

Much Ado About Non-State Actors: The Vanishing Relevance of State Affiliation in International Criminal Law

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TABLE OF CONTENTS

I.	INTRODUCTION	336
II.	THE POSITIVIST CONCEPTION OF THE INTERNATIONAL LEGAL SYSTEM, AND THE SCOPE OF THE TERM "NON-STATE ACTOR"	337
	A. "State Actors" and "Non-State Actors"	338
III.	BEYOND THE STATE-CENTRIC MODEL: THE EMERGENCE OF INDIVIDUAL CRIMINAL RESPONSIBILITY AND THE EROSION OF THE NON-INTERVENTION PRINCIPLE	340
IV.	THE POST-NUREMBERG EVOLUTION OF INTERNATIONAL CRIMINAL LAW	344
	A. <i>The 1949 Geneva Conventions & Non-State Actors</i>	344
	B. <i>The Genocide Convention</i>	346
	C. <i>Crimes Against Humanity</i>	347
	D. <i>The Draft Code of Crimes Against the Peace and Security of Mankind</i>	347
	E. <i>Torture</i>	348
V.	THE FURTHER DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW BY INTERNATIONAL CRIMINAL COURTS	349
	A. <i>The Yugoslav Tribunal (ICTY)</i>	349

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B.	<i>The Rwanda Tribunal (ICTR)</i>	352
C.	<i>The International Criminal Court (ICC)</i>	354
VI.	CONCLUSION	355

I. INTRODUCTION

Much has been made recently of the deficiencies of international law in grappling with violence perpetrated by non-state actors. From transnational terrorist networks to private security contractors (PSCs), organizations that are not officially part of the apparatus of any state are increasingly engaged in protracted episodes of intense violence, giving rise to questions of accountability under international law. Does international law provide rules applicable to such conduct?

While the repression of crime, especially that perpetrated by non-state actors, has traditionally been left to the internal law of states, most international jurists will point to the ancient rules of international law pertaining to piracy to support the proposition that international law has always governed criminal activity by non-state actors. Today, these same jurists can point to Article 25(2) of the Rome Statute of the International Criminal Court which provides for individual criminal responsibility of perpetrators without any reference to state affiliation. In light of the correspondence between these ancient and modern rules of international law, why is there such controversy over the question of the responsibility of non-state actors under international criminal law?

In order to understand the controversy, it is essential first to recognize that Grotius' condemnation of pirates as guilty of violating the law of nations had a very different legal character from the concept of individual criminal responsibility under the Rome Statute. For Grotius, the pirate was guilty of violating natural law,¹ a body of law that bound individuals in the first place, and only by extension from this central case formed part of the law of nations applicable to states. Once the foundation of international law shifted from natural law to positivism, the focus of the international rules concerning piracy shifted from the individual to the state. Rather than focusing on individual responsibility, the rules of international law were understood to afford jurisdiction to all states to repress piracy.

By the early 20th century, the natural law conception of the international legal system had receded to the vanishing point, so much so that delegates to the League of Nations could take the view that "inasmuch as only States were subjects of international law, individuals

1. HUGO GROTIUS, *DE JURE BELLI AC PACIS*, bk. II, ch. XX, §. XL (1625).

could only be punished in accordance with their national law.”² The significance of the Nuremberg Tribunal’s revival of the concept of individual criminal responsibility can be fully appreciated only when seen against this state-centric backdrop.

II. THE POSITIVIST CONCEPTION OF THE INTERNATIONAL LEGAL SYSTEM, AND THE SCOPE OF THE TERM “NON-STATE ACTOR”

From the inception of the Westphalian system in 1648, the sovereign equality of states and the related principle of non-intervention were paramount. As the positivist conception of the international legal system came to prevail, only states could be deemed true subjects of international law, with individuals generally relegated to the status of mere objects.³ The substantive norms of international law therefore were conceived as a network of consent-based, reciprocal obligations that focused almost exclusively on inter-state relations.

According to this traditional model, international law had no direct application to individuals. At the same time, states, as abstract entities, are incapable of acting as such. The conduct of states is the conduct of individuals whose acts or omissions are attributable to the state.⁴

2. *Report of the International Law Commission on Question of International Criminal Jurisdiction*, ¶ 17, U.N. GAOR, 5th Sess., U.N. Doc. A/CN.4/15 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 1 [hereinafter *Report on Question of International Criminal Jurisdiction*].

3. The legal status of the individual in the pre-World War II international legal system is a matter of some debate. The individual was regarded as a subject of natural law, and was thus regulated by international law to the extent the Westphalian system was superimposed onto a pre-existing natural law system. See John Cerone, *The Status of the Individual in International Law*, 100 ASIL PROC. 257, 259–260 (2006). The scope of the present chapter is limited to rules of positive international law, and includes natural law only to the extent it has been incorporated into the positive law.

4. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Comm'n, art. 4, *adopted in* G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002). Draft Articles on Responsibility and Commentary are reprinted in JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 61 (2002)) [hereinafter *ARTICLES AND COMMENTARY*]; see also John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 VAND. J. TRANSNAT'L L. 1447, 1455 (2006).

