of non-opposing forces cannot constitute war crimes, is correct. Firstly, it will consider the *RUF* case<sup>5</sup> from the Special Court for Sierra Leone (SCSL), which supports the traditional position. Secondly, it will examine IHL and will argue that several provisions protect members of non-opposing forces who are no longer directly participating in hostilities, and that violation of these provisions are war crimes. The final part of the brief will consider the ICC and will discuss which war crime provisions within its Statute<sup>6</sup> allow for victims of the crime to be members of non-opposing forces.

## II. HOW THE ISSUE WAS ADDRESSED IN THE *RUF* CASE

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The question of whether or not war crimes can be committed against members of non-opposing forces arose before the Trial Chamber of the SCSL in the *RUF* case. The charges faced by the accused, who had been leaders within the armed group known as the Revolutionary United Front (RUF), included charges concerning the killings of three individuals, each of whom had been fighting on the same side as the RUF during the armed conflict in Sierra Leone.<sup>7</sup>

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<sup>4</sup> The first case is that of *Pilz* from the Dutch Special Court of Cassation. Pilz was a Dutch doctor working in the German army. He was accused of failing to provide medical help to a member of the German army who was also Dutch. The Court held that once an individual joins an armed force the protection of the laws of war is lost, regardless of the nationality one has. The legal position of members of a state's armed forces is a matter for the domestic law of that state and not international law. *Pilz*, Dutch Special Court of Cassation, 5 July 1950, *NederJ* (1950), No. 681; 17 *ILR* (1950) 391-392; Cassese, *ibid.*, p. 82 at footnote 1 and see: Göran Sluiter, *Pilz* in Cassese (ed.) *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), p. 872. The second case is that of *Motosuke*, before the Temporary Court Martial of the Netherlands East Indies. It involved a Japanese officer who was accused of shooting a Dutch national who had joined the Gunkes, a corps of volunteers who served with the Japanese army. The Court held that by joining the Japanese forces he had lost his nationality, and his killing by the accused was not a war crime, see: Cassese, *supra* note 3 and Jonas Nilsson, 'Motosuke', in Cassese, *Oxford Companion*, *ibid.*, 816-817.

<sup>5</sup> *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-2004-15-T, Trial Judgment, 2 March 2009.

<sup>6</sup> Statute of the International Criminal Court, 1998.

<sup>7</sup> The issue was also briefly considered by the SCSL Trial Chamber in the *CDF* case. Two fighters who, like the accused, had been members of the CDF, were killed as part of a Kamajor ritual killing. The Trial Chamber found that it did not constitute a war crime as they had been fighting on the same side as the accused. In their closing argument, the Prosecution agreed that the killings were not war crimes, but argued that they constituted evidence of the accused's standing in the hierarchy of the CDF, in that it showed that they were in absolute control and could do acts without sanction from anyone else. See: *Prosecutor v*

The first incident concerned an Armed Forces Revolutionary Council (AFRC) fighter called Charles Kayioko.<sup>8</sup> He was arrested, together with 109 others, on suspicion of being a Kamajor.<sup>9</sup> He was initially released on parole as part of a larger group of civilian prisoners. The group was later re-arrested on the orders of Sam Bockarie, one of the accused, and all were subsequently killed.<sup>10</sup> The second incident concerned a senior AFRC fighter, Fonti Kanu. Bockarie ordered Kanu to be killed on the basis that he was deemed to be a security threat to the RUF. During the case, another accused, Issa Hassan Sesay, explained that execution was the standard punishment for members of the RUF who connived with the enemy.<sup>11</sup> The third incident concerned the killing of an AFRC leader, Foday Kallon. He was summarily executed after a dispute between himself, and Sesay and Bockarie, over money and the sharing of RUF information in Liberia.<sup>12</sup>

All three of these victims had been fighting on the same side as the accused in the case, and the question arose as to whether or not their killings could constitute a war crime as a consequence. In its analysis, the Trial Chamber stated that '[t]he Chamber is of the opinion that the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces.'<sup>13</sup> It justified its conclusion by referring to the law of international armed conflict, despite having determined earlier in its judgment that the conflict in Sierra Leone was a non-international armed conflict.<sup>14</sup> It (wrongly)<sup>15</sup> noted that the law in international armed conflicts 'regulates the conduct of combatants *vis-à-vis* their adversaries and persons *hors de combat* who do not belong to any of the armed groups participating in the hostilities'.<sup>16</sup> The Trial Chamber continued:

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*Moinina Fofana and Allieu Kondewa*, SCSL-04-14-T, Trial Judgment, 2 August 2007, paras. 632-633 and 925 (CDF case).

