

The Challenges of Prosecuting Non-State Actors Under the International Criminal Law

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Abstract

There is an increasing rate of violence in the 21st century in the international arena from terrorism to war crimes to crimes against humanity. Not limited to only state actors, the perpetrators of such violence are much contributed by the non-state actors too. Non-state actors including terrorist groups, rebel factions, and private militias allies of many unrecognized communities across the globe. Prosecution of such non-state actors under International criminal law invites a lot of legal, logistical, procedural, jurisdictional, and ethical challenges, much impacting the efforts of peace and justice globally. This article thus analyses such obstacles found in the existing legal frameworks like Rome statute and customary international law. Also, with participatory veneration, the article highlights the need for a reinforced international legal framework ensuring both the accountability of non-state actors as well as cooperative mechanisms to mitigate prosecution challenges.

Keywords: Non-state actors, ICC, Rome Statue, Prosecution, Accountability, War crime, Jurisdiction

Introduction

International Criminal Law (ICL) has long served as a cornerstone for pursuing accountability for perpetrators of war crimes, crimes against humanity, and genocide.^{1 2} However, the emergence of non-state actors as significant contributors to international crimes presents profound challenges to the existing legal framework.³⁴⁵ This article also examines the prosecution of leaders from non-state actors such as the Lord's Resistance Army (LRA), Hamas, Al-Qaeda, and paramilitary groups involved in the Colombian conflict to illustrate the practical difficulties of applying ICL to non-state entities.⁶⁷

The rise in non-state actors involved in conflicts and crimes impacting international peace and human rights has shifted the focus of International Criminal Law from state-centric to non-state

¹ The Title is: Resource Library, 2023

² Rome Statute of the International Criminal Court, 2023

³.d'Aspremont et al., 2015

⁴ Jain, 2013

⁵ D'Alessandra & Sutherland, 2021

⁶ Poecke et al., 2021

⁷ The Challenges of Prosecuting Non-State Actors under the International Criminal Law, n.d., Heffes, 2015

perpetrators.⁸ Non-state actors, such as armed insurgent groups, terrorist organizations, and transnational criminal networks, operate across borders and exploit jurisdictional gaps, challenging traditional

frameworks of accountability.⁹¹⁰ This paper examines the challenges of prosecuting non-state actors under International Criminal Law and provides recommendations for reform.

I. Defining Non-State Actors in International Criminal Law

Non-state actors are individuals or entities that do not operate under the legal or political framework of any state.¹¹ This category includes armed rebel groups, terrorist organizations, transnational corporations, and private military companies. In the context of ICL, these actors may be involved in the perpetration of war crimes, genocide, crimes against humanity, or terrorist acts.¹²¹³ One of the primary challenges in prosecuting non-state actors lies in the ambiguity surrounding their legal status. International law has traditionally focused on the responsibility of states and their officials, while non-state actors often operate in a legal grey area¹⁴¹⁵. The lack of a consistent legal framework addressing their actions complicates efforts to prosecute them under ICL. International criminal tribunals and national courts often face jurisdictional hurdles when dealing with non-state actors.¹⁶ These actors may operate transnationally or within failed states, where there is no clear authority to enforce international law.¹⁷¹⁸ Moreover, the principle of state sovereignty often limits the ability of international institutions to intervene in internal conflicts where non-state actors are involved.¹⁹ Despite these challenges, there has been a growing recognition of the need to hold non-state actors accountable for international crimes^{202122 23}.

Jurisdictional and Procedural Issues- The ICC, established under the Rome Statute, has jurisdiction over individuals accused of genocide, war crimes, crimes against humanity, and crimes of aggression²⁴. However, the ICC's jurisdiction is limited to state parties, which creates a challenge when

⁸ Cullen, 2008

⁹ The Challenges of Prosecuting Non-State Actors under the International Criminal Law, n.d.

¹⁰ Violent Non-State Actors and National and International Security, 2023

¹¹ Ibid.

¹² ICRC Engagement with Non-State Armed Groups," 2020

¹³ Hofmann & Schneckener, 2011

¹⁴ d'Aspremont et al., 2015

¹⁵ Violent Non-State Actors and National and International Security, 2023

¹⁶ Ibid.

