Chapter 11
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, Kallon and Gbao*

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Abstract In its 2009 judgment in the case of *Prosecutor v Sesay, Kallon and Gbao,* the Special Court for Sierra Leone asserted that "the killing of a member of an armed group by another member of the same group does not constitute a war crime". The current chapter subjects that categorical assertion to critical examination. It concludes that the reasoning of the Special Court for Sierra Leone is unconvincing and displays a misapprehension of the protective reach of the law of armed conflict.

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11.1 Prescript

To prelude this contribution with some personal words about Avril is challenging, because it would require quite a lengthy exposé if I wanted to do justice to what she meant to me professionally and personally. I met Avril for the first time in 1998 when I was a student interning at the TMC Asser Institute for a project that was, to put it mildly, a far cry from exciting. I bumped into her in the corridors of the Institute. A colleague introduced us. We started talking and, as was quite characteristic of conversations with Avril, it was not a 1-min chat. At the end of our talk, Avril offered me an internship to assist her in the work on the Yearbook of International Humanitarian Law. What started as a professional relationship soon grew into a lasting friendship.

In the following years, we co-operated on the production of the Yearbook of International Humanitarian Law and on a number of research and teaching projects. It was due to Avril that I could take the first steps in the area of international humanitarian law beyond studying it at university. I benefited immensely from Avril putting a great deal of trust in people, encouraging them to take the initiative, to develop their own projects and to take responsibility.

And as friends, we shared the experiences of quite a few great (jazz) concerts and festivals, dinners, parties, pub crawls, trips in the Netherlands and abroad and long conversations.

If one tried to capture all of these memories and experiences in one word, it would probably have to be 'extreme'. Avril was extremely committed to the subject she worked in, extremely open and interested, extremely supportive, helpful, modest and warm. She was extremely genuine. It was foreign to her to play games with people and impossible to hide her feelings and opinions. Avril could be extremely happy and joyful, and sometimes also extremely sad; extremely enthused and extremely bored; extremely funny; with an extreme wit. She was also an extremely rapid speaker and loved extreme shoes! Avril was never middle of the road. She stood out. One could not fail to notice her presence and be touched by her personality. Avril was bigger than life. I miss her … extremely!

11.2 Introduction

On 2 March 2009, Trial Chamber I of the Special Court for Sierra Leone ('SCSL'), composed of Judges Boutet, Mutanga Itoe and Thompson, rendered its long (awaited) judgment in *Prosecutor v. Sesay, Kallon and Gbao,* the so-called 'Revolutionary United Front ('RUF') case'.[1] In its more than 800 pages, the

[1] SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber 1, Judgment, 2 March 2009, available at http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/TrialChamberJudgment/tabid/215/Default.aspx.

Judgment provides a detailed analysis of the charges laid against the three accused, which included a litany of crimes against humanity and war crimes under Articles 2–4 of the SCSL's Statute. Several findings of the Trial Chamber are worthy of analysis, not least those in relation to the crime of intentionally directing attacks against personnel involved in a humanitarian or a peacekeeping mission[2] on which the Judgment is the first that has ever been rendered. However, a comprehensive examination of all those aspects are beyond the purview of the present note. Rather, the focus here will be on the Trial Chamber's assertion that "the killing of a member of an armed group by another member of the same group does not constitute a war crime",[3] a finding that was not appealed and therefore continues to stand irrespective of the subsequent Appeals Chamber Judgment of 26 October 2009. The part of the judgment which led the Trial Chamber to that conclusion is relatively short and does not seem to have attracted much attention in comparison to other aspects. The Trial Chamber's finding is prone to be overlooked. Yet, it concerns an issue of fundamental importance: the protective reach of the law of armed conflict. As such, it touches upon a basic precept of the law of armed conflict and goes far beyond the specific case of convicting the RUF accused of yet another set of war crimes. An examination of the Trial Chamber's finding will help to elucidate one of the central questions of the law of armed conflict: who enjoys protection and who does not? In considering that question, I will first briefly recount the factual background to the Trial Chamber's findings (Sect. 11.3) and its legal findings (Sect. 11.4), before turning to a *critique* of its legal findings (Sect. 11.5).

11.3 The Factual Background to the Trial Chamber's Finding

Under count 5 of the Indictment the three Accused had been charged with violence to life, health and physical or mental well-being of persons, in particular murder, as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II. The charges included the unlawful killing of "an unknown number of civilians" in locations in Kailahun District, including Kailahun Town in the period between 14 February and 30 June 1998.[4] That period followed the intervention by forces of the Economic Community of West African States Monitoring Group ('ECOMOG').