<sup>8</sup> The AFRC were allies of the RUF from the late 1990s onwards.

<sup>9</sup> The Kamajors were a group of traditional hunters from a particular ethnic group in Sierra Leone who were incorporated into the Civil Defence Forces – the government security force during the conflict against whom the RUF and the AFRC were fighting.

<sup>10</sup> *RUF case supra* note 5, paras. 1389, 1396.

<sup>11</sup> *Ibid*, para. 1399.

<sup>12</sup> *Ibid*, paras 1400-1402.

<sup>13</sup> *Ibid*, para. 1451.

<sup>14</sup> *Ibid*, para. 977.

<sup>15</sup> This statement by the Trial Chamber that 'persons who are *hors de combat* who do not belong to any of the armed groups participating in the hostilities' is inaccurate – in fact, it is persons who are *hors de combat* who *belong* to the armed groups who are participating in hostilities who are protected by IHL. See Article 41(2), Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1977 (Additional Protocol I). Also see: Jann K. Kleffner, *Friend or Foe? On the Protective Reach of the Law of Armed Conflict: A Note on the SCSL Trial Chamber's Judgment in the Case of Prosecutor v Sesay, Kalon and Gbao*, in M. Matthee *et al.*, eds., *Armed Conflict and International Law: In Search of the Human Face, Liber Amicorum In Memory of Avril McDonald* (Asser Press, 2013), pp. 292-294.

<sup>16</sup> *RUF case, supra* note 5, para. 1452.

It is trite law that an armed group cannot hold its own members as prisoners of war. The law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal law of the State of the armed group concerned and human rights law. In our view, a different approach would constitute an inappropriate re-conceptualisation of a fundamental principle of international humanitarian law. We are not prepared to embark on such an exercise.<sup>17</sup>

As the three victims had been fighting on the same side as those who had killed them, their deaths could not constitute a war crime.<sup>18</sup> The matter was not appealed, meaning that the decision stands. Let us now consider whether the Tribunal was correct in its finding that IHL does not protect members of an armed group from violence directed against them by members of non-opposing forces, and that, accordingly, atrocities perpetrated in such circumstances cannot constitute war crimes.

### **III. PROTECTION EXTENDED TO MEMBERS OF NON-OPPOSING FORCES BY IHL**

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The protection accorded to individuals by IHL varies to some degree depending upon whether or not the conflict in question may be classified as an international armed conflict or a non-international armed conflict.<sup>19</sup>

Turning firstly to international armed conflicts: some IHL provisions certainly provide that they apply only between members of opposing forces, a prime example being the one to which the Trial Chamber refers in the *RUF* case,<sup>20</sup> namely Article 4A of the Third Geneva Convention, according to which only those persons who 'have fallen into the power of the

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<sup>17</sup> *Ibid*, para. 1453.

<sup>18</sup> *Ibid*, paras. 1454, 1455 and 1457, respectively.

<sup>19</sup> For international armed conflicts, see: Common Article 2(2), Geneva Conventions [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War, 1949 (Third Geneva Convention) and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (Fourth Geneva Convention)]; and Article 1(4), Additional Protocol I. For non-international armed conflicts, see: Common Article 3 to the Geneva Conventions and Article 1(1), Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, 1977 (Additional Protocol II).

<sup>20</sup> *RUF* case, *supra* note 5, para. 1452.

enemy' may qualify for prisoner of war status.<sup>21</sup> However, other IHL provisions do not restrict the protection they give to members of opposing forces.<sup>22</sup> Protections for the wounded, sick and shipwrecked granted in the First and Second Geneva Conventions and in Additional Protocol I apply to all, regardless of affiliation. The First and Second Geneva Conventions state that they apply to 'members of the armed forces of a Party to the conflict'<sup>23</sup> and '[m]embers of other militias and members of other volunteer corps (...) belonging to a Party to the conflict'.<sup>24</sup> In contrast, Article 14 of the First Geneva Convention provides that: 'the wounded and sick of a belligerent who fall into *enemy hands* shall be prisoners of war',<sup>25</sup> thereby implying that references within the Convention to 'a Party to the conflict' includes the Party to which a member of military personnel belongs.<sup>26</sup> Both the First and Second Conventions provide that those entitled to protection 'shall be respected and protected in all circumstances'.<sup>27</sup> In its Commentary to Article 12 of the First Geneva Convention, the International Committee of the Red Cross (ICRC) clarifies the meaning of the phrase 'in all circumstances' as being that '[t]he wounded are to be respected just as much when they are with their own army or in no man's land as when they have fallen into the hands of the enemy'.<sup>28</sup>