¹⁷ "Introduction: National Prosecutions of International Crimes: Sentencing Practices and (Negotiated) Punishments," 2019

¹⁸ Ingadóttir, 2011

¹⁹ Couzigou, 2014

²⁰ Atzili, 2010

²¹ Farmer, 2013

²² Henriksen, A., 2023

²³ Tsagourias, 2016

²⁴ Smith, A., Lindsay, R. and Cutler, B. (2014)

prosecuting non-state actors operating in non-member states.²⁵ Additionally, the ICC can only exercise jurisdiction when national courts are unwilling or unable to prosecute²⁶. In the case of non-state actors, national courts may be incapable of apprehending and prosecuting such individuals, particularly in conflict

zones or failed states. Universal jurisdiction allows states to prosecute individuals for international crimes regardless of where the crime occurred or the perpetrator's nationality.²⁷²⁸ While this principle theoretically enables the prosecution of non-state actors, its application is limited by political considerations, resource constraints, and diplomatic relations. Furthermore, non-state actors frequently evade capture, which further undermines efforts to prosecute them under universal jurisdiction.²⁹ The doctrine of command responsibility holds leaders accountable for the actions of their subordinates if they knew or should have known about the commission of international crimes.³⁰³¹³² While this doctrine is well-established in the context of state actors, applying it to non-state actors, particularly those with diffuse and decentralized command structures, is more complex.³³³⁴ Rebel groups and terrorist organizations often operate with fluid hierarchies, making it difficult to identify and prosecute leaders under the command responsibility doctrine.³⁵³⁶

Evidentiary and Investigative Challenges- Investigating crimes committed by non-state actors often poses significant challenges, particularly in conflict zones.³⁷ Gathering evidence in such environments is fraught with risk, and non-state actors are adept at covering their tracks.³⁸ Moreover, non-state actors often operate outside formal state structures, making it difficult to access witnesses or documentation that can corroborate claims of international crimes.³⁹ The admissibility of evidence is another challenge in prosecuting non-state actors.⁴⁰ Evidence collected in conflict zones may not meet the high standards required by international criminal tribunals, particularly if it was obtained through unconventional means or under coercion. This raises concerns about the fairness of trials and the protection of due process rights for the accused.⁴¹ Non-state actors, particularly terrorist organizations,

²⁵ Ibid.

²⁶ Universal Jurisdiction in Europe: The State of the Art, 2006

²⁷ The Princeton Principles on Universal Jurisdiction, 2001

²⁸ Yee, 2011

²⁹ Gilbert & Rüsche, 2014

³⁰ Danner, 2005

³¹ Stewart, 2012

³² Jain, 2013

³³ Slidregt, 2016

³⁴ Ibid.

³⁵ Stewart, 2012

³⁶ Berster, 2010

³⁷ Johnston et al., 2023

³⁸ Hunton, 2011

³⁹ Grace, 2014

⁴⁰ Ponte, 2006

⁴¹ D'Alessandra & Sutherland, 2021

often maintain significant power and influence in the regions where they operate, making witnesses reluctant to testify due to fear of reprisals. Ensuring witness protection is critical, but it can be extremely difficult in areas where the rule of law is weak or non-existent.⁴²

Enforcement Challenges- One of the most significant challenges in prosecuting non-state actors is the

lack of effective enforcement mechanisms.⁴³ Even when international criminal tribunals issue indictments or arrest warrants, enforcing them in regions controlled by non-state actors is exceptionally difficult. Non-state actors often operate in areas beyond the reach of international law enforcement, making it challenging to apprehend and bring them to trial.⁴⁴ The effectiveness of international criminal prosecutions often hinges on the cooperation of states. However, states may be unwilling or unable to cooperate in the arrest and prosecution of non-state actors, particularly when these actors serve a political or strategic purpose. Some states may also harbor non-state actors as proxies, further complicating international efforts to hold them accountable.⁴⁵

Political and Diplomatic Implications- Prosecuting non-state actors under ICL is not only a legal challenge but also a political one. Many non-state actors, particularly armed groups and rebel movements, are involved in broader political struggles, and prosecuting their leaders may have significant diplomatic consequences.⁴⁶ States may be reluctant to support international prosecutions that could destabilize a region or derail peace negotiations.⁴⁷