A. "State Actors" and "Non-State Actors"

The term "state actor" is traditionally employed to describe those who are officially part of the machinery of the state. The conduct of these individuals is generally attributable to the state.⁵ The term "non-state actor" (NSA) is employed to describe those who are not officially part of the machinery of the state, and whose conduct is not generally attributable to the state. As a brief survey of the rules of attribution will demonstrate, however, there is no category of individuals whose conduct is *always* attributable to the state; nor is there a category of individuals whose conduct is *never* attributable to the state.⁶

The first rule of attribution is that the conduct of an organ of a state, including that of any individual who is an official part of the machinery of the state,⁷ or of an entity legally empowered by a state to exercise elements of governmental authority,⁸ is considered to be an act of that state. This would also include situations in which an organ is placed at the disposal of a state by another state and the organ is acting in the exercise of elements of the governmental authority of the former state.⁹ Even where an actor's conduct is *ultra vires*, or beyond the scope of his or her authority, so long as he or she was acting in an official capacity the conduct of such actor is attributable to the state.¹⁰

The conduct of non-state actors may also be attributed to a state under certain circumstances. The conduct of a non-state actor may be imputed to a state when the actor is "in fact acting on the instructions of, or under the direction or control of, [a] state in carrying out the conduct";¹¹ when the actor is "in fact exercising elements of the governmental authority in

5. See ARTICLES AND COMMENTARY, *supra* note 5, art. 4.

6. See generally ARTICLES AND COMMENTARY, *supra* note 6.

7. See *id.* art. 4.

8. *Id.* art. 5.

9. *Id.* art. 6. This rule is limited to situations in which "the organ, originally that of one State, acts *exclusively* for the purposes of and on behalf of another State and its conduct is attributed to *the latter State alone*." *Id.* at 103 (emphasis added).

10. *Id.* art. 7. See also Velasquez-Rodriguez v. Honduras Case, 1988 Inter-Am. Ct. H.R. (Ser. C) No. 4, paras. 169-70 (July 29, 1988).

11. ARTICLES AND COMMENTARY, *supra* note 5, art. 8. In the absence of specific instructions, a fairly high degree of control has been required to attribute the conduct to the state. According to the Commentary on the Articles,

[s]uch conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.'

Id. at 110.

the absence or default of the official authorities";¹² when the conduct is subsequently adopted by a state;¹³ or when "[t]he conduct [is that] of an insurrectional movement which becomes the new government of a State."¹⁴

An example of attribution of the conduct of NSAs may be seen in the use of private contractors in the recent conflicts in Iraq and Afghanistan.¹⁵ The rules of attribution contemplate two situations in which the conduct of private contractors may be attributable to the state.

One situation in which the conduct of private contractors may be attributable to the state arises whenever the contractor is *de jure* acting on behalf of the state. This situation is covered by article five of the Articles on State Responsibility, which applies to entities that are empowered by the law of the state to exercise elements of governmental authority.¹⁶ The conduct of private contractors that are legally authorized to carry out public functions on behalf of the state will therefore be attributable to the state. These entities are essentially assimilated to organs of the state when they are acting in their public capacity. Their *ultra vires* conduct therefore remains attributable to the state so long as they are acting in that capacity.

A second situation in which the conduct of private contractors may be attributable to the state arises where the contractor is, in fact, authorized to act on behalf of the state, without the official imprimatur of legal empowerment. It does not matter whether the contractor is carrying out a public function in such situations.¹⁷ This situation would be governed by article eight of the Articles, however, which, as noted above, sets a fairly high threshold for attribution. In addition, as there is not necessarily any "official" capacity in such situations, the entity's conduct will not be attributable to the state if such conduct was contrary to the state's instructions.¹⁸

12. *Id.* art. 9.

13. *Id.* art. 11. See also Diplomatic and Consular Staff in Tehran (*U.S. v. Iran*), 1979 I.C.J. 3, 19 (Dec. 15), available at <http://www.icj-cij.org/docket/files/64/6283.pdf>.

14. ARTICLES AND COMMENTARY, *supra* note 5, art. 10.

15. See, e.g., Victoria L. Starks, *The U.S. Government's Recent Initiatives To Prevent Contractors From Engaging In Trafficking In Persons: Analysis Of Federal Acquisition Regulation Subpart 22.17*, 37 PUB. CONT. L.J. 879, 881 n.16 (2008) (citations omitted).

16. ARTICLES AND COMMENTARY, *supra* note 5, art. 5.

17. *Id.* art. 8.

18. But see Prosecutor v. Tadic, Case No. IT-94-1-A, Appeal Judgment, (July 15, 1999), reprinted in 38 I.L.M. 1518 (1999). In Tadic, the ICTY Appeals Chamber took

The legal position of such NSAs whose conduct in a given instance is attributable to the state is essentially the same as that of state actors. In any event, the rules of international law, as traditionally understood, would not directly bind even state actors because it was the state as such that was the subject of legal obligation.¹⁹

The events of World War II, however, spurred a number of developments in international law that struck at the core structure of the system. The two most significant developments for present purposes were the emergence of the individual as a subject of international law and the erosion of the non-intervention principle.

