

ARTICLE

A Postmortem for International Criminal Law?
Terrorism, Law and Politics, and the Reaffirmation of State Sovereignty

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Abstract

This Article explores the intersection of International Criminal Law (“ICL”) and domestic legal systems in the counterterrorism arena, with a particular focus on the United Nations Security Council’s (“UNSC”) promulgation of relevant legal obligations. This account critically examines the ways in which ICL, and international law more broadly, can address terrorism, and then investigates the viability of expanding the International Criminal Court’s (“ICC”) jurisdiction to encompass crimes of terrorism. In analyzing ground-breaking UNSC resolutions imposing wide-ranging counterterrorism duties on states, I shed light on that organ’s “quasi-legislative” exercise of its powers and the implications for the implementation of those obligations in domestic law. Ultimately, I argue that the global counterterrorism campaign can only be pursued meaningfully through what I term a “transnational network of criminal and civil law.” This system is based on giving states the power to write and enforce their own counterterrorism laws under a UNSC mandate.

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Introduction

Claims that international criminal justice is dead are premature. While the field is considerably limited, in large part because of political realities, the interaction between international terrorism law and domestic counterterrorism legislation suggests that its doctrines still have some weight. A cursory review of post-9/11 literature shows the great breadth of scholarly commentary on the intersection of terrorism and many key areas of international law, such as the law of state responsibility,¹ recourse to force,² human rights,³ international humanitarian law (“IHL”),⁴ international criminal law (“ICL”),⁵ and international security.⁶

¹ See, e.g., VINCENT-JOËL PROULX, *TRANSNATIONAL TERRORISM AND STATE ACCOUNTABILITY: A NEW THEORY OF PREVENTION* (2012); KIMBERLEY N. TRAPP, *STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM* (2011); ROBERT P. BARNIDGE, *NON-STATE ACTORS AND TERRORISM: APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE* (2008); TAL BECKER, *TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY* (2006).

² See, e.g., LINDSAY MOIR, *REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, JUS AD BELLUM AND THE WAR ON TERROR* (2011); NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* (2010); MYRA WILLIAMSON, *TERRORISM, WAR AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001* (2009); JACKSON NYAMUYA MAOGOTO, *BATTLING TERRORISM: LEGAL PERSPECTIVE ON THE USE OF FORCE AND THE WAR ON TERROR* (2005); see generally THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002).

³ See, e.g., IPEK DEMIRSU, *COUNTER-TERRORISM AND THE PROSPECTS OF HUMAN RIGHTS* (2017); HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* (2d ed. 2015); *TERRORISM AND HUMAN RIGHTS* (Martin Scheinin ed., 2013); *COUNTER-TERRORISM, HUMAN RIGHTS AND THE RULE OF LAW* (Aniceto Masferrer & Clive Walker eds., 2013); *GENDER, NATIONAL SECURITY, AND COUNTER-TERRORISM: HUMAN RIGHTS PERSPECTIVES* (Margaret L. Satterthwaite & Jayne C. Huckerby eds., 2013); ANICETO MASFERRER, *POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM* (2012); LOUISE DOSWALD-BECK, *HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM* (2011); DAVID J. WHITTAKER, *COUNTER-TERRORISM AND HUMAN RIGHTS* (2009).

⁴ See, e.g., Hans-Peter Gasser, *Acts of Terror, Terrorism and International Humanitarian Law*, 84 INT’L REV. RED CROSS 547 (2002); YAROSLAV RADZIWIŁŁ, *CYBER-ATTACKS AND THE EXPLOITABLE IMPERFECTIONS OF INTERNATIONAL LAW* 173–224 (2015); Ben Saul, *Terrorism and International Humanitarian Law*, in *RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM* 208, 208–31 (Ben Saul ed., 2014); ANDREA BIANCHI & YASMIN NAQVI, *INTERNATIONAL HUMANITARIAN LAW AND TERRORISM* (2011).

⁵ See, e.g., DUFFY, *supra* note 3, at 119; SARA FIORENTINI, *TERRORISM AND INTERNATIONAL CRIMINAL LAW* (2013); KEVIN KATOUYA, *RÉFLEXIONS SUR LES INSTRUMENTS DE DROIT PÉNAL INTERNATIONAL ET EUROPÉEN DE LUTTE CONTRE LE TERRORISME* (2013); Ben Saul, *Terrorism and International Criminal Law: Questions of (In)coherence and (Il)legitimacy*, in *INTERNATIONAL CRIMINAL JUSTICE: LEGITIMACY AND COHERENCE* 190, 190–230 (Gideon Boas et al. eds., 2012); ROBERTA ARNOLD, *THE ICC AS A NEW INSTRUMENT FOR REPRESSING TERRORISM* (2004).

⁶ See, e.g., *SECURITY AND INTERNATIONAL LAW* (Mary Footer ed., 2016). Other scholarly accounts center on general inquiries about the role of international law in combating transnational terrorism. See, e.g., *INTERNATIONAL LEGAL DIMENSION OF TERRORISM* (Pablo Fernández-Sánchez ed., 2009); Pierre Klein, *Le Droit International à l’Épreuve du Terrorisme*, 321 RECUEIL DES COURS 203 (2006); JEAN-CHRISTOPHE MARTIN, *LES REGLES INTERNATIONALES RELATIVES A LA LUTTE CONTRE LE TERRORISME* (2006); *ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM* (Andrea Bianchi ed., 2004).

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But international counterterrorism law has been routinely used (and abused) for political ends,⁷ and has engendered “a range of intended and unintended political consequences.”⁸ Because ICL and terrorism are inseparable from any state’s internal *and* international affairs, the real challenge is to understand their key differences and commonalities.

Despite political pressures stemming from a country’s security interests, international legal developments have an important role to play in the institution and success of domestic counterterrorism measures. This vertical translation and implementation process—from domestic international legal obligations to finalized domestic legislation—is not insulated from political considerations. The conversion of international law obligations into national security law provisions and practice has been most actively pursued in the areas of criminal and administrative law, with domestic legal systems doing most of the heavy lifting, including through preventive detention, investigative work, and prosecutions.

In this account, I argue that to understand how states are combating the increasingly transnational threat of terrorism and implementing United Nations (“UN”) resolutions to that effect, it might be helpful to reimagine the role of ICL.⁹ This line of argument stands on three pillars. First, states must accept the dwindling relevance of classical ICL, which is attributable to political constraints and understandable concerns over the legitimacy of the broader ICL enterprise, embodied most prominently in critiques levelled against the work of the International Criminal Court (“ICC”).¹⁰

Second, the numerous multilateral sectoral anti-terrorism conventions and United Nations Security Council (“UNSC”) resolutions are more relevant to the

⁷ See THE POLITICS OF INTERNATIONAL CRIMINAL LAW (Holly Cullen, Philipp Kastner & Sean Richmond eds., forthcoming 2020); Frédéric Mégret, *The Politics of International Criminal Justice*, 13 EUR. J. INT’L L. 1261 (2002); Tor Kvever, *Unveiling (and Veiling) Politics in International Criminal Trials*, in CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW 117, 117–37 (Christine Schwöbel ed., 2014).

⁸ Holly Cullen, Philipp Kastner & Sean Richmond, *Introduction: The Politics of International Criminal Law*, 18 INT’L CRIM. L. REV. 907, 920 (2018); see also Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT’L L. 331 (2009).

⁹ For visual representations of the transnational spread and reach of terrorist attacks in 2018, see *Global Terrorism Database*, NAT’L CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM (last visited Dec. 9, 2019), https://www.start.umd.edu/sites/default/files/publications/local_attachments/START_GTD_TerrorismIn2018_Oct2018.pdf.

¹⁰ The most recent and innovative research on ICL and the ICC has been critical of their ability to tackle transnational terrorism. See, e.g., ANNA MARIE BRENNAN, TRANSNATIONAL TERRORIST GROUPS AND INTERNATIONAL CRIMINAL LAW (2018) (exploring the limits of ICL and the ICC in prosecuting transnational terrorism, partly because of the contested existence of a relevant international crime, and drawing on organizational network theory to develop her critique). On issues of relevance, legitimacy, transparency, efficacy, and legality related to both ICL and the ICC, see STRENGTHENING THE VALIDITY OF INTERNATIONAL CRIMINAL TRIBUNALS (Joanna Nicholson ed., 2018).

international and transnational fight against terrorism than is classical ICL. These instruments and documents impose categorical duties upon states, which must be translated, incorporated, and ultimately implemented in domestic legal systems. While favoring internationalized judicial action to address terrorism might appeal to some constituencies, reaffirming states' sovereign, legislative, and prosecutorial dominion over terrorism makes pragmatic sense.¹¹ This framework, coupled with concerted transnational action and cooperation through bodies like the Financial Action Task Force ("FATF"),¹² suggests that it might be more fitting to turn to what I term a "transnational network of criminal and civil law."

By "transnational network of criminal and civil law," I mean that the international legal framework related to counterterrorism remains primarily transnational in application. States have international counterterrorism obligations, for instance to prevent and repress terrorist activities and extradite under certain circumstances.¹³ In addition, states bear obligations of cooperation and mutual assistance to ensure timely coordination and better counterterrorism outcomes across national jurisdictions. The international legal framework provides guidance on the obligations of states and, to a lesser extent, of non-state actors in counterterrorism matters. Yet, it does not provide for the substantive criminalization of most terrorism-related offenses on the international plane. States are primarily directed to fulfill their obligations through domestic criminal and civil law. This framework affords states with near complete power in determining how to best deal with terrorism through domestic legal means.

Finally, while the UNSC has imposed several counterterrorism obligations directly upon states requiring them to regulate non-state actors' conduct, it has also recently moved to the direct regulation of non-state terrorist actors itself.¹⁴ This shift in UNSC practice might signal a move from individual criminal liability

¹¹ *But see* Robert Cryer, *International Criminal Law vs State Sovereignty*, 16 EUR. J. INT'L L. 979 (2006) (lamenting the erroneous conceptualization of the relationship between ICL and state sovereignty in scholarship, advocating that ICL empowers sovereignty in many ways, and identifying fruitful synergies between ICL's institutional dimensions and sovereignty).

¹² The FATF is an intergovernmental organization, formed at the behest of the G7, which develops policies to prevent and address money laundering. Its mandate was later expanded to include the formulation of counterterrorism measures. *See generally* IVICA SIMONOVSKI & ZEYNEP ECE ÜNSAL, COUNTERING THE FINANCING OF TERRORISM IN THE INTERNATIONAL COMMUNITY 110–18 (2018); CECILY ROSE, INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS 177–16 (2015).

¹³ *See, e.g.*, International Convention for the Suppression of Terrorist Bombings, art. 4, Dec. 15, 1997, 2149 U.N.T.S. 284 (obligating states parties to legislate criminal offenses related to terrorist bombings, based on the convention, in their domestic legal system); *id.* art. 8 (requiring states to extradite or prosecute individuals alleged to have committed such offenses); International Convention for the Suppression of the Financing of Terrorism, art. 4, Dec. 9, 1999, 2178 U.N.T.S. 197 [hereinafter Terrorist Financing Convention] (obligating states parties to legislate criminal offenses related to terrorist financing, based on the convention, in their domestic legal system); *id.* art. 10 (requiring states to extradite or prosecute individuals alleged to have committed such offenses).

¹⁴ *See* David DeBartolo, Sandra Krähenmann, Moira Macmillian, & Vincent-Joël Proulx, *Foreign (Terrorist) Fighters: Prospects and Challenges*, 112 ASIL PROC. 301, 301–14 (2018).

towards individual civil accountability under international law,¹⁵ alongside other applicable domestic and international legal regimes. This interaction between different legal regimes in counterterrorism¹⁶ may lead to conflicting interpretations of relevant legal norms.¹⁷ Nevertheless, it also means that a true global

¹⁵ At present, international law does not support the existence of a general regime of international individual accountability to hold individuals and other non-state actors responsible beyond criminal liability. That said, many of the building blocks of such a regime appear to already be in place or emerging, including through the works of the International Law Commission (“ILC”). Further, there is an increasing interest, if not demand, for such an accountability model across several substantive areas of international law. While the political implications of this potential shift from criminal to civil responsibility are not yet known, it would seem to cater to the intrinsic political dimensions of “terrorism” described below, at least in dealing with non-state terrorist actors. In addition, other reasons might militate in favor of this shift, including the changing nature and extent of the international legal personality of non-state actors and the practical need to identify alternative targets of liability for terrorist wrongdoing (especially when a territorial state cannot be held accountable). For a full-fledged argument with particular focus on the UNSC’s role in this framework, see Vincent-Joël Proulx, *International Civil Individual Responsibility and the Security Council: Building the Foundations of a General Regime*, 40 MICH. J. INT’L L. 215 (2019). An earlier example of a shift away from criminalization occurred when the ILC abandoned the controversial notion of crime of state in its work on state responsibility law. See generally James Crawford, *Responsibility for Breaches of Communitarian Norms*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 224, 224–40 (Ulrich Fastenrath et al. eds., 2011).

¹⁶ See, e.g., Kimberley N. Trapp, *The Interaction of the International Terrorism Suppression Regime and IHL in Domestic Criminal Prosecutions: The UK Experience*, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 165 (Derek Jinks et al. eds., 2014). On the relationship between ICL and state responsibility in counterterrorism, see TRAPP, *supra* note 1, at 230–263. For different takes on regime interaction in the field of ICL, see Anna Oriolo, *Revisiting the Interaction between the ICC and National Jurisdictions as a New Gateway to Strengthening the Effectiveness of International Criminal Justice*, 83 REVUE INTERNATIONALE DE DROIT PÉNAL 195 (2012); Ward Ferdinandusse, *The Interaction of National and International Approaches in the Repression of International Crimes*, 15 EUR. J. INT’L L. 1041 (2004). On regime interaction and international law more generally, see Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15 INT’L J. CONST. L. 671 (2017); Hisashi Owada, *Problems of Interaction between the International and Domestic Legal Orders*, 5 ASIAN J. INT’L L. 246 (2015); REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION (Margaret A. Young ed., 2015). For an interactional theory on the formation of international legal obligations, see JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010).

¹⁷ A classic example of a potential normative conflict relevant to counterterrorism—at least at the level of judicial interpretation, but nonetheless construed by some as an instance of fragmentation—arose in connection with the International Court of Justice’s (“ICJ”) and International Criminal Tribunal for the Former Yugoslavia’s (“ICTY”) respective applications of the “effective control” and “overall control” tests under the law of state responsibility. Compare *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. Rep. 14, 62–65, ¶¶ 109–15 (June 27, 1986), and *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, 142–49 (Feb. 26, 2007), with *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 117, 120, 131–32, 137–38 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). For a discussion and sampling of different views on this aspect of those precedents, see PROULX, *supra* note 1, at 62, 68–70 (and scholarship canvassed therein).

counterterrorism campaign may only be pursued by enlisting the assistance of different legal regimes and institutions.¹⁸

Based on this background, Part I turns to the forces preventing ICL from encompassing all terrorist acts. Part II surveys ICL's role in states' counterterrorism agendas, with a view to exposing its limitations. Part III then explores the idea of reimagining the nature of ICL—beyond its strictly classical tenets—to encompass UNSC resolutions and criminalize various terrorism-related offenses. The Article concludes by positing that national and international counterterrorism law should be viewed as a “transnational network of criminal and civil law,” which has the distinct advantage of enhancing the prospect of securing international cooperation between states. I argue that states will be more inclined to cooperate if they are assured that they will not be expected to relinquish their sovereignty and domestic control over terrorism cases.

I. International Criminal Law and Terrorism: A Quintessential Encapsulation of International Law, State Sovereignty, and Politics

Some scholars rightly underscore that “[l]aw and politics interact at both the international and domestic levels,” adding that “this interaction seems particularly charged in [ICL], where at root a nascent legal regime aims to regulate the longstanding power of states to define and manage war and crime.”¹⁹ ICL's rules and institutions were created to regulate the states which make up the international system. To some states, ICL is an affront to international law's otherwise consensual nature.²⁰ The UNSC's pervasive and top-down law-making on counterterrorism matters, explored below, also facially erodes state sovereignty by directing states to define, prevent, and prosecute terrorist acts. Most states have translated the UNSC's prescriptions into domestic counterterrorism laws and shifted their policy infrastructures accordingly, but are unwilling to relinquish their control over the enforcement and prosecution of such laws.

Where a state is unwilling or unable to enforce ICL in its domestic legal order, a majority of states have vested adjudicative power in a permanent international institution the ICC to fill that enforcement gap. Consequently, the

¹⁸ For one study on potential normative conflicts between two international institutions and their reconciliation, see KATJA SAMUEL, *THE OIC, THE UN, AND COUNTER-TERRORISM LAW MAKING: CONFLICTING OR COOPERATIVE LEGAL ORDERS?* (2013). Others argue that the work of certain institutions like UN organs, particularly the UNSC and ICJ, can address different aspects of the same “terrorism” disputes, as those organs' fundamental functions are complementary and at times mutually reinforcing. *See, e.g.,* VINCENT-JOËL PROULX, *INSTITUTIONALIZING STATE RESPONSIBILITY: GLOBAL SECURITY AND UN ORGANS* 143–48 (2016).

¹⁹ Cullen et al., *supra* note 7, at 907.

²⁰ *See* Daryl Robinson, *Inescapable Dyads: Why the International Criminal Court Cannot Win*, 28 *LEIDEN J. INT'L L.* 323, 332 (2015) (remarking that ICL “seeks to create a vertical regime on a horizontal plane, a system of legal coercion among actors accustomed to a more consensual regime”); *see also* Cullen et al., *supra* note 7, at 907.

ICC's principle of complementarity²¹ presumably insulates domestic sovereignty from perceived threats of interference by the Court.

By contrast, when a state is unable or unwilling to enforce counterterrorism law, no equivalent international judicial institution exists to fill that void. Thus, domestic terrorism laws are an expression of state sovereignty and some commentators have accordingly predicted that international law's future will be predominantly driven by domestic law.²²

The international community has yet to agree on a universal legal definition of "terrorism" and has yet to finalize and adopt the Draft Comprehensive Convention on Terrorism.²³ Much has been written on the definitional debate,²⁴ and this Article does not attempt to settle it. Rather, I want to draw the reader's attention to the fact that the two principal stumbling blocks impeding a universal definition, namely state terrorism and whether to include or exclude national liberation movements are driven by divergent state interests.²⁵ On a primary level, they are

²¹ According to this principle, the ICC's jurisdiction remains complementary to domestic criminal jurisdictions, meaning that the Court will only take jurisdiction over a case where a state is unwilling or unable to investigate or prosecute a relevant crime. *See generally* OVO CATHERINE IMOEDEMHE, *THE COMPLEMENTARITY REGIME OF THE INTERNATIONAL CRIMINAL COURT: NATIONAL IMPLEMENTATION IN AFRICA* (2017); SARAH M.H. NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* (2013); *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* (Carsten Stahn & Mohamed M. El Zeidy eds., 2011); JANN K. KLEFFNER, *COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS* (2008).

²² Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, The European Way of Law)*, 47 *HARV. INT'L L.J.* 327, 344–46 (2006).

²³ On the outstanding disagreements concerning the draft convention, see U.N. Ad Hoc Committee, Rep. of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996: Seventh Session, U.N. Doc. A/58/37, at 8–9 (Apr. 2, 2003); *see also* Robert Kolb, *Universal Criminal Jurisdiction in Matters of International Terrorism*, 50 *REVUE HELLENIQUE DE DROIT INT'L* 43, 48–58, 70 (1997).

²⁴ *See, e.g.*, Ben Saul, *Defining Terrorism: A Conceptual Minefield*, in *THE OXFORD HANDBOOK OF TERRORISM* 34 (Erica Chenoweth et al. eds., 2019); STELLA MARGARITI, *DEFINING INTERNATIONAL TERRORISM: BETWEEN STATE SOVEREIGNTY AND COSMOPOLITANISM* (2017); Alan Greene, *Defining Terrorism: One Size Fits All*, 66 *INT'L & COMP. L. Q.* 411 (2017); Romyana Grozdanova, "Terrorism: Too Elusive a Term for an International Legal Definition?", 61 *NETH. INT'L L. REV.* 305 (2014); Marcello Di Filippo, *The Definition(s) of Terrorism in International Law*, in *RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM* 3, 3–19 (Ben Saul ed., 2014); Ben Saul, *Civilising the Exception: Universally Defining Terrorism*, in *POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY* 79, 79–100 (Aniceto Masferrer ed., 2012); BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* (2006); John Dugard, *The Problem of the Definition of Terrorism in International Law*, in *SEPTEMBER 11, 2001: A TURNING POINT IN INTERNATIONAL AND DOMESTIC LAW?* 187, 187–225 (Paul Eden & Thérèse O'Donnell eds., 2005); Michael Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes*, 36 *CASE W. RES. J. INT'L L.* 359 (2004).

²⁵ In fact, progress was achieved on several provisions of the Draft Comprehensive Convention on Terrorism under the auspices of the UN, including on the definition of terrorism-related offenses. However, considerable debate—and an enduring impasse on adopting the convention to this day—was triggered when Malaysia, acting on behalf of the Organisation of Islamic Cooperation, suggested excluding from the definition of "terrorism" "[p]eoples' struggle including armed

acutely domestic political considerations because ascertaining the occurrence of state terrorism and labeling national liberation movements fighting for self-determination and/or against colonial domination as “terrorist” is often a highly subjective endeavor. Further, the “terrorism” label might be used domestically by governments as a bargaining chip to induce rebels, subversive elements, or merely inconvenient actors to plead guilty to lesser criminal charges or agree to a ceasefire in exchange for dropping charges of “terrorism.”²⁶ In addition, further controversy persists over whether conduct carried out during armed conflict should be excluded from a definition and whether such exclusion should apply to all parties in such a conflict.²⁷

In a broader sense, the term’s legal content is arguably recognized by a sufficiently diversified number of states and institutions. Common elements of a legal definition of terrorism typically include an act, often carried out for political, religious, or ideological motives, that is committed with the intent to intimidate the population or compel a government or an international organization to perform, or abstain from performing, a task or demand.²⁸ Of course, these elements are subject to challenge as considerable differences remain across definitions enshrined in multilateral and regional instruments, resolutions adopted by UN political organs, and domestic legislation.²⁹ In short, the definitional debate and its political

struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination.” Surya Subedi, *The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law*, 4 INT’L L. FORUM 159, 163 (2002). See also Tim Wilson, *State Terrorism*, in THE OXFORD HANDBOOK OF TERRORISM 331 (Erica Chenoweth et al. eds., 2019); *id.* at 348 (Jessica A. Stanton’s *Terrorism, Civil War, and Insurgency*); TRAPP, *supra* note 1, at 15–18.

²⁶ For example, in 2006 Nepalese authorities agreed to drop “terrorism” charges in exchange for a ceasefire from Maoist rebels. See *Nepal Calls Ceasefire with Rebels*, BBC NEWS (May 3, 2006), http://news.bbc.co.uk/2/hi/south_asia/4969422.stm, [<https://perma.cc/JGJ6-ZJE8>]. In a different context, Singapore legislated multi-layered yet similar criminal offenses, including terrorism-related offenses, which introduced the risk of the government using the more serious offenses as bargaining chips to induce indicted individuals to plead guilty to lesser criminal charges. See Michael Hor, *Singapore’s Anti-Terrorism Laws: Reality and Rhetoric*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 271, 285–286 (2d ed., Victor Ramraj et al. eds., 2012).

²⁷ See, e.g., U.N. Ad Hoc Committee, Rep. of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996: Sixth Session, U.N. Doc. A/57/37, annex IV, 17 (Feb. 1, 2002); Press Release, U.N. Ad Hoc Committee, Finalizing Treaty Requires Agreement on “Armed Forces”, “Foreign Occupation”, Anti-Terrorism Committee Told, U.N. Press Release L/2993 (Feb. 1, 2002); see also Sabine von Schorlemer, *Human Rights: Substantive and Institutional Implications of the War on Terror*, 14 EUR. J. INT’L L. 265, 272 (2003).

²⁸ However, some eminent publicists advocate a narrower definition of “terrorism,” one that would omit reference to religious or political motives. See, e.g., Kent Roach, *Defining Terrorism: The Need for a Restrained Definition*, in THE HUMAN RIGHTS OF ANTI-TERRORISM 97, 97–127 (Nicole LaViolette & Craig Forcese eds., 2008); Kent Roach, *The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive*, in LAW AND LIBERTY IN THE WAR ON TERROR 39, 39–48 (Andrew Lynch ed., 2007).

