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## Punishment of Non-State Actors in Non-International Armed Conflict

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# Punishment of Non-State Actors in Non-International Armed Conflict

William A. Schabas

## **Abstract**

Non-State actors—like State actors—are increasingly exposed to the threat of accountability and punishment for abuses of human rights. If human rights law has shown itself to be somewhat limited with respect to non-State actors precisely because it is focused on the obligations of the State towards individuals within its jurisdiction, this is not the case when it comes to individual liability for international crimes. The broadening of the scope of the concept of “crimes against humanity” and war crimes in recent years, so as to include acts committed in time of non-international armed conflict, has been of decisive importance in this respect. As the judges at Nuremberg observed in condemning the Nazi leaders for their atrocities: “[c]rimes 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.”

# PUNISHMENT OF NON-STATE ACTORS IN NON-INTERNATIONAL ARMED CONFLICT

*William A. Schabas\**

## INTRODUCTION

Over the last half a century, international law has become increasingly involved in the regulation of non-international armed conflict or, as it is known more colloquially, civil war. In its landmark ruling on jurisdiction in the *Tadic* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) dated the origins of this phenomenon to the Spanish Civil War:

As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives.<sup>1</sup>

The Appeals Chamber went on to review the evolution of State practice with respect to the application of international law during internal conflicts — situations like the Chinese Civil War of the late 1940s. The judgment notes that such developments culminated in recognition by the International Court of Justice (“ICJ”), in the 1985 *Nicaragua* case, that certain minimum humanitarian standards apply during internal armed conflict.<sup>2</sup>

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1. See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at para. 100 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1995).

2. See *id.*, at paras. 101-02.

Nevertheless, as is the case in the related field of international human rights law, the traditional view is that these norms constitute obligations imposed upon States, not individuals. It is true that Article 29(1) of the Universal Declaration of Human Rights ("UDHR") says that "[e]veryone has duties to the community,"<sup>3</sup> and the African Charter of Human and Peoples' Rights gives some particular attention to the subject.<sup>4</sup> As a general rule, however, international human rights law addresses the question of individual responsibility only in an indirect manner, holding that States are bound to ensure respect for human rights by, for example, enacting and enforcing criminal law.<sup>5</sup> This duty is usually only implicit in the human rights instruments, with some notable exceptions: Convention on the Prevention and Punishment of the Crime of Genocide,<sup>6</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>7</sup> the

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3. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). Article 29(1) reads: "Everyone has duties to the community in which alone the free and full development of his personality is possible." *Id.* See also American Declaration on the Rights and Duties of Man, 1992, arts. XXIX-XXXVII, OAS Doc. OEA/Ser.L/V/II.23, Doc. 21, rev. 6 (1992).

4. See African Charter on Human and Peoples' Rights, 1981, arts. 27-29, OAU Doc. CAB/LEG/67/3 Rev. 5 (1981).

5. See *Velasquez Rodriguez v. Honduras*, 4 Inter-Am. C.H.R. (Ser. C) (1988); *Bautista de Arellana v. Colombia* Communication no. 563/1993, at paras. 8.3, 10, U.N. Doc. CCPR/C/55/D/563/1993 (1998); *Streletz, Kessler and Krenz v. Germany*, (34044/96, 35532/9, 44801/98) Eur. Ct. of H.R., 2001, at para. 86. See also *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, C.H.R. Res. 1998/53, ESCOR Supp. (No.3) at 175, U.N. Doc. E/CN.4/1998/53, at para. 27 (1998).

6. See Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, art. V, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*]. Article V reads:

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

*Id.*

7. See International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, art.4, 660 U.N.T.S. 195. Article 4 reads:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based

International Convention on the Suppression and Punishment of the Crime of Apartheid,<sup>8</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>9</sup> The duty to prosecute is also set out explicitly in international humanitarian law instruments. Accordingly, Article 146 of the Geneva Convention on the Protection of Civilians requires States parties “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.”<sup>10</sup>

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on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

*Id.*

8. *See* International Convention on the Suppression and Punishment of the Crime of Apartheid, Jul. 18, 1976, art. IV, 1015 U.N.T.S. 244 [hereinafter Apartheid Convention]. Article IV reads:

The States Parties to the present Convention undertake:

(a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime;

(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.

*Id.*

9. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, art. 4, 1486 U.N.T.S. 85 [hereinafter Convention against Torture]. Article 4 reads:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

*Id.*

10. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287. *See also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Oct. 21, 1950, art. 49, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition

## I. PROSECUTION OF "INTERNATIONAL CRIMES"

By and large, the obligation to investigate and prosecute concerns crimes committed within the jurisdiction of a State, that is, its territory, and as a general rule, is limited to serious crimes of violence against the person. Arguably, many of the norms that impose a duty to investigate and prosecute serious violent crimes against the person, are not only binding upon those States that have signed, ratified, or acceded to the relevant treaties, but are also obligations imposed by customary international law. These obligations are enhanced with respect to a somewhat narrower category of offenses that are sometimes described as "international crimes." The Rome Statute of the International Criminal Court ("Rome Statute") declares: "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . ."<sup>11</sup>

The concept of "international crimes" is not clarified further in the Rome Statute<sup>12</sup> or, for that matter, in any of the other relevant treaties. Rather, it is a customary international law concept, and it implies not only a duty upon a State to prosecute those crimes that take place on the territory of that State, but crimes outside the State as well. The Rome Statute gives the International Criminal Court ("ICC" or "Court") jurisdiction to prosecute three "international crimes", namely, genocide, crimes against humanity, and war crimes.<sup>13</sup> In the recent *Arrest Warrant* case, the ICJ referred to "crimes against humanity and war crimes" rather than to international crimes,<sup>14</sup> probably because there may be other "international crimes" that lack the same level of importance and do not strike at the core of fundamental human rights. The exclusionary clauses in the 1951 Con-

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of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Oct. 21, 1950, art. 50, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (IV), Oct. 12, 1950, art. 129, 75 U.N.T.S. 135.

11. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, PmbL. (1998) [hereinafter Rome Statute].

12. See *id.* art. 1.

13. See *id.* art. 5(1). See generally WILLIAM SCHABAS, INTRODUCTION TO THE ROME STATUTE (2001) (noting that while Article 5(1) contemplates possibility of prosecution for aggression, the crime itself is left undefined, and the conditions for prosecution are not specified). At present, and for the foreseeable future, the ICC is not capable of prosecuting the crime of aggression.