III. BEYOND THE STATE-CENTRIC MODEL: THE EMERGENCE OF INDIVIDUAL CRIMINAL RESPONSIBILITY AND THE EROSION OF THE NON-INTERVENTION PRINCIPLE

While the state-centric model of the international legal system persists to this day, this model was significantly eroded by the events of World War II. One feature of this transformation was the emergence²⁰ of the principle that violation of certain norms of international law could give rise to individual criminal responsibility. Certain serious violations of international law would engage not only the classical form of responsibility in international law, that is, the responsibility of the state,

the position that overall control of a hierarchically-organized non-state entity may be sufficient to assimilate that entity to a state organ, rendering all of its conduct attributable to the state. For a comprehensive overview of these developments, see John Cerone, *"Human Dignity in the Line of Fire,"* 39 VAND. J. TRANSNAT'L L. 1447 (2006).

19. See, *supra* Part I.

20. As noted above, this principle was not generally accepted among international lawyers in the decades prior to World War II. Early in its existence, the Council of the League of Nations had before it a proposal to create an international criminal court. An Advisory Committee of Jurists, appointed by the Council in February 1920, recommended the creation of a "High Court of International Justice," which would be competent to criminally prosecute individuals for violations of the "universal law of nations." *Report on Question of International Criminal Jurisdiction, supra* note 3, ¶ 15. This proposal was rejected by the League. According to the Third Committee of the League Assembly, it was "best to entrust criminal cases to the ordinary tribunals as is at present the custom in international procedure." While recognizing that "crimes of this kind" might "in future be brought within the scope of international penal law," consideration of the issue was, "at the moment, premature." *Id.* ¶ 16. (italics omitted). According to UN Special Rapporteur Richard Alfaro, this rejection

"reflected the views of those who had opposed the establishment of an international jurisdiction for the trial of the First World War criminals, for certain legal reasons, to wit: that there was no defined notion of international crimes; that there was no international penal law; that the principle *nulla poena sine lege* would be disregarded; that the different proposals were not clear; and that inasmuch as only States were subjects of international law, individuals could only be punished in accordance with their national law."

Id. ¶ 17.

but also that of the individuals perpetrating the violation. Such perpetrators could be criminally prosecuted and punished for these violations of international law.

The emergence of this principle was driven by the need to develop effective means of enforcement. As reasoned by the International Military Tribunal at Nuremberg, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."²¹ While the IMT lacked a solid juridical basis for espousing the principle of individual criminal responsibility, subsequent acceptance of the principle by the international community arguably cured any defect in its legal foundation.

The IMT had at least two potential paths to deriving individual criminal liability for violations of international law. One possible path contemplated that individual criminal responsibility was predicated on a violation of international law by the state. Once a violation was established, the adjudicator could then inquire as to whether the violation was serious enough to give rise to the criminal responsibility of the individual as well as that of the state. The other jurisprudential strand drew upon remnants of the natural law system, positing that some of the rules of the "law of nations" were addressed directly to individuals. Under this latter theory, it would not be necessary to first establish that a violation of international law had been committed by a state. While this approach would seem to have a weaker foundation in the positive law of the time,²² it appears to be the position adopted by the Tribunal.²³

21. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG 14 NOVEMBER 1945–1 OCTOBER 1946, at 223 (1947), *available at* http://avalon.law.yale.edu/subject_menus/imt.asp [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS].

22. As noted above, earlier conceptions of individual responsibility for violations of the "law of nations," rested on a conception of the latter as consisting primarily of natural law. Even this pre-existing doctrine was unclear and not without controversy. For example, the traditional prohibition of piracy in international law is often cited as an example of the regulation of non-state actors by international law. Yet it remains unclear whether the rules of international law were directly binding on the pirates or whether these rules merely provided to states a jurisdictional basis to prosecute them. In common law jurisdictions, as customary international law was applied through the vehicle of the common law, it is difficult to tell whether individual criminal responsibility arose through international law itself or through the common law. To further confuse matters, customary international law and the common law were both rooted, traditionally, in natural law, which was primarily addressed to individuals. In any event, the principle of individual criminal responsibility for violations of international law was not universally

Once the link between state responsibility and individual responsibility is severed, the significance of the distinction between state and non-state actors greatly diminishes. Much of this significance had related to a conception of international law in which the state was the exclusive subject of legal obligation. The distinction mattered in that context because the conduct of state actors was generally attributable to the state, while the conduct of non-state actors was generally not. Once the individual is deemed capable of being directly bound by rules of international law, it essentially becomes a policy choice of those creating the law whether they wish to address rules of international law to all individuals or only to individuals falling within certain categories or operating within certain contexts. The issue is no longer one of legal coherence, but rather of the more discretionary matter of why certain criminal activity should be regulated by international law.

The IMT Charter primarily adopts a context-based approach. Although the Charter recognized the individual as a subject of international obligations, it still reflected the existing substance of international law as a body of rules concerned almost exclusively with inter-state transactions. In addition, the Charter restricted the Tribunal's personal jurisdiction to those who were "acting in the interests of the European Axis countries."²⁴ Several aspects of the IMT's jurisdiction therefore narrowed the scope of possible defendants to those who had some connection to the state.

The subject matter jurisdiction of the IMT was largely concerned with state-sponsored violence. The IMT was given jurisdiction to prosecute three categories of crimes: Crimes Against Peace, War Crimes, and Crimes Against Humanity.²⁵ The inclusion of Crimes Against Peace and War Crimes was not particularly controversial, as each entailed a

embraced as positive law until after World War II. Today, of course, the principle of individual criminal responsibility is clearly regarded as positive law. See Rome Statute of the International Criminal Court art. 25(2), July 17 1988, 2178 U.N.T.S. 3.