Within Additional Protocol I, the provisions regarding the wounded, sick and shipwrecked apply 'without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria';<sup>29</sup> while, Article 10 states: 'All the wounded, sick and shipwrecked, *to whichever Party they belong*, shall be respected and protected' (emphasis added). Thus, the duties owed under the Geneva Conventions and Additional Protocol I to respect and protect the wounded, sick and shipwrecked apply as equally to non-opposing military personnel as they do to opposing military personnel.<sup>30</sup>

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<sup>21</sup> Kleffner, *supra* note 15, p. 292.

<sup>22</sup> *Ibid.*, pp. 294-300.

<sup>23</sup> Article 13(1), First Geneva Convention and Article 13(1), Second Geneva Convention, emphases added. Also see: Article 5, First Geneva Convention, which states: 'For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply under their final repatriation'.

<sup>24</sup> Article 13(2), First Geneva Convention and Article 13(2), Second Geneva Convention, emphases added.

<sup>25</sup> Also see: Article 16, Second Geneva Convention.

<sup>26</sup> Kleffner, *supra* note 15, pp. 294-296.

<sup>27</sup> Articles 12, First and Second Geneva Convention

<sup>28</sup> J.S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, Geneva, 1952) (ICRC Commentary), p.135 and see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2014), pp. 247-248.

<sup>29</sup> Article 9(1), Additional Protocol I.

<sup>30</sup> Sivakumaran, *supra* note 28, pp. 247-248.

What about military personnel in the situation of the three fighters in the *RUF* case, who are detained, rather than being wounded, sick or shipwrecked? As the Trial Chamber noted, treaty law is clear that prisoner of war status applies only to those 'who have fallen into the power of the enemy'.<sup>31</sup> However, IHL provides for certain fundamental guarantees that apply to persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Conventions.<sup>32</sup> In international armed conflicts these fundamental guarantees are to be found in Article 75 of Additional Protocol I, which provides that violence to life and outrages upon personal dignity are prohibited at any time and in any place whatsoever.<sup>33</sup> The guarantees also have customary international law status.<sup>34</sup> While Article 75 is contained within Part IV of Additional Protocol I, which is headed 'Civilian Population', the text of the Article itself states that it applies to: '*persons* who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol' (emphasis added), suggesting that it is not just civilians who are protected by the provision.<sup>35</sup> This is the view taken by the ICRC in its study of customary international law<sup>36</sup> (ICRC Study), which states that the fundamental guarantees listed within the study as being customary law apply both to civilians and to those who are *hors de combat*.<sup>37</sup>

This leads to the matter of whether or not a member of a military force can be described as being '*hors de combat*' when he or she is detained by members of his or her own side. The term '*hors de combat*' is defined in Article 41(2) of Additional Protocol I, and part of the definition is that the person is 'in the power of an adverse party'. Thus, one could argue that, according to the ICRC Study, under customary law the fundamental guarantees apply only to members of opposing forces, as only members of opposing forces can be *hors de combat* according to the definition provided in Article 41(2). An alternative argument is that the ICRC Study uses the phrase '*hors de combat*' in a more general sense, to describe a person who is no longer able to wage war due to being wounded, sick or detained, whether they be an

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<sup>31</sup> Article 4A, Third Geneva Convention and see Articles 44(1), 44(4) and 45(1), Additional Protocol I.

<sup>32</sup> See, Kleffner, *supra* note 15, pp. 296-297.

<sup>33</sup> Article 75, Additional Protocol I prohibits: (a) violence to the life, health or physical or mental well-being of persons, in particular: murder; torture of all kinds, whether physical or mental; corporal punishment and mutilation; (b) outrages upon personal dignity; (c) the taking of hostages; (d) collective punishments and (e) threats to commit any of the foregoing acts.

<sup>34</sup> See Rules 87-105, International Committee of the Red Cross, Customary IHL database, available at: <https://www.icrc.org/customary-ihl/eng/docs/home>.