14. See Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.) 2002 I.C.J. 121.

vention Relating to the Status of Refugees ("Refugee Convention") seem to make a similar distinction, recognizing a category involving "a crime against peace, a war crime, or a crime against humanity," and another, almost certainly broader, category of "acts contrary to the purposes and principles of the United Nations."<sup>15</sup> Drug trafficking, for example, may be an "international crime" and "contrary to the purposes and principles of the United Nations," but it is almost certainly neither a crime against humanity nor a war crime, nor can it be said to rise to the same level of gravity.<sup>16</sup> In other words, when the Rome Statute refers to a duty to exercise criminal jurisdiction over those responsible for international crimes, it is surely referring to crimes against humanity and war crimes, but probably not to drug trafficking.

For the purposes of this discussion, the term "international crime" will be used in this narrow sense, and on the understanding that it overlaps more or less precisely with the category of crimes considered by the ICJ in the *Arrest Warrant* case, and that set out in article I(F)(a) of the Refugee Convention.<sup>17</sup> Crimes falling within this category also include genocide and apartheid, both of which are often said to be merely specific categories of the broader concept of "crimes against humanity."<sup>18</sup>

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15. See Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

16. See *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982, at paras. 59-60.

17. See Refugee Convention, *supra* n.15, art. 1(F)(a).

18. There is much authority for the view that genocide is also a crime against humanity. See generally *Apartheid Convention*, *supra* n.8 (recognizing that apartheid is a crime against humanity). See also *Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, Nov. 26, 1970, art. I, 754 U.N.T.S. 73. See also *European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes* of Jan. 25, 1974, art.1(1), Eur.T.S. No.82; Second Report on the Draft Code of Offences Against the Peace and Security of Mankind, [1984] 2 Y.B. ON H.R. 93, at paras. 28-29; Report of the International Law Commission on the Work of its Forty-Eighth Session, U.N. GAOR 51st Sess., Supp No.10, at 86, U.N. Doc. A/51/10 (1996); STEFAN GLASER, *DROIT INTERNATIONAL PÉNAL CONVENTIONNEL* 109 (1970); Yoram Dinstein, *Crimes Against Humanity*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 905 (Jerzy Makarczyk ed., 1997); Theodor Meron, *International Criminalisation of Internal Atrocities*, 89 AM. J. INT'L L. 554, 557 (1995); *Tadic*, Case No. IT-94-I-AR72, at para. 140; *Prosecutor v. Tadic*, Case No. IT-94-I-T, Opinion and Judgment, paras. 622, 655 (May 7, 1997) [hereinafter *Tadic* Opinion and Judgment 1997]; *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment, at para. 251 (Jul. 15, 1999) [hereinafter *Tadic* Judgment 1999]. See generally Report on the Situation of Human Rights in Rwanda submitted by Mr. René Degni-Segui, Special Rapporteur, under paragraph 20 of resolution S-3/1 of 25 May 1994, U.N. Doc. E/CN.4/

## II. *AUT DEDERE AUT JUDICARE AND UNIVERSAL JURISDICTION*

Recognition of a “duty to exercise criminal jurisdiction” in the case of international crimes raises a number of important questions. At a minimum, it clearly means the obligation to prosecute crimes committed on a State’s territory. But, as has already been noted, this duty exists, in any event, under various human rights treaties as well as under customary law with respect to a broad range of crimes against the person, many of which do not rise to the seriousness of “international crimes”. The duty of States resulting from international human rights law to prosecute crimes committed on their territory corresponds to another general principle of public international law by which States exercise criminal law jurisdiction over their own territory and nationals.<sup>19</sup> Louis Joinet has pointed out that “[o]n principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the[N]ation itself.”<sup>20</sup> However, “all too often national courts are not yet capable of handing down impartial justice or are physically unable to function”.<sup>21</sup> Frequently, too, they are resistant to this responsibility, usually because the authorities involved in prosecution are complicit with the perpetrators themselves. Even if it is not necessarily an element of the offence, the crimes in question — genocide, apartheid, torture, and so on — almost invariably imply State policy and involvement or, at the very least, tolerance.

Definition of an act as an “international crime,” as opposed to simply an “ordinary” crime against the person, has a number of consequences, whose objective is to facilitate prevention and punishment of the act. In the case of international crimes, there may be a duty upon States to ensure prosecution of offences committed elsewhere, should they obtain custody of a suspected offender. States guarantee that these crimes are adjudicated either by trying the accused person themselves, or by extraditing him or her to another State that is prepared to do so. This is

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1996/7, at para. 7 (1994); Report of the Committee on the Elimination of Racial Discrimination, U.N. Doc. A/52/18, at para. 159 (1997).

19. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (Ser.A) No.10, at 70 (Sept. 7).

20. See Commission on Human Rights, *Questions on Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, at para. 28, available at <http://www2.hri.ca/forther-record1997/documentation/subcommission/e-cn-sub2-1997-20.htm>.

21. See *id.*



often known by the Latin expression *aut dedere aut judicare* (literally, “extradite or prosecute”). The principle is designed to ensure that perpetrators of particularly serious crimes are brought to justice. This obligation is set out in Article 5(2) of the Convention Against Torture<sup>22</sup> and in the “grave breaches” provisions of the Geneva Conventions.<sup>23</sup> However, there is nothing similar in the Genocide Convention or the Apartheid Convention. Some writers have argued that *aut dedere aut judicare* for international crimes is also a customary norm.<sup>24</sup>

In the case of international crimes, it is also said that States must recognize that crimes committed within their own jurisdictions – that is, on their sovereign territories — may be prosecuted by other States on a basis known as “universal jurisdiction”.<sup>25</sup> This is obviously implicit in the obligation *aut dedere aut judicare*. Unlike *aut dedere aut judicare*, universal jurisdiction is rarely set out in international treaties. In the case of the Genocide Convention, for example, the drafters quite intentionally decided to exclude universal jurisdiction, and to specify that genocide should be prosecuted by the State upon whose territory the crime was committed or, alternatively, by an international court.<sup>26</sup> In 1948, at the time the Genocide Convention was drafted, States were very nervous that another State might purport to have the authority to prosecute such serious violations of human rights as genocide, committed upon their own territory. This was at the beginning of the Cold War, and they feared political mischief in various forms.