The ECOMOG forces acted on behalf of President Ahmad Tejan Kabbah, whose government had been overthrown on 25 May 1997 by a military *coup d'état* led by a group of soldiers of the 1st Battalion of the Sierra Leone Army ('SLA'),

[2] Ibid., paras 213–235, 1749–1969.

[3] Ibid., para 1455, see also paras 1451, 1457.

[4] Ibid., Indictment at para 49.

who called themselves the Armed Forces Revolutionary Council ('AFRC'). Under the leadership of Major Johnny Paul Koroma, the AFRC formed an alliance with the RUF, an organised armed group led by Foday Sankoh that had been founded in the late 1980s and had fought against several Sierra-Leonean governments, including the one of President Ahmad Tejan Kabbah. The governing body of the Junta regime which was installed as a consequence of the 1997 *coup d'état*, the Supreme Council, possessed exclusive *de facto* executive and legislative powers in Sierra Leone and was composed of members of both the AFRC and the RUF.[5] While the relationship between the AFRC and the RUF was not free of mutual suspicions and rising tensions, the alliance between the two groups held, by and large, for the period between 14 February until 30 June 1998, which concerns us here.[6] During that post-intervention period, the armed conflict in Sierra Leone thus saw the AFRC/RUF alliance pitted against a coalition between ECOMOG forces and militias loyal to President Ahmad Tejan Kabbah, known as the Civil Defence Forces ('CDF'), the latter organised in regional groups (Kamajors in the East and the South, the Donsos in the remote East, the Gbettis or Kapras in the North and the Tamboros in the far North of the country).[7]

11.3.1 The Killing of Charles Kayioko

Following the ECOMOG Intervention, there was widespread anxiety within the RUF leadership about possible Kamajor infiltrators among the civilian population. Sam 'Mosquito' Bockarie, one of the most senior RUF leaders, ordered that suspected Kamajors were to be arrested for an investigation in Kailahun Town by Gbao, the RUF Overall Security Commander.[8]

As ordered by Bockarie, a group of Military Police ('MP')[9] led by Kailahun District MP Commander John Aruna Duawo arrested 110 individuals suspected of being Kamajors.[10] These suspected Kamajors were divided into two groups.[11] Amongst the second group was Charles Kayioko, an AFRC fighter who had come

[5] Ibid., paras 21–22, 747–754.

[6] For an overview of the developments during and subsequent to the ECOMOG intervention until the end of the armed conflict, see Ibid., paras 28–44.

[7] Ibid., paras 16, 28.

[8] Ibid., para 1387.

[9] The MP unit handled complaints from both fighters and civilians and was responsible for enforcing discipline within the RUF. The MP unit carried out arrests and detentions, assisted in investigations and punished individuals who had been found guilty of transgressions. In 1998, the MP were also responsible for issuing civilians with travel passes. Punishments administered by the MP included forced labour, flogging and detention. RUF members who committed serious crimes, such as rape, could be executed; Ibid., paras 690, 691.

[10] Ibid., para 1388.

[11] Ibid., para 1389.

from Daru and was arrested by MP officials for not carrying an RUF travel pass.[12] While the first group of men were released after having been investigated, members of the second group were released on parole so that they were allowed some freedom of movement around Kailahun Town under the supervision of the MPs during the day, while being required to report back to the MP office, where they were confined at night.[13]

On 19 February 1998, Bockarie came to Kailahun along with other senior officers. Irate upon discovering that the first group of prisoners had been released, he ordered the second group of prisoners who had been released on parole to be re-arrested and killed. That order was carried out and all detainees, including the AFRC fighter Charles Kaiyoko, were shot except one.[14]

11.3.2 The Killing of Fonti Kanu in Pendembu

Sometime in April 1998, Fonti Kanu, a senior AFRC fighter, was arrested by the RUF border security in Nyandehun Mambabu on allegations that he had been trying to escape to Liberia. He was taken to and detained in Kailahun upon the order of Bockarie. Fonti Kanu was subsequently released but ordered to remain in Kailahun Town. In June 1998, Fonti Kanu attempted to escape and was again caught by border guards, this time in Bomaru, and was subsequently taken to the MP Commander in Baiwala. The MP Commander reported the matter to Bockarie. Fonti Kanu was collected from the Liberian border and later killed in Pendembu upon the orders of Bockarie, because he was considered a security threat to the RUF. According to the Accused Sesay, execution was the standard punishment for those RUF who connived with the enemy.[15]

11.3.3 The Killing of Foday Kallon in Buedu

ECOMOG forces pushed out AFRC fighters based in the eastern town of Daru who subsequently fled to Monrovia, Liberia. Foday Kallon was the leader of these AFRC fighters and he was ordered by Sesay, Bockarie and Charles Taylor to mobilise the fighters and return with them to Sierra Leone. About 300 fighters returned to Sierra Leone and were deployed to various areas while Foday Kallon remained at the RUF Headquarters at Buedu. Under the orders of Bockarie and Sesay, Foday Kallon travelled on two other occasions to Liberia to assemble the

[12] Ibid.