23. The IMT's peculiar legal posture makes it difficult to draw definite conclusions as to the nature of its jurisdiction. While the IMT purported to sit as an international tribunal applying international law directly to individuals, it simultaneously relied on the fact that, in constituting the tribunal, the Allies had "done together what any one of them might have done singly." TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 22, at 218. The Judgment also refers to the creation of the Charter as "the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world." *Id.* Taken together, these propositions blur the line between an international tribunal and a domestic court. The attendant uncertainty may have facilitated the Tribunal's invocation of the principle of individual responsibility.

24. Charter of the International Military Tribunal art. 6, Oct. 6, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, available at <http://www.avalon.law.yale.edu/imt/avalon/imt/judlawch.asp> [hereinafter IMT Charter].

25. *Id.*

substantial transnational dimension, either the use of armed force by one state against another or abuses committed by someone acting on behalf of one state against the citizen of another. This transnational dimension placed these acts within the traditional inter-state framework of international law.

The inclusion of Crimes Against Humanity, however, which comprised certain inhumane acts committed in the course of an attack against any civilian population, was a watershed event in international law. Use of the term "any" made clear that such crimes could be committed even within a single state.²⁶ In addition, the definition did not require that the perpetrator have any connection to the state.²⁷ The boldness of including this crime, however, was tempered by the insertion of a jurisdictional element.

Recognizing that they were breaking new ground, the drafters expressed a degree of caution by including a nexus requirement.²⁸ Crimes Against Humanity could only be prosecuted if they were committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal."²⁹ In other words, there had to be a connection to a traditional inter-state violation for the Tribunal to exercise jurisdiction over this newly defined category of crimes.

Each of the categories of crimes thus required some connection to state-sponsored violence, either as a substantive element or as a jurisdictional requirement. This was only reinforced by the Charter's restriction of personal jurisdiction to those who were "acting in the interests of the European Axis countries."³⁰

Thus, even though individual non-state actors could be prosecuted for their participation in violations of international law, it was still necessary to show some link³¹ to the state in determining whether they fell within the Tribunal's jurisdiction.³²

26. *Id.*

27. *Id.* art. 6(c).

28. *Id.*

29. *Id.*

30. *Id.* art. 6.

31. This link, of course, need not rise to the level required by the rules of attribution. As the concern here was not state responsibility, the rules of international criminal law were not constrained by the law of state responsibility.

32. A number of cases involving non-state actors were prosecuted by the occupying powers in post-World War II Germany. See, e.g., *United States v. Krupp (The Krupp Case)*, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1949) (Military Tribunal, Nuernberg,

Subsequent developments, however, lessened the significance of whether a given perpetrator had any connection to a state.

IV. THE POST-NUREMBERG EVOLUTION OF INTERNATIONAL CRIMINAL LAW

International criminal law continued to evolve in the post-war period. This evolution occurred, in part, through the further development of humanitarian law (i.e., the law of armed conflict).

A. The 1949 Geneva Conventions & Non-State Actors

International criminal law, born as it was in the cauldron of armed conflict, evolved primarily from international humanitarian law (IHL), resulting in a dynamic relationship between these two bodies of law. It was the establishment of the International Military Tribunals in the aftermath of World War II that spurred the development of international criminal law. As a result, the overwhelming majority of international crimes that were given cognizance by the international community at that time were those relating to war, that is, criminal violations of humanitarian law. As such, the work of the IMTs in turn facilitated the further development of IHL.³³

Germany, Oct. 1946-Apr. 1949) [hereinafter NUERNBERG TRIALS]; United States v. Flick (*The Flick Case*), 6 NUERNBERG TRIALS, *supra*; United States v. Krauch (*The Farben Case*), 8 NUERNBERG TRIALS, *supra*; *The Zyklon B Case* (Trial of Bruno Tesch and Two Others), 1 Law Reports of Trials of War Criminals (Brit. Mil. Ct. 1946). *The Flick Case* tribunal saw no difficulty in prosecuting private citizens for violations of international law. Perhaps overstating the position of the individual in international law, the *Flick* tribunal held that “[i]nternational law, as such, binds every citizen just as does ordinary municipal law.” *The Flick Case*, *supra*, at 1192.

[I]t is urged that individuals holding no public offices and not representing the State, do not, and should not come within the class of persons criminally responsible for a breach of international law. It is asserted that international is a matter wholly outside the work, interest, and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in *propria persona*. The application of international law is no novelty. . . . There is no justification for a limitation of responsibility to public officials.

Id. However, it should be noted that, notwithstanding its protestations to the contrary, the *Flick* tribunal was essentially sitting as a domestic, and not an international, court. As such, it is more difficult to discern whether the law being applied by the tribunal was international law as such, or rules of domestic law that had been derived from international norms.

33. See TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 22, at 171–342.

This development is manifest in the 1949 Geneva Conventions, which contain a number of advances over earlier IHL treaties. One advance was the inclusion of a regime of mandatory criminal sanctions for certain serious violations.

In the course of its judgment, the IMT at Nuremberg relied heavily on the rules of humanitarian law set forth in the Hague Conventions of 1907.³⁴ While those treaties were not applicable as such to World War II, as several of the belligerents were not parties to those treaties, the IMT found that the rules set forth therein had acquired the status of customary law, and that their breach gave rise to individual criminal responsibility.³⁵

Part of what made this finding so extraordinary is that the Hague Conventions do not require criminal punishment for violations. Indeed, the exclusive remedy provided for in those treaties is compensation by the violating state.