Recently, in individual opinions issued as part of the judgment in the *Arrest Warrant* case of February 14, 2002, several judges of the ICC recognized that the exercise of universal jurisdiction in the case of international crimes (*i.e.*, crimes against humanity and war crimes) was consistent with customary interna-

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22. See Convention against Torture, *supra* n.9, art. 5(2).

23. See Fourth Geneva Convention, *supra* n.10, art. 49.

24. M.CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE, THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 3-5 (1995) (on file with author).

25. See Colleen Enache-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 *MCGILL L.J.* 613, 621 (1998) (defining universal jurisdiction as principle that assumes that every State has interest in exercising jurisdiction to combat egregious offenses that States universally condemn).

26. See Genocide Convention, *supra* n.6, art. VI. See also WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 46 (2000).

tional law.<sup>27</sup> However, since several judges disagreed, it cannot be said that the question is entirely resolved.<sup>28</sup> In December 2002, an application was filed before the ICC that requires it to address the matter and, perhaps, resolve it definitively.<sup>29</sup>

The law has developed considerably over the past decade or so with respect to whether or not acts committed during non-international armed conflict are punishable as “international crimes”. Two specific questions need to be considered: the meaning of the term “non-international armed” conflict, and the acts punishable as international crimes when they are committed during non-international armed conflict.

#### A. *Non-International Armed Conflict and the Other Categories*

The distinction between international and non-international armed conflict exists because States have historically been more willing to accept obligations about the conduct of war and the treatment of victims, especially non-combatants, when the conflict is international in nature. International humanitarian law was originally concerned with reciprocal commitments between sovereign States.<sup>30</sup> At the time of the Spanish Civil War in the late 1930s, it did not really admit any particular role for international law in the case of internal conflict.<sup>31</sup> Since that time, international humanitarian law has developed more or less in parallel with the related field of international human rights law, which, from its very beginning, has addressed individuals rights *vis-à-vis* the States that have jurisdiction over them, rather than

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27. See Case Concerning Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), 2002 I.C.J. 121, at para. 59 (Feb. 15) [hereinafter Arrest Warrant Case] (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal; Dissenting Opinion of Judge Van Den Wyngaert).

28. See *id.* Separate Opinion of President Gilbert Guillaume; Individual Opinion of Francisco Rezek; and Declaration of Raymond Ranjeva.

29. See Press Release, International Court of Justice, The Republic of the Congo seizes the International Court of Justice (“ICJ”) of a dispute with France (Dec. 9, 2002), available at <http://www.nieuwsbank.nl/en/2002/12/11/r004.htm> (stating that proceedings in the case are conditional upon France consenting to jurisdiction of the Court, pursuant to Article 36 of Statute of the International Court of Justice). See also Statute of the International Court of Justice, 1978 I.C.J. Acts & Docs. 5, available at <http://www.icj-cij.org/icjwww/basicdocuments/Basetxt/istatute.htm>.

30. See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 56 (2d ed. 2000) (identifying inherently international character of humanitarian law of war).

31. This is not to say that rules of humanitarian law did not apply to non-international armed conflict. See *Tadic*, Case No. IT-94-I-AR72 at para. 33.

in the context of reciprocity that prevails generally in public international law.<sup>32</sup>

From the standpoint of positive law, the starting point is common Article 3 to the 1949 Geneva Conventions, a provision that constitutes a kind of summary codification of norms applicable in what is described as “armed conflict not of an international character.”<sup>33</sup> The minimum standards applicable in such conflicts were further developed and supplemented in Additional Protocol II to the Geneva Conventions (“Additional Protocol”), adopted in 1977.<sup>34</sup> Unlike common Article 3, the Additional Protocol attempts to define the concept of “non-international armed conflict,” applying it to armed conflicts that take place between a State’s armed forces and dissident armed forces or other organized armed groups, “which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>35</sup> It adds: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”<sup>36</sup> The Rome Statute, adopted on July 17, 1998, defines non-international armed conflicts slightly differently, as “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”<sup>37</sup>

The definition of non-international armed conflict is intricately bound up with the existence of organized non-State armed groups. These are the “non-State actors” in the title of this Article. Common Article 3 of the Geneva Conventions, at least explicitly, imposes no such requirement, but the other two instruments insist, for their application, upon the presence of “non-State actors” with a certain level of organizational capacity.

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32. See STEINER & ALSTON, *supra* n.30, at 57 (identifying interconnectedness of human rights law and international law).

33. See Geneva Convention relative to the Protection of Civilian Persons in Time of War, *supra* n.10, art. 3.

34. See Protocol Additional to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), *entered into force* Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter AP II].

35. See *id.* art.1.

36. See *id.* art. 2.

37. See Rome Statute, *supra* n.11, art. 8(2)(f).

The requirements in the Additional Protocol are somewhat higher than those of the Rome Statute, in that in the former case, the non-State actor must actually control territory. It must be “State-like,” even if it lacks all of a sovereign State’s attributes, and does not enjoy recognition by other States, or membership in international organizations.<sup>38</sup> At the low end of non-international armed conflict, the definition hinges upon the intensity of the conflict, rather than upon the level of organization or territorial control of its non-State participants.

There is a common denominator of humane conduct applicable to both international and non-international armed conflicts, as well as to circumstances that do not even rise to the threshold of non-international armed conflict — the “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” referred to in Article 1 of the Additional Protocol.<sup>39</sup> Such norms would include the prohibition of summary executions and torture, and they are as much a part of international humanitarian law, as they are of the international human rights law. They are the non-derogable norms of the major human rights treaties.<sup>40</sup> They are also norms of customary international law,<sup>41</sup> and are sometimes described as peremptory or *jus cogens* norms.<sup>42</sup>

### B. *Individual Responsibility in Non-International Armed Conflict*

What, then, is the significance of the distinction between international and non-international armed conflict, and between non-international armed conflict and riots or sporadic acts of violence, as it concerns the kind of atrocity that is prohibited under all three legal regimes? Probably the most important

38. See AP II, *supra* n.34, art. 1.

39. See *id.* art. 1(2).

40. See International Covenant on Civil and Political Rights, 1976, art. 4(2), 999 U.N.T.S. 171 [hereinafter ICCPR]. See also Convention for the Protection of Human Rights and Fundamental Freedoms, 1955, art. 15(1), 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]; American Convention on Human Rights, 1979, art. 27, 1144 U.N.T.S. 123.