[13] Ibid., para 1391.

[14] Ibid., paras 1392–1397.

[15] Ibid., paras 1398–1399.

remaining fighters. On the third trip, Foday Kallon delayed his return and a dispute arose over the money he had been provided and his sharing of RUF information in Liberia. Upon his return to RUF Headquarters in Buedu, Foday Kallon was summarily executed. Subsequently, a radio message was sent to the front lines informing them of Foday Kallon's death and warning fighters against committing acts of betrayal or sabotage.[16]

11.4 The Trial Chamber's Legal Findings

The Trial Chamber found none of the Accused guilty in relation to the three killings of Charles Kayioko, Fonti Kanu and Foday Kallon. In relation to Charles Kayioko, it found that he was *hors de combat* but no war crime had been committed because, in its view, "the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces".[17] In a noteworthy passage that deserves to be quoted in full, it then turned to the law of international armed conflict to substantiate its finding:

> The law of international armed conflict 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. In this respect, we recall that the field of application of the Third Geneva Convention is restricted to persons 'who have fallen into the power of the enemy'. 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.[18]

The Trial Chamber referred to this finding when equally rejecting the war crime charge of violence to life, as charged in Count 5 of the Indictment, in relation to Fonti Kanu, whom it equally determined to be *hors de combat* at the time of the killing.[19] The Trial Chamber also repeated that Foday Kallon was not a member of the armed forces opposing the RUF, and hence, in its view, "his killing does not constitute a war crime".[20] In the following critique of these legal findings of the Trial Chamber, we presume the underlying facts as determined by the Trial Chamber.

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[16] Ibid., paras 1400–1402.

[17] Ibid., para 1451.

[18] Ibid., paras 1452–1453, footnotes omitted.

[19] Ibid., para 1455.

[20] Ibid., para 1457.

11.5 A Critique of the Trial Chamber's Legal Findings

The rather cursory reasoning of the Trial Chamber leaves one with some dissatisfaction. If one contrasts the explanation given for the conclusion that "the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces" does not amount to war crimes, on the one hand, with the Trial Chamber's analysis of the crime of intentionally directing attacks against personnel involved in a humanitarian or a peacekeeping mission,[21] for example, it seems fair to conclude that the former issue has been given only light treatment *en passant.* Admittedly, if matters were as clear as suggested, there would hardly be a need to enter into a meticulous analysis of the underlying issues. However, the reasoning of the Trial Chamber falls short of convincingly showing whether and how a different approach would indeed "constitute an inappropriate re-conceptualisation of a fundamental principle of international humanitarian law", as asserted by the Trial Chamber. In particular, its sweeping and unqualified assertion that the law of international armed conflict "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" is open to criticism (Sect. 11.5.1). Even more fundamentally, however, the Trial Chamber seems to conflate the law of international armed conflict and the law of non-international armed conflict to an extent that it disregards crucial differences between the protective reach of the two (Sect. 11.5.2).

11.5.1 The Protective Reach of the Law of International Armed Conflict

The underlying assumption that dominates much of the overall structure of the law of international armed conflict is that States as sovereign equals, with their territory, government and armed forces, and populations, have reciprocal interests in regulating situations in which they confront one another by means of armed force. Notwithstanding significant developments which have qualified it as a central structural feature of the law of armed conflict,[22] the paradigm of reciprocity remains pivotal in understanding that the main concern of the law of international armed conflict has been, and to a significant extent remains, to regulate the conduct of one State party to an armed conflict *vis-à-vis* its adversary and civilians. As such, the regulation of conduct of combatants *vis-à-vis* their adversaries is a central part of the law of international armed conflict. The treatment of prisoners of war, i.e. combatants who fall within the power of an *adverse* Party, falls squarely into

[21] Ibid., paras 213–235, 1749–1969.