Moreover, the prosecution of non-state actors may be perceived as selective or biased, particularly if it targets one side in a conflict. This can undermine the legitimacy of international tribunals and fuel perceptions of victor's justice.⁴⁸

Potential Avenues for Reform- One potential solution to the challenges of prosecuting non-state actors is to strengthen international legal frameworks. This could involve expanding the jurisdiction of the ICC or creating new international instruments specifically designed to address the actions of non-state actors.⁴⁹ Another avenue for reform is to improve mechanisms for state cooperation in the arrest and prosecution of non-state actors.⁵⁰ This could involve increased diplomatic pressure on states that harbor or support non-state actors, as well as enhanced international

⁴² Ibid.

⁴³ Monterosso, 2022

⁴⁴ Naarden & Locke, 2004

⁴⁵ Johnston et al., 2023

⁴⁶ Heffes, 2015

⁴⁷ Jo & Simmons, 2016

⁴⁸ Rodman, 2016

⁴⁹ Sarkin, 2020

⁵⁰ Reike, 2014

coordination in law enforcement efforts.⁵¹ Ultimately, efforts to hold non-state actors accountable under ICL must be accompanied by broader efforts to address the root causes of non-state violence, including political instability, economic inequality, and human rights abuses.⁵²

Challenges in Prosecuting Non-State Actors- Non-state actors often operate transnationally, moving between jurisdictions and exploiting territories without effective governance. This fluidity challenges the ICC and domestic courts, which rely on jurisdiction over specific territories or nationalities for prosecution.⁵³ Collecting evidence in conflict zones or areas controlled by non-state actors is a daunting task. Often, there is a lack of reliable documentation, and witnesses may be unwilling or unable to testify due to safety concerns.⁵⁴ The admissibility of evidence collected through unconventional means can also

be problematic in international trials. Many states harbor or tacitly support non-state actors for political or strategic reasons, impeding international efforts to prosecute them.⁵⁵ Such actors are often shielded by state allies or entities with vested interests, complicating extradition requests and diminishing international cooperation.⁵⁶ The prosecution of powerful non-state groups entails serious security risks for judicial staff, witnesses, and victims. Non-state actors may resort to threats or violence to obstruct proceedings, undermining the integrity and safety of judicial processes. Even when international courts issue arrest warrants, enforcing these against non-state actors proves difficult.⁵⁷ Unlike states, non-state actors have no formal obligations under international treaties, making it challenging to execute judgments without state cooperation.⁵⁸

II. The Legal Framework for Non-State Actors in International Law

The Rome Statute established the ICC as a permanent court to prosecute crimes of genocide, war crimes, crimes against humanity, and aggression. However, it lacks a direct mechanism for prosecuting non-state actors unless their actions meet these crimes' specific criteria.⁵⁹ Additionally, the ICC's jurisdiction is limited to states that have ratified the Rome Statute, allowing non-state actors in non-signatory countries to evade prosecution. International humanitarian law, especially the Geneva Conventions, recognizes obligations for both state and non-state actors in armed conflicts.⁶⁰ The conventions and customary international law impose constraints on non-state actors, especially in

⁵¹ Johnston et al., 2023

⁵² Roccatello & Suma, 2021

⁵³ Hignett, 2021

⁵⁴ James & Gladyshev, 2016

⁵⁵ Ponte, 2006

⁵⁶ Johnston et al., 2023

⁵⁷ Samuel et al., 2012

⁵⁸ Weatherall, 2023

⁵⁹ Rome Statute of the International Criminal Court, 2023

⁶⁰ Lake, 2014

terms of protecting civilians.⁶¹ Yet, enforcement mechanisms remain weak, particularly when non-state actors refuse to recognize or adhere to these norms. The UNSC holds significant power in addressing crimes committed by non-state actors, through ad hoc tribunals like those for the former Yugoslavia and Rwanda. However, the UNSC's capacity is often hindered by political interests and veto power, leading to selective and inconsistent justice.⁶²

Relevant Articles from the Rome statute- not supporting prosecution of Non-state actors.