41. See ICCPR, *supra* n.40. See also General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under this article 41 of the Covenant, Human Rights Committee, U.N. Doc. CCPR/C/21/Rev.1/Add.6, at para. 8 (1964).

42. See ICCPR, *supra* n.40. See also General Comment No. 29, States of emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, at para. 11 (2001).

issue, at least historically, has concerned the punishment of such acts as “international crimes.” The rapid growth and expansion of international criminal law in the past decade or so, of which the centerpieces are the ICC together with the Rome Statute, may tend to obscure the relatively underdeveloped status of this body of law for most of the second half of the twentieth century.

That certain violations of international humanitarian law might incur individual criminal liability was first established at Nuremberg, in 1946.<sup>43</sup> These “violations of the laws and customs of war” reflected prohibitions in the 1907 Convention (IV) Respecting the Laws and Customs of War By Land (“Hague Convention”),<sup>44</sup> but were also considered to form part of customary international law. Because the entire concept of legal regulation of non-international armed conflict was in its infancy, it was not considered that there could be international criminal liability for violations of humanitarian law in non-international armed conflict. In 1949, when the Geneva Conventions were adopted, certain rules concerning international criminal liability were codified. This is the “grave breach” regime, as it is known in the Conventions, and as has already been mentioned, it establishes obligations upon States to prosecute or extradite (*aut dedere aut judicare*) in the case of certain particularly serious violations. Because it was generally believed that common Article 3 was the only provision in those instruments that governed non-international armed conflict, the prevailing view was that the grave breach system simply did not apply in such cases.<sup>45</sup> In other words, there were no “international crimes” in non-international armed conflicts. Proposals to extend the grave breach system to

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43. See generally *Judicial Decisions: International Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946*, 41 AM. J. INT'L L. 172 (1947) [hereinafter *Judicial Decisions*].

44. See Convention (IV) Respecting the Laws and Customs of War by Land, Oct. 18, 1907 [1910] U.K.T.S. 9, Annex.

45. But see *Tadic*, Case No. IT-94-I-AR72 Separate Opinion of Judge Abi-Saab on the Defense Motion for Interlocutory Appeal on Jurisdiction, at para. 100 (Oct. 2, 1995) (stating that customary international law had extended application of grave breaches system to non-international armed conflict). See also *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, at para. 202 (Nov. 16, 1998). See generally *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-PT, Decision on Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the Limited Jurisdictional Reach of Articles 2 and 3 (Mar. 2, 1999); *Prosecutor v. Aleksovski*, Case No. IT-94-14/1-T, Opinion dissidente du juge Rodrigues, Président de la chambre de première instance, at paras. 44-49 (Jun 25, 1999).

non-international armed conflict were rejected by those who negotiated the Additional Protocol.

This did not mean that non-State actors, and the individuals composing them, escaped punishment. Usually, States contended that rebel groups are mere “outlaws” or “bandits,” and as such, their conduct is governed by ordinary criminal law. Many countries in the throes of civil disturbance or conflict have their jails packed with criminals claiming to be “political prisoners.” Typically, non-State actors would escape individual criminal responsibility when they were victorious, or when they were able to obtain amnesty in return for a peace agreement. In both situations, the result has been impunity. There is a long tradition of this, and still no shortage of contemporary examples, such as the Belfast Agreement of 1998<sup>46</sup> and the Peace Agreement between the government of Sierra Leone and the Revolutionary United Front (“RUF”) of Sierra Leone of 1999 (“Lomé Peace Agreement”),<sup>47</sup> that brought an end to the conflict in Sierra Leone. The recognition that acts committed by non-State actors — as well as, of course, by the States themselves and those acting on their behalf — during non-international armed conflict constitute international crimes has, despite amnesty in a peace agreement or some form of inability or unwillingness to prosecute, subjected such acts to prosecution by the courts of other States. This has been done under the principle of universal jurisdiction or the jurisdiction of an international criminal court.

But well into the 1990s, it was widely believed that there was simply no individual criminal liability — as a matter of international law — during non-international armed conflict. When the matter was litigated before the Appeals Chamber of the ICTY, in 1995, most specialists supported this view. Judge Haopei Li referred to a number of authorities on this, including Professor Theodor Meron,<sup>48</sup> the Commission of Experts appointed by the Security Council (the “Bassiouni Commission”),<sup>49</sup> and the Inter-

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46. See Agreement Reached in Multi-Party Negotiations, Apr. 10, 1998, Ir.-UK, available at <http://www.nio.gov.uk/issues/agreelinks/agreement.htm>.

47. See Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Jul. 7, 1999), available at <http://www.sierra-leone.org/lomeaccord.html>.

48. See Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 80 (1994).

49. See Final Report of 27 May 1994 of the Commission of Experts established Pursuant to Security Council Resolution 780, at 13, U.N. Doc. S/1994/674 (1992).

national Committee of the Red Cross ("ICRC").<sup>50</sup> The landmark ruling of the Appeals Chamber established that violations of the laws or customs of war could be committed in non-international, as well as international, armed conflict.<sup>51</sup> The approach of the Appeals Chamber was subsequently confirmed in the Rome Statute, which establishes subject-matter jurisdiction of the ICC over war crimes committed in non-international, as well as international armed conflicts.<sup>52</sup> Nevertheless, the lists of punishable acts are somewhat different depending upon the nature of the conflict, so it cannot be said that the distinction has lost all legal significance.

The fact that atrocities committed by non-State actors during non-international armed conflict are also punishable as offenses falling under the general rubric of crimes against humanity should not be lost sight of. But until recently, the question of whether or not crimes against humanity were punishable if committed during non-international armed conflict or in peacetime, was also subject to contention. The original definition of "crimes against humanity," established at the London Conference for the purposes of the Nuremberg Trials of the major war criminals, confined the concept to acts committed in association with international armed conflict. The Nuremberg Tribunal refused to convict the Nazis for acts committed prior to the outbreak of the Second World War, in September 1939.<sup>53</sup>

Since Nuremberg, certain types of crimes against humanity were recognized, by international treaty, as being international crimes even when committed in peacetime and therefore, *a fortiori*, during non-international armed conflict. The first of them was genocide, defined as the "intentional destruction of a national, racial, ethnic or religious group." Article 1 of the 1948 Genocide Convention specifies that it is a crime under international law "whether committed in time of peace or in time of war".<sup>54</sup> Although not spelled out, it is clearly understood that

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50. See *Tadic*, Case No. IT-94-I-AR72, Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, at para. 9 (Oct. 2, 1995).