²⁹ For a survey of relevant instruments and practice under customary international law, see DUFFY, *supra* note 3, at 72 (observing that, “[g]iven the outstanding differences of view on its key elements...it is difficult to sustain that international terrorism is, *per se*, defined and clearly regulated in international law,” but concluding that “[t]he absence of a generic definition of terrorism leaves no gaping hole in the international legal order”).

implications run through most, if not every, area of international law that intersects with “terrorism,” driving normative and enforcement uncertainty. For instance, the UNSC’s initial post-9/11 resolutions sought to regulate terrorism and set general obligations for states, without defining the term. It was only in 2004 that the UNSC offered an expansive, non-binding, and working definition of the term to guide states in adjusting their domestic legislation.³⁰

As shown below, states typically prefer to keep a tighter rein on terrorism-related investigations and prosecutions, though many align their domestic criminal and non-criminal legislation with the spirit of the UNSC’s prescriptions. States’ reticence to relinquish their sovereignty in matters of investigation and prosecution of terrorism is attributable to various reasons, many political. Given the absence of a universally agreed upon definition of “terrorism,” states have been left to their own devices, and many initially adopted definitions after 9/11 that catered to their own political agendas and objectives, which allowed some to use the “terrorism” label to marginalize and repress political dissidents and trample human rights.³¹ In the absence of a universal legal definition of “terrorism,” some argue that the core of sovereign power lies in a state’s discretion to determine who the international public enemy is, which in large part constitutes an eminently political task.³² Thus, the very absence of a legal definition of “terrorism” empowers hegemonic powers and their allies to determine the international public enemy on a case-by-case basis.³³

Deciding whether to exercise stricter control over domestic investigation and prosecution of terrorism instead of relinquishing suspects to an ICL institution, like the ICC, is not a zero-sum game. Both domestic and international proceedings pose their own sets of challenges. While there exists a compelling and logical impetus to “internationalize” the enforcement of counterterrorism norms, especially considering post-9/11 international legal discourse, states’ “preference for domestic prosecutions reflects a sensible choice and, likely, the best choice among the available range of imperfect options.”³⁴

³⁰ S.C. Res. 1566, ¶ 3 (Oct. 8, 2004).

³¹ See generally DUFFY, *supra* note 3, at 63, 544ff; Detlev Vagts, *Which Courts Should Try Persons Accused of Terrorism?*, 14 EUR. J. INT’L L. 313, 320 (2003).

³² See generally Jörg Friedrichs, *Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism*, 19 LEIDEN J. INT’L L. 69 (2006) (seeking inspiration from Schmitt’s seminal 1932 DER BEGRIFF DES POLITISCHEN and his premise that “politics is essentially about determining the public enemy”).

³³ See *Id.* Various actors within the state, namely lawyers, judges, scholars, and government officials, may interpret the law in light of their own interests, resulting in international treaty obligations not being implemented domestically to fulfil the intended objectives of the international counterterrorism legal framework. See Andrea Bianchi, *Enforcing International Law Norms Against Terrorism: Achievements and Prospects*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 500 (Andrea Bianchi ed., 2004).

³⁴ See generally Madeline Morris, *Terrorism and Unilateralism: Criminal Jurisdiction and International Relations*, 36 CORNELL INT’L L.J. 473 (2004).

States conceivably prefer domestic enforcement for terrorism-related offenses because terrorism poses an undeniable threat with political and foreign relations implications. Therefore, states are disinclined to relinquish their sovereignty to international institutions.³⁵ As discussed below, this preference might be accompanied by distrust of international institutions like the ICC, in part because there are still important uncertainties surrounding applicable legal norms and the ICC faces jurisdictional and structural constraints. For instance, the ICC espouses the concept of complementarity in exercising its jurisdiction, which remains primarily based on territoriality and nationality.³⁶ By design, and even if terrorism could be tried as a stand-alone category before the ICC, these features of its jurisdictional make-up confirm that the primary responsibility of prosecuting terrorist offenses lies with states and their domestic systems.

The great variance of domestic counterterrorism resources and legislation supports the case for a supra-national authority to deal with terrorism as an international crime, and several constituencies advocated for the inclusion of terrorism within the Court's jurisdictional purview.³⁷ However, shared fears that doing so would politicize the ICC ultimately limited the Court's mandate,³⁸ suggesting that the particularly charged relationship between international law and national interest on the subject of terrorism is perhaps intractable.

By contrast, legal definitions of core crimes falling under the ICC's jurisdiction have aided in generating a consensus among states because the crimes at issue were committed by governments, or with their complicity. In this light, it made good policy and legal sense to subject such actors to a supra-national judicial authority to prosecute those crimes, always subject to the principle of complementarity. Conversely, most terrorism cases involve non-state individuals or groups which are prosecuted or targeted by the states in which they operate. While it is true that state sponsorship of terrorism remains a reality in some instances, that issue may be better addressed under the law of state responsibility,³⁹

³⁵ See *id.* at 478; see also *id.* at 474 (declaring that “terrorism is not ordinary crime,” “indicat[ing], at a minimum, an unlawful violent act committed for a political purpose,” which means that “since terrorism has political motives, states are typically the targets and, not infrequently, the sponsors of terrorism,” a fact that “enormously complicates the issue of criminal jurisdiction over terrorism”).

³⁶ Some of these issues are explored below in Part II.B. See also Morris, *supra* note 34, at 477–78, 480–83.

³⁷ See, e.g., KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 227 (2001) (highlighting that Algeria, Armenia, the Democratic Republic of the Congo, India, Israel, Kyrgyz Republic, Libya, Macedonia, Russia, Sri Lanka, Tajikistan, and Turkey all supported the inclusion of terrorism as a crime in the Rome Statute); see also Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 994 (2001).

³⁸ See generally Neil Boister, *The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court*, 3 J. ARMED CONFLICT L. 27 (1998). On various aspects of the ICC's politicization more broadly, see STEVEN C. ROACH, POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW (2006).

³⁹ As discussed in Part II.A.2, the pending Ukraine v Russia case before the ICJ might present such an opportunity.

or through the intercession of the UN's political organs or other international organizations.

Another vital difference between ICL violations and terrorism is that states are often the targets of the latter. Consequently, many states prefer to investigate and prosecute the offenses themselves. Those states may also be endowed with better investigative and prosecutorial apparatuses than those of the ICC or other international institutions.⁴⁰ States may also wish to detain alleged perpetrators preventively or indefinitely to neutralize the threat they pose, to obtain evidence, conduct intelligence-gathering on other terrorist activities, or use such individuals as bargaining chips for a variety of reasons.⁴¹

The direct consequence of these fundamental differences is that states are extremely reluctant to relinquish jurisdiction and sovereignty over terrorism-related cases to a supra-national authority, even on the basis of complementarity. This siloed approach to counterterrorism inhibits the formulation of internationally recognized legal principles for prosecuting terrorist actors. Furthermore, the legal ambiguity over what constitutes "terrorism" under international law further obfuscates this exercise. The opposite is true of the core crimes falling under the ICC's jurisdiction, which enjoy robust legal definition and certainty.⁴²

The international legal framework that remains to deal with terrorism vests the quasi-totality of the operational, legislative, investigative, and prosecutorial power to states. As a corollary, the international legal system attempts to depoliticize the international arena with respect to terrorism, as far as possible, through the adoption of sectoral anti-terrorism conventions geared towards

⁴⁰ See also Morris, *supra* note 34, at 478.

⁴¹ On the legality of using individuals as "bargaining chips," see Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States*, 28 N.C.J. INT'L L. 1, 70–71 (2002); Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel*, 18 ARIZ. J. INT'L & COMP. L. 721 (2001); DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 129–30 (2002); Orna Ben-Naftali & Sean Gleichgevitch, *Missing in Legal Action: Lebanese Hostage in Israel*, 41 HARV. INT'L L.J. 185 (2000). On the legal implications and problematic aspects of indefinite and/or preventive detention of suspected terrorists, see Vincent-Joël Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 813–72 (2005).

⁴² On uniformity in ICL, see Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶ 756 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); Robert Cryer, *Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources*, 12 NEW CRIM. L. REV. 390, 394 (2009); Allison Marston Danner & Jenny S. Martinez, *Guilty Association: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 96–97 (2005); Margaret McAullife deGuzman, *Article 21*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 701, 710 (Otto Triffterer ed., 2d ed. 2008); Davis S. Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT'L L. & POL. 1019, 1026 n.16 (2008); Inés Mónica Weinberg de Roca & Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STAN. J. INT'L L. 1, 8 (2008); but see Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063 (2011).

domestic prosecution or extradition and “soft law” standards. As a result, international law does not advance the substantive criminalization of terrorism-related offenses at the international level.⁴³ Rather, it emphasizes state sovereignty, transnational cooperation, and mutual assistance, which are arguably softer forms of counterterrorism from international law’s perspective.⁴⁴ Further, several anti-terrorism conventions provide a number of ways to depoliticize state conflicts over terrorism-related situations in addition to the softer forms of counterterrorism mentioned above.⁴⁵

II. International Law and Counterterrorism

This section briefly outlines the general legal framework applicable to counterterrorism in international law, and then highlights some of ICL’s prospects and limitations in addressing terrorism.⁴⁶ By underscoring the importance of interaction between domestic and international legal regimes, this section identifies one critical role the UNSC plays within the classical ICL and political framework, and argues that ICL’s structure is only tenuously related to that of international counterterrorism law.

⁴³ In fairness, the area of terrorist financing is possibly one field in which robust international legal norms have crystalized with sufficient clarity. There are arguably emerging norms suggesting that the creation of a general customary crime of terrorism might also arise in the future. Both aspects are discussed in subsequent pages. *See generally* Harold A. Trinkunas, *Financing of Terrorism*, in *THE OXFORD HANDBOOK OF TERRORISM* 478 (Erica Chenoweth et al. eds., 2019).

⁴⁴ *See* Marcello Di Filippo, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes*, 19 *EUR. J. INT’L L.* 533, 569 (2008).

⁴⁵ One example is the removal of the political offense exception in some conventions. *See, e.g.*, Off. of the U.N. High Commissioner for Human Rights, Human Rights, Terrorism and Counterterrorism, Fact Sheet No. 32, at 14 (July 2008), <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>, [<https://perma.cc/F6JR-S4NU>]. Another example resides in dispute settlement clauses enshrined in some counterterrorism treaties granting jurisdiction to the ICJ. Indeed, the ICJ has often reiterated that it will not shy away from handling a legal dispute or request for advisory opinion submitted to it because it forms part of a broader political dispute, or because it carries with it political overtones. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶¶ 37, 40 (May 24); *Nicar. v U.S., Jurisdiction and Admissibility*, 1984 I.C.J. 392, ¶¶ 93, 95–96; *Accordance with International Law of the Unilateral Declaration in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, ¶ 27 (July 22); *Legal Consequences of the Construction of a Wall*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 51–58 (July 9); *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 1973 I.C.J. 166, ¶ 14 (July 12); *see generally* Andrew Coleman, *The International Court of Justice and Highly Political Matters*, 4 *MELB. J. INT’L L.* 29 (2003).

⁴⁶ *See generally* Andrea Bianchi, *Counterterrorism and International Law*, in *THE OXFORD HANDBOOK OF TERRORISM* 659 (Erica Chenoweth et al. eds., 2019).

A. Treaty Law

1. Multilateral Conventions on Terrorism

An international legal framework on counterterrorism existed long before the tragic events of September 11, 2001.⁴⁷ The global nature of Al Qaeda's operations re-incentivized the international community to further develop and adopt concerted measures to prevent and counteract terrorist activity, with emphasis on constricting terrorist financing and criminalizing a wide range of conduct that supports or facilitates terrorism. However, the counterterrorism conventions were adopted in a largely reactive posture and failed to instill greater coherence among signatories and within international law more generally.⁴⁸ This line of critique will sound familiar to many international lawyers given their discipline's reactive approach and narrow focus on a single set of events.⁴⁹

By 2010, the once small conventional framework on international terrorism law had expanded to nineteen multilateral instruments, obligating state parties to criminalize terrorism-related offenses within their sovereign territory and assert jurisdiction over any individuals or groups having engaged in the conduct proscribed by these treaties.⁵⁰ However, several of these instruments do not define the term "terrorism." Some conventions do not even use this label. In many cases,

⁴⁷ Indeed, the first serious efforts to define the legal contents and contours of "terrorism" under international law date back to the League of Nations' work in 1937. For a historical take on the evolution of this framework, see BIANCHI & NAQVI, *supra* note 4, at 266–81. For a historical overview of developments towards defining and capturing "terrorism" under both treaty law and customary international law, see DUFFY, *supra* note 3, at 29–74.

⁴⁸ See Kimberley Trapp, *The Potentialities and Limitations of Reactive Law Making*, 39 U. NEW SOUTH WALES L.J. 1191, 1209–1218 (2016); see also *id.*, at 1191 (observing that the counterterrorism treaty regime, which obligates state parties to prosecute domestically, "has developed in a piecemeal fashion, each treaty adopted in response to a specific act of 'headline-grabbing' terrorism committed by non-state actors"). On a complementary point, see also Cóman Kenny, *Prosecuting Crimes of International Concern: Islamic State at the ICC?*, 33 UTRECHT J. INT'L & EUR. L. 120, 122, 130 (2017) (arguing that ISIS/ISIL "constitutes a threat of such degree that piecemeal domestic prosecution is unsuitable," and "[f]ailing to prosecute terrorists as terrorists would arguably be a missed opportunity to ensure [ICL] remains capable of addressing the full extent of changing contemporary criminal threats").

⁴⁹ Developing law in response to specific crises, the argument goes, might neglect more long-term objectives and persistent challenges. See Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377, 384 (2002). For a nuanced analysis on the counterterrorism conventions, see Trapp, *supra* note 48.

⁵⁰ For these instruments, see U.N. Off. of Counter-Terrorism, International Legal Instruments (last visited Nov. 26, 2019), <http://www.un.org/en/counterterrorism/legal-instruments.shtml> [https://perma.cc/4325-AHYQ]. The most recent relevant regional instrument, the ASEAN Convention on Counter-Terrorism, came into force in 2011. It binds the whole ASEAN membership and mirrors many obligations found in the sectoral anti-terrorism conventions, but does not include a compromissory clause for any potential legal disputes. See ASEAN Convention on Counter-Terrorism, Jan. 13, 2007, U.N. Registration No. 54629. On some developments that paved the way for this treaty, see Gregory Rose & Diana Nestorovska, *Towards an ASEAN Counter-Terrorism Treaty*, 9 SING. Y.B. INT'L L. 157 (2005).

the states that have ratified these treaties have relied on domestic legislation to unilaterally define the circumscribed activity as “terrorism.”⁵¹

Few international legal disputes have arisen over the application or interpretation of counterterrorism conventions. Even though several treaties grant jurisdiction to the International Court of Justice (“ICJ”), countries tend to avoid it when disagreements emerge concerning counterterrorism treaties.⁵² For example, a pair of nearly identical disputes over extradition under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the “Montreal Convention”) arose in the Lockerbie cases before the ICJ, which opposed the United Kingdom and Libya and the United States and Libya, respectively, but failed to clear the preliminary objections phase. Precluding the Court from reaching the merits.⁵³

In parallel, the UNSC was seized of a dispute based on the same underlying facts in which certain states accused Libya of having sponsored and/or directed the

⁵¹ For a survey of relevant domestic legal practice on defining “terrorism,” see *Aligning Security with Civic Space: Database of Legislation on the Definition of Terrorism*, CENTER FOR STRATEGIC & INT’L STUD. (Feb. 2018), https://csis-prod.s3.amazonaws.com/s3fs-public/Matrix_AligningSecurity_Final.pdf?M7izhWzLETVPaLbybV3nql.sz4yYdj38 [<https://perma.cc/SV36-6DQF>]. One conventional exception to this trend can be found in Article 2(1) of the Terrorist Financing Convention, which integrates some of the elements canvassed in the introduction section above and defines “terrorism” as:

“[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or...[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

Terrorist Financing Convention, *supra* note 13, art. 2(1). The “treaties listed” refers to nine of the sectoral anti-terrorism conventions. In *Ukraine v. Russia*, the Applicant seeks to prove that civilians have been targeted for purposes that include “intimidat[ing] a population” and “compel[ling] a government or an international organization to do or abstain from doing any act”, with Russia’s support. See Application of the International Convention for the Suppression of the Financing of Terrorism and the of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Verbatim Record, 40 (Mar. 8, 2017, 10 a.m.), <https://www.icj-cij.org/files/case-related/166/166-20170308-ORA-03-00-BI.pdf> [<https://perma.cc/EU94-JRJR>].

⁵² See, e.g., Kimberley Trapp, *Holding States Responsible for Terrorism before the International Court of Justice*, 3 J. INT’L DISP. SETTLEMENT 279, 285–295 (2012); TRAPP, *supra* note 1, at 131–181.

⁵³ See Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Provisional Measures, 1992 I.C.J. Rep. 3 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Preliminary Objections, 1998 I.C.J. Rep. 9 (Feb. 27); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Provisional Measures, 1992 I.C.J. Rep. 114 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Preliminary Objections, 1998 I.C.J. Rep. 115 (Feb. 27).

individuals who carried out the Lockerbie bombing. Unlike the ICJ's judicial process, the UNSC was called upon to resolve that part of the dispute through its political process, though the contentions put forth clearly exhibited legal features. While the UNSC held Libya internationally responsible, the two individual culprits were eventually investigated and prosecuted by domestic institutions.⁵⁴ The resulting convictions in that process likely facilitated Libya's ultimate acknowledgment of its international "civil" responsibility for the bombing.⁵⁵ These precedents highlighted international law's ineffectiveness in the face of state interest as well as the nature and weight of the ICJ's and UNSC's respective functions and ability to resolve disputes.⁵⁶ Because the UNSC injected a legal approach into its handling of the dispute, it was able to resolve the case within its political framework and lay the groundwork for an enforceable resolution.

2. Potential Practice under the Multilateral Conventions

As discussed above, the content of most sectoral counterterrorism multilateral conventions remains relatively untested, at least before the international judiciary. One recent development and an excellent example of this system is the case brought by Ukraine against the Russian Federation partly under Article 24 of the Terrorist Financing Convention. In it, Ukraine alleges a range of violations by Russia, including the failure to prevent terrorist financing and the alleged financing and support of illegal armed groups and terrorist activities in Ukraine by its own organs and/or agents.⁵⁷ The impugned offenses relate to the bombing of flight MH17,⁵⁸ shelling of civilians in Ukraine, and bombings in

⁵⁴ The individuals were tried before a Scottish court set up in the Netherlands. See David R. Andrews, *A Thorn on the Tulip – A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial*, 36 CASE W. RES. J. INT'L L. 307 (2004).

⁵⁵ See, e.g., TRAPP, *supra* note 1, at 236 (also observing that "a credible judicial determination of the guilt of a Libyan secret service agent removed the element of deniability, and is likely to have encouraged acceptance of the obligation to make reparation on that basis"). On Libya's acceptance of international responsibility, see S.C. Res. 1506, pmbl. (Sept. 12, 2003); Chargé d'Affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya, Letter dated Aug. 15, 2003 from the Chargé d'Affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the President of the U.N. Security Council, U.N. Doc. S/2003/818 (Aug. 15, 2003).

⁵⁶ This precedent also confirmed that both organs operate in a "horizontal" relationship within the international legal system, as the UN Charter does not clearly divide the labour between them in such instances. See, e.g., PHILIPPA WEBB, *INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION* 128 (2013).

⁵⁷ Ukraine's submissions also cover the downing of Flight MH17 in Donetsk Oblast, which the UNSC condemned and demanded accountability in S.C. Res. 2166, ¶¶ 1, 11 (July 21, 2014). On subsequent developments and stumbling blocks, see Michael Ramsden, *Uniting for MH17*, 7 ASIAN J. INT'L L. 337, 337–39 (2017).

⁵⁸ In the wake of the downing of flight MH17, members of the Joint Investigation Team, including The Netherlands and Australia, advocated the establishment of an international tribunal to adjudicate the responsibility of the authors of the attack. Malaysia introduced a resolution in the UNSC to that effect, which garnered a majority of votes, but was ultimately vetoed by Russia. See Michelle Nichols, *Russia Vetoes Bid to Set up Tribunal for Downed Flight MH17*, REUTERS (July 29, 2015), <https://www.reuters.com/article/ukraine-crisis-mh17-un-idUSL1N1092HK20150729>, [https://perma.cc/F5LJ-Y5ML]. Instead, a domestic criminal trial is planned, which will take place at the high security court in Schiphol, The Netherlands. See Janene Pieters, *MH17 Relatives to Get*

Kharkiv. In an Order dated April 19, 2017, the ICJ declined to indicate provisional measures of protection in favor of Ukraine under the Terrorist Financing Convention, principally because the rights asserted by Ukraine under that treaty were not proven to be at least plausible at that stage of the proceedings.⁵⁹ Subsequently, Russia filed preliminary objections to the Court's jurisdiction and admissibility, to which Ukraine responded in writing, and which were dealt with by the Court in a separate phase prior to the merits.⁶⁰ The Court also heard those arguments in fuller form in the context of oral proceedings on preliminary objections and ruled that it has jurisdiction to hear the dispute.⁶¹

The *Ukraine v. Russia* case epitomizes the prominence of the international law–domestic law dialogue in counterterrorism. Ukraine's main grievances lie with Russia's alleged failure to properly legislate or implement its criminal law obligations under the Terrorist Financing Convention (both by failing to prevent or punish alleged perpetrators and by engaging in violations of prohibited conduct under the convention through its own state agents or organs). This case suggests that states party to this instrument must not only implement those international undertakings domestically in a meaningful and effective way, but must also enforce those domestic norms in an equally effective and meaningful manner. This translation from the international legal order to domestic legal systems not only requires states to ensure they conform with their international counterterrorism obligations by investigating, arresting, and prosecuting suspected terrorists, but also to apply their criminal law in a way that is congruent with other important international legal obligations (e.g. human rights protections).

Free Legal Assistance in Criminal Trial, NETH. TIMES (Jan. 8, 2019), <https://nltimes.nl/2019/01/08/mh17-relatives-get-free-legal-assistance-criminal-trial>, [https://perma.cc/AHK8-7KEM].

⁵⁹ For such plausibility to be established, Ukraine would have had to prove that certain elements found in the definition of Art 2(1) in the Terrorist Financing Convention of the underlying “terrorist” acts alleged—particularly “intention or knowledge” and “the element of purpose”—were present in the facts presented to the Court. The Court took the view that “Ukraine ha[d] not put before the Court evidence which affords a sufficient basis to find it plausible that these elements [were] present.” Application of the International Convention for the Suppression of the Financing of Terrorism and the of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Provisional Measures, ¶ 75 (Apr. 19, 2017), <https://www.icj-cij.org/files/case-related/166/166-20170419-ORD-01-00-EN.pdf> [https://perma.cc/ZJ5T-ZJ3B]. For commentary, see Iryna Marchuk, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russia)*, 18 MELB. J. INT'L L. 436 (2017).

⁶⁰ See Ukr. v. Russ., Preliminary Objections Submitted by the Russian Federation (Sept. 12, 2018), <https://www.icj-cij.org/files/case-related/166/166-20180912-WRI-01-00-EN.pdf> [https://perma.cc/T55G-5D86]; Ukr. v. Russ., Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation Submitted by Ukraine (Jan. 14, 2019), <https://www.icj-cij.org/files/case-related/166/166-20190114-WRI-01-00-EN.pdf> [https://perma.cc/P78U-UJTD].

⁶¹ Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed.), Judgment, 2019 I.C.J. Rep. __, ¶¶ 38–77, 134(1)(2) (Nov. 8, 2019), <https://www.icj-cij.org/files/case-related/166/166-20191108-JUD-01-00-EN.pdf> [https://perma.cc/7N28-NC78].

The *Ukraine v. Russia* case also presents the Court with a unique opportunity to provide helpful interpretive guidance on Article 2(1) and related issues, especially the notions of “intention” and “knowledge,” a matter of considerable contention between the parties.⁶² Despite Ukraine’s best efforts to find a relevant source to weaken Russia’s case on “intention,”⁶³ there is no authoritative judicial pronouncement on this front in the international arena. Therefore, this case affords the Court the option to at least provide insight into the proper interpretation of the definition of prohibited acts under this provision. More broadly, the Court’s pronouncements could also provide greater clarity and guidance on the concept of “terrorism” in international law, which has certainly been challenging to pin down in legal terms.⁶⁴ Indeed, there is a scarcity of relevant international practice on counterterrorism when compared to the corpus of state practice and judicial precedents on ICL’s core crimes.

Since the international community remains unable to agree on a universal legal definition of the term “terrorism,” the Court could provide greater clarity and guidance on this concept under international law.⁶⁵ However, this scenario assumes that the Court will be inclined to address issues perhaps lying beyond the strict confines of the immediate case before it. At this stage, this assumption seems temerarious and the Court’s provisional measures order coupled with its track record in matters of *obiter* suggest that this assumption might remain solely aspirational.