The Rome Statute of the International Criminal Court (ICC)⁶³ primarily focuses on prosecuting individuals for crimes such as genocide, war crimes, crimes against humanity, and the crime of aggression. While it applies to individuals (both state and non-state actors), its limitations in prosecuting non-state actors stem from jurisdictional and structural provisions. Below are the relevant articles that indirectly or directly do not support the prosecution of non-state actors:

Article 12: Preconditions to the Exercise of Jurisdiction⁶⁴: This article limits the ICC's jurisdiction to crimes committed:

- On the territory of a State Party or
- By a national of a State Party.

Limitation: Non-state actors operating in states that are not parties to the Rome Statute are outside the ICC's jurisdiction unless a situation is referred to the ICC by the United Nations Security Council (UNSC) or the concerned state accepts the court's jurisdiction under Article 12(3).

Article 13: Exercise of Jurisdiction⁶⁵: The ICC can exercise jurisdiction if:

- A State Party refers the case,
- The UNSC refers to the case under Chapter VII of the UN Charter, or
- The Prosecutor initiates an investigation in a State Party's territory or involving its nationals.

⁶¹ International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Excerpt of the Report Prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent Geneva, December 2003,

⁶² Lentner, 2020

⁶³ Rome Statute of the International Criminal Court, 2023

⁶⁴ Ibid.

⁶⁵ Ibid.

Limitation: The ICC cannot act against non-state actors operating in states that are not parties to the Rome Statute unless referred by the UNSC. Such referrals are subject to political dynamics and often vetoed, as seen in conflicts like Syria and Sudan.

Article 15: Prosecutor's Initiation of Investigation⁶⁶: The Prosecutor may initiate investigations *proprio motu* (on their own accord) if crimes appear to have been committed, subject to Pre-Trial Chamber approval.

Limitation: Even though the Prosecutor can act independently, investigations are limited to states that fall under the ICC's jurisdiction, which often excludes territories where non-state actors operate extensively.

Article 17: Issues of Admissibility⁶⁷: The ICC can only intervene when a state is unwilling or unable to prosecute.

Article 17(1)(a)⁶⁸: The ICC will find a case inadmissible if it is being investigated or prosecuted by a state unless the state is genuinely unwilling or unable to carry out the prosecution. The limitation here is that the States often assert their sovereignty and claim to be prosecuting non-state actors domestically, even if these efforts are insufficient or politically motivated. This restricts the ICC's ability to step in directly.

Article 25: Individual Criminal Responsibility⁶⁹: This article establishes criminal responsibility for individuals, regardless of whether they are state or non-state actors.

Article 25(3)⁷⁰: Limits liability to individuals who participate in crimes as perpetrators, accomplices, or planners.

Limitation: The ICC does not hold organizations or groups accountable but rather focuses on individuals. This framework does not directly address the collective nature of crimes committed by non-state actors as groups (e.g., terrorist organizations).

Article 27: Irrelevance of Official Capacity⁷¹: This article ensures that state officials cannot invoke

immunity as a defense.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

Article 27(1)⁷²: Official capacity as a head of state or government does not exempt an individual from responsibility.

Limitation: Non-state actors, who often lack "official capacity," cannot benefit from immunity protections, but this article does not explicitly empower the ICC to prosecute them unless they meet other jurisdictional criteria.

Article 98: Cooperation concerning Waivers of Immunity and Consent to Surrender:⁷³ This article prohibits the ICC from requesting a state to surrender an individual without the consent of a third state, especially when immunity agreements exist.

Limitation: If non-state actors operate under the protection of states or have agreements with them, this article can delay or prevent their prosecution by requiring third-party consent for surrender or extradition.

III. Case Studies

This section will examine specific case studies, including the prosecution of leaders from non-state actors to illustrate the practical challenges of applying international criminal law to non-state actors.