The 1949 Geneva Conventions, building off the achievements of the IMTs, included a special penal regime for certain violations—the so-called “grave breaches.” When a grave breach is committed, all States Parties are obliged to seek out the perpetrators and to bring them to justice through prosecution or extradition.³⁶ While these rules do not purport to directly bind individuals, they clearly show the drafters’ intent that their violation entail criminal consequences for individual perpetrators. Nothing in the text of the Conventions limits application of the grave breaches regime to state actors.

Another major development of the 1949 Geneva Conventions was the inclusion of provisions expressly regulating non-international armed

34. Convention Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, *available at* http://avalon.law.yale.edu/20th_century/hague04.asp [hereinafter Hague Convention IV].

35. *See generally* Judgment of the International Military Tribunal for the Trial of German Major War Criminals: The Law of the Charter (1946), *available at* <http://avalon.law.yale.edu/imt/judlawch.asp>.

36. *See, e.g.,* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I].

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id. art. 50.

conflicts, and, consequently, directly binding non-state organized, armed groups.³⁷

As noted above, at the time of the IMT judgment, existing IHL treaties were embedded in the traditional structure of the international legal system, and thus regulated only international (i.e., interstate) armed conflicts. Prior to World War II, internal conflicts were generally regarded as an internal matter. By providing that Crimes Against Humanity could be committed against *any* civilian population, however, the drafters of the IMT Charter heralded a continuing erosion of the non-intervention principle that led to the development of the law of non-international armed conflict.

Common Article 3 of the 1949 Geneva Conventions sets forth standards regulating armed conflicts “not of an international character.”³⁸ Thus, express treaty provisions now regulated even purely internal armed conflicts. Even more significantly, the text of the article makes clear that it binds all parties to the conflict, including non-state organized armed groups. This was the first time that a multilateral IHL treaty asserted that a non-state entity was bound by international law.

In light of the dynamic relationship between IHL and international criminal law, as humanitarian law expanded to regulate the conduct of non-state actors, so too did international criminal law increasingly provide for their individual responsibility.³⁹

B. The Genocide Convention

In 1948, the U.N. General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide.⁴⁰ The Genocide Convention provides a definition for the crime of genocide and asserts that it is a crime under international law.⁴¹

The Convention provides that genocide may be committed in peacetime, thus making clear that the existence of armed conflict is not

37. See, e.g., *id.* art. 3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Geneva Convention Relative to the Protection of Prisoners of War art.3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

38. See Geneva Convention IV, *supra* note 38, art. 3; Geneva Convention I, *supra* note 37, art. 3.

39. While it was initially unclear whether violations of Common Article 3 gave rise to individual criminal responsibility, it has now been accepted by a number of international criminal courts. See *infra* Part V. *infra*.

40. Convention on the Prevention and Punishment of the Crime and Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, available at http://www.unhchr.ch/html/menu3/b/p_genoci.htm [hereinafter Genocide Convention].

41. *Id.* arts. 1, 2.

required as a contextual element for genocide.⁴² Even more significantly, the Convention expressly states that genocide may be committed by a NSA. According to Article 4 of the Convention, “[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”⁴³

C. Crimes Against Humanity

The legal content of Crimes Against Humanity also evolved in the decades following World War II. Severing the link between this category of crimes and a state of armed conflict, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provides that statutes of limitations shall not apply to crimes against humanity “whether committed in time of war or in time of peace.”⁴⁴

D. The Draft Code of Crimes Against the Peace and Security of Mankind

The notion of Crimes Against Humanity continued to evolve through the work of the International Law Commission, which had been charged with developing a draft code of international criminal law. In its final incarnation, the Code defined Crimes Against Humanity as including acts “instigated or directed by a Government *or by any organization or group*,” affirming that Crimes Against Humanity need not be committed on behalf of a state.

Other crimes included in the Draft Code were genocide, war crimes, crimes against United Nations and associated personnel, and aggression. Only one of these categories of crimes was expressly limited to individuals having a connection to a state. The crime of aggression, derived from the IMT category of Crimes Against Peace, was limited to individuals who participate in “the planning, preparation, initiation or waging of aggression *committed by a State*.”

42. *Id.* art. 1.

43. *Id.* art. 4.

44. See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art.1, Nov. 26, 1968, 754 U.N.T.S. 73, available at http://www.unhchr.ch/html/menu3/b/p_limit.htm.

E. Torture

In apparent contrast to the trend in favor of extending international criminal law to reach the conduct of non-state actors, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defined torture so as to exclude purely private conduct. Article 1 defined “torture” as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*⁴⁵

This would seem to preclude purely private conduct from the scope of the Convention. However, this does not mean that the conduct of non-state actors is entirely excluded from its scope. Indeed, the language of the definition makes clear that the perpetrator need not be a state actor. There need be only some level of state involvement; even mere acquiescence will suffice.⁴⁶

Perhaps of even greater significance is that CAT does not purport to apply directly to individuals. It operates through the modality of domestic legislation. All parties must “ensure that all acts of torture are offences under its criminal law.” The Convention does not assert that acts of torture as defined therein give rise to individual criminal responsibility in international law. As will be demonstrated below, international criminal courts have been granted jurisdiction to prosecute torture only when committed as a war crimes or crime against humanity.⁴⁷ These courts have found that the act of torture does not require any state involvement when committed as a war crime or crime against humanity.⁴⁸

45. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art.1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 113, *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm (emphasis added).