Finally, this case again highlights the rich interplay between different legal regimes. One area of interaction necessarily occurs at the intersection of international law and domestic criminal law, as exemplified by states’ implementation through domestic legislation of their international obligations stemming from the sectoral counterterrorism conventions, UNSC resolutions, and customary international law.⁶⁶ Another area of regime interaction might arise between those regimes and International Humanitarian Law (“IHL”), given the likely existence of concurrent international and non-international armed conflicts

⁶² Compare *Ukr. v. Russ.*, Memorial Submitted by Ukraine, 131–35 (June 12, 2018), <https://www.icj-cij.org/files/case-related/166/166-20180612-WRI-01-00-EN.pdf> [<https://perma.cc/65X6-HKH6>], with *Ukr. v. Russ.*, Preliminary Objections Submitted by the Russian Federation, 18–42 (Sept. 12, 2018), <https://www.icj-cij.org/files/case-related/166/166-20180912-WRI-01-00-EN.pdf> [<https://perma.cc/W2PE-CB8F>].

⁶³ During its pleadings, Ukraine referred to the Italian Supreme Court of Cassation dealing with this aspect of the Terrorist Financing Convention, which held that, “an action against a military objective must also be regarded as terrorism if the particular circumstances show beyond any doubt that serious harm to the life and integrity of the civilian population are inevitable, creating fear and panic among the local people.” See Verbatim Record, *supra* note 51, at 39–40, ¶ 16; Memorial Submitted by Ukraine, *supra* note 62, at 134–35, ¶ 207.

⁶⁴ On the difficulties of circumscribing the precise content of “terrorism” as a legal concept, see Ben Saul, *Terrorism as a Legal Concept*, in *ROUTLEDGE HANDBOOK OF LAW AND TERRORISM* 19, 19–37 (Genevieve Lennon & Clive Walker eds., 2015).

⁶⁵ Much has been written on attempts to define “terrorism” in international law. See *supra* note 24 and authorities cited therein.

⁶⁶ The UNSC’s contributions on this front are discussed in greater detail in Parts III.A. and III.C.

in Ukraine at the material time.⁶⁷ Moreover, this case draws attention to the potential interplay between the legal regimes and the law of state responsibility, as Ukraine initially alleged that Russia violated the Terrorist Financing Convention directly through the actions of its own agents or organs.⁶⁸

Ultimately, we are left with an international legal framework comprised of a patchwork of multilateral and regional anti-terrorism conventions, very sparse international case law or relevant practice, soft law standards, non-binding declarations from various international organizations (including the UN General Assembly), and binding resolutions authored by the UNSC. In addition, this legal framework is supplemented by emerging norms towards the establishment of a legal regime for holding individuals and non-state actors accountable in the civil, rather than criminal sense.⁶⁹ However, all these moving parts cannot be interpreted in isolation and are at times mutually reinforcing, though regime conflicts can arise as well. Relevant UNSC resolutions must serve as a prism through which disputes over terrorism must be filtered and as a benchmark against which future counterterrorism developments must be assessed. An additional reason for prioritizing this international legal framework on terrorism might reside in the need to respect power, to ensure this framework gains traction among powerful states and maintains its authority as something more than “an irrelevant moralistic utopia.”⁷⁰

B. *The Dwindling Relevance of International Criminal Law in Combating Terrorism*

The core crimes under ICL can be prosecuted at both the domestic and international levels, subject to additional jurisdictional constraints in the latter case. By contrast, the terrorism-related international legal framework relegates the duty and power to prosecute to domestic courts, without establishing international crimes. This framework centers on provisions in sectoral counterterrorism conventions enshrining both the obligation to extradite or prosecute and, in some cases, universal jurisdiction over terrorism suspects. In many ways, ICL and the international legal framework pertaining to terrorism run on parallel tracks which

⁶⁷ See generally Michael Plachta, *Ukraine Has Filed Lawsuit Against Russia in the International Court of Justice over Terrorism and Racial Discrimination*, 33 INT’L ENFORCEMENT L. REP. 148 (2017).

⁶⁸ In its judgment on preliminary objections, the Court held that state financing of terrorism falls outside the scope of the Terrorist Financing Convention, but stressed that UNSC Resolution 1373 clearly makes this practice unlawful at international law. See *Ukraine v. Russia*, Judgment, *supra* note 61, at ¶¶ 59–60.

⁶⁹ See *supra* note 15; *infra* notes 254–55, 262 and accompanying text.

⁷⁰ See Cullen et al., *supra* note 7, at 908, 914–15 (citing MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005)). Some commentators argue that the shortcomings of the international counterterrorism legal framework are primarily attributable to its emphasis on punishment by national jurisdictions. See, e.g., Bianchi, *supra* note 33, at 498–99. For a survey of international, comprehensive, sectoral, and regional anti-terrorism treaties, see Zdzislaw Galicki, *International Law and Terrorism*, 48 AM. BEHAV. SCIENTIST 743 (2005).

do not intersect.⁷¹ The only possible way they could intersect, rather artificially, is by using terrorism-related facts to make out the elements of core offenses under ICL.

Arguably, the ICC might have a potential role to play where there is uncertainty over what to do with certain terrorism suspects for a range of factual or political reasons.⁷² Despite these potential overtures, ICL “remains in a state of confusion in relation to terrorism as a distinctive crime.”⁷³ Core ICL crimes “revolve around a central reasoning or rationale,” while the international legal framework to combat terrorism remains characterized by a “state of confusion.”⁷⁴ The lack of a universally agreed upon legal definition of “terrorism” exacerbates the regime’s deficient comprehensiveness. Because ICL is largely unable to hold non-state actors accountable for “terrorist” acts, the UN and other international institutions and instruments remain the more effective enforcement mechanisms.

1. International Criminal Law’s More Obvious Shortcomings

The general international legal framework to combat terrorism described above not only shows the rich interactions between legal regimes, institutions, and decision-makers, but also potentially paves the way for ICL to play some role in combating terrorism, as similar to how ICL relates to IHL.⁷⁵ However, upon closer inspection, ICL appears to be largely ignored or ineffective.⁷⁶ In fairness, a recurrent theme of this Article might be that international law in general, as opposed to ICL specifically, is largely irrelevant in combating terrorism when compared to its role in addressing ICL’s core crimes.⁷⁷ This reality is supported by parsimony of state practice on terrorism-related matters, the absence of a robust corpus of relevant jurisprudence, the difficulty for states to coalesce around a common legal definition of “terrorism,” and the lack of crystalized customary norms supporting the international prosecution of terrorist crimes.

⁷¹ On ICL’s limitations in dealing with terrorism, see also Tim Stephens, *International Criminal Law and the Response to International Terrorism*, 27 U. NEW SOUTH WALES L.J. 454 (2004).

⁷² One example is where two or more states are attempting to assert concurrent jurisdiction over terrorist suspects. See *id.*, at 480–81; Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify As Crimes Against Humanity?*, 19 AM. U. INT’L L. REV. 1009, 1014–19 (2004).

⁷³ See Stephens, *supra* note 71, at 481.

⁷⁴ See Stephens, *supra* note 71, at 481.

⁷⁵ On the interplay between IHL and ICL, see Paola Gaeta, *The Interplay between The Geneva Conventions and International Criminal Law*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 737–53 (Andrew Clapham et al. eds., 2015).

⁷⁶ For a survey of ICL’s role in combating terrorism and also highlighting that scheme’s shortcomings, see BIANCHI & NAQVI, *supra* note 4, at 208.

⁷⁷ I am not suggesting that there are no ICL crimes perpetrated globally for which no corresponding adequate responses are deployed. In fact, there have been many unpunished ICL crimes. The discrepancy between their commission and commensurate domestic or international legal responses may be greater than for terrorism-related crimes, but it is impossible to verify this, absent a robust empirical study. While some have been prosecuted successfully on the international plane, no such equivalent landmark cases have been established for terrorism.

But that is only part of the story. International law has made important advances in the areas of terrorist financing and terrorism prevention through binding UNSC resolutions and regional approaches to novel threats like foreign terrorist fighters.⁷⁸ Perhaps Dame Rosalyn Higgins' prescient remarks more than two decades ago still hold true: terrorism is merely a term of (political) convenience used to capture acts which are already widely prohibited under different regimes of international law, which leads one to ask whether there is "an international law of terrorism" or "merely international law about terrorism?"⁷⁹ However, some academics have lobbied for greater use of ICL to deal with terrorists and their actions, especially ISIS/ISIL militants.⁸⁰ While there might be emerging normative foundations towards the recognition of terrorism as a transnational crime,⁸¹ that is a far cry from recognizing it as a stand-alone crime in general international law and/or under ICL.

One notable exception arose in the Special Tribunal for Lebanon's ("STL") identification in 2011 of an international crime of terrorism. Given the Tribunal's jurisdiction to try the individuals responsible for the 2005 assassination of the Lebanese Prime Minister and related attacks, in 2011 the Prosecutor submitted a sealed indictment for the pre-trial judge to validate. In response, the pre-trial judge directed the Appeals Chamber to field questions concerning, *inter alia*, the substantive criminal law and modes of criminal liability to be applied by the STL. In its decision, the Appeals Chamber interpreted the definition of "terrorism" in Lebanese criminal law by reference to international law to fill interpretive gaps. It proceeded to conclude that a binding legal definition of "terrorism" had emerged in international law, which assisted it in identifying a stand-alone customary terrorism crime.⁸²

⁷⁸ See generally FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND (Andrea de Guttry et al. eds., 2016).

⁷⁹ Rosalyn Higgins, *The General International Law of Terrorism*, in TERRORISM AND INTERNATIONAL LAW 13, 13–14, 27–28 (Rosalyn Higgins & Maurice Flory eds., 1997).

⁸⁰ See, e.g., Kenny, *supra* note 48, at 120–44. In this Article, "ISIS/ISIL" refers to the extremist group known as "The Islamic State of Iraq and the Levant" (also known as "Daesh").

⁸¹ See, e.g., Ben Saul, *Terrorism as a Transnational Crime*, in HANDBOOK OF TRANSNATIONAL CRIMINAL LAW 394, 394–408 (Neil Boister & Robert Currie eds., 2014) (chronicling states' efforts to cooperate on criminal matters and the international community's attempts to standardize rules on counterterrorism through sectoral treaties, a would-be comprehensive international convention, regional agreements, UNSC resolutions and measures, war crimes liabilities, and a debate about an emerging customary law crime). On the interplay between "terrorism" and other transnational crimes, see Ben Saul, *The Legal Relationship between Terrorism and Transnational Crime*, 17 INT'L CRIM. L. REV. 417 (2017).

⁸² See Prosecutor v. Ayyash et al., Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶¶ 83–113, 145–148 (Feb. 16, 2011). At ¶¶ 110–111, the Tribunal ruled that the legal definition of "terrorism" under customary international law comprises the following elements:

In sum, the subjective element of the crime under discussion is twofold, (i) the intent or *dolus* of the underlying crime and (ii) the special intent (*dolus specialis*) to spread fear or coerce an authority. The objective element is the

A cursory review of available ICL tools to combat terrorism, including UNSC referrals of terrorism-related situations to the ICC, reveals considerable, if not insurmountable, political impediments.⁸³ Moreover, the field has few relevant cases where ICL norms are applied to terrorism. This makes the prospect of formulating reliable conclusions as to ICL's suitability to repress terrorism all the more challenging. This reality is particularly acute in studying ICL's viability for handling terrorism by non-state actors, which are largely unmoved by the classic IHL and ICL features of punishment, deterrence, and reciprocity.⁸⁴ To this end, one must add the growing list of challenges confronting the ICC, grounded both in political and legal misgivings and broader concerns over legitimacy.

The Rome Statute itself does not establish a stand-alone jurisdictional category for the Court to handle terrorism-related cases. The negotiations surrounding that instrument not only evidenced several states' lack of agreement on a legal definition of "terrorism," but also their belief that terrorism-related offenses are better suited to domestic adjudication.⁸⁵ Even if such a stand-alone crime had been created, the concept of complementarity would have relegated primary responsibility to prosecute such crimes to states, which is also the default scenario for core ICL crimes.⁸⁶ This means that the ICC will only take jurisdiction in the absence of national criminal proceedings in states having jurisdiction, or

commission of an act that is criminalised by other norms (murder, causing grievous bodily harm, hostage taking, etc.). The crime of terrorism at international law of course requires as well that the terrorist act be transnational.

See also Matthew Gillet & Matthias Schuster, *Fast-Track Justice: The Special Tribunal for Lebanon Defines Terrorism*, 9 J. INT'L CRIM. JUST. 1021 (2011). However, this precedent is highly problematic. *See infra* Part II.B.2(i).

⁸³ Following past exercises of the UNSC's referral mechanism in non-terrorism contexts, states, including Rome Statute parties, showed a lack of political will in supporting ICC proceedings to implement the referral, including by not extraditing indicted individuals. Obviously, other political factors might also explain the difficulties associated with this mechanism, such as disagreement or a lack of willingness among the Permanent Five to refer situations to the ICC, or their decision not to characterize situations as sufficiently grave to warrant such referral. On the political aspects of UNSC referrals, see Philipp Kastner, *Armed Conflicts and the International Criminal Court*, 12 J. INT'L CRIM. JUST. 471, 475 (2014); Robinson, *supra* note 20, at 328. For a recent study on this mechanism as an expression of delegated UNSC powers to the ICC, see GABRIEL LENTNER, *THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT: THE REFERRAL MECHANISM IN THEORY AND PRACTICE* (2018).

⁸⁴ *See generally* MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* (2009).

⁸⁵ Mahnouch Arsanjani, *The 1998 Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 29 (1999). Some nations, like the United States, also opposed the inclusion of "terrorism" for national security reasons. Mateo Hoyos, *Including the Crime of Terrorism Within the Rome Statute*, 3 GLOBAL POL. L. REV. 25, 28 (2017). Moreover, in the eyes of some commentators, adopting a single legal definition of "terrorism" could jeopardize the ICC's independence and reveal a value-judgment. *See id.* at 30.

⁸⁶ *See* Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78 (Sept. 25, 2009).

where such nations are unable or unwilling to pursue genuine investigations and/or prosecutions.⁸⁷ This enforcement gap in the international legal system also signals that, in addition to the lack of agreement on the legal definition of “terrorism,” no international judicial body has compulsory or optional jurisdiction over crimes involving terrorism.⁸⁸

While complementarity seems straightforward in theory, its practical application is not always simple in counterterrorism. For example, domestic authorities may encounter challenges in apprehending individuals in territories under the control of ISIS/ISIL or other extremist groups. Should suspected terrorists be detained in remote locales, states’ efforts to seek extradition for purposes of domestic prosecution might be frustrated by shortcomings in the extant transnational framework on terrorism-related extradition.⁸⁹ In fairness, similar challenges may arise in the investigation and prosecution of core ICL crimes, although states might be more inclined to cooperate with and support ICL proceedings when they are not themselves the targets of those crimes. Given the potential enforcement gap created by scenarios in which state officials themselves committed core ICL crimes, the case for subjecting them to a supra-national judicial authority becomes more compelling.

Since some scholars perceive an “impunity gap” engendered by the dearth of domestic prosecutions of suspected terrorists, they contend that ICL should be brought to bear on the situation.⁹⁰ Given the particularly large-scale and grave nature of transgressions perpetrated by certain groups, such as ISIS/ISIL, ICL

⁸⁷ Rome Statute of the International Criminal Court, art. 17, July 17, 1998, 2187 U.N.T.S. 90; *see also* Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ¶ 41 (Aug. 30, 2011).

⁸⁸ MARSHALL B. LLOYD, *TRANSNATIONAL CRIMES IN THE AMERICAS: LAW, POLICY AND INSTITUTIONS* 60 (2018).

⁸⁹ *See* Pouyan Mazandaran, *An International Legal Response to an International Problem: Prosecuting International Terrorists*, 6 INT’L CRIM. L. REV. 503, 522 (2006). Further challenges may stem from the variances in classification of terrorism-related offenses and punishments in different domestic legal systems, including also potential issues concerning the observance of due process guarantees and prosecutorial integrity. *See id.* at 524–25. In fact, one significant lacuna a Comprehensive Convention on Terrorism may palliate “may not relate so much to the definition [of “terrorism”], but to the lack of a comprehensive framework for international cooperation, covering all such modalities, including clarifying the hitherto irregular, and at times confusing, rules regarding extradition.” *See* DUFFY, *supra* note 3, at 71 (emphasis added) (citing also a 2003 report of the International Bar Association Task Force on Terrorism); *see also* Kimberly Prost, *The Need for a Multilateral Cooperative Framework for Mutual Legal Assistance*, in *COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED LEGAL ORDER* 93 (Larissa van den Herik & Nico Schrijver eds., 2013).

⁹⁰ *See, e.g.*, Rod Rastan, *Jurisdiction*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 141, 152 (Carsten Stahn ed., 2015). On using the ICC to address shortcomings in domestic jurisdictions, *see* David Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 51–52 (2002).

proponents persist in advocating recourse to the ICC.⁹¹ Doing so, they insist, “would demonstrate that the Court—mandated to tackle the worst criminality affecting the international community and address the shortcomings of domestic jurisdictions—is capable of dealing with matters of immediate and pressing international concern and ensure that perpetrators of the most egregious violations of international law do not go unpunished.”⁹² Such prospects, however, will considerably complicate the task of clearly identifying the boundaries, similarities, and differences between the legal regimes governing ICL and terrorism respectively, since ISIS/ISIL carried out its crimes during an armed conflict. Other instances of terrorist acts carried out during peacetime might be addressed through other norms than ICL, although international law might remain relevant in the calculus—the assassination of the Lebanese Prime Minister and related terrorist attacks, which paved the way for the creation of the STL, come to mind.⁹³

2. A Limited Role for International Criminal Law in Combating Terrorism

In addition to ICL’s political and legal constraints, the ICC’s potential role is equally hampered by jurisdictional, legal, and political realities.⁹⁴ In 2015, ICC Chief Prosecutor Bensouda raised the possibility of the ICC handling ISIS/ISIL’s crimes in Syria and Iraq, but observed that “the jurisdictional basis for opening a preliminary examination into [alleged crimes against humanity, war crimes, and genocide] is too narrow at this stage.”⁹⁵ Nevertheless, it is useful to briefly review

⁹¹ The alleged large-scale crimes include genocide; mass executions; sexual slavery, rape, and other instances of sexual and gender-based violence; torture; mutilation; enlistment and forced recruitment of children; and destruction of cultural property. See Fatou Bensouda, *Statement of the Prosecutor of the ICC on the Alleged Crimes Committed by ISIS* (Apr. 8, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1> [<https://perma.cc/BXB7-T9JX>]. Those crimes also encompass ethnic and religious cleansing on a widespread and “historic scale.” See AMNESTY INTERNATIONAL, *ETHNIC CLEANSING ON A HISTORIC SCALE: ISLAMIC STATE’S SYSTEMIC TARGETING OF MINORITIES IN NORTHERN IRAQ* (2014). For a variety of views, see also Cecilia Polizzi, *The Crime of Terrorism: An Analysis of Criminal Justice Processes and Accountability of Minors Recruited by the Islamic State of Iraq and Al-Sham*, 24 U.C. DAVIS J. INT’L L. & POL’Y 1 (2017); Emily Chertoff, *Prosecuting Gender-Based Persecution: The Islamic State at the ICC*, 126 YALE L.J. 1050 (2017); David Sverdlov, *Rape in War: Prosecuting the Islamic State of Iraq and the Levant and Boko Haram for Sexual Violence Against Women*, 50 CORNELL INT’L L.J. 333 (2017); Matthew Clapperton et al., *Iconoclasm and Strategic Thought: Islamic State and Cultural Heritage in Iraq and Syria*, 93 INT’L AFF. 1205 (2017); Mohamed Badar, *The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS)*, 16 INT’L CRIM. L. Rev. 361 (2016); Mark Vlasic & Helga Turku, *Protecting Cultural Heritage as a Means for International Peace, Security and Stability*, 49 VANDERBILT J. TRANSNAT’L L. 1371 (2016).

⁹² Kenny, *supra* note 48, at 122.

⁹³ See S.C. Res. 1664 (Mar. 29, 2006).

⁹⁴ For a recent survey of both jurisdictional challenges and potential jurisdictional and substantive bases to prosecute ISIS/ISIL terrorists under the Rome Statute, see Kenny, *supra* note 48, at 127–39.

⁹⁵ Bensouda, *supra* note 91. The Prosecutor emphasized that territorial jurisdiction might be too tenuous at this stage, as the alleged crimes were perpetrated on the territories of Syria and Iraq, two states which are not parties to the Rome Statute. The Prosecutor observed that a similar conclusion holds with respect to personal jurisdiction, as the perpetrators are primarily nationals of those two nations.

potential entry-points in both ICL and at the ICC for counterterrorism efforts. For that purpose, the atrocities allegedly committed by ISIS/ISIL serve as a useful frame of reference given their magnitude and gravity. As argued above, however, these atrocities also make clear line drawing between relevant legal regimes difficult.

Several stakeholders—including the ICC Prosecutor—have invoked evidence suggesting that ISIS/ISIL members have perpetrated numerous offenses that would likely qualify as crimes against humanity, war crimes, and genocide.⁹⁶ As discussed in Part II.C., the UNSC has similarly taken the view that certain acts carried out by ISIS/ISIL qualify as “crimes against humanity” and “genocide,” and called for those responsible to be held accountable. Moreover, the UNSC has unequivocally designated that entity as a terrorist group.⁹⁷ The primary obstacle, however, is that the Rome Statute—which was negotiated and finalized prior to 9/11—offers no stand-alone basis to prosecute terrorism as a distinct international crime, or individual perpetrators of terrorism as “terrorists” under ICL.

While a broad provision addressing “crimes of terrorism” was temporarily inserted into the Draft Statute,⁹⁸ the finalized text of the Rome Statute excludes a stand-alone crime of terrorism.⁹⁹ Unsurprisingly, creating a stand-alone crime of terrorism remained hampered by the inability to define such a crime.¹⁰⁰ In addition to the definitional deadlock over “terrorism,” fears over politicization of the Court were central in driving this exclusion.¹⁰¹ That said, the drafters of the Rome Statute left the door open for the issue to be reassessed at a Review Conference¹⁰² and, since then, some publicists have suggested an amendment to include terrorism as a

⁹⁶ See Bensouda, *supra* note 91.

⁹⁷ See, e.g., S.C. Res. 2253 (Dec. 17, 2015).

⁹⁸ In the draft provision, “crimes of terrorism” comprised the following: (i) acts of violence against individuals and/or property to instil terror, fear or insecurity for political, ideological or other purposes; (ii) offenses enshrined under numerous international anti-terrorism conventions; and (iii) offenses which—through recourse to arms—inflicted indiscriminate violence against individuals, groups of persons, or property. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rep. of the Preparatory Committee on the Establishment of an International Criminal Court*, 27–28, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998).

⁹⁹ See Andreas Zimmermann, *Jurisdiction, Admissibility and Applicable Law: Article 5, in ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 111, 113–15 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016); Cassese, *supra* note 37, at 994.

¹⁰⁰ See WILLIAM SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 84 (5th ed. 2017) (observing that “[t]errorism seems to have more to do with motive than with either the mental or physical elements of a crime, and this is something that is not generally part of the definitions of offences.”).

¹⁰¹ See Preparatory Committee on the Establishment of an International Criminal Court, *Summary of the Proceedings of the Preparatory Committee*, 21, U.N. Doc. A/AC.249/1 (May 7, 1996); see also Proulx, *supra* note 72, at 1022–25.

¹⁰² U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Final Act*, 7–8, U.N. Doc. A/CONF.183/10, annex I (July 17, 1998).

stand-alone crime, within the purview of crimes against humanity.¹⁰³ However, the lack of political will to do so and other practical realities suggest that such amendment is unlikely.¹⁰⁴ Ultimately, the ICC is arguably left only with the possibility to take into account the nature of terrorism as a “distinguishing factor” at the sentencing stage, though this approach might “lessen the normative value of prosecuting terrorists” since it would fail to “specifically criminalize the intentional attacking of civilians to spread terror in pursuit of an ideological goal.”¹⁰⁵ Obviously, the ICC Prosecutor’s possession of sufficient evidence to prosecute ISIS/ISIL members for genocide might obviate the need to take terrorism into account altogether, as genocide would entail more serious consequences and implications.¹⁰⁶

(i) Fitting Terrorism Under the Crimes Against Humanity Rubric

Potential rapprochements between international terrorism and ICL do not end there. In future cases before the ICC, the Court could determine that certain terrorist acts—defined as such purely on factual grounds—*also* meet all other jurisdictional and admissibility requirements and “elements of crimes” under the Rome Statute to qualify as crimes against humanity. Many eminent commentators have equated the 9/11 attacks with crimes against humanity, including then-UN High Commissioner for Human Rights Mary Robinson,¹⁰⁷ UN Secretary-General Kofi Annan,¹⁰⁸ Robert Badinter,¹⁰⁹ M. Cherif Bassiouni,¹¹⁰ Antonio Cassese,¹¹¹

¹⁰³ See, e.g., Christian Much, *The International Criminal Court (ICC) and Terrorism as an International Crime*, 14 MICH. ST. INT’L L. REV. 121, 133–34 (2006).