<sup>35</sup> Article 75(1), Additional Protocol I.

<sup>36</sup> *Supra* note 34.

<sup>37</sup> 'The fundamental guarantees identified in this chapter apply to all civilians in the power of a party to the conflict who do not take a direct part in hostilities, as well as to all persons who are *hors de combat*.' *Ibid*, Part V, 'Introduction to the Fundamental Guarantees.'

enemy fighter or not. It is in this sense that the phrase is used in the *RUF* Trial Judgment, which refers to the three victims as having been *hors de combat* at the time they were killed.<sup>38</sup>

Furthermore, if the statement in the ICRC Study that the fundamental guarantees apply to those who are *hors de combat* is interpreted in a way that excludes members of non-opposing forces, this would contradict the position taken by the ICRC in its Commentary to Article 75.<sup>39</sup> The ICRC Commentary explains that, in order to benefit from the protection of Article 75, three conditions must be fulfilled: firstly, the individual must be in the power of a Party to the conflict; secondly, they must be affected by armed conflict or by occupation, and, thirdly, they must not benefit from more favourable treatments under the Convention or the Protocol.<sup>40</sup> The Commentary describes the difficulties which arose at the Diplomatic Conference for the Additional Protocols in discussions regarding the application of Article 75 to a state's own nationals.<sup>41</sup> The original draft of the Article had contained a reference to a state's own nationals, but this reference had disappeared by the final text.<sup>42</sup> The ICRC Commentary concludes that '[a]dmittedly, it would certainly have been very useful to mention explicitly that nationals are included, but no negative conclusions should be drawn from the absence of such mention.'<sup>43</sup> According to the ICRC, the protections granted in Article 75 apply to the nationals of a state, thereby including members of non-opposing forces. Thus, when the ICRC Study refers to the fundamental guarantees as applying to those who are *hors de combat*, it is likely doing so in the general sense of the individual being unable to fight due to being sick, wounded or incarcerated, rather than in the sense that the individual is in the power of an adverse party. There is, therefore, a strong argument to be made that the fundamental guarantees under IHL, violations of which are war crimes,<sup>44</sup> apply to all persons who are in the power of a party to the conflict during international armed conflicts

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<sup>38</sup> For example, the Trial Chamber refers to the victim, Kayiolo as 'an *hors de combat* member of the AFRC', *RUF* case, *supra* note 5, para. 1451. It also states that: 'The Chamber is satisfied that Kanu was *hors de combat* at the time of his death', *ibid.*, para. 1455. This is also the sense that the phrase is used in Common Article 3, which protects 'Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause'. Kleffner, *supra* note 15, p. 294.

<sup>39</sup> Y. Sandoz, C. Swinarski, B. Zimmerman eds. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (ICRC, Martinus Nijhoff, Geneva, 1987).

<sup>40</sup> *Ibid.*, para. 3009.

<sup>41</sup> *Ibid.*, para. 3017.

<sup>42</sup> *Ibid.*, para. 3018. As Kleffner argues, 'That controversy alone appears to be a good reason for the Trial Chamber to have delved into the matter somewhat more in depth', Kleffner, *supra* note 15, p. 296.

<sup>43</sup> Sandoz *et al.*, *supra* note 39, para. 3020.

<sup>44</sup> *Prosecutor v Duško Tadić*, ICTY, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

who do not qualify for more favourable treatment under the Conventions, including non-opposing military personnel who have been detained.

Turning now to non-international armed conflicts – is there anything within IHL to suggest that it extends protection to members of non-opposing forces?<sup>45</sup> Again, there is a strong argument to be made that there is. Firstly, Common Article 3 of the Geneva Conventions applies to ‘persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause’. The article continues that such persons be treated humanely ‘without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’. Several acts are prohibited under Common Article 3, such as murder of all kinds, mutilation, cruel treatment and torture, and of these the article provides that ‘the (...) acts are and shall remain prohibited at any time and in any place whatsoever’. In its Commentary to the article, the ICRC states of this phrase that: ‘No possible loophole is left; there can be no excuse, no attenuating circumstances.’<sup>46</sup> Thus, the protection of Common Article 3 applies to all and is dependent upon the conduct of an individual – that they were taking no active part in hostilities at the time – rather than upon their status or affiliation.<sup>47</sup>