51. See *Tadic*, Case No. IT-94-I-AR72, at paras. 128-36.

52. See Rome Statute, *supra* n.11, art. 8.

53. See *Judicial Decisions*, *supra* n.35.

54. See Genocide Convention, *supra* n.6, art. 1. Article 1 reads:

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

the Apartheid Convention and the Torture Convention both have a similar scope. Thus, as a matter of treaty law, applicable to States that have bound themselves to the relevant instruments, it has been possible to punish certain types of crime against humanity — genocide, apartheid, torture — even when committed in peacetime or during non-international armed conflict. Many would argue that these norms form part of customary international law as well, and therefore, apply even to States that have not ratified or acceded to the relevant treaties.

But in any event, until quite recently, persons charged with most of the acts punishable as crimes against humanity, could continue to refer to the Nuremberg precedents and argue that such offences were only punishable when committed during international armed conflict. To that extent, they were more or less similar in scope to war crimes. Here, too, a decisive change in the law was operated by the *Tadic Jurisdiction Decision* of the Appeals Chamber of the ICTY. It held that “[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all.”<sup>55</sup> Like the conclusion that war crimes could be committed in non-international armed conflict, this finding was also endorsed in the Rome Statute.<sup>56</sup>

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*Id.*

55. See *Tadic*, Case No. IT-94-I-AR72, at para. 141.

56. See Rome Statute, *supra* n.11, art. 7(1). Article 7(1) reads:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;



The recent non-international armed conflict in Sierra Leone provides an excellent example of the importance of recognizing that acts committed in non-international armed conflict by non-State actors are punishable as “international crimes.” Article IX of the Lomé Peace Agreement between the RUF and the government of Sierra Leone, granted a full amnesty and pardon to the participants in the conflict that had raged from March of 1991. Moreover:

[t]o consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF, ex-AFRC [Armed Forces Revolutionary Council], ex-SLA [Sierra Leone Army] or CDF [Civil Defence Forces], in respect of anything done by them in pursuit of their objectives as members of those organizations since March 1991 up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted, ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.<sup>57</sup>

Although a “moral guarantor” of the agreement, the United Nations (“U.N.”) attached a note to the document declaring that it could not recognize amnesty for serious international crimes, although it had made no similar objection in 1996 when an earlier peace agreement had been negotiated.<sup>58</sup> In January 2002, an international body, the Special Court for Sierra Leone, was established by the U.N. and the government of Sierra Leone to prosecute certain international crimes committed during the armed conflict.<sup>59</sup> Article 10 of its Statute declares: “An amnesty

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- (i) Enforced disappearance of persons;
  - (j) The crime of apartheid;
  - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

*Id.*

57. See Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art IX (Jul. 7, 1999). See generally Karen Gallagher, *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149 (2000).

58. See Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. 14 (Nov. 30, 1996).

59. See Agreement between the United Nations and the Government of Sierra Le-

granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.”<sup>60</sup> Moreover, the amnesty in the Lomé Agreement is also no obstacle to prosecution by courts of other States acting pursuant to universal jurisdiction.

It is now beyond any doubt that war crimes and crimes against humanity are punishable as crimes of international law when committed in non-international armed conflict. Non-State actors, who may be members of guerrilla movements, armed bands, and even provisional governments, are subject to prosecution on this basis. Where, for whatever reason, trials are not possible or desirable before the courts of the territory where the crimes have taken place, justice systems of other States may assume their responsibilities and prosecute on the basis of universal jurisdiction. Amnesty or some other measure of impunity applicable in the State where the crime has taken place, is no obstacle or bar to trial elsewhere. These developments in the law — most of them quite recent — mean that perpetrators of serious violations of human rights during non-international armed conflicts, including non-State actors, are far less likely to escape justice than they were in the past.

### III. DEFINING THE CRIMES: THE CASE OF SEPTEMBER 11, 2001

The principles concerning the punishment of non-State actors for offenses committed during non-international armed conflict, apply to the extent that the acts committed fall within the definitions of “crimes against humanity” and “war crimes.” This is an area where there is much room for debate. Both cate-

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one on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2002/246 (Jan. 16, 2002).

60. *Id.* art. 10. See also S. Beresford & A.S. Muller, *The Special Court for Sierra Leone: An Initial Comment*, 14 LEIDEN INT’L L.J. 635, 639 (2001). See generally Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUR. J. INT’L L. 857 (2000); Robert Cryer, *A “Special Court” for Sierra Leone?*, 50 INT’L & COMP. L. Q. 435, 437 (2001); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. FORUM 185 (2001); Avril McDonald, *Sierra Leone’s Shoestring Special Court*, 84 INT’L REV. RED CROSS 121, 125 (2002); Melron C. Nicol-Wilson, *Accountability for Human Rights Abuses: The United Nations’ Special Court for Sierra Leone*, [2001] AUSTL. INT’L L.J. 159, 163; Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT’L L. 436, 450 (2002).

gories of crimes have been defined by treaty law, the current benchmark being the provisions of the Rome Statute. In the case of crimes against humanity in particular, it is the threshold requiring that the acts be part of a “widespread or systematic attack directed against any civilian population” that poses much of the difficulty in interpretation and application. For the purposes of illustration, and because it is a matter of considerable interest at the present time, this Article examines, in detail, the terrorist acts committed on September 11, 2001. Most of the available evidence suggests the conclusion that the perpetrators are best described as “non-State actors,” even if they may have received some support and encouragement from the existing government of Afghanistan. The existence of an armed conflict is also a matter of some debate, but certainly few would argue that this was a case of *international* armed conflict, in the sense of a war between two sovereign States.