[22] For an overview of these developments, see Meron 2000, pp. 247–251.

this paradigm. In that regard, it is indeed "trite law that an armed group cannot hold its own members as prisoners of war".[23] It is not difficult to add other areas of the law of international armed conflict which clearly epitomize that an important part of the law of international armed conflict aims at regulating the conduct of (members of) one party to an armed conflict *vis-à-vis* (members of) the adverse party. Thus, the generic principle prohibiting the employment of weapons, projectiles and Materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering[24] is clearly limited to the employment of such methods and means against an adversary. For, only members of the armed forces of that adversary (together with civilians directly participating in hostilities) are legitimate military targets as far as persons are concerned.

The same assumption that the prime concern of the law of international armed conflict is to regulate the conduct of one State party to an armed conflict vis-à-vis another underlies the protective regime for 'protected persons' as defined in Article 4 of the Fourth Geneva Convention, as it is also limited to the relationship between one party to an armed conflict, on the one hand, and nationals other than its own. The provision defines such 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".[25] Although some developments suggest that this nationality requirement has been loosened so that the definition of 'protected persons' hinges on substantial relations more than on formal bonds,[26] it is the allegiance owed to the party other than the one in whose hands the person concerned finds him/herself which is determinative.[27]

It is also not suggested here that the Trial Chamber erred in its assertion that the protection of persons *hors de combat* is part and parcel of the law of international armed conflict. It is equally trite law that conventional and customary rules applicable in international armed conflicts do indeed protect persons *hors de combat.*[28] What is problematic, though, is that the Trial Chamber seems to suggest that this protection of persons *hors de combat* is limited to those "who do not

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[23] *Supra* note 18 and the accompanying text; See also Judicial Committee of the Privy Council (U.K.), *Public Prosecutor v. Oie Hee Koi* and the connected appeals, 4 December 1967, [1968] A.C. 829.

[24] Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 75, Article 35 (2); Henckaerts and Doswald-Beck 2005, Customary International Humanitarian Law (hereinafter CLS), Rule 70.

[25] Convention (IV) relative to the Protection of Civilian Persons in Time of War (GC IV), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, Article 4.

[26] ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf, paras 166–169.

[27] Ibid; See also ICTY, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004, http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf, paras 322–323, 328–330.

[28] Henckaerts and Doswald-Beck 2005, p. 306, Rule 87 CLS.

belong to any of the armed groups participating in the hostilities".[29] Yet, the protection provided by the law in fact extends to persons *hors de combat* who do belong to members of the armed forces of a party to an armed conflict. Indeed, the First Additional Protocol of 1977 makes it clear that being *hors de combat* encompasses members of the armed forces, namely those who are in the power of the adverse party, who clearly express an intention to surrender, and who are incapacitated by wounds or sickness.[30] As far as members of the armed forces in an *international* armed conflict are concerned who are wounded, sick, or shipwrecked or who have fallen into the power of the enemy, they are identified as persons protected in the First, Second and Third Geneva Conventions.[31] Furthermore, if Common Article 3 is anything to go by (although it is acknowledged that the explicit wording of that provision suggests that it is limited to armed

[29] *Supra* note 18.

[30] AP I, *supra* note 24, Article 41 (2).

[31] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter GC I), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, Article 13; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter GC II), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, Article 13; Convention (III) relative to the Treatment of Prisoners of War (Hereinafter GC III), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, Article 4. See also, for instance, the ICTY Appeal Judgments in *Prosecutor v. Galić* and *Prosecutor v. Blaškić*, confirming that members of the armed forces do not gain the status of civilians by virtue of the fact that they are *hors de combat*. In other words, in an international armed conflict, they retain their status as combatants: ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf, footnote 437 and text, affirmatively citing para 114 and footnote 220 of the *Blaškić* Appeal Judgment of 29 July 2004, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf, in which the ICTY Appeals Chamber asserted: "Persons *hors de combat* are certainly protected in armed conflicts through Common Article 3 of the Geneva Conventions. This reflects a principle of customary international law. Even *hors de combat*, however, they would still be members of the armed forces of a party to the conflict and therefore fall under the category of persons referred to in Article 4(A)(1) of the Third Geneva Convention"; As such, they are not civilians in the context of Article 50, para 1, of AP I, *supra* note 24. Common Article 3 of the Geneva Conventions supports this conclusion in referring to "[p]ersons 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"' [emphasis added]; It is also somewhat surprising that the Trial Chamber of the SCSL does not seem to have taken notice of the earlier decision in *Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Trial Chamber II, Judgment, 20 June 2007, http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/TrialChamberJudgment/tabid/173/Default.aspx, paras 218–219, where the aforementioned ICTY jurisprudence was invoked concurringly.

conflict 'not of an international character', to which we will turn in the subsequent section),[32] the provision makes it abundantly clear that the notion of being '*hors de combat*' also extends to 'members of armed forces' that are incapacitated from partaking in hostilities 'by sickness, wounds, detention or any other cause'.