Several provisions of Additional Protocol II also seemingly protect members of non-opposing forces. Article 2(1) states that the Protocol applies ‘[w]ithout any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or other social origin, wealth, birth or other status, or by any other similar criteria to all persons affected by an armed conflict as defined in Article 1’, while Article 4(1), listing fundamental guarantees which prohibit violence to the life and protect the health and physical or mental well-being of persons,<sup>48</sup> apply to ‘*all persons* who do not take a direct part or who have ceased to take part in hostilities’. In addition, Article 6, concerning penal prosecutions, applies to ‘the prosecution and punishment of offences related to the armed conflict’,<sup>49</sup> without specifying that the accused belong to an opposing side. Thus, as with Common Article 3, there is no language within these provisions suggesting that they protect only those who belong to the opposing side.

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<sup>45</sup> Kleffner, *supra* note 15, pp. 297-300.

<sup>46</sup> J.S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC, Geneva, 1960), p. 39.

<sup>47</sup> Sivakumaran, *supra* note 28, p. 248.

<sup>48</sup> Article 4(2), Additional Protocol II. The fundamental guarantees have also be held to be customary law in the ICRC Study. ICRC Study, *supra* note 34, Part V.

<sup>49</sup> *Ibid*, Article 6(1).

To summarise, while IHL was originally conceived to regulate the interplay between opposing parties during armed conflict, it nevertheless also imposes obligations on a party to a conflict to protect its own members. It requires parties to protect members of non-opposing forces who are wounded, sick, shipwrecked and detained in both international and non-international armed conflicts.<sup>50</sup> Violations of these fundamental IHL provisions constitute war crimes. The Trial Chamber in the *RUF* case was too ready to accept the traditional view that war crimes cannot be committed by members of a military force against members of a non-opposing force, without making further enquiry into the matter. Indeed, there is a class of war crimes which requires that the perpetrator and the victim be members of the same military force, namely the war crimes of conscripting, enlisting and using children under fifteen to participate actively in hostilities.<sup>51</sup> In the *RUF* case, the accused were charged with these war crimes, and the Trial Chamber did not consider it to be a difficulty that the alleged victims had been members of the same armed force as the accused. Nor has this been considered to be an issue in any other case concerning the war crimes of the recruitment and use of child soldiers that have arisen before the SCSL or the ICC.<sup>52</sup>

If, for completeness' sake, we return to the three alleged victims in the *RUF* case, could the finding that military personnel can be victims of war crimes committed by other military personnel fighting on the same side have made a difference to the Trial Chamber's decision? In the first incident, the victim, Kayioko, had been an AFRC fighter who was arrested along with other individuals on suspicion of being an enemy fighter, and he was killed on that basis. In view of the fact that he had been detained and was no longer actively participating in hostilities, he was entitled to protection under IHL and his death should have been considered a potential war crime, on a par with the other members of the group who were killed in the same circumstances.

The other two cases are different. Both of the alleged victims had been arrested in the knowledge that they were members of a non-opposing force. They were killed for 'crimes' they had committed in this capacity – one ostensibly for 'conniving with the enemy', and the other ostensibly for betrayal. IHL does not prohibit the use of the death penalty during times

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<sup>50</sup> Kleffner, *supra* note 15, p. 300.

<sup>51</sup> See Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), ICC Statute.

<sup>52</sup> For example, at the SCSL see, *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* SCSL-04-16-T, Trial Judgment, 20 June 2007 and the *CDF* case, *supra* note 7. At the ICC, see *Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/006-2842, 14 March 2012. Nobuo Hayashi, *Military Necessity*, forthcoming, currently on file with the author, section 3.2.

of armed conflict,<sup>53</sup> and executing a member of one's own armed force for, for example, desertion, is not a war crime. However, IHL provides that those who are accused of a crime are entitled to a fair trial.<sup>54</sup> Thus, the deaths of these two alleged victims could have constituted a war crime if it were shown that they had been executed without due process.