In the weeks that followed September 11, 2001, many recognized authorities in the field of international law described the attacks as a “crime against humanity.” The U.N. High Commissioner for Human Rights (“UNHCR”), Mary Robinson, used this characterization,<sup>61</sup> as did the London barrister, Geoffrey Robertson,<sup>62</sup> and the French legal academic, Alain Pellet.<sup>63</sup> In the academic literature, M. Cherif Bassiouni used the term “crimes against humanity,” but without real explanation,<sup>64</sup> while Antonio Cassese was somewhat more circumspect, observing cautiously that “it may happen that [S]tates gradually come to share this characterisation . . .”<sup>65</sup> Mark Drumbl discussed the matter without taking any real position,<sup>66</sup> implying that it was perhaps so obvious as to require no discussion, as did Nico Schrijver.<sup>67</sup>

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61. Press Release, U.N. High Commissioner of Human Rights, Statement by the High Commissioner for Human Rights to Informal One-Day Meeting of Commission on Human Rights (Sept. 25, 2001).

62. Geoffrey Robertson, *America Could Settle This Score Without Spilling Blood Across Afghanistan*, TIMES (U.K.), Sept. 18, 2001, at 18.

63. Alain Pellet, *Non ce n'est pas la guerre!*, LE MONDE, Sept. 21, 2001, at 12.

64. See M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARVARD INT'L L.J. 83, 84 (2002).

65. See Antonio Cassese, *Terrorism is Also Disputing Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 995 (2001).

66. See generally Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q. 323 (2002).

67. See N.J. Schrijver, *Responding to International Terrorism: Moving the Frontiers of International law for 'Enduring Freedom'?*, 48 NETH. INT'L L. REV. 271, 282 (2001).

Among non-governmental organizations (“NGOs”), Human Rights Watch (“HRW”) used the term “crimes against humanity,”<sup>68</sup> although the International Commission of Jurists (“ICJ”) was more hesitant and equivocal.<sup>69</sup>

Justification for the use of the term “crimes against humanity” to describe the terrorist acts of September 11th hinges on what is essentially a literal reading of the definition of “crimes against humanity” that appears in Article 7(1) of the Rome Statute, namely murder “committed as part of a widespread or systematic attack directed against any civilian population”.<sup>70</sup> It is of course true that in a literal sense, the September 11th attacks were “widespread” and “systematic,” and the victims were “civilians.” But then, this can be said of the conduct of practically any serial killer.

There is no significant judicial precedent to support such an interpretation, despite the growing body of case law giving meaning to the concept of “crimes against humanity” in a contemporary setting. Moreover, those who advocate describing terrorist acts as “crimes against humanity” must deal with the uncomfortable fact that terrorism was quite explicitly excluded from the subject-matter jurisdiction of the ICC. The Rome Statute provides that the Court will have jurisdiction over genocide, crimes against humanity, war crimes and aggression, but it does not cover terrorism. The Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (“Final Act”), adopted at the same time as the Rome Statute, notes that “terrorist acts, by whomever and wherever perpetrated, and whatever their forms, methods and motives, are serious crimes of concern to the international community” — language that implies that they ought to be included in the Rome Statute.<sup>71</sup> The Final Act then goes on to regret the fact that no definition of terrorism could be agreed upon, adding that the situation may well change when the Rome Statute

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68. See Human Rights Watch, *Human Rights News, September 11: One Year On: A Message to the Human Rights Community* (Sep. 9, 2002), available at <http://www.hrw.org/press/2002/09/sept11.htm>.

69. See Roderico Andreu-Gueran, *Terrorisme et droits de l'homme*, [2002] REV. INT'L COMM'N OF JURISTS 31, 35. See also U.N. Doc. A/CONF.183/C.1/L.27.

70. Rome Statute, *supra* n.11, art. 7(1).

71. See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Res. E, U.N. Doc. A/CONF.183/10 (Jul. 17, 1998) [hereinafter Final Act].

is reviewed seven years after its entry into force.<sup>72</sup> In its final statement at the Rome Conference, Turkey lamented the fact that terrorist crimes “were not covered by the Statute.”<sup>73</sup>

The exclusion of terrorism from the Rome Statute is perhaps not as serious an obstacle as it may seem, however. Although “terrorism” is a concept that has eluded definition, there can be no doubt that acts that may terrorize civilian populations in order to achieve political objectives may also, in specific circumstances, constitute crimes against humanity, or war crimes, or for that matter, genocide. There is undoubtedly an overlap. But this does not mean that terrorist acts are, by definition, crimes against humanity merely because they may appear to be “widespread” or “systematic” attacks on civilian victims. There is something profoundly unsatisfying about legal constructions that are rooted in literalism and that have no precedent among judicial authorities. Progressive jurists tend to eschew literal interpretation in favor of a purposive or teleological approach, aimed at the true intent of the drafters of the legislation, rather than some unpredictable technical result that may fly in the face of what the provision was meant to say.

The problem with the literal approach to crimes against humanity that is proposed by some jurists, is that while it may catch the events of September 11th, it leaves the concept with indeterminate parameters and virtually impossible to distinguish from other “terrorist” acts of lesser magnitude, such as the release of sarin gas in the Tokyo subway, the bombings in the Paris metro, IRA bomb attacks in the City of London or at Canary Wharf,<sup>74</sup> or the destruction of the federal office building in Oklahoma City by a few right wing eccentrics.

Until recently, it was generally agreed that crimes against humanity required a “State policy” component, and this would probably have been enough to exclude the events of September 11th from the ambit of “crimes against humanity.” This was how “crimes against humanity” were originally conceived of when the

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72. *See id.*

73. *See* THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 629 (Roy Lee ed., 2000).

74. *See* Dovydas Vitkauskas, *The Role of Security Intelligence Service in a Democracy, North Atlantic Treaty Organization: Democratic Institution Fellowships Programme 15* (June 15, 1999), available at <http://www.nato.int/acad/fellow/97-99/vitkauskas> (providing list of prominent terrorist attacks in 1990s).

term was first coined for the Nuremberg trial of the major war criminals. For example, in 1994, in one of the major national prosecutions for crimes against humanity, *R. v. Finta*, the majority of the Supreme Court of Canada relied upon expert witness M. Cherif Bassiouni, who had testified that “[S]tate action or policy’ was a pre-requisite legal element of crimes against humanity,”<sup>75</sup> a view that seemed to be common ground even for the dissenters.<sup>76</sup>

But the law was already changing, and in 1997, a Trial Chamber of the ICTY held that “crimes against humanity” required “a governmental, organizational or group policy” rather than the narrower ‘[S]tate policy.’”<sup>77</sup> The Trial Chamber relied upon the views of the International Law Commission, which had greatly broadened the scope of crimes against humanity when it gave them an essentially negative definition, stating that this was driven by “the desire to exclude isolated or random acts.”<sup>78</sup> But focusing on this negative aspect can lead to absurd results, such as the inclusion of individual serial killers. In any event, the Trial Chamber limited the scope of “crimes against humanity by invoking the “policy” requirement, which, it must be said, had never been part of the literal definition of “crimes against humanity.” At the very least, this expansion of the definition made it applicable to certain “non-State actors.”