More fundamentally, however, the wording chosen by the Trial Chamber suggests that it sees the law of international armed conflict to *exhaust itself* in regulating 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". It seems to elevate the aforementioned areas in which that holds true to an unqualified dogma that permeates the entire body of law, without being subject to any exceptions. This is apparent from the Trial Chamber's assertion that to do otherwise would "constitute an inappropriate re-conceptualisation of a fundamental principle of international humanitarian law".[33] In other words, according to the Trial Chamber, the law of international armed conflict falls short of granting *any* protection to members of the armed forces of a party to an armed conflict against acts committed by (other members of) that same party. That view needs to be qualified in a number of respects, including the following.

11.5.1.1 Protection of the Wounded, Sick and Shipwrecked

First, the contemporary law of armed conflict regulating the protection of the wounded, sick and shipwrecked extends to *all* those who are in need of medical assistance or care, or in peril at sea or in other waters as a result of misfortune, and who refrain from all acts of hostility.[34] Already the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field clearly distinguished between 'wounded or sick combatants' in general and '*enemy* combatants wounded during an engagement'[35] and stipulated that the former "shall be collected and cared for"… "to whatever nation they may belong".[36] The 1906 and 1929 Geneva Conventions for the Amelioration of the Condition of the

[32] Note, however, that some have taken the position that Common Article 3, Ibid., "is not limited to the field dealt with in Article 3. Representing, as it does, the minimum, which must be applied in the least determinate of conflicts, its terms must a fortiori be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For 'the greater obligation includes the lesser …'", Pictet 1960b, p. 38.

[33] *Supra* note 18.

[34] For these definitions, AP I, *supra* note 24, Article 8 (a) and (b).

[35] 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864, available at http://www.icrc.org/ihl.nsf/full/120?opendocument, Article 6 (emphasis added).

[36] Ibid; Considered in its historical context as a reaction to Henry Dunant's 'A Memory of Solferino' it is worthy of note that the Swiss businessman was not only struck and appalled by the treatment of the wounded and sick by enemy forces and looters, but his writing also displays a striking concern for the lack of care available to the wounded and sick from their own armed forces, Dunant 1986.

Wounded and Sick in Armies in the Field subsequently reaffirmed such an inclusive approach by expressly regulating certain aspects of the relationship between the wounded and sick and their own State[37] or imposing obligations on States Parties which were broad enough to extend to a belligerent's own armed forces.[38]

Furthermore, a comparison of the language chosen to circumscribe the personal scope of applicability of the 1949 First and Second Geneva Conventions, on the one hand, with that of the 1949 Third Convention, on the other, suggests that the wounded, sick and shipwrecked also enjoy protection against acts of (members of) their own party. For, while the Third Geneva Convention explicitly provides that the categories of persons mentioned in Article 4 only qualify as prisoners of war if and when they 'have fallen into the power of the enemy', no similar qualification is to be found in relation to the categories mentioned in Article 13 of both the First and the Second Convention. Indeed, underlying such a conception of who is entitled to protection as a wounded, sick, or shipwrecked person is, in the words of Jean Pictet, "the essential idea which was championed by the founders of the Red Cross and, since 1864, has been the focal point of the Geneva law—namely, that the person of a combatant who has been placed 'hors de combat' by wounds, sickness or any other cause, such as shipwreck, is from that moment sacred and inviolable. He must be tended with the same care *whether he be friend or foe*".[39] The prohibition of *any* adverse distinction between the wounded, sick and shipwrecked on grounds other than medical ones emphasises that they are entitled to the same protection, respect and care, if and to the extent that they are in the same need thereof.[40] The question whether they belong to the enemy armed forces or one's own is irrelevant as a matter of law. In comparison to other treaties, the First Additional Protocol of 1977 is perhaps the most clear in that regard when it

[37] See e.g. Article 1 of the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906, Geneva, available at http://www.icrc.org/ihl.nsf/FULL/180?OpenDocument: "Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are. A belligerent, however, when compelled to leave his wounded in the hands of his adversary, shall leave with them, so far as military conditions permit, a portion of the personnel and 'matériel' of his sanitary service to assist in caring for them."; See also the almost identical provision in the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, Article 1, available at http://www.icrc.org/ihl.nsf/FULL/300?OpenDocument.