46. In addition, the obligation to criminalize applies also to “attempt to commit torture and to an act *by any person* which constitutes complicity or participation in torture.” *Id.* art. 4(1) (emphasis added). Thus, once the minimum level of state involvement to constitute torture is established, the status of the individuals perpetrating the crime or participating in it is irrelevant.

47. The Special Panels for Serious Crimes in East Timor were granted jurisdiction to prosecute torture as such. However, the Panels sat essentially as domestic courts of East Timor.

48. *See, e.g.,* Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001).

V. THE FURTHER DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW BY INTERNATIONAL CRIMINAL COURTS

International criminal law has evolved rapidly in recent years. This evolution was spurred in large part by the development of a number of international criminal courts since the early 1990s. The International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court are competent to prosecute all individuals, including non-state actors, who commit crimes falling within their jurisdiction.

A. The Yugoslav Tribunal (ICTY)

The subject matter jurisdiction of the ICTY includes war crimes, genocide, and crimes against humanity. As noted above, each category of crimes is capable of being committed by a non-state actor, and the Tribunal has convicted a number of such individuals.⁴⁹

By the time of the Tribunal's establishment, it was clear that genocide and crimes against humanity could occur within a single state⁵⁰ and could be perpetrated by a non-state actor.⁵¹ The definition for genocide was taken directly from the text of the 1948 Genocide Convention. The

49. See, e.g., Prosecutor v. Limaj, Case No. IT-03-66-A, Appeal Judgment (Sept. 27, 2007); Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Appeal Judgment (Feb. 25, 2004); Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment (Apr. 3, 2008); see also *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 419 (abandoning the state involvement requirement for torture as a war crime).

50. The definition of the Crimes Against Humanity in the Statute of the ICTY includes an armed conflict requirement as a jurisdictional element. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]. However, the definition makes clear that the armed conflict may be international or internal. The ICTY has also opined that this requirement is a purely jurisdictional element, and is not part of the definition of crimes against humanity in customary international law. See, e.g., Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 572 (May 7, 1997); Prosecutor v. Rajic, Case No. IT-95-12-R61, Review of the Indictment, ¶ 7 (Sept. 13, 1996); Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 66 (Mar. 3, 2000).

51. While an early decision of the ICTY seemed to indicate that a policy was a necessary element in sustaining a prosecution for crimes against humanity, the Appeals Chamber rejected this. *Blaskic*, Case No. IT-95-14-T, Judgment, ¶ 69-70. To the extent a policy was required, it would have been easier to establish in a governmental context.

definition for Crimes Against Humanity drew upon the work of the IMTs, as well as that of the International Law Commission.

The contextual elements for Crimes Against Humanity are set forth in the chapeau of Article 5 of the ICTY Statute. It defines crimes against humanity as certain inhumane acts “committed in armed conflict, whether international or internal in character, and directed against any civilian population.”⁵² The ICTY has interpreted this language as requiring a nexus between an individual’s inhumane act and this broader attack.⁵³ Thus, crimes against humanity consist of individual “acts” that, on some essential level, form part of the attack.⁵⁴

It is this nexus requirement that distinguishes Crimes Against Humanity from ordinary crimes, just as War Crimes are distinguished from ordinary crimes by virtue of their connection to an armed conflict and genocidal acts are distinguished from ordinary crimes by the special intent required for their commission (i.e., the intent to destroy a racial, ethnical, national, or religious group in whole or in part).

The war crimes provisions of the ICTY Statute retain a bit more of the traditional inter-state structure of international law. When the drafters of the Statute began to develop the subject matter jurisdiction of the Tribunal, they were faced with the challenge of determining which violations of IHL gave rise to individual criminal responsibility. The first category of war crimes included in the Statute was the category of “grave breaches” as set forth in the 1949 Geneva Conventions. Because such breaches were the subject of a mandatory penal regime in the Conventions, the drafters of those Conventions had clearly intended that the breach of these norms should attract criminal sanctions.

The ICTY Appeals Chamber early on held that grave breaches could only be committed in international armed conflict.⁵⁵ In order to determine whether a conflict was international or non-international, the Appeals Chamber relied on the law of state responsibility.⁵⁶ It thus made the nature of the actor and his or her relationship to the state significantly more relevant. At the same time, the Appeals Chamber seemed to lower the threshold for attributing the conduct of certain non-state actors to the state. In a departure from the rules of attribution as formulated by the International Law Commission, the Appeals Chamber

52. ICTY Statute, *supra* note 50, art. 5.

53. This requirement is separate from the jurisdictional element, also set forth in the chapeau, that an armed conflict exist at the relevant time.

54. Prosecutor v. Tadic, Case No. IT-94-I-A, Appeal Judgment, ¶ 251 (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>.