#### **IV. WAR CRIMES AGAINST MEMBERS OF NON-OPPOSING FORCES AT THE ICC**

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The final part of this Brief will consider which of the war crimes provisions within the ICC Statute, aside from the provisions concerning the enlistment, conscription and use of children under fifteen to actively participate in hostilities,<sup>55</sup> allow for a victim of the crime to be a member of a non-opposing force. The ICC Statute's jurisdiction over war crimes varies according to whether the armed conflict is an international or a non-international armed conflict.<sup>56</sup>

##### **A) International Armed Conflicts**

In international armed conflicts, Article 8(2)(a) of the ICC Statute gives the Prosecutor jurisdiction over grave breaches of the Geneva Conventions. As we have seen, both the First and Second Geneva Conventions impose obligations to respect and protect those who are wounded, sick and shipwrecked regardless of what side they have been fighting for. Thus, grave breaches of the First and Second Geneva Conventions against members of non-opposing forces who were wounded, sick or shipwrecked at the time of the alleged offence constitute war crimes that fall within the jurisdiction of the ICC.

The situation is different for grave breaches of the Third and Fourth Conventions. The Third Convention, concerning prisoners of war, protects persons who have 'fallen into the power of the enemy', meaning members of non-opposing forces who have been detained are not protected by the Convention and cannot be victims of grave breaches of it.<sup>57</sup> The same is

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<sup>53</sup> For example, see Articles 100-101, Third Geneva Convention, regarding the imposition of the death penalty on prisoners of war. Indeed, in the *RUF* case, the accused, Sesay, argued in connection with one of the two incidents, that execution was the standard punishment for members of the RUF who connived with the enemy. *RUF* case, *supra* note 5, para. 1399.

<sup>54</sup> See, Common Article 3(1)(d), Geneva Conventions; Articles 82-88, Third Geneva Convention; Article 75(3) and (4), Additional Protocol I, and Article 6, Additional Protocol II. Also see, Article 8(2)(c)(iv), ICC Statute.

<sup>55</sup> Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), ICC Statute.

<sup>56</sup> Article 8, ICC Statute.

<sup>57</sup> Article 4A, Third Geneva Convention.

true for the Fourth Geneva Convention, which defines ‘protected persons’, as those who ‘at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or occupying power of which they are not nationals’.<sup>58</sup> Whilst the definition of nationality has been interpreted liberally as ‘hinging on substantial relations more than on formal bonds’, there remains a firm requirement that the person be in the hands of an adverse party.<sup>59</sup> Thus, crimes committed against members of non-opposing forces who are detained rather than being wounded, sick or shipwrecked, cannot be prosecuted as grave breaches under the Statute.

Article 8(2)(b) of the ICC Statute gives the court jurisdiction over several other serious violations of the laws and customs applicable in international armed conflict, some of which could potentially allow for the victims of the crime to be a member of a non-opposing force. One such possibility, is Article 8(2)(b)(vi) which lists as a war crime the act of ‘killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at his discretion’. However, the wording of the article likely precludes the possibility that the victim and perpetrator fight on the same side. Cottier notes that the wording follows that of Article 23(c) of the Hague Regulations, and that ‘the term “enemy” has been replaced by “combatant” (meaning “adversary combatant”)’.<sup>60</sup> The use of the term ‘surrendered’ also suggests that the combatant be fighting on the opposing side. It is, therefore, doubtful that Article 8(2)(b)(vi) can be applied to the killing or wounding of a member of a non-opposing force. The same can be said of Article 8(2)(b)(xi), which gives the Court jurisdiction over ‘[k]illing or wounding treacherously individuals belonging to the hostile nation or army’,<sup>61</sup> which clearly requires that the victims belong to an opposing side.

Greater possibility is offered by Article 8(2)(b)(xxi) of the ICC Statute – ‘[c]ommitting outrages upon personal dignity, in particular inhuman and degrading treatment’ – and Article 8(2)(b)(xxii) – ‘[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy (...) enforced sterilization, or any other form of sexual violence also constituting a breach of the Geneva Conventions’. Neither of these provisions contain language which suggests that members of non-opposing forces are barred from being victims of the war crime. This means that, in international armed conflicts, while maltreatment and sexual offences perpetrated

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<sup>58</sup> Article 4, Fourth Geneva Convention.

<sup>59</sup> *Prosecutor v Duško Tadić*, ICTY, IT-94-1-A, Appeals Judgment, 15<sup>th</sup> July 1999, para. 166. See Kleffner, *supra* note 15, p. 292; Sivakumaran, *supra* note 28, p. 249 and Hayashi, *supra* note 52.

<sup>60</sup> Michael Cottier *War Crimes in Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck, Hart, Nomos, 2<sup>nd</sup> edition, 2008), p. 344.