¹⁰⁴ See also Zimmermann, *supra* note 99, at 115. Moreover, even if possible, such amendment would fail to capture the crimes perpetrated by ISIS/ISIL given the required timeframe to collect a sufficient number of ratifications to institute “terrorism” as a stand-alone crime, along with other temporal restrictions applicable to that scenario. See Review Conference of the Rome Statute Res. RC/Res. 6 (June 11, 2010); Kenny, *supra* note 48, at 131.

¹⁰⁵ Kenny, *supra* note 48, at 130.

¹⁰⁶ On the historical and jurisprudential roots of treating genocide as the most serious international law crime, see PAYAM AKHAVAN, *REDUCING GENOCIDE TO LAW: DEFINITION, MEANING, AND THE ULTIMATE CRIME* (2012).

¹⁰⁷ See Cassese, *supra* note 37, at 994; *Terror Attacks on US Were Crimes Against Humanity*, UN Rights Official Says, UN NEWS CENTRE (Sept. 25, 2001), <https://news.un.org/en/story/2001/09/15342-terror-attacks-us-were-crimes-against-humanity-un-rights-official-says> [<https://perma.cc/HJ8W-7JMV>].

¹⁰⁸ See Cassese, *supra* note 37, at 994 n.5.

¹⁰⁹ See Cassese, *supra* note 37, at 994 n.5.

¹¹⁰ M. Cherif Bassiouni, *Legal Control of International Terrorism*, 43 HARV. INT’L L.J. 83, 101 (2002).

¹¹¹ See Cassese, *supra* note 37, at 993–95.

Alain Pellet,¹¹² Geoffrey Robertson QC,¹¹³ and David Scheffer.¹¹⁴ What first arose by way of laconic rhetorical condemnation in these reactions was then taken up by a first group of scholars for further intellectual development.

In this first wave of scholarship, scholars attempted to lay down robust justifications for qualifying the 9/11 attacks as “crimes against humanity” under the Rome Statute, presumably to produce an extrapolatable analysis extending beyond Al-Qaeda. Those initial accounts thus focused on aligning terrorist acts, using the 9/11 attacks as a case-study, with the jurisdictional requirements of the Rome Statute and the constitutive elements of “crimes against humanity” under Article 7 of the Statute.¹¹⁵ Consequently, those scholars contended that many acts of terrorism could fit within the parameters of “crimes against humanity” under the Rome Statute and be prosecuted before the Court as such.

While this argument initially gained traction in the years after 9/11, it then receded, given the practical and political stumbling blocks identified above. However, the possible rapprochement between terrorism and crimes against humanity has been revived in recent scholarship, which refined the initial argument and advocated broadening the ICC’s jurisdiction to capture terrorism, or reading it in within the purview of crimes against humanity.¹¹⁶ That said, considerable resistance remains, articulated through a range of arguments of varying but undeniable persuasiveness.¹¹⁷ As seen above, the primary driving factor behind this resistance is that states want to prevent the ICC from becoming too politicized.

¹¹² Alain Pellet, *Non, Ce N’est Pas la Guerre!*, LE MONDE (Sept. 21, 2001), https://www.lemonde.fr/archives/article/2001/09/21/non-ce-n-est-pas-la-guerre_4193847_1819218.html [<https://perma.cc/D5XG-QAYN>].

¹¹³ Geoffrey Robertson, *America Could Settle this Score Without Spilling the Blood Across Afghanistan*, GUARDIAN (Sept. 14, 2001), <https://www.theguardian.com/world/2001/sep/14/september11.usa39> [<https://perma.cc/8PNR-RLX6>].

¹¹⁴ Scheffer, *supra* note 90, at 49.

¹¹⁵ See, e.g., Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court*, 34 RUTGERS L.J. 1, 26–41, 52 (2002); Proulx, *supra* note 72.

¹¹⁶ See, e.g., Harmen van der Wilt & Inez Braber, *The Case for Inclusion of Terrorism in the Jurisdiction of the International Criminal Court*, in THE INTERNATIONAL CRIMINAL COURT IN SEARCH OF ITS PURPOSE AND IDENTITY 17 (Triestino Mariniello ed., 2015); Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism*, 20 MICH. ST. INT’L L. REV. 219 (2012); Michael P. Scharf & Michael Newton, *Terrorism and Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 262, 262–78 (Leila N. Sadat ed., 2011) (advocating against the creation of a stand-alone crime against humanity of “terrorism”); Angela Hare, *A New Forum for the Prosecution of Terrorists: Exploring the Possibility of the Addition of Terrorism to the Rome Statute’s Jurisdiction*, 8 LOY. U. CHI. INT’L L. REV. 95 (2010); Beth Van Schaack, *Crimen Sin Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 192 (2008); see also Kenny, *supra* note 48 (exploring the prospect of prosecuting “terrorism” before the ICC as both a war crime and crime against humanity).

¹¹⁷ See, e.g., Mohammed Wattad, *From Rome to Nuremberg with Romanticism: On Terrorism*, 38 HOUS. J. INT’L L. 689, 710–11 (2016); Amos Guiora, *The Quest for Individual Adjudication and Accountability: Are International Tribunals the Right Response to Terrorism?*, 24 EMORY INT’L L. REV. 497, 501–06 (2010); CIARA DAMGAARD, INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE

Undeniably, persuasively fitting terrorist acts within the ambit of crimes against humanity's constitutive elements under Article 7 of the Rome Statute will depend on effective advocacy. As a starting-point, terrorist acts typically share one common and key, if not essential, feature with the category of crimes against humanity: they direct attacks against civilian targets.¹¹⁸ Beyond the obvious, the inquiry becomes more complex. Past scholarly analyses under Article 7 have invoked Al-Qaeda and the 9/11 attacks as the test case.¹¹⁹

Should the ICC be faced with comparable terrorist acts such as those perpetrated by ISIS/ISIL in the future, the Article 7 threshold might be reached more easily, where the previous 9/11 case-study may have failed. For example, the “plan or policy” element of crimes against humanity might be more readily met by the acts of ISIS/ISIL than in Al-Qaeda's case, given that the former group's propaganda materials unequivocally confirm that it pursues a broader policy of establishing a caliphate.¹²⁰ Moreover, few would challenge the notion that ISIS/ISIL's crimes are both widespread and systematic in nature, including ongoing crimes in occupied territories and regular large-scale excursions in other locales. These characteristics might lead to the conclusion that those acts would *prima facie* fall within the purview of crimes against humanity.¹²¹ In that event, the next step in potential prosecution would be an attempt to “fit” the acts in question within the specific crimes found in Article 7, such as murder, extermination, torture, persecution, or rape. While this aspect of the terrorism–ICL rapprochement has been explored elsewhere,¹²² it fails to capture the motive-driven or ideological peculiarities of terrorism, however ultimately defined.

Another interesting proposal would be to prosecute terrorist acts under the residual category of “other inhumane acts” found at Article 7(1)(k) of the Rome

INTERNATIONAL CRIMES: SELECTED PERTINENT ISSUES (2008); Hala El Amine, *Pourquoi la Cour Pénale Internationale N'est-elle pas Compétente en Matière de Terrorisme International*, in *TERRORISM AND INTERNATIONAL LAW* 247, 247–67 (Michael Glennon & Serge Sur eds., 2008); HELEN DUFFY, *THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW* 39 (2005); *but see* Hervé Ascensio, *Terrorisme et Juridictions Internationales*, in *LES NOUVELLES MENACES CONTRE LA PAIX ET LA SÉCURITÉ INTERNATIONALES* 271, 280 (SFDI ed., 2004); William Schabas, *Is Terrorism a Crime Against Humanity?*, 8 *J. INT'L PEACEKEEPING* 255 (2004).

¹¹⁸ The “chapeau” requirements of the Rome Statute, art. 7 ¶ 1, dictate this *sine qua non* of that category of crimes.

¹¹⁹ *See, e.g.*, Proulx, *supra* note 72; *see also* Robert Cryer, *Terrorism and the International Criminal Court*, 82 *AUSTL. L. REFORM COMM'N REFORM J.* 14 (2003).

¹²⁰ *See, e.g.*, Badar, *supra* note 91. *See also* Suleyman Ozeren et al., *An Analysis of ISIS Propaganda and Recruitment Activities Targeting the Turkish-Speaking Population*, 56 *INT'L ANNALS OF CRIMINOLOGY* 105 (2018). For arguments that Al-Qaeda's actions could not fit under Art. 7 of the Rome Statute, *see* THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS AND INTEGRATED TEXT VOL. I 151–52 (M. Cherif Bassiouni ed., 2005) (arguing that the provision was not meant to cover non-state actors and that the terms “organisational policy” are meant to capture a state policy). *See also* M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 243–81 (2d rev. ed. 1999).

¹²¹ *See* Kenny, *supra* note 48, at 132.

¹²² *See, e.g.*, *supra* note 120 and accompanying text.

Statute.¹²³ This approach would provide some leeway in prosecuting “inhumane conduct” which is not otherwise captured or proscribed as a crime against humanity in the remainder of the provision. The outstanding query in that scenario would be to ascertain whether terrorism qualifies under this rubric, which is likely a matter of discretion. On this point, the Pre-Trial Chamber I declared that Article 7(1)(k) was adopted to cover “serious violations of international customary law and basic rights pertaining to human beings, drawn from the norms of international human rights law, akin to the acts referred to in Article 7(1) of the Statute.”¹²⁴

Placing terrorist activity under the “other inhumane acts” component of the Rome Statute presents an attractive possibility, in theory. However, the Pre-Trial Chamber II stated that this provision “must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity.”¹²⁵ Therefore, the “other inhumane acts” limb of the Rome Statute is arguably narrower than what was found in other ICL instruments established before it, which traditionally inserted the provision to address the impossibility of devising an exhaustive provision capturing all crimes falling within this category.¹²⁶

Even without a statutorily defined crime of “terrorism”, some terrorist acts could nonetheless fulfill the criteria of war crimes or crimes against humanity under the Rome Statute, and possibly genocide in certain circumstances. Under that approach, the ICC would nonetheless face challenges in prosecuting such crimes. For one thing, the ICC’s capacity signals that it will only be able to handle a modest amount of terrorism cases, if any, given its focus on the most serious crimes perpetrated by leaders and organizers. However, in 2016 the Office of the Prosecutor (“OTP”) indicated that its general prosecutorial orientation now allows it, in certain circumstances, to prosecute select mid-level perpetrators.¹²⁷ This new

¹²³ For further development, see Kenny, *supra* note 48, at 133–35. See also Scharf & Newton, *supra* note 116 (underscoring that terrorist acts which do not conform to the parameters of “murder” under Art. 7 of the Rome Statute (e.g. systematic kidnappings by a terrorist group), or fail to be captured by IHL might be covered under the “other inhumane acts” limb of Art. 7 on a case-by-case basis, and advocating against the creation of a new specified crime against humanity of “terrorism”).

¹²⁴ Prosecutor v. Katanga, Case No. ICC-01/04-01/07-717, Decision on Confirmation of Charges, ¶ 448 (Sept. 30, 2008). For a list of “inhumane acts” provisions in historically relevant instruments, see Kenny, *supra* note 48, at 133 & n.146.

¹²⁵ Prosecutor v. Muthaura, Case No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 269 (Jan. 23, 2012). See also Katanga, *supra* note 124, ¶ 450.

¹²⁶ See Int’l Law Comm’n, Thirteenth Rep. on Draft Code of Crimes Against Peace and Security of Mankind, U.N. Doc. A/CN.4/466, at 43 (Mar. 24, 1995). For example, the Rome Statute’s version of the “other inhumane acts” limb differs from that of the Nuremberg Charter and the ICTR and ICTY Statutes, which included it as a catch all device, thereby enabling the international judiciary to determine its parameters. By contrast, “the Rome Statute contains certain limitations, as regards to the action constituting an inhumane act and the consequence required as a result of that action.” See Katanga, *supra* note 124, at ¶ 450. For further elaboration, see *id.*, ¶¶ 451–455.

¹²⁷ In 2016, the OTP issued a policy paper providing general prosecutorial guidance related to its work, indicating that it could prosecute mid-level perpetrators in certain circumstances to build an adequate evidentiary basis to capture those deemed “most responsible” within the ICC’s

orientation in the OTP's case selection envisages the prospect of bringing cases against lower-level offenders whose unlawful behavior is particularly serious.¹²⁸ While ICL cases may typically be launched against the leadership of organizations like Al-Qaeda or ISIS/ISIL, there is nothing preventing the prosecution of lower-ranked terrorist operatives before the ICC under existing ICL criminal categories, except for court capacity.

Attempts to "read in" a factual scenario involving terrorism within the ambit of "crimes against humanity" bypasses the need to agree on a universal legal definition of "terrorism."¹²⁹ It is unclear whether the STL's audacious and unilateral identification of a customary crime of terrorism, articulated on questionable methodological grounds in 2011, helps or hampers a potential rapprochement between terrorism and ICL. In an interlocutory decision on applicable law, the STL Appeals Chamber held that a customary international crime of terrorism exists during peacetime,¹³⁰ which required it to venture an authoritative definition of the term, at least in its own eyes.¹³¹ For one thing, the STL's mandate and the applicable law (i.e. Lebanese criminal law) that it is called upon to use in its decisions are radically different than those the ICC would confront, should it adjudicate terrorist facts qualifying as crimes against humanity.

In any event, some publicists have long advocated the existence of a customary crime of terrorism, including the late Antonio Cassese who also presided in the STL Appeals Chamber's interlocutory decision on the applicable law.¹³² This

prosecutorial net. See International Criminal Court Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, ¶ 42 (Sept. 15, 2016).

¹²⁸ The Office of the Prosecutor's shift in case selection policy aligns with the Rome Statute's stated objectives, which aim to capture the "most serious crimes," as opposed to the most serious offenders. See *id.*; Rome Statute, *supra* note 87, pmb., arts. 1, 5; see also Prosecutor v. Ntaganda, ICC-01/04-169, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ¶ 79 (July 13, 2006) ("[H]ad the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they could have done so expressly.")

¹²⁹ See, e.g., Fiona de Londras, *Terrorism as an International Crime*, in ROUTLEDGE HANDBOOK ON INTERNATIONAL CRIMINAL LAW 167, 167–68 (William Schabas & Nadia Bernaz eds., 2010); Scharf & Newton, *supra* note 116, at 278.

¹³⁰ See Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I, ¶¶ 83–113, 145–48 (Feb. 16, 2011).

¹³¹ On this aspect of the decision, see also Manuel Ventura, *Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?*, 9 J. INT'L CRIM. JUST. 1021 (2011). Prior to the decision, some publicists had already attempted to define the parameters of "terrorist" acts. See, e.g., Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT'L CRIM. JUST. 933, 936–40 (2006); Hans-Peter Gasser, *Acts of Terror, "Terrorism" and International Humanitarian Law*, 84 INT'L REV. RED CROSS 547, 553 (2002). See also *supra* note 82 and accompanying text.

¹³² For his views supporting the existence of an international customary crime of "terrorism" prior to the STL's decision, see, e.g., Antonio Cassese, *Terrorism as an International Crime*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 213, 213–25 (Andrea Bianchi ed., 2004); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 120–30, 139, 148 (2003). For other compatible views, see Marcello Di Filippo, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International*

minority position has traditionally met with robust counter-arguments emphasizing, *inter alia*, that there is insufficient evidence of both state practice and *opinio juris* to support a customary norm establishing an international crime of terrorism, let alone a legal definition of that term.¹³³ Additionally, the existence of a potential stand-alone crime does not flow directly from any source of international law.¹³⁴

Therefore, the backlash against the STL's puzzling reasoning is unsurprising, not least because this decision unduly expands the scope of Lebanese criminal law, misreads and misrepresents several legal sources (especially domestic legislation), misapplies methodological approaches to determine the existence of customary international law, evinces arguably poor reasoning, and likely violates the *nullum crimen sine lege* principle.¹³⁵ Thus, it seems unlikely that this decision has in any way aided the possible rapprochement between terrorism and ICL. The STL's definition of terrorism (or its stand-alone international crime) is certainly not binding. While it is probable that the STL's decision will provide traction for the idea that a peacetime customary crime of "terrorism" has crystalized,¹³⁶ this prospect is troubling to many as the Tribunal unquestionably melded *lex lata* elements and *lex ferenda* inclinations, which might hamper STL proceedings in the future.¹³⁷

Ultimately, should terrorist attacks be captured under the "other inhumane acts" rubric or some other Article 7 heading, they would still amount to *facts* meeting all the statutory and jurisprudential composite elements to qualify as crimes against humanity under the Statute, but would also happen to correspond to *some* definition of "terrorism."¹³⁸ This would remain strictly a factual determination with no legal effects across the category of crimes against humanity under the Rome Statute. This conclusion applies to all sub-categories of crimes against humanity enshrined in Article 7. While arguably an intermediate solution between the more radical proposal of carving out a stand-alone ICL crime of

Crimes, 19 EUR. J. INT'L L. 533, 569 (2008); Patrick Robinson, *The Missing Crimes*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 497, 518, 520 (Antonio Cassese ed., 2002).

¹³³ See, e.g., SAUL, *supra* note 24, at 191–270, 319.

¹³⁴ See, e.g., Robert Cryer, *Terrorism as an International or National Crime*, Public Lecture at the TMC Asser Institute (Oct. 2, 2007), in BIANCHI & NAQVI, *supra* note 4, at 282.

¹³⁵ For critical accounts, see Erik Stier, *The Expense of Expansion: Judicial Innovation at the Special Tribunal for Lebanon*, 36 B.C. INT'L & COMP. L. REV. E. SUPP. 115 (2015); Kai Ambos, *Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism Under International Law?*, 24 LEIDEN J. INT'L L. 655 (2011); Ben Saul, *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism*, 24 LEIDEN J. INT'L L. 677 (2011).

¹³⁶ For a judicial endorsement of the STL's decision, see *R. v. Gul*, [2012] EWCA (Crim) 280 [33]–[35]. On these cases and subsequent relevant judicial pronouncements, see Thomas Weatherall, *The Status of the Prohibition of Terrorism in International Law: Recent Developments*, 46 GEO. J. INT'L L. 589, 601–11 (2015).

¹³⁷ See, e.g., Nidal Jurdi, *The Crime of Terrorism in Lebanese and International Law*, in THE SPECIAL TRIBUNAL FOR LEBANON 73, 73–87 (Amal Alamuddin et al. eds., 2014). For a more nuanced assessment, see DUFFY, *supra* note 3, at 60–61.

¹³⁸ See BIANCHI & NAQVI, *supra* note 4, at n.247.

terrorism and the more conservative posture of imposing a blanket exclusion of terrorism from all ICC proceedings, this approach might leave proponents in both camps dissatisfied.

(ii) The Terrorism and War Crime Rapprochement

Finally, IHL has long prohibited certain manifestations of terrorism in both international¹³⁹ and non-international¹⁴⁰ armed conflict. At first, Article 33 of Geneva Convention IV¹⁴¹ and later Article 51(2) of Additional Protocol I, and Articles 4(2) and 13(2) of Additional Protocol II to the Geneva Conventions all defined or addressed terrorism during armed conflict. Both additional protocols added some contour to terrorism in this context—as the previous texts had left that concept undefined—by providing that a “civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”¹⁴²

The relevance of these provisions was subsequently affirmed by the International Criminal Tribunal for the former Yugoslavia (“ICTY”) when it held that, despite the Tribunal’s statute remaining silent on terrorism as an enumerated offense, “terrorizing [a] civilian population” amounts to a war crime under customary international law capable of adjudication before that judicial body.¹⁴³ In the Galić case, for instance, the ICTY Trial Chamber held that an offense “constituted of acts of violence willfully directed against the civilian population with the primary purpose of spreading terror among the civilian population” was now recognized in the scheme of customary ICL norms.¹⁴⁴ The unifying theme weaving these provisions and jurisprudential precedents together resides in the fact that the underlying attacks were designed to terrorize civilians, as opposed to being

¹³⁹ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, ¶ 2, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

¹⁴⁰ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13, ¶ 2, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. See also M. Adatci, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT’L L. 95, 114 (1920) (including “systematic terrorism” in a list of customary crimes submitted to the Preliminary Peace Conference after World War I).

¹⁴¹ See Geneva Convention Relative to the Protection of Civilians in Time of War art. 33, Aug. 12, 1949, 75 U.N.T.S. 287.

¹⁴² Protocol I, *supra* note 139, art. 51, ¶ 2; Protocol II, *supra* note 140, art. 13, ¶ 2. On the role of IHL in combating terrorism, see Saul, *supra* note 4, at 208–31; Marco Sassòli, *Terrorism and War*, 4 J. INT’L CRIM. JUST. 959 (2006); Luigi Condorelli & Yasmin Naqvi, *The War Against Terrorism and Jus in Bello*, in Bianchi, *supra* note 6, at 25–38.

¹⁴³ See Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶¶ 79, 87–98 (Nov. 30, 2006). See also Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶ 589 (Jan. 17, 2005); Ben Saul, *Crimes and Prohibitions of “Terror” and “Terrorism” in Armed Conflict*, 4 J. INT’L L. PEACE & ARMED CONFLICT 264, 269 (2005).

¹⁴⁴ Galić, Trial Chamber I Judgment and Opinion, ¶ 138 (Dec. 5, 2003). For commentary, see Robert Cryer, *Prosecutor v. Galić and the War Crime of Terror Bombing*, 2 IDF L. REV. 75 (2005–06).

geared towards securing a definitive military advantage.¹⁴⁵ Therefore, like scholars attempting to bring terrorism closer to the crimes against humanity rubric, some analyze the prospects and limits of prosecuting terrorism as a war crime under ICL.¹⁴⁶

One of the major limits of the ICTY's approach to prosecuting acts of terror as war crimes is that it fails to encompass the full scope and nature of terrorist acts. The underlying acts must necessarily be committed in the context of an armed conflict to be justiciable under the ICTY's model and qualify as a war crime. More relevantly, the Rome Statute's framework provides a perhaps even narrower construction of the war crime rubric capable of encompassing terrorist acts at Article 8.

Indeed, the ICTY's jurisprudence confirmed that the customary war crime of terrorist acts or threats of violence excludes the requirement of an ideological component commonly found in many conceptions of terrorism.¹⁴⁷ No such analogue exists in the Rome Statute. Article 8 proscribes intentionally directing attacks against civilians, but it does not include a provision prohibiting attacks with the primary purpose of spreading terror among civilians in wartime, let alone spreading terror to coerce a government or international organization to do or abstain from doing something.¹⁴⁸ Like the crimes against humanity option, the war crime avenue remains unsatisfying because, even assuming the underlying terrorist acts fit this category, prosecution would fail to capture the whole spectrum of criminality animating the perpetrators of terrorism (for instance, ISIS/ISIL, Al-Qaeda, and Boko Haram).

Given the ICTY's, International Criminal Tribunal for Rwanda's ("ICTR"), and relevant hybrid tribunals' limited mandates, the ICC currently remains the sole standing court to prosecute terrorist crimes under ICL. However, its ability to do so remains severely limited, and the available ICL legal categories are far from optimal in addressing terrorism.

C. The UNSC's Expansive Counterterrorism Efforts

¹⁴⁵ See Jelena Pejić, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRIT. Y.B. INT'L L. 71 (2004); Kenny, *supra* note 48, at 131–32.

¹⁴⁶ In so doing, they arguably enjoy steadier footing in the light of both ICTY and Special Court for Sierra Leone ("SCSL") jurisprudence. See, e.g., Kirsten Keith, *Deconstructing Terrorism as a War Crime: The Charles Taylor Case*, 11 J. INT'L CRIM. JUST. 813 (2013); Sébastien Jodoin, *Terrorism as a War Crime*, 7 INT'L CRIM. L. REV. 77 (2017). On the SCSL, see Roberta Arnold, *The Judicial Contribution of the Special Court for Sierra Leone to the Prosecution of Terrorism*, in THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW 260 (Charles Chernor Jalloh ed., 2013).

¹⁴⁷ See Galić (Trial Chamber I), *supra* note 144, ¶ 130; Galić (Appeals Chamber), *supra* note 143, ¶¶ 103–09.

¹⁴⁸ See Kenny, *supra* note 48, at 132.

Given the seemingly dwindling relevance of ICL in combating terrorism, further solutions should be explored. One obvious answer would be for the international community to institute a specialized tribunal to handle terrorism cases. This was recommended in the past but faced considerable stumbling blocks, including the lack of an agreed-upon definition of “terrorism.”¹⁴⁹ Any study on available responses to terrorism at the intersection of law and politics must take stock of the UNSC’s activities, since this body has been the central entity responsible for articulating international counterterrorism obligations and frameworks, which have had a considerable impact on many countries’ domestic legal systems.