55. Prosecutor v. Tadic, Case No. IT-94-I-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 71 (Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

56. Tadic, Case No. IT-94-I-A, Appeal Judgment, ¶ 121.

held that overall control of a hierarchically-organized non-state entity may be sufficient to assimilate such an entity into a state organ, rendering all of its conduct attributable to the state.⁵⁷

The other category of war crimes included in the ICTY Statute is described simply as “[v]iolations of the laws or customs of war,”⁵⁸ essentially leaving to the judges the question of which violations of IHL would constitute war crimes.

In the *Tadic* decision, the Appeals Chamber developed a framework for analyzing which norms of IHL gave rise to individual criminal responsibility and could therefore be prosecuted before the Tribunal. The primary criteria set forth were the character of the norm itself, the severity of the violation, and the interest of the international community in its repression.⁵⁹

The Appeals Chamber also made clear in that same decision that Article 3 of the Statute potentially encompassed all of humanitarian law, including the law of non-international armed conflict. It therefore found that serious violations of Common Article 3 of the 1949 Geneva Conventions could also be prosecuted under the ICTY Statute.⁶⁰

Regardless of whether an individual is prosecuted under Article 2 or Article 3 of the Statute, the Prosecutor must demonstrate not only the existence of the requisite type of armed conflict (i.e., either international or non-international), but also a nexus between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.⁶¹ The ICTY has determined that such a nexus exists where an act is closely related to an armed conflict; i.e., if the act was committed in furtherance of an armed conflict or under the guise of an armed conflict. The ICTY has cited several factors in this determination including whether or not the perpetrator is a combatant, the victim is a member of the opposing party, the act may be said to serve the ultimate goal of a military campaign, and the crime is committed as part of or in the context of the perpetrator’s official duties.⁶²

57. *Id.*

58. ICTY Statute, *supra* note 50, art. 3

59. *Tadic*, Case No. IT-94-I-A, Appeal Judgment, ¶ 128.

60. *Id.* ¶ 137.

61. It should be noted, however, that unlike Crimes Against Humanity, war crimes need not be committed as part of a broader pattern of crimes. A single act may constitute a war crime so long as it has the requisite nexus to an armed conflict.

62. Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 59 (Feb. 22, 2001).

In light of these contextual elements, an individual's status as a state official may be relevant in establishing the commission of crimes within the Tribunal's jurisdiction. However, it has never been strictly required that an individual be a state official in order to establish that a crime within the Tribunal's jurisdiction has been committed. The question of whether an individual is a state actor has effectively been replaced with the question of whether an individual's act is sufficiently connected with a context that justifies international regulation. State affiliation is just one factor among many that may enter into that calculation.

B. The Rwanda Tribunal (ICTR)

The subject matter jurisdiction of the Rwanda Tribunal encompasses the same three categories: War Crimes, Genocide, and Crimes Against Humanity.⁶³ Significantly, however, the ICTR was established in the context of a conflict that was deemed to be internal in nature. Thus, the war crimes provisions of the ICTR Statute were limited to violations of the law of non-international armed conflict—to wit, Common Article 3 and Additional Protocol II to the 1949 Geneva Conventions. Tailored as it was to the context of an internal conflict, the subject matter jurisdiction of the Rwanda Tribunal was even less concerned with the issue of state affiliation.

At the same time, the Rwanda Tribunal has further elaborated on the nexus requirements for War Crimes and Crimes Against Humanity, and has made a number of valuable contributions to the evolving international jurisprudence on genocide.

Providing guidance as to what sort of nexus is required for Crimes Against Humanity, the Semanza Trial Chamber held that while the act does not need to be committed at the same time or place as the attack, or share the same features as the actual attack, the act must, on some essential level, form part of the attack.⁶⁴ The act does not even have to be committed against the same population as the broader attack of which it is a part.⁶⁵ However, the act must “must, by its characteristics, aims,

63. Statute of the International Criminal Tribunal for Rwanda arts. 2-4, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

64. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 326 (May 15, 2003) (providing that “[a]lthough the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack.”); cf. *Tadic*, IT-94-1-A, Appeal Judgment, ¶ 251.

65. See *Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 330 (emphasizing that although the act does not have to be committed against the same population, if it is committed against the same population, that characteristic may be used to demonstrate the nexus between the act and the attack).

nature, or consequence objectively form part of the discriminatory attack."⁶⁶

Another dimension of this nexus is found in the *mens rea* requirement for Crimes Against Humanity. Again, it is the association with a widespread or systematic overarching attack that elevates these offenses to matters subject to international regulation.

This requirement was made express by the *Bagilishema* Trial Chamber:

A mental factor specific to crimes against humanity is required to create the nexus between an underlying offence and the broader criminal context, thus transforming an ordinary crime into an attack on humanity itself.

... [T]he Accused mentally must include his act within the greater dimension of criminal conduct. This means that the accused must know that his offence forms part of the broader attack. By making his criminal act part of the attack, the perpetrator necessarily participates in the broader attack.⁶⁷

To satisfy this *mens rea* element, the defendant must be aware of the attack that makes his or her act a crime against humanity. In practice, this means that the perpetrator must have knowledge of the attack, either actual or constructive, and some understanding of the relationship between his or her acts and the attack.⁶⁸

The requisite nexus between an act and an attack is therefore established in part by proving that some aspect of the attack forms the circumstances around a certain act and makes that act part of that attack. While proving such an aspect may be assisted by demonstrating a policy, the existence of a policy is not required. In any event, all a prosecutor need ultimately prove in this regard is, that given the context and circumstances of an act, the act cannot reasonably be seen as random or isolated.