<sup>61</sup> Hayashi, *supra* note 52.

against members of non-opposing forces may be prosecuted as war crimes under the ICC Statute, the act of murder cannot be.

## **B) Non-international armed conflicts**

There are two war crimes provisions in the ICC Statute applying in non-international armed conflicts which could potentially allow for the victims of the crimes to be members of non-opposing forces.<sup>62</sup> Firstly, Article 8(2)(c), which gives the Court jurisdiction over serious violations of Common Article 3 of the Geneva Conventions, and secondly, committing rape, sexual slavery and other forms of serious sexual violence under Article 8(2)(e)(vi).

The matter of whether or not these provisions can apply to members of non-opposing forces has been considered in the context of child soldier victims by Pre-Trial Chamber II of the ICC in the *Ntaganda* Decision on the Confirmation of Charges (*Ntaganda* Decision).<sup>63</sup> In that case, one of the charges currently faced by the accused, Bosco Ntaganda, concerns the rape and sexual slavery of UPC/FPLC<sup>64</sup> child soldiers under Article 8(2)(e)(vi). In the *Ntaganda* Decision, the Prosecution, referred to Common Article 3 of the Geneva Conventions and Article 4 of Additional Protocol II, particularly Article 4(3), which concerns special protection for children, and argued that 'Child soldiers are afforded general protections against sexual violence under the fundamental guarantees applicable to persons affected by non-international armed conflict. They also have special protections because of their vulnerability as children.'<sup>65</sup>

The Defence responded that the protection of Article 4 of Additional Protocol II applies only to children captured by the opposing side – crimes committed by members of armed forces on members of the same armed force do not come within the jurisdiction of IHL or within international criminal law. They argued that IHL is not intended to protect combatants from crimes committed by combatants within the same group, and that such crimes fall under national law and human rights law. Accordingly, the charges cannot be confirmed in accordance with the principle of legality.<sup>66</sup>

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<sup>62</sup> Article 8(2)(e)(ix) criminalises 'Killing or wounding treacherously a combatant adversary', which, as with its sister provision that applies in international armed conflicts, limits its application to victims who fought on the opposing side in the conflict. Sivakumaran, *supra* note 28, p. 249.

<sup>63</sup> *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Confirmation of Charges, 9 June 2014.

<sup>64</sup> *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo*.

<sup>65</sup> *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Document Containing the Charges, 10<sup>th</sup> January 2014, para. 107.

<sup>66</sup> *Ntaganda*, Confirmation of Charges, Open Session, ICC-01/04-02/06-T-10-Red-ENG, p. 27.

In its Decision, the Pre-Trial Chamber noted the terms of Common Article 3 that ‘persons taking no active part in the hostilities (...) shall in all circumstances be treated humanely’; together with the relevant parts of Articles 4(1) and (2) of Additional Protocol II to the effect that ‘all persons who do not take a direct part or who have ceased to take a part in hostilities (...) shall in all circumstances be treated humanely,’ and that the acts of outrages upon personal dignity, including rape, enforced prostitution and any form of indecent assault are prohibited under the provision.<sup>67</sup> The Chamber stated that:

Accordingly, in order to determine whether UPC/FPLC soldiers under the age of 15 years are entitled to protection against acts of rape and sexual slavery by other members of the UPC/FPLC, the Chamber must assess whether these persons were taking direct/active part in hostilities at the time they were victims of acts of rape and/or sexual slavery.<sup>68</sup>

It concluded that the children could not be considered to be actively participating in hostilities at the time they were subject to acts of a sexual nature.<sup>69</sup> The Pre-Trial Chamber accepted that in non-international armed conflicts war crimes can be committed against children under fifteen belonging to a non-opposing force who are not directly participating in hostilities at the time. Does it follow that that this applies to all members of non-opposing forces who are not directly participating in hostilities, and not simply to children under the age of fifteen? As this Brief has argued, to some degree<sup>70</sup> it does: a member of the military who has been detained by his or her own side, or who is wounded, sick or shipwrecked, is no longer directly participating in hostilities, and is entitled to the protection of Common Article 3 and the fundamental guarantees of Article 4 of Additional Protocol II. Thus, they can be victims of war crimes charged under Article 8(2)(c) of the ICC Statute as Common Article 3 offences, or under Article 8(2)(e)(vi) if the crimes are of a sexual nature.

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<sup>67</sup> *Ntaganda*, Document Containing the Charges, *supra* note 65, para. 107 and *Ntaganda* Decision, *supra* note 63, para. 77.