It is also important to keep in mind the UNSC’s potential contributions in dealing with terrorism within the international system, especially in light of its powers. As discussed below, this political organ can issue binding decisions under the UN Charter, which means that it can promulgate and set general obligations under international law, bind UN membership, and prescribe more targeted measures to deal with specific situations. In fact, the UNSC has been a very active law-maker and implementer of international counterterrorism obligations.¹⁵⁰ In the last few decades, the UNSC has interpreted its powers broadly, including calling for and supporting the creation of ad hoc international criminal tribunals and the abovementioned STL to deal specifically with terrorism.¹⁵¹

Consequently, the UNSC could create an ad hoc tribunal for acts committed by ISIS/ISIL, similar to those it instituted to deal with the situations in Rwanda and the former Yugoslavia. This proposal was voiced shortly after 9/11 to deal with Al-Qaeda and other similar groups,¹⁵² but the proposals faced considerable political and practical obstacles. For one thing, it would be challenging to determine the contours of the international tribunal’s jurisdiction, both in terms of subject-matter and personal jurisdiction, not to mention whether it covers acts committed during armed conflict, or only in peacetime, or in both. In addition, the legal basis selected for establishing such a tribunal, be it through a binding UNSC resolution or by international agreement between select states, will have specific implications for

¹⁴⁹ On the prospects and limits of instituting a specialized “terrorism” court, see Bibi Van Ginkel, *Combating Terrorism: Proposals for Improving the International Legal Framework*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 461, 470ff (Antonio Cassese ed., 2012).

¹⁵⁰ See, e.g., Special Rapporteur of the Human Rights Council, *Rep. on Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 33, U.N. Doc. A/73/361 (Sept. 3, 2018). The UNSC’s role in legislating counterterrorism norms also presents its own set of political challenges. See, e.g., Luis Hinojosa Martínez, *The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits*, 57 *INT’L & COMP. L.Q.* 333 (2008).

¹⁵¹ See Final Act, *supra* note 102 and accompanying text. For a review of practice demonstrating the UNSC’s expansive interpretation of its own powers, see PROULX, *supra* note 18, at 155–260.

¹⁵² See, e.g., Christopher Greenwood, *International Law and the “War Against Terrorism”*, 78 *INT’L AFF.* 301, 305 (2002). More recently, Sweden suggested the creation of an international tribunal to deal with the crimes of ISIS/ISIL. See Helen Warrell, *Sweden Proposes International Tribunal to Try ISIS Fighters*, *FINANCIAL TIMES* (May 19, 2019), <https://www.ft.com/content/9086250e-7802-11e9-bbad-7c18c0ea0201> [<https://perma.cc/DS4B-V76P>].

temporal jurisdiction, enforcement, cooperation, and legitimacy. Finally, the would-be tribunal's lack of enforcement mechanism and its coordination with the ICC's own work would generate further obstacles.¹⁵³

Perhaps more immediately impactful to counterterrorism efforts—yet problematic in a range of ways—has been the UNSC's institution of targeted sanctions addressing individuals and entities suspected of supporting or training terrorist groups.¹⁵⁴ While the targeted sanctions regime extends beyond the scope of this Article, it has been bolstered and expanded by a series of UNSC resolutions¹⁵⁵ and has significantly affected domestic and transnational legal systems. Under this regime, states are expected to heed the UNSC's prescriptions and freeze the assets of relevant individuals and groups. It remains one significant way in which the UNSC has advanced counterterrorism efforts without reference to ICL. These developments—coupled with the fact that domestic legal systems must deploy both their criminal law and civil/administrative apparatuses to comply with international counterterrorism obligations—militate in favor of recognizing the existence of a “transnational network of criminal and civil law,” which supplants ICL as the more efficient and relevant model.

Here, the UNSC's prescriptions are not derived from ICL (and are not even criminal in nature), but rather behoove states to constrict terrorist funding and neutralize terrorists' assets. In this regard, while the normative prescriptions are transmitted in a top-down fashion, states remain entirely sovereign and free to implement those prescriptions in the best—or most self-interested—way they deem. Domestic legal systems retain their paramouncy in this model. Moreover, for states to even be in a position to implement those prescriptions in many

¹⁵³ But for an optimistic take, see Bibi van Ginkel, *How to Repair the Legitimacy Deficit in the War on Terror: A Special Court for Dealing with International Terrorism?*, in CHALLENGES IN A CHANGING WORLD: CLINGENDAEL VIEWS ON GLOBAL AND REGIONAL ISSUES 145 (Jaap de Zwaan, Edwin Bakker & Sico van der Meer eds., 2009).

¹⁵⁴ Indeed, while it had a transformative and at times effective impact on counterterrorism, the “targeted” sanctions regime raises a whole series of due process concerns and problems related to transparency and the presumption of innocence, and it stems from an arguably undemocratic and unrepresentative process. *See, e.g.*, Kristen Boon, *U.N. Sanctions as Regulation*, 15 CHINESE J. INT'L L. 543 (2016); DEVIKA HOVELL, THE POWER OF PROCESS: THE VALUE OF DUE PROCESS IN SECURITY COUNCIL SANCTIONS DECISION-MAKING (2016); Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT'L L. 1 (2016); Larissa Van den Herik, *Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regime*, 19 J. CONFLICT & SECURITY L. 427 (2014); Lisa Ginsborg, *The United Nations Security Council's Counter-Terrorism Al-Qaida Sanctions Regime: Resolution 1267 and the 1267 Committee*, in RESEARCH HANDBOOK, *supra* note 4, at 608–25; Luigi Condorelli, *Le Conseil de Sécurité, les Sanctions Ciblées et le Respect des Droits de l'Homme*, in INTERNATIONAL LAW AND THE QUEST FOR ITS IMPLEMENTATION: LIBER AMICORUM VERA GOWLLAND-DEBBAS 72 (Marcelo Kohen & Laurence Boisson de Chazournes eds., 2001). On UN sanctions and international law, see generally UN SANCTIONS AND INTERNATIONAL LAW (Vera Gowlland-Debbas ed., 2001).

¹⁵⁵ For the ISIS/ISIL and Al-Qaeda Sanctions Committee, see, *inter alia*, S.C. Res. 1267 (Oct. 15, 1999); S.C. Res. 1333 (Dec. 19, 2000); S.C. Res. 1730 (Dec. 19, 2006); S.C. Res. 1904 (Dec. 17, 2009); S.C. Res. 1989 (June 17, 2011); S.C. Res. 2161 (June 17, 2014); S.C. Res. 2253 (Dec. 17, 2015).

instances, they must also deploy their criminal and administrative legal apparatuses to generate outcomes which will give meaningful effect to the UNSC's mandate. Therefore, different domestic legal regimes interact across civil and criminal boundaries in carrying out the UNSC counterterrorism mandate. Domestic legal systems remain paramount in that process, save that they are imbued with a transnational dimension. Indeed, the international counterterrorism legal framework complements this transnational network of criminal and civil law by instituting softer obligations of cooperation, mutual assistance, and information-sharing. Consequently, ICL norms are virtually irrelevant in this context.

There are other important ways in which the UNSC contributes to global counterterrorism efforts, some more connected with the framework of ICL. For instance, the UNSC can register its condemnations and resolutions firmly within ICL by holding non-state actors accountable for core ICL violations. The UNSC has already done this on several occasions. For example, Resolutions 2170 and 2379 expressly equate the unlawful acts carried out by ISIS/ISIL, Al-Nusrah Front, and other individuals or entities associated with Al-Qaeda with crimes against humanity, war crimes, or genocide and insist that the perpetrators be held accountable.¹⁵⁶ Specifically, Resolution 2170 observes:

that widespread or systematic attacks directed against any civilian populations because of their ethnic or political background, religion or belief *may constitute a crime against humanity, emphasizes* the need to ensure that ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida *are held accountable* for abuses of human rights and violations of international humanitarian law, [and] *urges all parties* to prevent such violations and abuses.¹⁵⁷

Through this mechanism, the UNSC could bolster future prosecutions of terrorist acts before the ICC. At the very least, it could lend rhetorical support to the fight against impunity if a state insists on prosecuting the crimes in its domestic courts. Along similar lines, in several resolutions the UNSC has directed its prescriptions directly at non-state actors, either by reiterating that terrorist groups and individuals must comply with IHL and human rights duties, or by emphasizing the parties' respective obligations under an existing peace treaty in the context of an armed conflict.¹⁵⁸ As will be shown below in Part III.C., the UNSC's recent regulation of

¹⁵⁶ See S.C. Res. 2170, ¶ 3 (Aug. 15, 2014); S.C. Res. 2379, ¶ 1 (Sept. 21, 2017). See also Scott A. Gilmore, *United Nations Security Council Resolution 2379*, 57 INT'L LEG. MATERIALS 960 (2018).

¹⁵⁷ S.C. Res. 2170, *supra* note 156, ¶ 3 (emphasis added). See also S.C. Res. 2170, *supra* note 156, pmb. (“*Reaffirming* that those who have committed or are otherwise responsible for violations of international humanitarian law or violations or abuses of human rights in Iraq and Syria, including persecution of individuals on the basis of their religion or belief, or on political grounds, must be held accountable”); S.C. Res. 2379, *supra* note 156, ¶ 1.

¹⁵⁸ See Gérard Cahin, *The Responsibility of Other Entities: Armed Bands and Criminal Groups*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 331, 340 (James Crawford et al. eds., 2010). In addition to existing obligations under institutionalized peace treaties, the UNSC has also directed

non-state terrorist actors might suggest that not only do criminal prosecutions have an important role to play, but that civil proceedings might also be initiated to enforce the international or domestic legal accountability of terrorists.

Similarly, the UNSC has assumed a position of leadership in commissioning initiatives to collect and secure evidence which might be used in criminal proceedings against individuals and groups involved in large-scale terrorist activities. For instance, in 2017 the Council requested that the UN Secretary-General institute an investigative entity mandated with gathering and preserving evidence of alleged crimes against humanity, war crimes, and genocide perpetrated by ISIS/ISIL.¹⁵⁹ This development clearly underscores how the UN's political organs can lend direct support to the ICL machinery through binding resolutions or other measures designed to facilitate the collection of evidence necessary for obtaining future convictions. Presumably, such evidence might also be useful in future domestic criminal proceedings.

More importantly, the UNSC can play an even more supportive—and arguably legitimizing—role in assisting proceedings before the ICC.¹⁶⁰ Article 13(b) of the Rome Statute¹⁶¹ enables the UNSC to refer matters to the ICC for prosecution in situations where one or more crimes listed in Article 5¹⁶² appears to have been committed. The UNSC can refer such situations to the Prosecutor under

non-state actors “to comply with the provisions of the Charter of the United Nations and with rules and principles of international law, in particular international humanitarian law, human rights, and refugee law, and to implement fully the relevant decisions” or cease the international law transgressions immediately. *See, e.g.*, S.C. Res. 1296, pmb. (Apr. 19, 2000); *id.* ¶ 12.

¹⁵⁹ *See* S.C. Res. 2379, *supra* note 156, ¶ 2.

¹⁶⁰ On the relationship between the UNSC and ICC, see generally Vera Gowlland-Debbas, *The Security Council and the ICC*, in *DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT* 25 (Laurence Boisson de Chazournes ed., 2013); Nigel White & Robert Cryer, *The ICC and the Security Council: An Uncomfortable Relationship*, in *THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF PROFESSOR IGOR BLISHCHENKO* 455 (Jose Doria et al. eds., 2009); Vera Gowlland-Debbas, *The Relationship between Political and Judicial Organs of International Organisations: The Role of the Security Council in the New International Criminal Court*, in *INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS* 195 (Laurence Boisson de Chazournes et al. eds., 2002); Vera Gowlland-Debbas, *The Role of the Security Council in the New International Criminal Court from a Systemic Perspective*, in *THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY: LIBER AMICORUM* GEORGES ABI-SAAB 629 (Laurence Boisson de Chazournes & Vera Gowlland-Debbas eds., 2001).

¹⁶¹ Art. 13(b) of the Rome Statute, *supra* note 87, states:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: . . . (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

¹⁶² Art. 5 of the Rome Statute, *supra* note 87, provides that “[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole,” and establishes the Court’s jurisdiction over the following crimes: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.

Chapter VII.¹⁶³ The UNSC has ascertained that ISIS/ISIL poses a threat to international peace and security and has formulated similar findings regarding other subversive groups.¹⁶⁴ Presumably, the UNSC could use this determination as a basis to refer ISIS/ISIL crimes to the ICC Prosecutor. This action would be in accord with the spirit and letter of the UN Charter and falls within the UNSC's mandate to ensure international peace and security.¹⁶⁵

At a more principled level, the Article 13(b) jurisdictional avenue raises legitimate concerns that it might enable “back door” prosecutions through UNSC referrals, thereby unduly expanding the ICC's jurisdiction. This approach does seem inconsistent with the principle of state consent in international law.¹⁶⁶ However, the legitimacy of such a referral would rest on how the UNSC framed it and on which actors or activities the referral captured.¹⁶⁷

Perhaps a dose of political pragmatism is warranted. At the outset, granting such a referral power to an organ like the UNSC might signal that its exercise of power will run up against political obstacles and tactical noncompliance. This might explain the reticence of some states, including several Rome Statute parties (e.g. Chad, Djibouti, Nigeria, South Africa, and Uganda), to support UNSC referrals to the ICC. For example, following the referral of a “situation” by the UNSC to the ICC, arrest warrants were issued against Sudanese President Omar al-

¹⁶³ See Rome Statute, *supra* note 87, art. 13(b).

¹⁶⁴ See *supra* notes 98–99 and accompanying text; Kenny, *supra* note 48, at 124.

¹⁶⁵ See Kenny, *supra* note 48, at 124.

¹⁶⁶ This might vest the Court with some type of universal jurisdiction in select “situations.” See, e.g., ALEXANDRE S. GALAND, UN SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT: LEGAL NATURE, EFFECTS AND LIMITS 6, 12–13 (2019). For a review of the drafting history of the Art. 13(b) referral mechanism, see LENTNER, *supra* note 83, at 10–31. For a cynical account emphasizing the neo-colonial features of this mechanism, see RES SCHUERCH, THE INTERNATIONAL CRIMINAL COURT AT THE MERCY OF POWERFUL STATES: AN ASSESSMENT OF THE NEO-COLONIALISM CLAIM MADE BY AFRICAN STAKEHOLDERS 169–217 (2017). The flipside to these concerns is that it might be better to have a politically driven (and imperfect) system of referrals—sometimes capturing non-parties to the Rome Statute—if the overarching objective is truly to fight impunity, as opposed to restraining the UNSC's referral power.

¹⁶⁷ For instance, should such a referral attempt to provide the ICC with jurisdiction over Syrian state forces or opposition forces, it would unquestionably be met by a Russian and/or Chinese veto, as both Permanent Members have been resolute in their opposition to potential UNSC resolutions addressing the violence in Syria. Indeed, in 2014 both states voted against a draft resolution aiming to refer the Syrian situation to the ICC, although they did not manifest such resistance to the earlier referral of the situation in Libya to the same court. See Press Release, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, Meetings Coverage SC/11407 (May 22, 2014). Conversely, should the subject-matter of a UNSC referral be couched solely in terms of the acts of ISIS/ISIL, it would engender a significant legal complexity, as neither the Rome Statute nor the ICC's Rules of Procedure and Evidence define the term “situation.” It follows that this would “raise the question of whether a referral may refer a defined group as opposed to a series of criminal events or incidents, thus precluding individuals who are not members of the group, but who have potentially committed crimes, from possible adjudication.” See Kenny, *supra* note 48, at 123. For further discussion of this issue and its implications, see Kenny, *supra* note 48, at 122–25.

Bashir.¹⁶⁸ However, the subject of the warrants continued relatively unimpeded in his travels, including several trips to states party to the Rome Statute. None of these states arrested or extradited him, which elicited the condemnation of the ICC Prosecutor and her ultimate abdication.¹⁶⁹ The case of ISIS/ISIL is different. While international law seems behind such prosecutions, it is likely that UNSC referrals involving terrorist groups or individuals might run into different, but equally challenging, obstacles. As argued above, there may be several political factors prompting states' reticence to support ICL or ICC proceedings,¹⁷⁰ and in the context of indictments of heads of state or high-ranking government officials, some states believe that international law precludes them from arresting such individuals.¹⁷¹

¹⁶⁸ See S.C. Res. 1593 (Mar. 31, 2005). For a partly critical yet optimistic take, see Robert Cryer, *Sudan, Resolution 1593, and International Criminal Justice*, 19 LEIDEN J. INT'L L. 195 (2006). Similarly, in 2016 the ICC Prosecutor entertained the possibility of indicting Mr. Duterte, the President of the Philippines, for alleged massive extrajudicial killings and other crimes in his "war on drugs." In such a case, however, no UNSC referral would be required given the Philippines' status as a Rome Statute party. See Nikko Dizon, *International Court Warns PH on Killings*, PHILIPPINE DAILY INQUIRER (Oct. 16, 2016), <https://globalnation.inquirer.net/146810/international-court-warns-ph-on-killings> [<https://perma.cc/37PR-XBBH>]. The Philippines recently withdrew from the ICC, although this development should not affect the prospect of prosecution before the ICC, as it was a state party to the Rome Statute at the material time the alleged offenses were perpetrated. On this aspect and the ongoing ICC preliminary examination into this situation, see Proulx, *supra* note 15, at 259–260 n.177–79.

¹⁶⁹ See Fatou Bensouda (Prosecutor of the Int'l Crim. Court), *Twenty-Third Rep. to the UN Security Council Pursuant to UNSCR 1593 (2005)*, ¶ 11 (June 9, 2016) (also critiquing the UNSC's inaction). One possible avenue to make referrals more effective would be for the UNSC to enforce arrest warrants or induce state compliance with ICC proceedings, including through its enforcement measures under Art. 41 of the UN Charter. However, this path seems potentially fraught with political difficulties, not least the threat of the exercise of veto power by a recalcitrant Permanent Member. On broader problems related to states' noncompliance and non-cooperation with ICC proceedings, see Rod Rastan, *Can the ICC Function Without State Compliance?*, in THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT (Margaret M. deGuzman & Valerie Oosterveld eds., forthcoming 2019), <https://ssrn.com/abstract=3332497> [<https://perma.cc/6PYC-P2YF>].

¹⁷⁰ See *supra* note 83 and accompanying text. That said, both UNSC resolutions and domestic proceedings can have a legal impact on states' obligations to cooperate with the ICC. See Dapo Akande, *The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*, 10 J. INT'L CRIM. JUST. 299 (2012).

¹⁷¹ See generally Dapo Akande, *The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333 (2009). In the case against Sudan's former President Mr. Al-Bashir, the ICC concluded that high-ranking officials of states parties enjoy no immunity against prosecution, nor do those of non-states parties in the context of a UNSC referral to the Court. In this case, therefore, Jordan was obligated to cooperate with the Court with a view to bringing Mr. Al-Bashir to justice. See *Prosecutor v. Al-Bashir*, ICC-02/05-01/09-397-Corr, Judgment in the Jordan Referral re Al-Bashir Appeal (May 6, 2019); *Prosecutor v. Al-Bashir*, ICC-02/05-01/09-397-Anx1-Corr, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa ¶¶ 447–448 (May 6, 2019). The ICJ will likely soon have the opportunity to pronounce on the implications of states' international legal obligations with respect to immunities of heads of state and government and other senior officials in the context of a forthcoming advisory opinion request. See Permanent Rep. of Kenya to the U.N., Letter dated 9 July 2018 From the Permanent Rep. of Kenya to the United Nations addressed to the Secretary-General, U.N. Doc. A/73/144 (July 18, 2018).

III. Counterterrorism, Law, and Politics: Reaffirmation of State Sovereignty

Based on the foregoing barriers, it becomes clear that ICL can only currently play a marginal role, at best, in repressing terrorism. In addition to the political and legal constraints highlighted above, ICL's dwindling relevance in this area is further compounded by the legitimacy crisis faced by the ICC. For instance, several African states threatened to withdraw from the Rome Statute on the grounds that the ICC harbors an African bias by overly targeting African states and individuals in its cases, which is accompanied by various other perceived legitimacy deficits.¹⁷² The recent track record of the Court—including a controversial acquittal in the Bemba appeal;¹⁷³ intimidation and other ill treatment of witnesses;¹⁷⁴ governmental obstruction of ICC investigations and other activities;¹⁷⁵ the Pre-Trial Chamber II's

¹⁷² See, e.g., Manisuli Ssenyonjo, *State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia*, 29 CRIM. L. FORUM 63 (2018); Michelle Nel & Vukile Ezrom Sibiyi, *Withdrawal from the International Criminal Court: Does Africa Have an Alternative?*, 17 AFR. J. CONFLICT RES. 79 (2017); Brendon J. Cannon et al., *The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative*, 2 AFR. J. INT'L CRIM. JUST. 6 (2016); Kamari M. Clarke et al., *Africa and the ICC: An Introduction*, in AFRICA AND THE ICC: PERCEPTIONS OF JUSTICE 1, 1 (Kamari M. Clarke et al. eds., 2016); Sarah McGibbon, *Risky Business: Witnesses and Africa's ICC Withdrawal*, 28 HAGUE Y.B. INT'L L. 115, 157–58 (2015); Mandiaye Niang, *Africa and the Legitimacy of the ICC in Question*, 17 INT'L CRIM. L. REV. 615 (2017). In fairness, some states that initially announced their intention to withdraw from the Rome Statute have reversed their intentions or have seen their domestic courts block their withdrawal. See, e.g., Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html?searchResultPosition=1> [<https://perma.cc/45NH-CZ3F>]; *Burundi Becomes First Nation to Leave International Criminal Court*, GUARDIAN (Oct. 28, 2017), <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court> [<https://perma.cc/YU23-2SR5>]; Jason Burke, *South African Judge Blocks Attempt to Withdraw from ICC*, GUARDIAN (Feb. 22, 2017), <https://www.theguardian.com/world/2017/feb/22/south-african-judge-blocks-attempt-to-withdraw-from-international-criminal-court> [<https://perma.cc/E829-PB37>]. For a more nuanced approach, see Rebecca J. Hamilton, *Africa, the Court, and the Council*, in THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT, *supra* note 169. For more general critical takes, see also TIJTSKE LINGSMA, ALL RISE: THE HIGH AMBITIONS OF THE INTERNATIONAL CRIMINAL COURT AND THE HARSH REALITY (2017); NERIDA CHAZAL, THE ICC AND GLOBAL SOCIAL CONTROL: INTERNATIONAL CRIMINAL JUSTICE IN LATE MODERNITY (2016).

¹⁷³ See *Prosecutor v. Bemba*, No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute" (June 8, 2018). See also Oumar Ba, *What Jean-Pierre Bemba's Acquittal by the ICC Means*, AL JAZEERA (June 13, 2018), <https://www.aljazeera.com/indepth/opinion/jean-pierre-bemba-acquittal-icc-means-180612121012078.html> [<https://perma.cc/N5HD-GSLB>]; Marlise Simons, *International Court Throws Out War Crimes Conviction of Congolese Politician*, N.Y. TIMES (June 9, 2018), <https://www.nytimes.com/2018/06/09/world/africa/bemba-overtturn-international-court.html?searchResultPosition=1> [<https://perma.cc/WWM8-XF8V>]. For academic commentary, see Susana SáCouto & Patricia Viseur Sellers, *The Bemba Appeals Chamber Judgment: Impunity for Sexual and Gender-Based Crimes?*, 27 WM. & MARY BILL RTS. J. 599 (2019).

¹⁷⁴ See, e.g., LIONEL NICHOLS, THE INTERNATIONAL CRIMINAL COURT AND THE END OF IMPUNITY IN KENYA 119–21, 168, 211 (2015).

¹⁷⁵ See, e.g., Jonneke Koomen, *The International Criminal Court*, in THE INSTITUTIONS OF HUMAN RIGHTS: DEVELOPMENTS AND PRACTICES 65, 81 (Gordon DiGiacomo & Susan L. Kang eds., 2019).

recent rejection of the Prosecutor's request to investigate alleged ICL crimes in Afghanistan,¹⁷⁶ and problematic remarks delivered by a sitting ICC Judge¹⁷⁷—have also further undermined its perceived efficacy and credibility. These factors do not deprive ICL of its ability to generate important rhetorical messages and contribute to the discourse against impunity, but it is undeniable that there is a dearth of criminal prosecution and enforcement avenues concerning terrorism on the international plane. Thus, a more mixed solution is required to deal with the transnational threat of terrorism. ICL norms can illuminate the counterterrorism work of both the UNSC and states by providing rhetorical support for their respective activities, norms to apply or use more concretely (for instance, when formulating a resolution or domestic legislation), and interpretive tools to construe various issues surrounding individual criminal responsibility.

A. *The UNSC as Law-Maker*

As discussed above in Part II.C., the UNSC has been particularly ambitious since 9/11 in developing counterterrorism law and policy at the international level, addressing most of its prescriptions to states. Indeed, that organ's contributions on counterterrorism have generated considerable scholarly and expert commentary that equates the Council's far-reaching exercise of its powers with "quasi-legislation."¹⁷⁸ The UNSC's expansive post-9/11 measures began with Resolutions 1368 and 1373,¹⁷⁹ requiring states to criminalize terrorism within their domestic legal systems, prevent and criminalize terrorist financing, deny safe haven to terrorists (or those supporting them), increase border surveillance, and verify the travel documents of individuals attempting to enter their states.¹⁸⁰ Building on the

See also Patrick Wintour et al., *US Revokes ICC Prosecutor's Visa over Afghanistan Inquiry*, GUARDIAN (Apr. 5, 2019), <https://www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor> [<https://perma.cc/X4LL-2K92>]; Owen Bowcott et al., *John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack*, GUARDIAN (Sept. 10, 2018), <https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech> [<https://perma.cc/L2FX-5QWL>].