With respect to the *mens rea*, the nexus between an act and an attack is partly established through showing that the perpetrator had knowledge

66. *Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 326.

67. *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgement, ¶¶ 93–94 (June 7, 2001) (citations and paragraph numbers omitted).

68. *Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 332; *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment and sentence, ¶¶ 133–34 (May 21, 1999) (“The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act.”). Under ICTY jurisprudence, the requisite *mens rea* is satisfied if the perpetrator “took the risk that his acts were part of the attack.” (alteration in original). *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment, ¶ 102 (June 12, 2002). The Appeals Chamber in *Kunarac* made clear that the perpetrator need not know the details of the attack. *Id.*

of the attack. It need not be proven, however, that by the time the accused committed the act at issue, he or she had made the legal determination that the attack was indeed a crime against humanity.

C. The International Criminal Court (ICC)

The Rome Statute of the International Criminal Court sets forth the most comprehensive codification of international criminal law to date.⁶⁹ While the ICC, similar to the ad hoc tribunals, has jurisdiction to prosecute war crimes, genocide, and crimes against humanity, it also maintains jurisdiction to prosecute the crime of aggression, a crime that had not been included within the jurisdiction of an international court since the IMTs. The crime of aggression, however, remains undefined, and the ICC cannot prosecute this crime until the Assembly of States Parties settles upon a definition.⁷⁰

As with the ad hocs, the crimes are addressed to all individuals, but their scope is limited by contextual elements. The contextual element of importance for war crimes is armed conflict. Some of the war crimes provisions require a nexus to international armed conflict. The others require a nexus to non-international armed conflict. In addition, the Statute stipulates that “[t]he ‘Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes,’⁷¹ perhaps raising the contextual bar.

The contextual elements for Crimes Against Humanity are found in the requirement that they be committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁷² This definition is a bit broader than the definitions in the ICTY and ICTR statutes in that it does not include the jurisdictional elements of armed conflict (ICTY) or that the attack be discriminatory (ICTR). However, the Statute narrows the definition by requiring the existence of a policy. Article 7(2)(a) of the statute defines “[a]ttack directed against any civilian population” as “a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁷³

While the definition of genocide set forth in the ICC Statute does not expressly set forth contextual elements, such elements are arguably

69. Rome Statute of the International Criminal Court, *supra* note 23.

70. *See, e.g.*, Reports of the ICC Working Group on the Crime of Aggression.

71. Rome Statute of the International Criminal Court, *supra* note 23, art. 8.

72. *Id.* art. 7(1).

73. *Id.* art. 7(2)(a).

implicit in the *mens rea* requirement for the crime. In addition, the ICC Elements of Crimes sets forth as an element of the crime of genocide that the “conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”⁷⁴

Each category of crimes therefore entails contextual elements linking the particular act to a larger context that is deemed to warrant international regulation. The commission of any of these crimes arguably requires some connection to an organized power structure. In a sense, the focus on the state has been replaced with a more realistic focus on power.

At the same time, the jurisprudence of these courts continues to evolve in a way that broadens the reach of international criminal law. For example, in light of the broad nexus tests formulated for war crimes and crimes against humanity, individual perpetrators need not even be part of a particular power structure. Their conduct need only be in some way related to that power structure or its activities.

VI. CONCLUSION

The IMT, through its revival of a natural law concept in a positivist era, facilitated the transformation of the principle of individual criminal responsibility into positive law. The necessary consent of the international community was made clear in the General Assembly affirmation of the Nuremberg principles⁷⁵ and codified in the Rome Statute.

Once the individual has been deemed a subject of positive international law, the requirement of state affiliation is no longer essential to analytical coherence. The issue becomes simply whether international law should directly regulate the conduct of non-state actors—something that was traditionally left to the internal law of states.

As the non-intervention principle continues to erode and as international law penetrates more deeply into the internal sphere, the international community is faced with the question of what sorts of activities should be regulated by international criminal law. The international community and the IMT's progeny have adopted a primarily context-based approach. Thus, most international crimes are addressed to all

74. See International Criminal Court, Elements of Crimes, ICC-ASP/1/3 (Part II-B), art. 6, (Sept. 9, 2002), available at http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf.

75. G.A. Res. 95(I), U.N. Doc. A/236 (Dec. 11, 1946).

individuals, but the scope of these crimes is limited by contextual elements.

There is ultimately no requirement in modern international criminal law that a perpetrator be a state actor. The status of an individual, however, is not necessarily irrelevant. While rules of international criminal law are not addressed exclusively to state actors, whether or not a perpetrator is a state actor may be relevant in establishing contextual elements, such as whether a conflict is international for purposes of prosecuting grave breaches, or to establish the existence of a policy for the prosecution of Crimes Against Humanity under the Rome Statute. It could also be relevant for crimes that are based on the status of the victim (e.g., crimes against Prisoners of War), or in establishing certain modes of liability, such as command responsibility, which is predicated on a superior-subordinate relationship.⁷⁶

One of the strengths of international law is its dynamism—its capacity to develop in response to the changing realities of international life and the evolving values of the international community. In no other field of international law is this more visible than in the realm of international criminal law.

76. This type of relationship may be more easily established in the *de jure* hierarchy of a state's official machinery.