<sup>68</sup> *Ntaganda* Decision, *ibid.*, para. 77.

<sup>69</sup> ‘The sexual character of these crimes which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time’. *Ibid.*, para. 79. For a discussion of this case see: Rosemary Grey, Protecting Child Soldiers from Sexual Violence by Members of the Same Military Force: A Re-Conceptualisation of International Humanitarian Law (*International Crimes Database Brief*, April 2015).

Available at: [http://www.internationalcrimesdatabase.org/upload/documents/20150423T113341-Grey\\_ICD\\_Brief\\_AB\\_FINAL.pdf](http://www.internationalcrimesdatabase.org/upload/documents/20150423T113341-Grey_ICD_Brief_AB_FINAL.pdf)

<sup>70</sup> Whether the definition of direct/active participation is different for child soldiers than it is for adults is an interesting and as yet unsettled question, see: Grey, *ibid.*, p. 9.

This means that, in an unusual turn of affairs, the ICC Statute gives wider scope for prosecuting cases where war crimes have been committed against members of non-opposing forces in non-international armed conflicts than in international armed conflicts. In international armed conflicts, while crimes against the wounded, sick and shipwrecked can be prosecuted under Article 8(2)(a) as a grave breach of the Geneva Conventions, the Court only has jurisdiction concerning offences committed against those who are detained if the offences constitute outrages upon personal dignity or sexual offences under Articles 8(2)(b)(xxi) and (xxii) respectively. However, it has no jurisdiction over, for example, the war crime of murder in international conflicts if the victims were members of non-opposing forces. In contrast, in non-international armed conflicts the ICC has jurisdiction over Common Article 3 offences which grant protection based upon the conduct of the victim – whether or not they were directly participating in hostilities, thereby including members of non-opposing forces. Furthermore, the offences covered by Common Article 3 are much wider than those available to the ICC Prosecutor in such cases in international armed conflicts, including murder as an act of violence to life and person.

Should this gap in the ICC Statute cause concern? Yes, it should. Atrocities are committed against members of non-opposing forces. Certainly, such crimes may be prosecuted domestically, however this is not always a realistic possibility. Atrocities can be committed against members of non-opposing forces in situations where the victims showed remarkable bravery – for example, when a detained fighter is killed for refusing to obey an order to commit criminal acts against civilians.<sup>71</sup> Although it is possible for crimes against members of non-opposing forces to be prosecuted as crimes against humanity, the circumstances of the crime may not meet the *chapeau* elements of crimes against humanity, namely that the act be committed as part of a widespread and systematic attack directed against a civilian population.<sup>72</sup> It is unsatisfactory that the killing of members of non-opposing forces is not prosecutable as a war crime under the ICC Statute if the conflict is deemed to be an international armed conflict and the alleged victim has been detained, rather than being wounded, sick or shipwrecked.

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<sup>71</sup> For example, see

<http://www.independent.co.uk/news/world/africa/body-bags-reveal-fate-of-soldiers-who-refused-to-fire-on-their-own-people-2228512.html> (Alleged soldiers who refused to obey orders to fire against those marching against the Gaddafi regime in Libya and who were disarmed and beaten up by their comrades before being imprisoned and then shot and their bodies burnt).

<sup>72</sup> For example, see Article 7, ICC Statute. For a discussion of when military personnel can be victims of crimes against humanity, see, Joanna Nicholson, *Fighters as Victims in International Criminal Law*, PhD thesis, University of Oslo, 2015.

## V. CONCLUSION

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The traditional view that members of non-opposing forces cannot be victims of war crimes is certainly open to challenge. The Trial Chamber in the *RUF* case was wrong to accept this as being so, without making a more thorough enquiry into the matter. While some provisions of IHL clearly only protect military personnel on the opposing side, other provisions are equally clear that they apply to all, regardless of which side in a conflict an individual fights for – serious breaches of these IHL provisions constitute war crimes under international criminal law. It is to be hoped that should these cases come before an international criminal court or tribunal in the future, the court will be willing to delve into this issue in greater detail to explore whether the individual was entitled to protection under IHL in the circumstances of the case. Unfortunately, in the event that such a case comes before the ICC, and in the event that the conflict in question happens to be an international conflict, then the ICC may find its hands tied by the terms of its Statute, which gives it unduly limited jurisdiction in these types of cases.