[38] See e.g. Article 3 of the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Ibid: "After every engagement the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and to protect the wounded and dead from robbery and ill treatment. He will see that a careful examination is made of the bodies of the dead prior to their interment or incineration." See also the almost identical provision in the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Ibid., Article 3.

[39] Pictet 1960a, p. 83 (emphasis added).

[40] Kleffner 2008, pp. 325–365, 331.

provides that "[a]ll the wounded, sick and shipwrecked, *to whichever Party they belong,* shall be respected and protected".[41]

11.5.1.2 Fundamental Guarantees

Secondly, the Trial Chamber does not give any consideration to the fundamental guarantees that are part of both conventional[42] and customary[43] international humanitarian law applicable in international armed conflict. Article 75 (1) of the First Additional Protocol provides that such guarantees grant protection to those affected by international armed conflicts 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 [the First Additional Protocol] … without any adverse distinction …".[44] If the Trial Chamber had considered that provision and its drafting history, it would have found that precisely the point which lies at the heart of the current matter had given rise to controversy, with some States taking the position that Article 75 should apply to a State's own nationals, whereas others opposed that view. It was in fact that controversy which prevented the Diplomatic Conference from adopting more precise wording. As frequently happens in treaty negotiations, this point of contention was not settled in the Diplomatic Conference's quest to achieve consensus.[45] That controversy alone appears to be a good reason for the Trial Chamber to have delved into the matter somewhat more in depth. At the heart of such an analysis would have been the meaning of the non-discriminatory applicability of the fundamental guarantees. Article 75 (1) AP I prohibits *all* forms of adverse distinction, whether it is "based upon 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*".[46] If the notion of 'national origin' does not already do so, such an open-ended list militates against an exclusion of persons from the protective reach of the provision on the ground that they are a Party's own nationals or are otherwise seen as 'belonging to' that Party. Indeed, one State Party to the First Additional Protocol, Finland, has

[41] AP I, *supra* note 24, Article 10 (1), (emphasis added); See in this vein also David 2002, p. 228, para 1.204.

[42] AP I, *supra* note 24, Article 75.

[43] Henckaerts and Doswald-Beck 2005, Rules 87-105 CLS.

[44] AP I, *supra* note 24, Article 75 (1).

[45] Pilloud et al. 1987, p. 868, paras 3017–3020.

[46] Emphasis added.

expressly declared that it understands Article 75 to apply also vis-à-vis a State Party's own nationals,[47] a view that is occasionally shared in the literature.[48]

The aforementioned areas of the protection of the wounded, sick and shipwrecked and of fundamental guarantees suggest that a correct analogous application of the law of international armed conflict would have led the Trial Chamber at least to a less sweeping statement as regards the limits of that law's protective reach and to a more in-depth consideration of the issue.

11.5.2 The Protective Reach of the Law of Non-International Armed Conflict

If the foregoing analysis suggests that a more nuanced stance by the Trial Chamber would have been justified as far as the protective reach of the law of international armed conflict is concerned, its reasoning becomes outright puzzling when considered against the backdrop of the nature of the conflict in Sierra Leone, as determined by the Trial Chamber itself. Earlier in the judgment, the Trial Chamber conducted an examination of the parties to the armed conflict and the involvement of ECOMOG and Liberia, which led it to conclude that "the armed conflict in Sierra Leone was of a non-international character",[49] meeting the threshold of Additional Protocol II.[50]

To then determine the question of the lawfulness or otherwise under the law of armed conflict of the killing of members of one's own armed forces by reference to the law of *international* armed conflict strikes one as being inconsistent. Admittedly, this inconsistency could be immaterial as far as the legal consequences are concerned, if there were no fundamental differences between the two bodies of law that apply in international and non-international armed conflicts, respectively. However, the pivotal point is that there are in fact such fundamental differences.

The difference that is most pertinent for our analysis is that the law of non-international armed conflict grants protection according to a person's actual

[47] See the Finnish Declaration at the time of ratifying the First Additional Protocol to the effect that "[w]ith reference to Articles 75 and 85 of the Protocol, the Finnish Government declare their understanding that, under Article 72, the field of application of Article 75 shall be interpreted to include also the nationals of the Contracting Party applying the provisions of that Article, as well as the nationals of neutral or other States not Parties to the conflict, and that the provisions of Article 85 shall be interpreted to apply to nationals of neutral or other States not Parties to the conflict as they apply to those mentioned in paragraph 2 of that Article", reproduced in Roberts and Guelff 2000, p. 504.