¹⁷⁶ *See* Press Release, International Criminal Court, Afghanistan: ICC Pre-Trial Chamber II Authorises Prosecutor to Appeal Decision Refusing Investigation, Press Release 1479 (Sept. 17, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1479&fbclid=IwAR0PPj8oAkVcrvJsbTTzTc3UcWkVMBB1hD6CihR4OR7112ef6YG-iRiM3C4> [<https://perma.cc/6P7C-R94Q>].

¹⁷⁷ *See* Kevin Jon Heller, *Problematic Statements by the French Judge at the ICC*, OPINIO JURIS (May 3, 2019), <http://opiniojuris.org/2019/05/03/problematic-statements-by-the-french-judge-at-the-icc/> [<https://perma.cc/S2NN-WQL3>].

¹⁷⁸ For a survey of relevant practice, see PROULX, *supra* note 18, at 126–36. *See also* IAN JOHNSTONE, THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS 93–105 (2011). On the UNSC's quasi-legislative role more generally, with some references to counterterrorism, see JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005).

¹⁷⁹ *See* S.C. Res. 1368 (Sept. 12, 2001); S.C. Res. 1373 (Sept. 28, 2001).

¹⁸⁰ Indeed, Resolution 1373, coupled with several subsequent UNSC resolutions and accompanying practice, have arguably enhanced states' due diligence obligations and heightened expectations regarding their counterterrorism efforts. *See generally* PROULX, *supra* note 1, at 223–24; Brigitte Stern, *La Responsabilité Internationale des Etats*, in 8 CURSOS EUROMEDITERRÁNEOS BANCAJA DE DERECHO INTERNACIONAL 659, 689 (Jorge Cardona Lloréns ed., 2003). Furthermore, Resolution 1373 essentially universalized as mandatory the content of the Terrorist Financing Convention for

seminal UNSC Resolution 1373, Resolution 1624 requires states to monitor and deny safe haven to inciters of terrorism.¹⁸¹

In tandem, these resolutions paved the way for the institution of the Counter-Terrorism Committee (“CTC”) and imposed stringent reporting requirements on states with a view to keeping the CTC, along with the UNSC, apprised of legislative, security, and administrative measures taken domestically to observe their obligations under both resolutions.¹⁸² This novel counterterrorism edifice facilitated ongoing dialogue between key institutions in the transnational security realm and domestic legal systems and ensured that international legal obligations would be translated and implemented in those same systems.¹⁸³ In the months and years that followed 9/11, the UNSC expanded this security apparatus by prescribing additional far-reaching counterterrorism obligations for states, including on mutual cooperation, assistance, and information-gathering.¹⁸⁴ It bolstered its counterterrorism strategy through a series of resolutions that promoted comprehensive and mutually reinforcing roles for states, international organizations, and non-state actors. These improvements stressed the importance of prevention, early identification of terrorist threats, and eradication of root causes of extremist violence and also compelled the adoption of preventive measures, financial regulations, counter-radicalization programs, and transnational cooperation.¹⁸⁵ These resolutions elicited a variety of scholarly responses ranging from recognizing them as falling within the ambit of the UNSC’s mandate to denouncing them as potentially *ultra vires* acts.¹⁸⁶

all states, also emphasizing that any support—direct or indirect, active or passive—of terrorism or its financing is prohibited and should be punished with serious penalties. *See also* JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 160 (2013). These international developments also entail clear obligations of cooperation and mutual assistance for states in preventing terrorism and its financing. *See, e.g.*, DUFFY, *supra* note 3, at 131.

¹⁸¹ S.C. Res. 1624, ¶ 1 (Sept. 14, 2005).

¹⁸² *See* Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism*, 97 AM. J. INT’L L. 333, 333–35 (2003). On the CTC’s mandate and work, *see generally* SECURITY COUNCIL COUNTER-TERRORISM COMMITTEE, <https://www.un.org/sc/ctc/> [<https://perma.cc/2T47-ZG CJ>] (last visited Oct. 23, 2019). For a more general critical account, *see generally* Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council’s Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT’L L. 881 (2006).

¹⁸³ *See, e.g.*, Rosand, *supra* note 182, at 335–38.

¹⁸⁴ On relevant post-9/11 resolutions, *see* Vincent-Joël Proulx, *An Incomplete Revolution: Enhancing the Security Council’s Role in Enforcing Counterterrorism Obligations*, 8 J. INT’L DISP. SETTLEMENT 303 (2017).

¹⁸⁵ *See, e.g.*, S.C. Res. 2255 (Dec. 21, 2015); S.C. Res. 2253 (Dec. 17, 2015); S.C. Res. 2249 (Nov. 20, 2015); S.C. Res. 2233 (July 29, 2015); S.C. Res. 2199 (Feb. 12, 2015); S.C. Res. 2195 (Dec. 19, 2014); S.C. Res. 2178 (Sept. 24, 2014); S.C. Res. 2170 (Aug. 15, 2014).

¹⁸⁶ Understandably, some commentators queried whether the UNSC’s powers would enable it, for all intents and purposes, to unilaterally dictate domestic legislation, set general obligations for States without any geographical or temporal timeframe, and augment the standard of care of states’ existing international counterterrorism obligations. By contrast, others opined that this approach fell squarely within the purview of the UNSC’s mandate to maintain international peace and security and its responsibility to manage global security threats. *See generally* Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT’L L. 175 (2005); Paul Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901 (2002).

Resolution 1373 and the UNSC's follow-up measures were adopted keeping in mind the conventional framework consisting of nineteen counterterrorism sectoral treaties that obligate states parties to criminalize certain acts in their domestic systems and assert jurisdiction over individuals having committed such acts (or extradite them for the purposes of prosecution). Hence, there is considerable continuity and synergy between that conventional framework and the binding counterterrorism norms promulgated by the UNSC.¹⁸⁷ When examining the UNSC's measures in the years following 9/11, it becomes clear that this organ directed its prescriptions predominantly at sovereign states, though relevant resolutions undeniably also condemned and proscribed conduct that would enable terrorist activity or constitute terrorism if perpetrated by individuals or non-state actors.¹⁸⁸ Many UNSC resolutions, coupled with smart sanctions, regulated the conduct of non-state actors only indirectly, primarily by requiring states to prevent or punish the unlawful activities of such actors falling within their jurisdiction.¹⁸⁹ However, as discussed below in Part III.C., the UNSC has recently engaged more squarely in the direct regulation of non-state actors' conduct. Before reviewing this development, it is important to appreciate the role of states in implementing international counterterrorism obligations.

In addition to those approaches discussed above, UNSC measures also rely on the assistance of "soft law" mechanisms to ensure their effective and enforceable implementation.¹⁹⁰ By "soft law," I refer to non-binding norms that are generally

¹⁸⁷ For an appraisal of relevant UNSC "quasi-judicial" resolutions, with some reference to the sectoral counterterrorism treaties, see Bianchi, *supra* note 182.

¹⁸⁸ See, e.g., Proulx, *supra* note 15, at 247–248. For recognition that the UNSC at least indirectly regulates the conduct of non-state actors, see also THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 800–02 (Bruno Simma et al. eds., 3d ed. 2012); Gregory H. Fox et al., *The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law*, 67 AM. U. INT'L L. REV. 649, 700 (2018). As a related point, the UNSC's smart sanctions targeting terrorist individuals and entities directly regulate non-state actors. See, e.g., Mikael Eriksson & Peter Wallenstein, *Targeting Sanctions and Ending Armed Conflicts: First Steps Towards a New Research Agenda*, 91 INT'L AFF. 1387, 1388 (2015); Kristen Boon, *U.N. Sanctions as Regulation*, 15 CHINESE J. INT'L L. 543, 560–61 (2016).

¹⁸⁹ However, some argue that casting such exercise of UNSC power as "indirect" regulation of non-state actors is premised on an artificial distinction with "direct" regulation, particularly given that "these sanctions are triggered by and designed to reverse acts of non-state entities." See Fox et al., *supra* note 188, at 700. *But see* Jan Klabbers, *(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors*, in NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 351, 354–55 (Jarna Petman & Jan Klabbers eds., 2003); Pieter H. Kooijmans, *The Security Council and Non-State Entities as Parties to Armed Conflicts*, in INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 333, 333–46 (Karel Wellens ed., 1998).

¹⁹⁰ See Christian Tomuschat, *The Responsibility of Other Entities*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 327–28 (James Crawford et al. eds., 2010). On challenges related to "soft law" regimes, especially concerning the imprecise and non-binding nature of relevant norms, see Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422 (2000); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

less formalized or precise which, although they may not be enforced through formal dispute settlement means, may still have an impact on states' and non-state actors' compliance. They stand in contrast to "hard law," which captures "legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law."¹⁹¹ Typically, soft law norms at least disable, or diminish, "one or more dimensions of obligation, precision and delegation."¹⁹² By way of example, the Financial Action Task Force (FATF) has proven instrumental in formulating "soft law" guidelines to tackle terrorist financing.¹⁹³ These initiatives were adopted in the spirit of relevant UNSC measures to constrict the movement and financing of terrorist actors within the global financial sector.¹⁹⁴ In this light, it might be more accurate to adopt a broader view of what ICL actually represents in the global struggle against terrorism: a more transnational, as opposed to top-down, reality. This system might also enlist the assistance of non-criminal legal frameworks to enforce international counterterrorism obligations.

While "soft law" norms play a role within the broader framework, particularly in supporting the application and implementation of binding rules, the latter norms remain vital in driving states' counterterrorism policies and practices. As demonstrated above, traditional ICL can play a role, albeit a limited one. Ultimately, states have great latitude to define "terrorism" and choose the resources and legal infrastructures to combat it. In summary, domestic prosecution remains at the core of this transnational counterterrorism framework, but it is supplemented by reciprocal, transnational obligations of cooperation, mutual assistance, and shared information-gathering.

Central to the UNSC's prescriptions are obligations to criminalize not only actual terrorist offenses, but also to regulate more indirect modes of unlawful behavior and impose criminal liability for inchoate or preparatory offenses.¹⁹⁵ This essentially means that states are expected to deploy considerable efforts in controlling extremist violence taking root within their borders through their national security apparatuses. Of course, there are many ways in which states translate and ultimately implement UNSC resolutions within their domestic laws,

¹⁹¹ Abbott & Snidal, *supra* note 190, at 421–22.

¹⁹² Abbott & Snidal, *supra* note 190, at 423. For a critical take, see Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 423 (1983) (positing that increased reliance on soft law mechanisms "might destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose").

¹⁹³ See, e.g., Anna Gardella, *The Fight Against the Financing of Terrorism between Judicial and Regulatory Cooperation*, in Bianchi, *supra* note 6, at 418–20, 447; Bianchi, *supra* note 33, at 528–29.

¹⁹⁴ See *Terrorist Financing: FATF's Strategy on Combating Terrorist Financing*, FATF, <http://www.fatf-gafi.org/publications/fatfgeneral/documents/terroristfinancing.html> [https://perma.cc/UNM8-ZAUL] (last visited Oct. 22, 2019). On the FATF's efforts to combat terrorist financing, see also Ben Saul, *The Emerging International Law of Terrorism*, 1 IND. Y.B. INT'L L. & POL. 1, 10–12 (2010). On terrorist financing and international law generally, see Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315 (2003).

¹⁹⁵ For a more extensive treatment of this question, see generally PROULX, *supra* note 1.

and a comprehensive review of state practice extends beyond the scope of this Article.

B. *States as the Main Implementers and Drivers of International Law*

As underscored in 2005 by the UN High-Level Panel on Threats, Challenges and Change, “States are still the front-line responders to today’s threats . . . [s]uccessful international actions to battle poverty, fight infectious disease, stop transnational crime, rebuild after civil war, reduce terrorism and halt the spread of dangerous materials all require capable, responsible States as partners.”¹⁹⁶ To understand fully what steps may be taken to criminalize terrorism and enhance national security infrastructures across the board, we must turn to domestic legal systems, which invariably reflect states’ levels of commitment to international norms geared towards the prevention and repression of terrorism. Indeed, states are typically better situated than international institutions to compel individuals under their jurisdiction and sovereignty (i.e. within their territory) to observe binding legal orders, which in many ways remains the most effective translation mechanism of UNSC resolutions.¹⁹⁷

Therefore, the legal framework to combat terrorism is increasingly developing into a transnational system in which states do most of the heavy-lifting at the domestic level through effective law enforcement work, intelligence-gathering, preventive and other regulatory measures, and prosecutorial work. Regionally and transnationally, states are also called upon to coordinate efforts between themselves and with regional/international organizations on issues of information-sharing and evidence-gathering, while also cooperating on various matters of mutual judicial and criminal law assistance. For instance, the recently adopted Association of Southeast Asian Nations (“ASEAN”) Convention on Counter-Terrorism constitutes a welcome addition to the framework of multilateral counterterrorism conventions, entailing a series of binding obligations for that organization’s membership with respect to preventing and prosecuting extremist violence. For example, this instrument imposes a series of cooperation obligations between parties in the prevention of terrorism and its financing and the provision of mutual legal assistance in criminal matters, along with the duties of member

¹⁹⁶ Rep. of the High-level Panel on Threats, Challenges and Change: A More Secure World, U.N. Doc. A/59/565, at 22 (Dec. 2, 2004). For further academic commentary on this report, see Ian Johnstone, *Threats, Challenges, and Change: The Secretary-General’s High Level Panel*, 99 ASIL PROC. 61 (2005); Maxwell Chibundu, *Assessing the High-Level Panel Report: Rethinking the Causes and Consequences of Threats to Collective Security*, in UNITED NATIONS REFORM AND THE NEW COLLECTIVE SECURITY 117–54 (Peter Danchin & Horst Fischer eds., 2010).

¹⁹⁷ See also Tomuschat, *The Responsibility of Other Entities*, in Crawford et al., *supra* note 190, at 319. On states’ implementation of UNSC terrorism-related resolutions, see Andrea Bianchi, *Security Council’s Anti-Terror Resolutions and their Implementation by Member States: An Overview*, 4 J. INT’L CRIM. JUST. 1044 (2006).

states to exercise jurisdiction over terrorism suspects within their jurisdiction, extradite or prosecute such suspects, and afford fair treatment to detainees.¹⁹⁸

States do not only resort to creating treaties, or signing onto existing instruments, as unique ways to observe their international obligations. While they do implement their conventional undertakings and customary international law obligations through binding domestic law, their counterterrorism efforts are also guided by more informal arrangements.

1. The Canadian Approach

Canadian criminal law and law enforcement provide a rich case-study for the implementation of the obligation to prevent and criminalize terrorism and related offenses.¹⁹⁹ Even a cursory review of the Canadian Criminal Code amendments since 9/11 reveals that international law is clearly an important, if not determinant, source of inspiration for Part II.1 of that legislation.²⁰⁰ More importantly, it evidences that the Canadian criminal law system reflects the abovementioned trend towards punishing more indirect or passive modes of enabling terrorism, which requires adopting more indirect modes of criminal liability. Nowhere is that reflection more obvious than when comparing specific counterterrorism provisions of the Code with key UNSC resolutions, which espouse similar language on indirect accountability.²⁰¹ These legislative developments closely mirror UNSC resolution-making on counterterrorism issues, which has called upon states to criminalize a range of behavior facilitating terrorism.

Across domestic jurisdictions, states have criminalized behavior that previously only amounted to mere evidentiary elements in criminal cases, often being preparatory and/or inchoate in nature. An example is found in Part II.1 of the Canadian Criminal Code, which enshrines a robust legislative framework of

¹⁹⁸ See ASEAN Convention, *supra* note 50, arts. 6–8, 12–13. On combating terrorism in the ASEAN region, generally, see Seng Tan & Hitoshi Nasu, *ASEAN and the Development of Counter-Terrorism Law and Policy in Southeast Asia*, 39 U. NEW SOUTH WALES L.J. 1219 (2016); Simon Tay & Hsien-Li Tan, *Southeast Asian Cooperation on Anti-Terrorism: The Dynamics and Limits of Regional Responses*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 399–424 (Victor Ramraj et al. eds., 2005).

¹⁹⁹ On Canadian national security law from an international law perspective, see CRAIG FORCESE, NATIONAL SECURITY LAW: CANADIAN PRACTICE IN INTERNATIONAL PERSPECTIVE (2008). For a more recent and critical take, see also CRAIG FORCESE & KENT ROACH, FALSE SECURITY: THE RADICALIZATION OF CANADIAN ANTI-TERRORISM (2015). For a more domestically focused take, see also Kent Roach, *Canada's Response to Terrorism*, in Ramraj et al., *supra* note 26, at 514–40; KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM 361–425 (2011).

²⁰⁰ See also *R v. Khawaja*, 2012 SCC 69, ¶¶ 21–22, (Can.); *Canadian Legal Perspectives on Incitement to Terrorism*, 95 NIJHOFF L. SPECIALS 56, 56–58 (2018).

²⁰¹ Compare Criminal Code, R.S.C., 1985, c. C-46 (Can.), §§ 83.18(1), 83.23(1), with S.C. Res. 1373, *supra* note 179, ¶ 1(b) and S.C. Res. 1368, *supra* note 179, ¶ 3, respectively. Many post-9/11 UNSC resolutions employ the language of “harbouring” and “supporting,” which is now reflected in domestic criminal legislation.

over a dozen terrorism-related offenses resting on a whole array of criminal involvement, including participation, financing, facilitation, instruction, and harboring.²⁰² What is more, since buttressing these criminal law provisions, Canadian law enforcement has produced effective counterterrorism results, foiling several terrorist plots.²⁰³ Successful prosecutions have been secured in the lower courts and ultimately upheld by the Supreme Court under Part II.1 of the Criminal Code.²⁰⁴ These developments also evince Canada's commitment to its international legal obligations. By criminalizing conduct facilitating terrorism and by adopting more exacting criminal law standards to cover the possible range of such behavior, Canada is also protecting itself against any prospective claim that it is responsible for terrorist acts planned or facilitated on Canadian soil.

Canada was one of the first domestic jurisdictions to deal with terrorism at the highest appellate judicial level after 9/11. While noting in the 2002 Suresh decision that there was no universally agreed upon definition of "terrorism," the Supreme Court held that the Terrorist Financing Convention's definition of the term²⁰⁵ "catches the essence of what the world understands" by it.²⁰⁶ Therefore, the Court held that the notion of terrorism was sufficiently settled in legal terms to be subject to adjudication. The Court added that the Canadian legislature was free to amend, update, or expand this definition as it saw fit, which it ultimately did under Part II.1 of the Criminal Code.²⁰⁷ Again, this precedent demonstrated the ongoing dialogue between international law and domestic legal systems on counterterrorism matters, but also the abovementioned synergy between key international legal instruments and institutions and domestic criminal law. This domestic translation and implementation of international legal norms suggests the existence and validity

²⁰² See Criminal Code, *supra* note 201, § 2 (definition of "terrorism offence") and Part II.1.

²⁰³ See, e.g., *Alleged Toronto 18 Ringleader Pleads Guilty*, CBC NEWS (Oct. 9, 2009) <https://www.cbc.ca/news/canada/toronto/alleged-toronto-18-ringleader-pleads-guilty-1.820678> [<https://perma.cc/A4L2-VSM8>]; *Toronto Bomb Plotter Khalid Gets 14 Years*, CBC NEWS (Sept. 4, 2009) <https://www.cbc.ca/news/canada/toronto-bomb-plotter-khalid-gets-14-years-1.798363> [<https://perma.cc/5C8D-SFXG>].

²⁰⁴ See, e.g., *R v. Khawaja*, *supra* note 200.

²⁰⁵ For the wording of the provision, see *supra* note 51.

²⁰⁶ *Suresh v. Canada*, 2002 SCC 1, ¶¶ 94–98 (Can.). See also *Cassese*, *supra* note 131, at 936–37. It should be noted that the proceedings in *Suresh* arose under Canadian immigration law, as opposed to criminal law.

²⁰⁷ See the definition of "terrorist activity" in Criminal Code, *supra* note 201, § 83.01(1). Interestingly, the notion of "terrorist activity" does not constitute a crime in the Criminal Code, but rather serves as a predicate for prosecuting most terrorism-related offenses under that legislative framework. It also demonstrates Canada's commitment to international law by incorporating references, at subsection 1, to sectoral anti-terrorism conventions to which Canada is party. Beyond these references to the sectoral conventions, the Code also puts forth a definition of "terrorist activity," which excludes "an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict" (emphasis added). Again, this shows the importance of the dialogue between international law and domestic law in implementing counterterrorism obligations. For a compatible judicial interpretation of this provision, see *Khawaja*, *supra* note 200, ¶ 102.

of a transnational framework blending criminal law, civil law, and transnational cooperation in addressing terrorism.

2. The Australian Approach

Australia has also been extremely active in incorporating and implementing international counterterrorism obligations into its domestic law since 9/11, especially those derived from UNSC resolutions. In the wake of UNSC resolutions, Australia's legislative branch adopted a series of preventive measures mirroring many of international law's recent developments.²⁰⁸ This approach tracked similar developments emphasizing criminal liability for preparatory and inchoate offenses in other Western democratic states.²⁰⁹ However, the most prominent feature of Australia's domestic counterterrorism legislative efforts resides in the sheer volume of counterterrorism legislation it adopted, including broadening its criminal law considerably.²¹⁰

This new counterterrorism legislation largely attempted to give effect to international counterterrorism obligations. Indeed, in 2002 Australia "enacted approximately 100 new offences" which did "not readily fit the traditional mould of domestic crimes," but rather purported "to encapsulate customary international law doctrines which rest on different principles to that of domestic criminal laws."²¹¹ The amount of legislation led one leading publicist to describe Australia's approach as "hyper-legislati[ng]."²¹² For example, the Howard government adopted 48 counterterrorism laws—an average of 1 counterterrorism law every 6.7 weeks.²¹³ In the first decade following 9/11, the federal parliament passed fifty-four counterterrorism laws in Australia, and by mid-2016 the federal parliament had

²⁰⁸ On Australia's counterterrorism efforts generally, see ANDREW LYNCH ET AL., *INSIDE AUSTRALIA'S ANTI-TERRORISM LAWS AND TRIALS* (2015). For a variety of views on Australia's domestic and international legal approaches to terrorism, see the various contributions in *Thematic: Counter-Terrorism Laws*, 27 U. NEW SOUTH WALES L.J. 252–578 (2004). See also *supra* Part II.A.1 on relevant international law developments.

²⁰⁹ See, e.g., Ben Saul, *Criminality and Terrorism*, in COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 133–35, 147–50 (Ana María Salinas de Frías et al. eds., 2012); ANDREW ASHWORTH & LUCIA ZEDNER, *PREVENTIVE JUSTICE* 98–101 (2014). On the dangers of this approach and potential slippages, see ROACH, *THE 9/11 EFFECT*, *supra* note 199, at 449; Victor Tadros, *Crimes and Security*, 71 MOD. L. REV. 940, 942–43, 953, 969 (2008).

²¹⁰ See, e.g., Bernadette McSherry, *Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws*, 27 U. NEW SOUTH WALES L.J. 354 (2004). See also George Williams, *A Decade of Australian Anti-Terror Laws*, 35 MELB. U. L. REV. 1136 (2011).

²¹¹ McSherry, *supra* note 210, at 354.

²¹² ROACH, *THE 9/11 EFFECT*, *supra* note 199, at 309. See also Hor, *supra* note 26, at 272 (describing a similar situation in Singapore as a "flurry of legislative anti-terrorism activity").