The specific problem faced by the Trial Chamber of the ICTY in *Tadic*, was qualification of acts of “ethnic cleansing” carried out in furtherance of the Bosnian Serb entity that ruled over parts of Bosnia and Herzegovina from April 1992.

According to the Trial Chamber:

An additional issue concerns the nature of the entity behind the policy. The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy “because their commission requires the use of the State’s institutions, personnel and resources in order to com-

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75. See *R. v. Finta*, [1994] 1 S.C.R. 701, 760-64. See also M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY* 243-81 (2d rev. ed., 1999).

76. See *id.* at 773.

77. See *Tadic* Opinion and Judgment 1997, *supra* n.18, at para. 645.

78. See *id.* at para. 648.

mit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nuremberg Charter].” While this may have been the case during the Second World War, and thus the jurisprudence followed by courts adjudicating charges of crimes against humanity based on events alleged to have occurred during this period, this is no longer the case. As the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the offences. In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory. The Prosecution in its pre-trial brief argues that under international law, crimes against humanity can be committed on behalf of entities exercising *de facto* control over a particular territory but without international recognition or formal status of a “*de jure*” State, or by a terrorist group or organization. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity.<sup>79</sup>

As an authoritative statement of the law, this paragraph still leaves some ambiguity. The judges declare that “the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory,” indicating that the entity must be “State-like.” Then, however, they cite the Prosecutor’s view that this might extend to “a terrorist group or organisation,” a view apparently unchallenged by the Defence. But an ephemeral reference to submissions by the Prosecutor is hardly a firm precedent. And, absent this puzzling sentence in the *Tadic* judgment, there is little else in the way of judicial authority upon which to anchor the contention that terrorist acts like those of September 11th constitute crimes against humanity.

The approach of the Trial Chamber in *Tadic* was confirmed a year later at the Rome Conference, when delegates agreed to include within the text of the definition of “crimes against humanity” a reference to the policy element. Paragraph 7(2)(a) of

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79. See *id.*, at para. 654.

the Rome Statute states that the words “attack directed against any civilian population,” which are part of the opening words of the definition of “crimes against humanity,” “means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>80</sup> The Elements of Crimes and Rules of Evidence and Procedure, adopted subsequent to the Rome Conference in order to provide greater clarification and specificity to the definitions, wrestle with the issue of State or organizational policy, but do nothing to clarify whether this might extend to a group like Al-Qaeda.

In a rather surprising judgment, the Appeals Chamber of the ICTY has ruled recently that no plan or policy is required as an element of the definition of “crimes against humanity.”<sup>81</sup> The judges stated that “[t]here was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes,” adding in a footnote that “[t]here has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity.”<sup>82</sup> There is no mention in the judgment of the “plan” requirement in Article 7 of the Rome Statute. One would have expected the judges to at the very least address this anomaly. Perhaps the reference to customary law “at the time” the acts were committed is meant to suggest that the Court considers plan or policy to be a requirement now, even if it was not in the early 1990s.

The best that can be said is that the situation is far from clear. It is certainly rather facile to rely upon a literal application of the words “widespread or systematic” so as to subsume the terrorist acts of September 11th within the ambit of “crimes against humanity.” Despite the recent ruling of the Appeals Chamber, there is much support for the view that historically, crimes against humanity required an ingredient of State policy, and that this was later extended to cover atrocities by “State-like”

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80. See Rome Statute, *supra* n.11, art. 7(2)(a).

81. See Prosecutor v. Kumarac, *et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, at para. 98 (June 12, 2002).

82. See *id.* at para. 98, n.114.



entities is beyond dispute. As a Trial Chamber of the ICTY wrote: “[t]he need for crimes against humanity to have been at least tolerated by a State, government or entity is also stressed in national and international case-law. The crimes at issue may also be State-sponsored, or at any rate, may be part of a governmental policy or of an entity holding *de facto* authority over a territory.”<sup>83</sup> Whether crimes against humanity also reach into the vast realm of crimes that are more than “random or isolated acts” committed by organized groups like Al-Qaeda,<sup>84</sup> the Red Brigades,<sup>85</sup> the Baader-Meinhof gang,<sup>86</sup> the Irish Republican Army,<sup>87</sup> the Ulster Volunteer Force,<sup>88</sup> and for that matter — why not? — the Hell’s Angels, can hardly be considered to be settled as a matter of law.

The very reason why the concept of crimes against humanity was originally developed at Nuremberg, was so that atrocities that went unpunished by the judicial authorities of the State in question would not escape prosecution. Mass murder of the disabled, or of the Jews and the Gypsies, might have been cloaked in some bizarre legality within Germany, but pursuant to the Nuremberg Charter, these acts would not go unpunished. This continues to be the case with respect to crimes conducted as part of a State policy, or the policy of a “State-like” entity like the Republika Srpska (Serbian Republic), or the Revolutionary Armed Forces of Colombia (“FARC”)<sup>89</sup>-controlled zones in cen-

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83. See Prosecutor v. Kupreskic, *et al.*, Case No. IT-95-16-T, Judgement, at para. 552 (Jan. 24, 2000).

84. See U.S. Dep’t of State, *Appendix B: Background Information on Terrorist Groups* (Apr. 30, 2001), available at <http://www.state.gov/s/ct/rls/pgtrpt/2000/2450.htm> [hereinafter *Terrorist Group Information*].