The Prosecution of War Crimes by Non-State Actors in Syria: The ICC and other international bodies have faced significant difficulties in addressing crimes by non-state actors in Syria. The complex web of actors and lack of cooperation from the Syrian state has hampered prosecutions, highlighting the need for a multilateral approach to address such scenarios.⁷⁴⁷⁵⁷⁶⁷⁷⁷⁸

Al-Shabaab and the International Justice System: Attempts to prosecute Al-Shabaab [Harakat al-Shabaab al-Mujahideen] operatives for terrorism and war crimes illustrate the

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Sweeney, 2019

⁷⁵ Mehra, 2023

⁷⁶ KA, 2018

⁷⁷ Schaack, 2019

⁷⁸ Wenaweser & Cockayne, 2023

jurisdictional limitations and security risks. Most prosecutions have taken place in national courts, where evidence collection and witness protection remain key concerns.⁷⁹⁸⁰⁸¹⁸²⁸³⁸⁴⁸⁵

Boko Haram and Transnational Justice Efforts: The challenges of prosecuting Boko Haram [Jamā'at Ahl as-Sunnah lid-Da'wah wa'l-Jihād] in both Nigeria and the ICC emphasize the need for better regional

cooperation and resource allocation. Although Boko Haram's crimes are documented, insufficient resources and jurisdictional limits impede the establishment of accountability.⁸⁶⁸⁷⁸⁸⁸⁹⁹⁰⁹¹

The Lord's Resistance Army (LRA): Joseph Kony's indictment by the ICC in 2005 marked a significant step toward accountability for non-state actors. However, despite international warrants, Kony remains at large, highlighting the difficulty of apprehending leaders operating in remote, unstable regions. The reliance on regional military forces and the lack of sustained international efforts have further hindered his prosecution.⁹²⁹³⁹⁴⁹⁵

Al-Qaeda: As a transnational terrorist organization, Al-Qaeda epitomizes the challenges of prosecuting non-state actors. Its decentralized structure and global reach complicate efforts to hold leaders accountable under ICL. The absence of a unified international strategy to address terrorism under criminal law has resulted in fragmented prosecutions, often limited to domestic jurisdictions.⁹⁶⁹⁷⁹⁸⁹⁹

Colombian Paramilitary Groups: Paramilitary leaders in Colombia have been implicated in widespread atrocities during the country's decades-long conflict. The Justice and Peace Law (2005) sought to balance prosecution with reintegration and truth-telling, but many perpetrators received

⁷⁹ Brouwer et al., 2020,

⁸⁰ No Justice, No Peace: Al-Shabaab's Court System, 2023

⁸¹ Betti, 2006

⁸² Udombana, 2006

⁸³ Rankin, 2017

⁸⁴ Hathaway et al., 2019

⁸⁵ Liss, 2019

⁸⁶ Ike, 2018

⁸⁷ Badar et al., 2014

⁸⁸ Nigeria, 2023

⁸⁹ Nigeria: Willingly Unable: ICC Preliminary Examination and Nigeria's Failure to Address Impunity for International Crimes, 2021

⁹⁰ Hummel, 2023

⁹¹ Okunade & Ogunnubi, 2020

⁹² Information on the Kony Case, 2024

⁹³ Demmers & Gould, 2018

⁹⁴ Kony's Message: A New Koine? 1999

⁹⁵ UGANDA: US Backs Hunt for Kony, 2011

⁹⁶ Violent Non-State Actors and National and International Security International Relations and Security Network, 2023

⁹⁷ Counter-Terrorism Module 4 Key Issues: Criminal Justice Responses, 2018

⁹⁸ Sarfati, 2021

⁹⁹ Blue Sky III: Taking UN Counterterrorism Efforts in The Next Decade From Plans to Action, 2023,

lenient sentences or avoided accountability altogether. This underscores the difficulty of achieving justice in contexts where political and transitional considerations take precedence.¹⁰⁰¹⁰¹¹⁰²¹⁰³¹⁰⁴

Hamas: Hamas, a Palestinian Islamist organization involved in the Israeli-Palestinian conflict since 1987, operates as both a political entity and a militant group. This dual role complicates its prosecution under

International Criminal Law (ICL), as it blurs distinctions between governance, military actions, and terrorism. The key challenges included their ambiguity of status and jurisdictional issues. Varied international views on Hamas as a terrorist group or resistance movement hinder its legal categorization. ICC jurisdiction is affected by Palestine's ICC membership, Israel's non-membership, and Hamas's transnational operations. Hamas has been accused of war crimes, including Rocket attacks on civilians, and violating international humanitarian law (IHL). Also, the use of human shields endangers civilians during military operations. They also committed suicide bombings and kidnappings, constituting acts of terrorism and violations of IHL.¹⁰⁵¹⁰⁶¹⁰⁷