[48] See e.g. Aldrich 1996, pp. 851–858.

[49] *Supra* note 1, para 977.

[50] Ibid., para 981.

activities, whereas the law of international armed conflict does so, by and large,[51] according to the status of the person in question.[52] The latter status-based protection attaches to a person falling into one of the categories that the law of international armed conflict defines positively (chiefly the wounded, sick and shipwrecked, medical and religious personnel, prisoners of war, and 'protected persons' in the sense of GC IV). In contrast, the protection under the law of non-international armed conflict is granted to persons defined negatively as those who do not or no longer take a direct part in hostilities.[53] No other criterion restricts or extends the protection under the law of non-international armed conflict than the question whether or not someone does not participate or no longer directly participates in hostilities. Indeed, both Common Article 3 and Additional Protocol II affirm such an understanding, when they stipulate that humane treatment shall be granted without any adverse distinction.[54] As regards the non-discrimination clause in Common Article 3, Pictet recalls that States considered it desirable to draft the clause in such a way so as to ensure that there are no possible loopholes as far as specific criteria on the basis of which it is prohibited to make an adverse distinction in non-international armed conflicts are concerned.[55] Articles 2 and 4 of AP II make it equally clear that *everybody* who is not participating or no longer directly participates in hostilities is entitled to humane treatment.[56] Customary international humanitarian law confirms that this entitlement is not restricted to those who belong to an adverse party or to those who do not belong to any of the armed groups participating in the hostilities.[57]

Nor can such a restriction be deduced from the case law of international or domestic tribunals other than the Special Court for Sierra Leone. The two cases of

[51] An important exception in that respect are the fundamental guarantees referred to above, Sect. 11.5.1.2.

[52] Bouvier and Sassoli 2011, p. 328, with further references.

[53] See on the distinction between positive and negative definitions of who enjoys protection, ICTY *Prosecutor v. Tadić*, Case No. IT-94-1-Tbis-R117, Trial Chamber, Merits judgment, 11 November 1999, http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj991111e.pdf, para 615; Notwithstanding this distinction, the law of non-international armed conflict includes notions that are reminiscent of positively defined status-based notions in international armed conflicts, such as 'wounded, sick and shipwrecked' and 'civilian', cf. e.g. Parts III and IV of Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter AP II), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125. However, the law of non-international armed conflict fails to define them positively. On the arising conceptual consequences in the realm of the principle of distinction in non-international armed conflicts, see Kleffner 2007, pp. 315–336.

[54] *Supra* note 31, Common Article 3 (1); AP II, Ibid., Articles 2 and 4.

[55] Pictet 1952, pp. 55 et seq.

[56] Pilloud et al. 1987, p. 1369, para 4520, referring to the Commentary on Article 2 AP II, pp. 1358–1359, paras 4482–4489.

[57] Henckaerts and Doswald-Beck 2005, Rule 88 CLS.

Motosuke[58] and Pilz[59] that are at times referred to in support of such a restriction[60] both concern situations of international armed conflicts that predate the coming into force of the 1949 Geneva Conventions. The cases' significance for determining the protective reach of the law of *non-international* armed conflict as it stands today is therefore limited. In that respect, the fate of the argument in a case before the ICTY that these two cases support a restriction of the protective reach of Common Article 3 as suggested by the Trial Chamber of the SCSL is revealing. In *Kvocka,* the two cases were invoked to substantiate the Defence's appeal against the conviction for a violation of the laws and customs of war under Article 3 of the ICTY Statute of Zoran Žigić, a Serb guard at Keraterm camp where predominantly non-Serb detainees were held, abused and killed. The Trial Chamber had convicted Zoran Žigić of the murder as a violation of the laws and customs of war in the Keraterm camp of Drago Tokmadzic, a half-Serb police officer who had declared loyalty to the Serbian authorities. The Defence argued:

> [T]here is no evidence whatsoever that Drago Tokmadzic belonged to the opposite side in the conflict, and as a civilian at that, so that the provisions of the Statute of the Tribunal would be applicable. On the contrary. There was evidence that he was a policeman in the Serb police force and it was wearing that uniform that he was brought to Keraterm. There is also evidence that he had signed a declaration of loyalty to the Serb authorities and that he had previously himself been bringing prisoners to Keraterm, and that in terms of ethnicity he was half Serb, half Croat. The only evidence as to why he was killed is that he was a cruel policeman who beat up people in the street. Even if the Serb side had thought that he belonged to the other side, which is not the case, one could not speak of the crimes that fall within the competence of the Tribunal. Namely, there is no mens rea that can replace or fill the absence of an objective and vital element such as actus reus, that the crime committed against the opposite side in the conflict. Nor is it sufficient to suspect that a person belonged to the other side. What is necessary is certain and unequivocal proof of that, which in this case is missing. This opinion is elaborated and supported by Judge Cassese in his work published in 2003 titled 'International Criminal Law', Oxford University Press, page 48, and he illustrates this opinion using cases Piltz and Motosuke. […T]he Prosecution must prove that Tokmadzic belonged to the opposite side in the conflict beyond any reason doubt.[61]