85. See *Red Brigades: Brigade Rosse*, available at [http://www.ict.org.il/inter\\_ter/orgdet.cfm?orgid=36](http://www.ict.org.il/inter_ter/orgdet.cfm?orgid=36) (describing group as Marxist-Leninist whose aim is separation of Italy from Western Alliance). It is an ultra-Leftist group that left its mark on the Italian political scene in the 1970s and 80s. *Id.*

86. See *Red Army Faction (“RAF”): Baader-Meinhof Gang*, available at [http://www.ict.org.il/inter\\_ter/orgdet.cfm?orgid=35](http://www.ict.org.il/inter_ter/orgdet.cfm?orgid=35) (stating that RAF was born out of student protest movement in the 1960s). It emerged from the Baader-Meinhof Gang and its ideology was based on a commitment to violence in the service of the class struggle. *Id.*

87. See *Terrorist Group Information*, *supra* n.84 (describing Irish Republican Army (“IRA”) as Marxist terrorist group formed in 1969 as clandestine armed wing of Sinn Féin, the political movement dedicated to removing British forces from Northern Ireland and unifying Ireland).

88. See BBC, *Paramilitaries: Ulster Volunteer Force*, available at <http://www.bbc.co.uk/history/war/troubles/factfiles/uvf.shtml> (stating that Ulster Volunteer Force (“UVF”) was formed in 1966 to combat rise in Irish nationalism).

89. See *Terrorist Group Information*, *supra* n.84 (describing FARC as the largest, best-trained, and best-equipped insurgent organization in Colombia). Established in 1964

tral Colombia. But it is hardly a problem with respect to genuine terrorist groups, where the justice systems of the States, whose populations are targeted, are more than eager to prosecute. As a general rule, the problem with contemporary terrorist groups is apprehending the perpetrators, and not with finding some legal framework by which the courts of the territory where the crimes were committed may prosecute.

The enthusiasm of human rights lawyers for the “crimes against humanity” qualification in the aftermath of September 11th is probably explained by two factors. First, there was quite a legitimate revulsion at the military response proposed by Washington and many felt that if a strong case could be made for criminal prosecution, this would answer arguments by which bombing Afghanistan was the way to bring Al-Qaeda to justice. But the very compelling argument that criminal prosecution was preferable to military attack, does not at all require that the terrorist acts be described as “crimes against humanity.” Murder in Manhattan can be prosecuted under both State and federal law, and it is subject to the most supreme of penalties. Indeed, a prosecutor in New York City would see little benefit in an indictment for crimes against humanity, with its complex thresholds and contextual elements, when 2,900 charges of murder would be more than enough to do the trick, and far easier to prove.

Second, as U.S. opposition to the ICC continued to accelerate, there was a sense that highlighting the new dynamism of international criminal justice might help the American public opinion to evolve in a positive direction. Recognizing that the ICC could not itself fill the gap as the Rome Statute can only cover acts subsequent to its entry into force (which took place on July 1, 2002), some went so far as to call for the establishment of a new international tribunal.<sup>90</sup> This would, of course, have been an option, but it would also have required a decision by the Security Council, and that is tantamount to saying that it could only be created if this was the desire of the U.S. government.

Even if the ICC had been in operation, and even if the United States had been a State Party to the Rome Statute, the Court could never have been the forum for prosecution of the

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as a guerrilla army, FARC is organized along military lines and includes several urban fronts. *Id.*

90. *See* Rome Statute, *supra* n.11, art. 11(1).

September 11th terrorists. That is because the Rome Statute only allows the ICC to exercise its jurisdiction when those States that normally exercise criminal jurisdiction over a crime, are either unwilling or unable to proceed.<sup>91</sup> And never has a justice system been more willing and more able to act than in the present case.

The suggestion that international justice would be preferable because it would be impossible for Al-Qaeda terrorists to get a fair trial within the United States, should not be entertained. Like all justice systems, that of the United States is not without serious problems. But in terms of fairness and the rights of the defense, it stands up rather well against its competitors. There can be little doubt that terrorists accused before the State or federal courts in New York City would be provided with all of the basic guarantees of a fair trial set out in such international standards as Article 14 of the ICCPR.<sup>92</sup>

Advocates of describing the September 11th events as “crimes against humanity” sometimes argue that the text of Arti-

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91. *See id.* art. 17(1)(a).

92. *See* ICCPR, *supra* n.40, art. 14. Article 14 reads, in relevant part:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law . . .

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

*Id.*

cle 7 of the Rome Statute should be interpreted broadly and flexibly. In this way, unclear cases, like the Twin Towers attacks, are to be made to fit within the definition. These advocates have obviously forgotten the terms of Article 22(2) of the Rome Statute, which reads: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."<sup>93</sup> But aside from concerns about fairness to the accused, supporters of the ICC should consider the damage that an excessively liberal interpretation may do to the ratification campaign. Concern about a "flexible" interpretation of the definition of "crimes against humanity" are surely very much in the minds of the many States who have signed the Rome Statute, but hesitated at ratification.

To summarize, while a literal reading of the definition of "crimes against humanity" may plausibly be considered to catch the September 11th atrocities, a purposive and contextual construction provides considerable support to the contrary view. Certainly, there is no particular legal interest in describing them as "crimes against humanity." Attempts to stretch the definition so as to encompass these criminal acts may actually discourage ratification of the Rome Statute. The terrorist acts of September 11th constitute murder on a mass scale, punishable as an ordinary crime by the courts of the United States. Never in human history has a State been more willing and able to prosecute than in the case of the September 11th attacks. There is no need to bring to bear the emerging body of international law that has developed in order to address impunity when the State where the crimes took place is unwilling or unable to prosecute. Indeed, efforts to encompass terrorist crimes, like the attack on the World Trade Center, may ultimately distort and damage the campaign against impunity.

### CONCLUSION

Non-State actors — like State actors — are increasingly exposed to the threat of accountability and punishment for abuses of human rights. If human rights law has shown itself to be somewhat limited with respect to non-State actors precisely because it is focussed on the obligations of the State towards indi-

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93. See Rome Statute, *supra* n.11, art. 22.2.

viduals within its jurisdiction, this is not the case when it comes to individual liability for international crimes. The broadening of the scope of the concept of “crimes against humanity” and war crimes in recent years, so as to include acts committed in time of non-international armed conflict, has been of decisive importance in this respect. As the judges at Nuremberg observed in condemning the Nazi leaders for their atrocities: “[c]rimes 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.”<sup>94</sup>

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94. See *Judicial Decisions*, *supra* n.43.