²¹³ Williams, *supra* note 210, at 1145; Keiran Hardy & George Williams, *Strategies for Countering Terrorism: An Australian Perspective*, in COUNTER-TERRORISM, CONSTITUTIONALISM AND MISCARRIAGES OF JUSTICE: A Festschrift for Professor Clive Walker 63, 67 (Genevieve Lennon, Colin King & Carole McCartney eds., 2019). For a review of legislative developments during this period, see ROACH, *THE 9/11 EFFECT*, *supra* note 199, at 309–60.

passed sixty-six counterterrorism laws, with several subsequent measures adopted to combat terrorism at the domestic level.²¹⁴

The Australian model also evidences the true transnational nature of the global counterterrorism legal framework, given that it borrowed legislative ideas from other jurisdictions (particularly from the United Kingdom and the United States) in shaping its own legislative content.²¹⁵ Like many states, Australia had limited involvement with counterterrorism efforts immediately after 9/11.²¹⁶ However, after the 2005 London bombings, “Australia adopted British innovations such as control orders, preventive arrests, and laws against the advocacy of terrorism.”²¹⁷ Additionally, Australia introduced several pieces of legislation criminalizing terrorism, coupled with preventive offenses ranging from engaging in terrorism directly, preparatory offenses, terrorist financing and/or other forms of material support for terrorism, and assisting in the organization of terrorism.²¹⁸ Again, this mirrored post-9/11 counterterrorism developments in Canada and other

²¹⁴ See Tamara Tulich, *Prevention and Pre-emption in Australia’s Domestic Anti-Terrorism Legislation*, 1 INT’L J. CRIM. JUST. & SOC. DEMOCRACY 52, 52 (2012); Scott Poynting & Linda Briskman, *Islamophobia in Australia: From Far-Right Deplorables to Respectable Liberals*, 7 SOC. SCI. 213, 220 (2018) (observing that “Australia had passed over sixty pieces of anti-terrorism legislation since 9/11”). Further information about Australia’s anti-terror laws can be found at <https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/AustraliasCounterTerrorismLaws.aspx> [<https://perma.cc/CNL6-ZU4S>] (last visited Nov. 6, 2019) and <https://www.cdpp.gov.au/crimes-we-prosecute/counter-terrorism> [<https://perma.cc/4DW9-8L3A>] (last visited Feb. 23, 2019). See also Tamara Tulich, *A View Inside the Preventive State*, 21 GRIFFITH L. REV. 209 (2012). On the importance of the terrorist threat in Australia, see Christopher Michaelson, *Australia and the Threat of Terrorism in the Decade after 9/11*, 18 ASIAN J. POL. SCI. 248 (2010).

²¹⁵ See, e.g., Rebecca Ananian-Welsh & George Williams, *The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia*, 38 MELB. U. L. REV. 362, 363–64 (2014). See also Laura K. Donohue, *Transplantation*, in Ramraj et al., *supra* note 26, at 67.

²¹⁶ See, e.g., Ananian-Welsh & Williams, *supra* note 215, at 365 (highlighting that “[p]rior to 9/11 Australia had no national laws dealing specifically with terrorism”).

²¹⁷ ROACH, *THE 9/11 EFFECT*, *supra* note 199, at 309.

²¹⁸ This trend has been most centrally observed in Australia’s Criminal Code amendments and through specific legislation, such as the 2002 Security Legislation Amendment (Terrorism) Bill, which introduced changes to Australian criminal law on terrorism-related matters. These legislative developments contributed to a robust anti-terrorism legal regime, with a strong emphasis on prevention and preparatory offenses. In *R v Lodhi* [2006] NSWCCA 121, ¶ 66 (Austl.), Chief Justice Spigelman underscored that, while “[p]reparatory acts are not often made into criminal offences,” the “particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime.” Earlier, in his remarks on sentence in *Regina v Lodhi* [2006] NSWSC 691, ¶ 51 (Austl.), which pertained to three preparatory offenses, Justice Whealy stated that “the legislation under which these offences have been created was specifically set up to intercept and prevent a terrorist act at a very early or preparatory stage, long before it would be likely to culminate in the destruction of property and the death of innocent people.” He added that “[t]he very purpose of the legislation is to interrupt the preparatory stages leading to the engagement in a terrorist act so as to frustrate its ultimate commission.” See *id.* This also aligns with the remarks of Justice Whealy in *R v Lodhi* [2005] NSWSC 1377, ¶ 52 (Austl.) where he declared that “an offence will have been committed by a person acting in a preliminary way in preparation for a terrorist act even where no decision has been made finally as to the ultimate target.” See also Tulich, *Prevention and Pre-emption in Australia’s Domestic Anti-Terrorism Legislation*, *supra* note 214.

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Commonwealth nations.²¹⁹ Akin to the recent powers granted to the Canadian Security Intelligence Service, Australia increased the power of its Security Intelligence Organization to include broader questioning latitude, detention warrants, and questioning warrants.²²⁰

Equally consistent across Commonwealth states are preventive legislative measures designed to counter “home-grown” or “lone-wolf” terrorists.²²¹ Like Canada, Australia adopted a robust counterterrorism legislative framework within its Criminal Code Act, particularly in Part 5.3 of Schedule 1 of its criminal code, which has led to successful prosecutions.²²² Many of these provisions embody the spirit of, if not directly mirror, relevant UNSC resolutions.²²³ Hence, the model prevalent across some Commonwealth nations is one example of how states have prioritized national security and implemented international counterterrorism obligations.²²⁴

²¹⁹ See, e.g., DANIEL BYMAN, *ROAD WARRIORS: FOREIGN FIGHTERS IN THE ARMIES OF JIHAD* (2019); NOT ONLY SYRIA? THE PHENOMENON OF FOREIGN FIGHTERS IN A COMPARATIVE PERSPECTIVE (Kacper Rekawek ed., 2017); PHIL GURSKI, *WESTERN FOREIGN FIGHTERS: THE THREAT TO HOMELAND AND INTERNATIONAL SECURITY* (2017); U.S. HOMELAND SECURITY COMMITTEE, *FINAL REPORT OF THE TASK FORCE ON COMBATING TERRORIST AND FOREIGN FIGHTER TRAVEL* (2016).

²²⁰ See, e.g., Greg Carne, *Detaining Questions or Compromising Constitutionality: The ASIO Legislation Amendment (Terrorism) Act 2003 (Cth)*, 27 U. N.S.W. L.J. 524 (2004).

²²¹ See, e.g., John McCoy & W. Andy Knight, *Homegrown Terrorism in Canada: Local Patterns, Global Trends*, 38 *STUD. IN CONFLICT & TERRORISM* 253 (2015); RAMÓN SPAALI, *UNDERSTANDING LONE WOLF TERRORISM: GLOBAL PATTERNS, MOTIVATIONS AND PREVENTION* (2012); Kendall Coffey, *The Lone Wolf-Solo Terrorism and the Challenges of Preventative Prosecution*, F.I.U. L. REV. 1 (2011).

²²² See *Criminal Code Act 1995* No. 12 Compilation No. 120, ch 5, pt 5.3 (Austl.). See also LYNCH ET AL., *supra* note 208, at 38.

²²³ See, e.g., S.C. Res. 1368 and S.C. Res 1373, *supra* note 179. On the translation and implementation of international counterterrorism obligations into domestic law in European states, including obligations derived from UNSC resolutions, see generally ERLING JOHANNES HUSABØ & INGVIÐ BRUCE, *FIGHTING TERRORISM THROUGH MULTILEVEL CRIMINAL LEGISLATION: SECURITY COUNCIL RESOLUTION 1373, THE EU FRAMEWORK ON COMBATING TERRORISM AND THEIR IMPLEMENTATION IN NORDIC, DUTCH AND GERMAN CRIMINAL LAW* (2009).

²²⁴ That said, there are more opaque models, which rely on secretive governmental action and preventive detention, arguably in violation of international human rights standards. This is not to say that Commonwealth nations have not also engaged in such practices in countering terrorism. For instance, the United Kingdom’s “Special Advocate” and secret trial systems have generated their share of controversy. See, e.g., Owen Bowcott, *What Are Secret Courts and What Do They Mean for UK Justice?*, *GUARDIAN* (June 14, 2013), <https://www.theguardian.com/law/2013/jun/14/what-are-secret-courts> [<https://perma.cc/LU22-K68K>]; Will Fitzgibbon, *Special Advocates: The Faces of Secret Justice*, *BUREAU OF INVESTIGATIVE JOURNALISM* (Nov. 1, 2012), <https://www.thebureauinvestigates.com/stories/2012-11-01/special-advocates-the-faces-of-secret-justice> [<https://perma.cc/DT25-TK57>]. In Canada, the security certificate system under domestic immigration law enables the government to detain and deport foreign nationals on national security grounds which, in its original formulation, did not withstand constitutional scrutiny. See, e.g., *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (Can.). For commentary on the case and the security certificate system’s broader implications, see Maureen Duffy & René Provost, *Constitutional Canaries and the Elusive Quest to Legitimize Security Detentions in Canada*, 40 *CASE W. RES. J. INT’L L.* 531 (2009). However, the security certificate scheme was ultimately replaced by a similar iteration of the original legislation, though introducing a “Special Advocate” mechanism inspired by the United

3. The Singaporean Approach

Along similar lines, Singapore presents an interesting case study and has a long history of dealing with extremist violence and terrorism. As seen below, Singapore's domestic treatment and use of international legal norms in combating terrorism is mostly deferential, but also somewhat skeptical. Singapore's legislative counterterrorism efforts largely reflect those undertaken in other Commonwealth nations and similar jurisdictions,²²⁵ and it has also adopted a robust counterterrorism legislative framework, particularly in the areas of criminal law and prevention of terrorist financing.²²⁶ Singapore has been successful in foiling terrorist plots through its criminal law, financial regulations, immigration legislation, and other regulatory frameworks.²²⁷ In fact, Singapore's track record on counterterrorism in these areas, along with its monitoring and compliance activities, border security and control, law enforcement, and counter-radicalization, were highlighted positively in the US Department of State's 2016 country report.²²⁸ While international counterterrorism norms were instrumental in bolstering Singapore's counterterrorism legislative framework, that state affords international human rights less weight when conducting certain counterterrorism practices, such as detention of suspects.

The way in which Singapore has leveraged the International Convention for the Suppression of Terrorist Bombings (“Terrorist Bombings Convention”)

Kingdom's own system. *See* Immigration and Refugee Protection Act, R.S.C. 2001, c 27, §§ 85ff. Similar to Australia's own legislative practice, this development again evinces the importance of the horizontal migration of counterterrorism laws and transnational legislative and judicial dialogue. On transnational judicial dialogue generally, *see* Robert Sharpe & Vincent-Joël Proulx, *The Use of Academic Writing in Appellate Judicial Decision-Making*, 50 CANADIAN BUS. L.J. 550, 554–58 (2011); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 69–79 (2004); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998).

²²⁵ *See, e.g.*, Eunice Chua, *Reactions on Indefinite Preventive Detention: An Analysis of How the Singapore, United Kingdom and American Judiciary Give Voice to the Law in the Face of (Counter) Terrorism*, 25 SING. L. REV. 3 (2007).

²²⁶ Singapore's terrorism-related criminal law has been the subject of some scrutiny. *See, e.g.*, Hor, *supra* note 26, at 271–89. Singapore also faces a considerable threat emanating from maritime terrorism. *See* Nihan Ünlü, *Straits of Malacca: Protecting the Straits of Malacca and Singapore against Piracy and Terrorism*, 21 INT'L J. MARINE & COASTAL L. 539 (2006).

²²⁷ *See, e.g.*, Fabian Koh, *International Conference Showcases Singapore's Counter-Terrorism Efforts*, STRAITS TIMES (Nov. 29, 2018), <https://www.straitstimes.com/singapore/courts-crime/international-conference-showcases-singapore-counter-terrorism-efforts>

[<https://perma.cc/PBJ6-EQQ6>]; Rohan Gunaratna, *The Changing Threat Landscape: Countering Terrorism in Singapore*, in HANDBOOK OF GLOBAL COUNTERTERRORISM POLICY 749–770 (Scott N. Romaniuk et al. eds., 2017).

²²⁸ *Country Reports: East Asia and Pacific*, U.S. DEPARTMENT OF STATE, BUREAU OF COUNTERTERRORISM AND COUNTERING VIOLENT EXTREMISM, <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/bureau-of-counterterrorism-and-countering-violent-extremism/> [<https://perma.cc/838S-LCNM>] (last visited Nov. 6, 2019).

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provides another example of how states have implemented international counterterrorism obligations. The Terrorist Bombings Convention provides that states parties must extradite or prosecute an individual within their jurisdiction suspected of having committed a prohibited offense.²²⁹ In such cases, the Convention obliges the state party, “if it does not extradite that person . . . without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution.”²³⁰

However, when it ratified the Convention, Singapore reserved the option to detain suspected terrorists indefinitely without ultimately or necessarily prosecuting them under its domestic criminal law.²³¹ While this inclination reflects Singapore’s preference for preventive detention over prosecution, its international legality remains dubious. Upon first glance, this declaration seems difficult to reconcile with the plain wording of Article 8(1) of the Convention cited above, which requires submission to competent authorities for the purposes of prosecution, whether through extradition or in the state’s own domestic legal system, “without exception whatsoever.”²³²

²²⁹ Terrorist Bombings Convention, *supra* note 13, art. 8(1). The range of offenses in that instrument covers the unlawful use of explosives in public places with the intent to kill, injure seriously, or cause extensive property damage. The convention also covers related participatory and organizational offenses. See Terrorist Bombings Convention, *supra* note 13, arts. 1–2.

²³⁰ Terrorist Bombings Convention, *supra* note 13, art. 8(1). For background on the convention, see Samuel M. Witten, *The International Convention for the Suppression of Terrorist Bombings*, 92 AM. J. INT’L L. 774 (1998).

²³¹ Its interpretive declaration to the convention reads as follows: “[t]he Republic of Singapore understands [the relevant provision on *aut dedere aut judicare*] to include the right of competent authorities to decide not to submit any particular case for prosecution before the judicial authorities if the alleged offender is dealt with under national security and preventive detention laws.” Singapore’s declaration is available at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-9.en.pdf> [<https://perma.cc/Q37D-HXSB>] (last visited Nov. 6, 2019). In its last publicly available report to the Counter-Terrorism Committee, Singapore indicated that it would extradite such an individual to one of the forty Commonwealth nations, or to territories with whom extradition arrangements exist under the London Scheme, or to states parties of some of the sectoral anti-terrorism conventions in the absence of an extradition treaty. See Letter dated Feb. 22, 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council 1373 (2001), U.N. Doc. S/2006/119, at 9–10 (Feb. 22, 2006). Moreover, pursuant to Art. 20(2) of the Terrorist Bombings Convention, Singapore made a reservation to the effect that it does not consider itself bound by Art. 20(1) of the same instrument, which enshrines a compromissory clause to submit disputes to the ICJ. The text of Singapore’s reservation is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&clang=_en#EndDec [<https://perma.cc/4EN8-AARB>] (last visited Nov. 6, 2019).

²³² Terrorist Bombings Convention, *supra* note 13, art. 8(1). That said, Singapore has also signed convictions against individual financiers of terrorism, thereby enforcing its international obligations under the Terrorist Financing Convention. See, e.g., Linette Lai, *3 Indonesian Maids Charged with Financing Terrorism after Being Detained under ISA*, STRAITS TIMES (Oct. 23, 2019), <https://www.straitstimes.com/singapore/three-radicalised-maids-charged-in-court-for-financing-terrorism> [<https://perma.cc/NV2X-ZTN6>]; Cara Wong, *Ex-IT Engineer First Singaporean to Be Convicted of Terrorism Financing, Jailed 30 Months*, STRAITS TIMES (Oct. 17, 2019),

Interestingly, many of Singapore's considerable intelligence and counterterrorism gains have been secured outside of the courtroom and, to some extent, outside of overly legalistic approaches. The most prominent aspect of its counterterrorism efforts undoubtedly resides in its Internal Security Act ("ISA"), which borrows from an old British law.²³³ This legislative scheme authorizes the Minister of Home Affairs, with the consent of the President, to order detention without trial (or robust judicial review) of an individual when it is determined that this person poses a threat to national security.²³⁴ While the initial detention period may be for up to two years, the Minister may renew the detention for an unlimited number of additional periods, not more than for two years at a time, upon direction from the President.²³⁵

The legality of the ISA appears suspect from an international legal perspective, as it seems to run counter to key human rights protections.²³⁶ This latter normative scheme entitles individuals deprived of their liberty to a prompt trial or release and, where the detention is arbitrary, to compensation.²³⁷ That said, Singapore is not a signatory to either the UN Convention Against Torture or International Covenant on Civil and Political Rights, although the content of their key relevant provisions might still bind it as a matter of customary international

<https://www.straitstimes.com/singapore/first-singaporean-to-be-convicted-of-terrorism-financing-jailed-for-30-months> [<https://perma.cc/AWD9-7THH>].

²³³ See, e.g., Kent Roach, *Comparative Counter-Terrorism Law Comes of Age*, in *COMPARATIVE COUNTER-TERRORISM LAW* 1, 28 (Kent Roach ed., 2015); Eugene K.B. Tan, *Singapore*, in *id.*, at 611; Arabinda Acharya, *WHITHER SOUTHEAST ASIA TERRORISM?* 195 (2015); Sundaresh Menon, *International Terrorism and Human Rights*, 4 *ASIAN J. INT'L L.* 1, 25–33 (2014). For a recent application of the ISA, see Linette Lai, *Three Radicalised Indonesian Maids Detained Under Internal Security Act*, *STRAITS TIMES* (Sept. 23, 2019), <https://www.straitstimes.com/singapore/three-radicalised-indonesian-maids-detained-under-internal-security-act> [<https://perma.cc/AT8U-45AU>].

²³⁴ Internal Security Act, 1985 CAP 143 (Mar. 30, 1987) art. 8(1)(a) (Sing.) (also listing several purposes for such detention at subparagraph (b)). On the relationship between this power and the exercise of judicial review, see *id.* art. 8(B).

²³⁵ *Id.* art. 8(2). For a recent application, see Adrian Lim, *2 Radicalised Singaporeans Who Intended to Join ISIS in Syria Detained Under ISA*, *STRAITS TIMES* (July 26, 2019), <https://www.straitstimes.com/politics/2-radicalised-singaporeans-who-intended-to-join-isis-in-syria-detained-under-isa> [<https://perma.cc/6HCU-7J5D>].

²³⁶ Those protections include the prohibitions against arbitrary detention and ill treatment during detention, along with the right to a fair trial within a reasonable time. See generally Damien Cheong, *Selling Security: The War on Terrorism and the Internal Security Act of Singapore*, 23 *COPENHAGEN J. ASIAN STUD.* 28 (2006). But see Josiah Zee, *Defending Singapore's Internal Security Act: Balancing the Need for National Security with the Rule of Law*, 18 *MURDOCH U. ELECTRONIC J.L.* 28 (2011).

²³⁷ See, e.g., Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 *INT'L REV. RED CROSS* 15 (2005). For a critique of Malaysia's ISA (now repealed and replaced), from which Singapore's legislation originated, see Nicole Fritz & Martin Flaherty, *Unjust Order: Malaysia's Internal Security Act*, 26 *FORDHAM INT'L L.J.* 1345 (2003); Therese Lee, *Malaysia and the Internal Security Act: The Insecurity of Human Rights after September 11*, 2002 *SING. J. LEGAL STUD.* 56 (2002).

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law.²³⁸ Moreover, there is strong indication that the ISA might also stand in contravention to classical common law approaches to both criminal and constitutional legal matters across Commonwealth nations, as indefinite detention without trial is difficult to reconcile with such approaches.²³⁹

Singapore has implemented its international counterterrorism obligations through a variety of means, including binding legislation to prevent and punish involvement in terrorism, regulatory structures to prevent and constrict terrorist financing, and less legalistic approaches focusing on rehabilitation of suspected terrorists. One of the distinctive features of Singapore's national security approach relies on counter-radicalization. Its approach focuses on raising awareness amongst detainees and "re-wiring" them towards reintegration into society, which includes enlisting support from their families, communities, and religious leaders.²⁴⁰ As one leading commentator underscores, "Singapore stands out as the jurisdiction . . . that has been most concerned with rehabilitation," adding that "Western democracies have largely ignored the rehabilitation of terrorists."²⁴¹

In many ways, this approach aligns with the UNSC's recent counterterrorism discourse, which identifies counter-radicalization and de-radicalization efforts, along with addressing root causes of extremist violence, as essential to a successful global counterterrorism campaign.²⁴² Moreover, Singapore's domestic law in other counterterrorism aspects seeks direct inspiration from international law, showing considerable commitment to relevant international obligations. In fact, Singapore translated and implemented some of its international legal commitments by closely tracking key international legal instruments within

²³⁸ See, e.g., Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the "International Bill of Rights"*, 16 IND. J. GLOBAL LEGAL STUD. 437, 439 n.6 (2009); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 184–85 (1995); Erica de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law*, 15 EUR. J. INT'L L. 97 (2004).

²³⁹ See, e.g., RAYNER THWAITES, *THE LIBERTY OF NON-CITIZENS: INDEFINITE DETENTION IN COMMONWEALTH COUNTRIES* (2014). For a broader treatment, see also MAUREEN DUFFY, *DETENTION OF TERRORISM SUSPECTS: POLITICAL DISCOURSE AND FRAGMENTED PRACTICES* (2018).

²⁴⁰ See generally HAMED EL-SAID, *NEW APPROACHES TO COUNTERING TERRORISM: DESIGNING AND EVALUATING COUNTER RADICALIZATION AND DE-RADICALIZATION PROGRAMS* 138–73 (2015); Rohan Gunaratna & Mohamed Feisal Bin Mohamed Hassan, *Terrorist Rehabilitation: The Singapore Experience*, in *TERRORIST REHABILITATION AND COUNTER-RADICALISATION: NEW APPROACHES TO COUNTER-TERRORISM* 36–58 (Rohan Gunaratna et al. eds. 2011). See also DANIEL KOEHLER, *UNDERSTANDING DERADICALIZATION: METHODS, TOOLS AND PROGRAMS FOR COUNTERING VIOLENT EXTREMISM* (2017).

²⁴¹ Kent Roach, *Thematic Conclusions and Future Challenges*, in Roach, *COMPARATIVE COUNTER-TERRORISM*, *supra* note 233, at 714.

²⁴² See also Jack Tsen-Ta Lee, *The Past, Present and Future of the Internal Security Act*, SINGAPORE PUBLIC LAW, (June 5, 2012), <https://singaporepubliclaw.com/2012/06/05/internal-security-act> [<https://perma.cc/TAJ7-BQZG>]. For a treatment on the situation in Southeast Asia, see also Rommel Banlaoi, *Counter-Terrorism Measures and De-Radicalization Efforts in Southeast Asia*, in *TALKING TO THE ENEMY: DERADICALIZATION AND DISENGAGEMENT OF TERRORISTS* 91–104 (Henning Glaser ed., 2017). On the risks of prisoner radicalization in the counterterrorism context, see Mark Hamm, *THE SPECTACULAR FEW: PRISONER RADICALIZATION AND THE EVOLVING TERRORIST THREAT* (2014).

its legislative process. For example, its Terrorism (Suppression of Bombings) Act and Terrorism (Suppression of Financing) Act were both adopted to give effect to the Terrorist Bombings Convention and Terrorist Financing Convention, respectively.²⁴³

4. Comparative Takeaways

Ultimately, this survey of some domestic legal approaches to counterterrorism suggests that international legal norms have had an important impact on shaping domestic national security inclinations, but that sovereign states remain the key drivers of successful counterterrorism efforts, including through criminal prosecutions, immigration and financial regulations, and diligent law enforcement.²⁴⁴ The ongoing dialogue between international law and domestic legal systems often results in a perhaps inevitable tension, which manifests in two ways. First, while international legal norms are important in the national security calculus, they are also very dependent, sometimes almost completely, on domestic law for effective implementation. Second, successful enforcement and implementation of international law obligations depends upon the idea of coordination, not only between transnational frameworks (e.g. FATF) and states and between states themselves, but also upon vertical coordination between the international legal order (e.g. international law, international organizations) and domestic legal systems.²⁴⁵

The international law–domestic law dialogue requires that international legal norms also be adequately translated and incorporated into domestic legal systems (for example, translated by converting the UNSC’s prescriptions into enforceable law or adopting implementing legislation mandated by treaty obligations). However, this is insufficient since legal norms derived from the international legal order must also be interpreted and enforced in a manner which

²⁴³ See Terrorism (Suppression of Bombings) Act, 2007 CAP 324A; Terrorism (Suppression of Financing) Act, 2003 CAP 325.

²⁴⁴ See also BIANCHI & NAQVI, *supra* note 4, at 282.

²⁴⁵ On the relationship between international law and national legal systems, see, e.g., THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: UNIFORMITY, DIVERSITY, CONVERGENCE (Helmut Aust & Georg Nolte eds., 2016); André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AM. J. INT’L L. 760 (2007); THE FLUID STATE: INTERNATIONAL LAW AND NATIONAL LEGAL SYSTEMS (Hilary Charlesworth et al. eds., 2005); A.F.M. Maniruzzaman, *State Contracts in Contemporary International Law: Monist versus Dualist Controversies*, 12 EUR. J. INT’L L. 302 (2001); Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT’L L. 427 (1994); Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT’L L. 183 (1993); John Jackson, *Status of Treaties in Domestic Legal System: A Policy Analysis*, 86 AM. J. INT’L L. 310 (1992); THE EFFECT OF TREATIES IN DOMESTIC LAW (Francis Jacobs & Shelley Roberts eds., 1987); Antonio Cassese, *Modern Constitutions and International Law*, 192 RECUEIL DES COURS 331 (1985). On the virtues of international law and international organizations in generating inter-state interaction and coordination on counterterrorism matters, see Asli Ü. Bâli, *International Law and the Challenge of Terrorism*, 9 J. ISLAMIC L. & CULTURE 1, 27–28 (2004).

gives them meaningful effect. Otherwise, the translation and implementation process from international law to domestic legal systems becomes a perfunctory and largely meaningless exercise.