The Appeals Chamber's findings in response to this argument of the Defence were as brief as they were clear: "The ethnic background of Drago Tokmadzic is in fact irrelevant to Žigić's conviction of murder as a violation of the laws or

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[58] Temporary Court-Martial at Amboina, In re *Motosuke*, Judgement of 28 January 1948, summarised in Annual Digest and Reports of Public International Law Cases, Vol. 15, 1948, p. 682.

[59] Dutch Special Court of Cassation, Judgment of 5 July 1950, summarised in International Law Reports, Vol. 17, p. 391.

[60] Cassese 2008, p. 82.

[61] ICTY, 24 March 2004, Appeals Proceedings Transcript, available at http://www.icty.org/x/cases/kvocka/trans/en/040324IT.htm, pp. 304–306; linguistic mistakes in original transcript.

customs of war. As he was detained in the camp, he belonged to the group of persons protected by the Common Article 3 of the Geneva Conventions".[62]

To sum up, the current state of the law of non-international armed conflict does not support an exclusion from the entitlement of humane treatment of a person who does not participate or no longer directly participates in hostilities on the sole ground that he or she does not belong to the *adverse* party or does not belong to *any* party. The law equally protects those *hors de combat* who are members of armed forces of a party to an armed conflict against mistreatment at the hands of (members of) that same party.

11.6 Concluding Remarks

The recognition that the law of armed conflict does not exhaust itself in the regulation of the conduct of adverse parties vis-à-vis one another and vis-à-vis civilians, but also includes within its protective realm persons *hors de combat* who are members of a party's own armed forces, may appear counter-intuitive to some extent. The counter-intuition confirms that our perception of the law of armed conflict continues to be dominated by the structural feature inherent in all armed conflicts: the existence of organised armed violence with the consequential risk of violations that one party to an armed conflict commits against captured adversaries and the civilian population. The treatment by a party to an armed conflict of members of its own armed forces are not at the forefront of our minds when we think about armed conflicts. There are good reasons for this, not the least the fact that captured adversaries and the civilian population do, of course, continue to be those who are most at risk of falling victims to violations of the law of armed conflict.

At the same time, there are other persons who may be affected by armed conflicts and who are in need of protection. The law of armed conflict would fail to realise its mission to strike a reasonable balance between military necessity and humanitarian considerations if it were to exclude altogether from its protection any of those persons on arbitrary grounds. The evolution of the law of armed conflict bears witness to the fact that States generally share that view, notwithstanding occasional attempts to exclude certain categories of persons from *any* form of protection. The fundamental guarantees structured around the quintessential centre piece of humane treatment without any adverse distinction confirm that the international community of States subscribe to a body of law without loopholes as far as the entitlement to humane treatment of those who do not or no longer take a direct part in hostilities is concerned. Contrary to what the Trial Chamber of the SCSL asserts, a potential loophole in respect of members of a party's own armed

[62] ICTY, *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf, para 561.

forces cannot be filled satisfactorily by "the criminal law of the State of the armed group concerned and human rights law",[63] especially not in non-international armed conflicts. The criminal law of the State will, for all practical purposes, be of limited value. This is clearly epitomized by the very fact that a non-international armed conflict with at least one non-state organised armed group as a party thereto exists. And to fill the protective void that would result from the Trial Chamber's reasoning with human rights law is also far less easily achieved than suggested. The Trial Chamber seems to take the applicability of human rights law as a given, notwithstanding the continuous debate that surrounds that applicability to non-state organised armed groups.

All in all, the Trial Chamber's reasoning and findings on the question whether the killing of a member of one's own armed forces can amount to a war crime leaves one with a great deal of dissatisfaction. It is to be hoped that the findings will not constitute a precedent that contributes to a re-conceptualisation and reduction of the protective reach of the law of armed conflict which would entail that the law of armed conflict loses part of its human face.

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[63] *Supra* note 18 and the accompanying text.

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