The evidentiary and enforcement Challenges were that there was limited access to Gaza for investigators impeded evidence collection. Fear of reprisals and accusations of bias undermine witness cooperation and investigations. And enforcement of arrest warrants is constrained by Hamas's control of Gaza and geopolitical dynamics. Prosecution risks inflaming regional tensions and perceptions of bias, especially amid ongoing investigations into Israeli military actions. The 2021 ICC investigation into war crimes in the Israeli-Palestinian conflict exemplifies the challenges of prosecuting Hamas, including jurisdictional, evidentiary, and enforcement obstacles.¹⁰⁸¹⁰⁹¹¹⁰¹¹¹¹¹²

Discussion and Conclusion

Prosecuting non-state actors under international criminal law requires a multi-faceted approach, addressing legal, practical, and political challenges. Strengthening international cooperation, clarifying legal definitions, improving evidence-gathering mechanisms, and adapting to the evolving

¹⁰⁰ Akech, 2020

¹⁰¹ Kiogora, 2014

¹⁰² Mukherjee, 2011

¹⁰³ Wiebelhaus-Brahm, 2016

¹⁰⁴ Salehi & Williams, 2016

¹⁰⁵ 'STRANGLING NECKS,' 2022

¹⁰⁶ Dolnik & Bhattacharjee, 2002

¹⁰⁷ Report of the United Nations Fact Finding Mission on the Gaza Conflict, 2009

¹⁰⁸ Moses, 2016

¹⁰⁹ Silverbrook, 2023

¹¹⁰ May, 2012

¹¹¹ Maurer, 2012,

¹¹² Saxon, 2016

nature of conflicts are essential to enhance the effectiveness of international criminal law in holding non-state actors accountable.

The activities of Hamas highlight the complexities of prosecuting non-state actors under international criminal law. Hamas, with its dual role as a governing body and a militant organization, operates in a legally ambiguous space, complicating efforts to hold its leaders accountable for international crimes. The challenges of jurisdiction, evidence collection, and enforcement, combined with the political sensitivity of the Israeli-Palestinian conflict, make prosecuting Hamas under international law an arduous task.

However, to maintain the legitimacy of international criminal law, efforts must continue to address these challenges. Whether through strengthening international institutions like the ICC, improving mechanisms

for cooperation between states and international courts, or addressing the root causes of the conflict, the international community must find ways to ensure accountability for non-state actors like Hamas.

The prosecution of non-state actors under international criminal law remains a formidable challenge due to jurisdictional limits, evidentiary issues, political dynamics, and security concerns. Despite these challenges, a reinforced international legal framework that adapts to the transnational nature of non-state actors is critical for advancing justice and deterrence. Through enhanced cooperation, strengthened evidence-gathering methods, and expanded jurisdictional mandates, the international community can make strides toward holding non-state actors accountable for their actions, thus fostering a more just and peaceful world. While the Rome Statute is designed to hold individuals accountable, its reliance on state cooperation, jurisdictional constraints, and the political nature of referrals significantly limits its applicability to non-state actors. Non-state actors that operate transnationally or in non-signatory states often fall outside its reach, highlighting the need for amendments or complementary mechanisms to address these gaps.

Allowing the ICC to prosecute a broader range of non-state actors, particularly in regions where local judicial systems are compromised, could enhance accountability. Regional courts or hybrid tribunals with jurisdiction over non-state actors could complement the ICC's mandate. Developing robust partnerships with NGOs, human rights organizations, and local governments can improve evidence collection in conflict zones. Additionally, technology such as remote sensing and satellite imagery can provide critical evidence for international cases. A global initiative to discourage states from harboring non-state actors could improve prosecution efforts. Diplomatic pressure and international sanctions on states that shield non-state actors may reduce barriers to accountability.

Protective measures, including relocation programs and specialized security for judges and witnesses, are essential to mitigate risks in cases involving violent non-state actors.

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