Without a common underlying interpretive mechanism, states are likely to take divergent approaches to their application of international norms due to varying domestic institutions and policy choices. For example, Canada and Australia both have active judiciaries that protect individual rights, the former enshrining those rights in a Charter of Rights and Freedoms.²⁴⁶ By contrast, Singapore's domestic legislation minimizes the role of both human rights and judicial review.²⁴⁷ Those countries have thus taken different approaches to the question of whether to suspend key human rights safeguards, but all have implemented policies that have resulted in legalization of preventive detention for the sake of intelligence and law enforcement purposes.²⁴⁸ To reconcile these different approaches and realize the

²⁴⁶ See generally ALEX CONTE, HUMAN RIGHTS IN THE PREVENTION AND PUNISHMENT OF TERRORISM: COMMONWEALTH APPROACHES: THE UNITED KINGDOM, CANADA, AUSTRALIA AND NEW ZEALAND (2010). On the differences between both legal systems' counterterrorism approaches, many of which can be explained by the existence of the Charter, see Kent Roach, *A Comparison of Australian and Canadian Anti-Terrorism Laws*, 30 U. N.S.W.L.J. 53 (2007). For a comparison of early post-9/11 counterterrorism efforts in relation to human rights in the United Kingdom and Australia, see Christopher Michaelson, *International Human Rights on Trial: The United Kingdom's and Australia's Legal Response to 9/11*, 25 SYDNEY L. REV. 275 (2003).

²⁴⁷ See, e.g., Hor, *supra* note 26, at 271–89; Chua, *supra* note 225. On the role of national courts in exercising judicial review of counterterrorism measures generally, see Eyal Benvenisti, *United We Stand: National Courts Reviewing Counterterrorism Measures*, in COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 251–76 (Andrea Bianchi & Alexis Keller eds., 2008).

²⁴⁸ On Singapore's use of the ISA, which allows for preventive detention without trial, along with some of its terrorism prevention success stories, see, e.g., Arlina Arshad, *Plot to Attack Marina Bay with Rocket from Batam Foiled*, STRAITS TIMES (Aug. 6, 2016), <https://www.straitstimes.com/singapore/plot-to-attack-marina-bay-with-rocket-from-batam-foiled> [https://perma.cc/B4ZB-Z4A5]; Danson Cheong, *Six Bangladeshi Charged with Financing Terrorism*, STRAITS TIMES (May 28, 2016), <https://www.straitstimes.com/singapore/six-bangladeshi-charged-with-financing-terrorism> [https://perma.cc/P7QU-T784]; Zakir Hussain, *8 Bangladeshi Men Detained under Singapore's ISA for Planning Terror Attacks Back Home*, STRAITS TIMES (May 3, 2016), <https://www.straitstimes.com/singapore/8-bangladeshi-men-detained-under-singapores-isa-for-planning-terror-attacks-back-home> [https://perma.cc/ZJS5-4FAT]. On Singapore's counter-radicalization efforts, see Gunaratna & Hassan, *supra* note 240; Maliki Osman *Reaffirms Singapore's Will to Combat Terrorism*, STRAITS TIMES (Feb. 9, 2019), <https://www.straitstimes.com/world/united-states/maliki-reaffirms-spores-will-to-combat-terrorism> [https://perma.cc/MPL5-6PP7]. On other aspects of Canada's counterterrorism law and policy, see CONTE, *supra* note 246, at 157–83. On Canada's counter-radicalization efforts, see *2018 Public Report on the Terrorist Threat to Canada: Building a Safe and Resilient Canada*, PUBLIC SAFETY CANADA, 28–30, <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/pblc-rprt-trrrsm-thrt-cnd-2018/pblc-rprt-trrrsm-thrt-cnd-2018-en.pdf> [https://perma.cc/Y5TU-HJ5B]. On Australia's use of preventive detention and other human rights issues related to its counterterrorism approach, see CONTE, *supra* note 246, at 118–19, 122, 127, 129–30, 551–52, 555–57, 568–74, 580. On other aspects of Australia's counterterrorism law and policy, see Fergal Davis, Nicola McGarrity & George Williams, *Australia*, in Roach, COMPARATIVE COUNTER-TERRORISM, *supra* note 233, at 650–82. On the benefits and challenges of counter-radicalization and de-radicalization efforts generally, see also HAMED EL-SAID, NEW APPROACHES TO COUNTERING TERRORISM: DESIGNING AND EVALUATING COUNTER RADICALIZATION AND DE-RADICALIZATION PROGRAMS (2015). For a case study of Australia's counter-radicalization efforts, see *id.*, at 76–95.

goals of international law, domestically translated and incorporated international legal norms should be interpreted and enforced with a common regard for fundamental human rights guarantees.

Finally, the dialogue on counterterrorism legal obligations and their implementation not only takes place between the international legal order and domestic legal systems in a vertical fashion, but also between sovereign states through a process of migration of laws, cross-fertilization, and legal borrowing. This phenomenon has been particularly acute across the Commonwealth states, making this Article's brief survey of counterterrorism approaches in Canada, Australia, and Singapore especially relevant.²⁴⁹

C. *The Increasing Regulation of Non-State Terrorist Actors*

In the above review of UNSC-imposed legal norms, the sovereign state remains the common denominator, as it is states that must translate and implement international legal norms into binding, enforceable domestic law. As a corollary, the UNSC's post-9/11 resolutions addressed their prescriptions primarily to states, at least for several years. While these resolutions require states to regulate non-state actors within their jurisdiction, the UNSC's resolutions were not, at first, addressed

²⁴⁹ See, e.g., Michael Tolley, *Australia's Commonwealth Model and Terrorism*, in *COURTS AND TERRORISM: NINE NATIONS BALANCE RIGHTS AND SECURITY* 134–49 (Mary L. Volcansek & John F. Stack, Jr. eds., 2011); CONTE, *supra* note 246; Roger Douglas, *Must Terrorists Act for a Cause?: The Motivational Requirement in Definitions of Terrorism in the United Kingdom, Canada, New Zealand and Australia*, 36 *COMMONWEALTH L. BULL.* 295 (2010); Andrew Lynch, *Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law*, 8 *OXFORD U. COMMONWEALTH L.J.* 159 (2008). One clear example of horizontal legal migration and borrowing pertains to control orders in counterterrorism matters, with the United Kingdom's model being influential in those processes. See also SUSAN DONKIN, *PREVENTING TERRORISM AND CONTROLLING RISK: A COMPARATIVE ANALYSIS OF CONTROL ORDERS IN THE UK AND AUSTRALIA* (2014); Andrew Lynch, Tamara Tulich & Rebecca Welsh, *Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values in the United Kingdom and Australia*, in *SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW* 154 (David Cole, Federico Fabbrini & Arianna Vidaschi eds., 2013); Lisa Burton & George Williams, *What Future for Australia's Control Order Regime?*, 24 *PUB. L. REV.* 182 (2013); Ananian-Welsh & Williams, *supra* note 215. Another example can be traced to the United Kingdom's definition of "terrorism," which similarly migrated to various jurisdictions, in different forms, including Australia, Canada, Israel, and Singapore. See Ananian-Welsh & Williams, *supra* note 215, at 407; cf. *COMPARATIVE COUNTER-TERRORISM*, *supra* note 233, at 442–43 ("British terrorism laws were never simply transplanted in any other country. Each country made its own adaptations."); see also Clive Walker, *The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!*, 37 *MELB. U. L. REV.* 143 (2013). Finally, a third example resides in the greater use of secrecy in terrorism-related proceedings, which has migrated across jurisdictions and signals that the intelligence-evidence tension is being resolved in favor of secrecy over procedural fairness. See, e.g., Kent Roach, *The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations*, in *COUNTER-TERRORISM AND BEYOND: THE CULTURE OF LAW AND JUSTICE AFTER 9/11* 48 (Nicola McGarrity, Andrew Lynch & George Williams eds., 2010) (analyzing Canada and Australia); Aileen Kavanagh, *Special Advocates, Control Orders and the Right to a Fair Trial*, 73 *MOD. L. REV.* 836, 837 (2010) (discussing the United Kingdom); Ananian-Welsh & Williams, *supra* note 215, at 399 (discussing Australia).

directly to these non-state actors. However, in recent years the phenomenon of state centrism has been changing, prompting several scholarly inquiries to situate the role and place of individuals and non-state actors not only as rights-holders, but also as obligations-bearers in international law.²⁵⁰ Recent attempts to better regulate and address the conduct of non-state actors stem from the increasing importance of such actors on the international scene, both in terms of norm-enforcement and norm-creation.²⁵¹

This new field of inquiry also serves as a legal response to the recent trend of individuals travelling from their respective nations to integrate into the ranks of extremist groups and terrorist organizations in other states, sometimes joining ongoing armed activities.²⁵² Indeed, newspaper headlines chronicling the travels and activities of such “foreign terrorist fighters” in various locales, particularly in Syria and Iraq, have multiplied in recent years. While this is by no means a new phenomenon, the volume of such occurrences poses a considerable threat to domestic, regional, and international peace and stability. In response, domestic, regional, transnational, and international actors have updated and revised relevant legal frameworks to address this increased threat.²⁵³ In this regard, the analysis advanced above, particularly in Part I, holds: states still do most of the heavy-lifting in criminalizing the activities of foreign terrorist fighters and prosecuting them, but transnational networks, such as those existing under the FATF, and UNSC resolutions play a critical role in establishing broader norms.²⁵⁴

²⁵⁰ See, e.g., ANNE PETERS, *BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW* (2016); KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* (2011); PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVE ON NON-STATE ACTORS IN INTERNATIONAL LAW (Jean d’Aspremont ed., 2011); Andrew Clapham, *The Role of the Individual in International Law*, 21 EUR. J. INT’L L. 25 (2010).

²⁵¹ For a thoughtful treatment exposing common misconceptions about the nature and scope of non-state actors’ international legal personality, see ASTRID KJELDGAARD-PEDERSEN, *THE INTERNATIONAL LEGAL PERSONALITY OF THE INDIVIDUAL* (2018). For a full-fledged argument, see also Proulx, *supra* note 15.

²⁵² See, e.g., FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND, *supra* note 78; TUNCAY KARDAŞ & ÖMER BEHRAM ÖDEMİR, *THE MAKING OF EUROPEAN FOREIGN FIGHTERS: IDENTITY, SOCIAL MEDIA AND VIRTUAL RADICALIZATION* (2014); Simon Chesterman, *Dogs of War or Jackals of Terror? Foreign Fighters and Mercenaries in International Law*, 18 INT’L COMMUNITY L. REV. 389, 396–97, 399 (2016); Proulx, *supra* note 15, at 250–56. On the nexus between foreign terrorist fighters and IHL, see Sandra Krähenmann, *The Interplay Between International Humanitarian Law, Terrorism and the “Foreign Terrorist Fighter” Regime*, 112 AM. SOC’Y INT’L L. PROC. 307 (2018). On Australia’s and the UK’s legal responses to the threat of foreign terrorist fighters, see JESSIE BLACKBOURN, DENIZ KAYIS & NICOLA MCGARRITY, *ANTI-TERRORISM LAW AND FOREIGN TERRORIST FIGHTERS* (2018).

²⁵³ See generally DANIEL BYMAN, *ROAD WARRIORS: FOREIGN FIGHTERS IN THE ARMIES OF JIHAD* (2019); NOT ONLY SYRIA? THE PHENOMENON OF FOREIGN FIGHTERS IN A COMPARATIVE PERSPECTIVE (Kacper Rekawek ed., 2017); PHIL GURSKI, *WESTERN FOREIGN FIGHTERS: THE THREAT TO HOMELAND AND INTERNATIONAL SECURITY* (2017); U.S. HOMELAND SECURITY COMMITTEE, *FINAL REPORT OF THE TASK FORCE ON COMBATING TERRORIST AND FOREIGN FIGHTER TRAVEL* (2016).

²⁵⁴ See, e.g., FINANCIAL ACTION TASK FORCE, *EMERGING TERRORIST FINANCING RISKS* (Oct. 2015), <http://www.fatf-gafi.org/media/fatf/documents/reports/Emerging-Terrorist-Financing-Risks.pdf>

Starting in 2014, the UNSC passed a series of resolutions to create what is commonly referred to as the “Foreign Terrorist Fighter” (“FTF”) regime.²⁵⁵ This regime sets out a series of obligations to prevent and punish the travel, recruitment, and activities of foreign terrorist fighters, relying on the assistance of states, non-state actors, international organizations, and regional organizations.²⁵⁶ This development signals that the UNSC may be called upon to play a role in implementing the responsibility of individuals or non-state terrorist actors on the international plane, or at least deliver pronouncements relevant to the subsequent implementation of individual and/or non-state responsibility in other settings.²⁵⁷ What is more, the resulting responsibility might take a form extending beyond solely international *criminal* liability (e.g. international *civil* responsibility of individuals/non-state actors).²⁵⁸ In remedial terms, this evolution suggests that individual victims of terrorism and their representatives might eventually have standing to claim reparation and/or compensation beyond mere declarations of unlawful behavior, through both domestic and transnational civil law mechanisms. Once more thoroughly defined and when coupled with the UNSC targeted sanctions regime, this remedial regime will form part and parcel of the “transnational network of criminal and civil law” identified above as the key model in combating terrorism.

[<https://perma.cc/9YYC-L9SJ>]. The UNSC has also urged states to adopt the FATF’s counterterrorism guidelines in their domestic policies and legislations. *See, e.g.*, S.C. Res. 2395, ¶ 25 (Dec. 21, 2017).

²⁵⁵ *See, e.g.*, Vincent-Joël Proulx, *Introductory Remarks*, 112 AM. SOC’Y INT’L L. PROC. 301 (2018). On foreign terrorist fighters generally, see FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND, *supra* note 78; INTERNATIONAL CENTRE FOR COUNTER-TERRORISM, THE FOREIGN FIGHTERS PHENOMENON IN THE EUROPEAN UNION (Apr. 2016), https://icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf [<https://perma.cc/9J79-F8MT>]; Zubeda Limbada & Lynn Davies, *Addressing the Foreign Terrorist Fighter Phenomenon from a Human Rights Perspective*, 18 INT’L COMMUNITY L. REV. 483 (2016).

²⁵⁶ For background on the FTF regime’s application and implications, see U.N.S.C. Counter-Terrorism Committee Executive Directorate, *Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters*, https://www.un.org/sc/ctc/wp-content/uploads/2016/09/FTF-Report-1-3_English.pdf [<https://perma.cc/EFT4-J8AE>].

²⁵⁷ One earlier manifestation arose in 2004, when the UNSC registered its profound concern that non-state actors “may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery,” stressing states’ duties to prevent any mode of support to non-state actors actively seeking to achieve the abovementioned objectives. S.C. Res. 1540, pmb., ¶¶ 1–2 (Apr. 28, 2004). On this precedent and its far-reaching institutional and law-making effects, see also Roberto Lavalle, *A Novel, If Awkward, Exercise in International Law Making: Security Council Resolution 1540 (2004)*, 51 NETH. INT’L L. REV. 411 (2004); Sarah Shirazy, *Building a Universal Counter-Proliferation Regime: The Institutional Limits of United Nations Security Council Resolution 1540*, 10 J. NAT’L SEC. L. & POL’Y 125 (2019).

²⁵⁸ For a full-fledged treatment canvassing relevant international practice and scholarship, see Proulx, *supra* note 15.

The UNSC has also articulated the contents and contours of the FTF regime.²⁵⁹ In Resolution 2170, it directly regulated the activities of individuals seeking to travel or actually travelling overseas for the purposes of receiving terrorist training or joining terrorist networks (invoking expressly Al-Qaeda, ISIS/ISIL, and the Al-Nusrah Front in Syria and Iraq).²⁶⁰ Acting under Chapter VII of the UN Charter, the UNSC obligated states to legislate “national measures to suppress the flow of foreign terrorist fighters” while adding numerous supplementary duties to its prescriptions and condemning the acts of specific terrorist groups.²⁶¹ Subsequently, the UNSC further expanded the scope of the FTF regime through Resolution 2178, which was largely construed as another far-reaching “quasi-legislative” development (reaching potentially even further than Resolution 1373), by prescribing *inter alia* a duty for states to prevent individuals from travelling to join terrorist organizations, and to limit such individuals’ participation and recruitment in terrorism.²⁶² Similarly, through Resolution 2396 the UNSC again broadened the FTF regime, possibly beyond what both Resolution 1373 and the counterterrorism sectoral multilateral conventions require.²⁶³

Many domestic jurisdictions have begun to translate and legislate the UNSC’s prescriptions on foreign terrorist fighters within their domestic law.²⁶⁴ In the coming years, a more complete picture of relevant state practice will emerge

²⁵⁹ United Nations Security Council Counter-Terrorism Committee, *Foreign Terrorist Fighters*, <https://www.un.org/sc/ctc/focus-areas/foreign-terrorist-fighters/> [https://perma.cc/RLW6-BXE4] (last visited Oct. 22, 2019).

²⁶⁰ On specific obligations, see S.C. Res. 2170, *supra* note 156, ¶¶ 2, 4, 7–8, 13–14. For further analysis, see also Proulx, *supra* note 15, at 251–53. The UNSC promulgated similar obligations in other resolutions concerning ISIS/ISIL, the Al-Nusrah Front, and all individuals and groups associated with Al Qaeda. *See, e.g.*, S.C. Res. 2199, *supra* note 185; S.C. Res. 2347, ¶ 2 (Mar. 24, 2017). *See also* MACHIKO KANETAKE, *THE UN SECURITY COUNCIL AND DOMESTIC ACTORS: DISTANCE IN INTERNATIONAL LAW* 50–51 (2018) (observing that Resolution 2170 differed from previous resolutions under the UNSC’s terrorism sanctions regime because the UNSC “directly demanded ‘individuals’ act in a certain manner”).

²⁶¹ S.C. Res. 2170, *supra* note 156, ¶ 8. *See also* S.C. Res. 2199, *supra* note 185.

²⁶² S.C. Res. 2178, *supra* note 185. *See also* MYRIAM FEINBERG, *SOVEREIGNTY IN THE AGE OF GLOBAL TERRORISM: THE ROLE OF INTERNATIONAL ORGANISATIONS* 40–42 (2016). For critical perspectives, see Letta Tayler, *Foreign Terrorist Fighters Laws: Human Rights Rollbacks Under UN Security Council Resolution 2178*, 18 INT’L COMMUNITY L. REV. 455 (2016); Roach, *Comparative Counter-Terrorism*, *supra* note 233, at 14–15.

²⁶³ *See* S.C. Res. 2396 (Dec. 21, 2017).

²⁶⁴ For Australia, the legislative response has included extending control orders to “foreign fighters” in the *Criminal Code Act 1995* No. 12 Compilation No. 120, ch 5, pt 5.3 (Austl.), creating “declared area” offenses, and confirming the power to revoke the Australian citizenship of dual citizens engaging in terrorism-related conduct. *See also* Paul Karp, *National Security Monitor Challenges Dutton on Citizenship-Stripping Laws*, *GUARDIAN* (Sept. 18, 2019), <https://www.theguardian.com/australia-news/2019/sep/18/national-security-monitor-challenges-dutton-on-citizenship-stripping-laws> [https://perma.cc/3GDZ-W97W]. In Canada, legislative measures include Criminal Code, *supra* note 201, §§ 83.191, 83.201–02, which criminalize various activities supporting terrorism-related offenses overseas. Similarly, while Singapore still relies heavily on the ISA in this field, its efforts have also led to successful results. *See, e.g.*, Danson Cheong, *Singaporean Man Tried to Join Fighters in Syria, Marawi*, *STRAITS TIMES* (Sept. 8, 2017), <https://www.straitstimes.com/singapore/sporean-man-tried-to-join-fighters-in-syria-marawi> [https://perma.cc/WRN6-FCML].

concerning the role (and effectiveness) of domestic law in tackling the problem of foreign terrorist fighters. Counter-radicalization and de-radicalization efforts will remain an essential part of that process, with a view to preventing as many individuals as possible from joining terrorist networks overseas. More importantly, this newest development in the international law–domestic law dialogue will remain painstakingly dependent upon domestic legal systems for effective implementation and enforcement. As in other contexts, while international counterterrorism norms might guide states in developing or interpreting their legislative frameworks, the answer to this challenge will remain predominantly domestic, obviating the need for an internationalized judicial option to prosecute foreign terrorist fighters. In fact, many states are currently updating their criminal legislation to cover this phenomenon.²⁶⁵ This reaffirmation of state sovereignty might also be further evidenced by challenges over transnational cooperation and extradition arising in some cases, once more foreign fighters are detained and judicial proceedings initiated.

Conclusion

Terrorism often crosses borders, populations, and cultures and is currently regulated to some extent by international law, both through multilateral treaties and UNSC resolutions. Yet its repression and prevention remain largely dependent on domestic systems endowed with suitable legal and policy architectures, law enforcement, and the proper allocation of counterterrorism resources. Given its inherent political dimensions, it is perhaps not surprising that a stand-alone crime of terrorism was not included in the core crimes over which the ICC can assert jurisdiction. While international law might be developing towards the eventual recognition of an international crime of terrorism, there is no indication that the requisite state practice and *opinio juris* have been satisfied to support its existence at the moment.²⁶⁶ In most circumstances, this outcome seems sound: there is validity to the argument that the ICC should not have jurisdiction over *all* terrorist

²⁶⁵ See, e.g., Marcus Tantau, *Australia Addresses the Growing Threat of Returning Foreign Fighters*, DIPLOMAT (July 31, 2019), <https://thediplomat.com/2019/07/australia-addresses-the-growing-threat-of-returning-foreign-fighters/> [<https://perma.cc/9ALX-DPAH>]; Clive Walker, *Foreign Terrorist Fighters and UK Counter Terrorism Laws*, 2 ASIAN Y.B. HUM. RTS. & HUMANITARIAN L. 177 (2018). On the treatment of this question in different domestic settings, see the various contributions in de Guttery et al eds., *supra* note 78, at 391–516. On the treatment of this question in different supranational settings, see the various contributions in de Guttery et al eds., *supra* note 78, at 229–387. *But see* KANETAKE, *supra* note 260, at 136 (equating the direct application of UNSC resolutions in domestic law with “a theoretical question” given their lack of precision, including in Resolution 2178, but observing that UNSC resolutions “have been drafted with the intention that they would bring about immediate consequences to individuals”). It should be stressed that the “primary aim of Resolution 2178 was to reduce the divergence in rules across different domestic legal systems as part of the Security Council’s counter-terrorism efforts.” See KANETAKE, *supra* note 260, at 51. See also Cian C. Murphy, *Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the “Wars on Terror”*, 6 TRANSNAT’L LEGAL THEORY 31, 43–48 (2015).

²⁶⁶ By contrast, and considering the above discussion, there is little doubt that terrorist financing now constitutes a recognized crime under customary international law. See also Kevin Jon Heller, *What Is an International Crime: (A Revisionist History)*, 58 HARV. INT’L L.J. 353, 411–12 (2017).

acts because some terrorist acts will not rise to a level requiring an international response. As noted by one publicist in this debate, “[w]e should not seek to dilute the importance of international action by dealing with less serious offences in an international context.”²⁶⁷

In most cases, domestic courts and legal systems will be sufficiently equipped to handle terrorism prosecutions, sometimes much better than the ICC or other international institutions, especially considering the robust conventional, transnational, and domestic legal frameworks explored above. However, massive or large-scale terrorist acts, such as those perpetrated on 9/11 or by ISIS/ISIL, could trigger some kind of international reaction. In such instances, it might be helpful to envisage prosecution before the ICC, even if only to “read in” a non-legally binding description of “terrorism” within the core crimes over which that court has jurisdiction. After all, we should not lose sight of the fact that horrendous and large-scale crimes that concern the international community as a whole warrant adjudication before a truly international decision-making body.²⁶⁸

Excluding this rare scenario, the global counterterrorism campaign will ultimately and predominantly be achieved through thorough domestic law enforcement, criminal prosecutions, vigilant border controls and monitoring, effective intelligence and evidence-gathering, sound counter-radicalization and de-radicalization strategies, and transnational cooperation. In tandem, non-criminal legal frameworks (e.g. human rights law and reparation/compensation under civil law mechanisms) may also be brought to bear upon this broader campaign, suggesting a shift towards a “transnational network of criminal and civil law” as the dominant model. As argued in this Article, to optimize global efforts, a more expansive and forward-looking conception of counterterrorism must be embraced beyond a strict reading of the classical doctrine and norms found in international legal discourse, including ICL. Thus, a transnational—and more effective—conception of counterterrorism must consider the dialogue between international law (and its institutions) and national legal systems.

²⁶⁷ Cryer, *supra* note 119, at 16, 70.

²⁶⁸ See, e.g., Mireille Delmas-Marty, *Global Crime Calls for Global Justice*, 10 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 286 (2002).