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INTERNATIONAL CIVIL INDIVIDUAL RESPONSIBILITY AND THE SECURITY COUNCIL: BUILDING THE FOUNDATIONS OF A GENERAL REGIME

*Vincent-Joël Proulx**

I. INTRODUCTION

Existing literature and jurisprudence pay little attention to individual responsibility in international law beyond criminal liability. This is partly due to the fact that, traditionally, international individual responsibility has predominantly been associated with *criminal* liability as opposed to focusing on *civil* responsibility for wrongdoing. Consequently, the resulting distinction between “individual” and “criminal” responsibility signals that the former concept “concerns a *target* of responsibility” whereas the latter concept “addresses the *nature* of the responsibility.”¹ However, there is no compelling reason why the discourse of international individual responsibility cannot be transposed away from the criminal paradigm² to the civil dimension, presumably with requisite adjustments.

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1. STEVEN R. RATNER ET AL., *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 15 (3d ed. 2009).

2. See Chimene I. Keitner, *Foreign Official Immunity After Samantar*, 44 *VAND. J. TRANSNAT’L L.* 837, 845 (2011); André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 *INT’L & COMP. L.Q.* 615, 618 n.14 (2003).

This Article focuses on a few tools at the disposal of the United Nations Security Council (“UNSC”) to enhance individual (read: *civil*) responsibility concerning nonstate terrorist actors with a view to opening other avenues of inquiry regarding other subversive nonstate actors (“NSAs”), for instance in the areas of transnational torts, human rights (“HR”) violations, and environmental damage caused by business entities.³ As discussed in Part V, recent developments surrounding the application of the Alien Tort Claims Act (“ATCA”)⁴ in the United States and the prospect of establishing a basis for universal *civil* jurisdiction further signal that no such solid basis exists in customary international law (or treaty law, for that matter) to hold corporations and individuals accountable for HR abuses, in large part because states are not willing to accept it. Therefore, these developments have created implementation and enforcement gaps in different areas related to civil recovery for violations of international law, of which terrorism-related wrongs form an important part.

Arguably, these developments have also engendered normative gaps given that both the relevant primary and secondary norms are not always clearly defined. In addressing these regulatory and enforcement gaps, I advocate turning to international institutions, particularly the UNSC, which can play an important role in advancing or implementing individual responsibility in some circumstances. While acknowledging the relevance of other domestic and transnational legal regimes geared toward the implementation of civil liability (however limited), this Article’s overarching purpose is to explore ways in which NSAs’ wrongful acts can be attributed to them and their international *civil* individual responsibility (“ICIR”) invoked strictly on the international plane, with a focus on the UNSC’s role in this framework.

While the other dimensions of this broader framework (for example, regional HR tribunals, domestic legislation and courts, and transnational legal regimes) remain important, this account focuses primarily on the interna-

3. Nonstate actors’ (“NSAs”) would-be civil liability in no way absolves states of their own potential international responsibility in the chain of wrongdoing since, if such a scenario were permitted, injured parties might be stripped of meaningful access to a remedy for international law violations. See CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 236 (2012); ANNE PETERS, *BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW* 165–66 (Jonathan Huston trans., 2016). For a more cynical view on imposing direct international responsibility on nonstate business enterprises, both in the HR and environmental fields, see André Nollkaemper, *Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives*, in *MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE* 179, 191–99 (Gerd Winter ed., 2006).

4. The Alien Tort Claims Act’s (“ATCA”) relevant provision provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Alien Tort Claims Act, 28 U.S.C. § 1350 (2012). For a seminal case that launched contemporary U.S. HR litigation, see *Filartiga v. Pena-Irala*, 630 F.2d 876, 885–86 (2d Cir. 1980) (equating customary international law with federal common law and recognizing a valid grant of federal jurisdiction over a suit between foreigners under ATCA).

tional legal framework. That said, these other dimensions will need to be addressed in a broader inquiry about the contents and contours of ICIR, be it in future scholarly projects or policy-based studies.⁵ By way of example, certain international instruments delegate an obligation upon municipal legal systems to ensure civil liability for individuals' violations of international law, including UN peacekeepers for sexual exploitation.⁶ Therefore, such accountability models are grounded on the notion of holding individuals to account through their home states.⁷ The UNSC has also emphasized the importance that "all troop- and police-contributing countries . . . take appropriate steps to hold accountable those personnel responsible for sexual exploitation and abuse and to report to the United Nations fully and promptly on actions undertaken"⁸

5. For instance, "[n]ational civil or administrative courts may create a corpus of case law on international responsibility, i.e., on the direct secondary international obligations of natural and legal persons." PETERS, *supra* note 3, at 163. A byproduct of this approach, either expressly or implicitly, is to provide further contour and content to relevant international primary obligations (and secondary obligations) of NSAs and individuals. In turn, this instills the relevant norms with a certain degree of foreseeability, making them known to potentially liable parties, thereby upholding the principle of legality. Moreover, domestic courts and their judgments remain significant drivers of enforcement of those would-be obligations. *See id.* at 163–64.

6. *See, e.g.*, S.C. Res. 2272, ¶¶ 8–9, 11 (Mar. 11, 2016); G.A. Res. 71/278, ¶¶ 3–4 (Mar. 20, 2017); *see also Standards of Conduct*, UNITED NATIONS PEACEKEEPING, <https://peacekeeping.un.org/en/standards-of-conduct> (last visited Mar. 16, 2019) (emphasizing the importance of addressing misconduct and stating that "[t]he disciplinary sanctions and any other judicial actions remain the responsibility of the national jurisdiction of the individual involved."); Int'l Law Comm'n, Draft Articles on the Responsibility of International Organizations, U.N. Doc. A/66/10/Add.1, at 56–57, art. 7, cmt., ¶¶ 1, 7 (2011).

7. *See, e.g.*, Richard J. Wilson & Emily Singer Hurvitz, *Human Rights Violations by Peacekeeping Forces in Somalia*, 21 HUM. RTS. BRIEF 2 (2014); Lauren Gabrielle Blau, Note, *Victimizing Those They Were Sent to Protect: Enhancing Accountability for Children Born of Sexual Abuse and Exploitation by UN Peacekeepers*, 44 SYRACUSE J. INT'L L. & COM. 121 (2016). *See generally* RÓISÍN SARAH BURKE, *SEXUAL EXPLOITATION AND ABUSE BY UN MILITARY CONTINGENTS* (2014).

8. S.C. Res. 2272, *supra* note 6, ¶ 11; *see also id.*, at pmb1. *See generally* JEREMY FARRALL ET AL., *STRENGTHENING THE RULE OF LAW THROUGH THE UNITED NATIONS SECURITY COUNCIL: POLICY PROPOSALS 23–24* (2016). Nevertheless, the academic and policy debate has centered considerably on perceived impunity and enforcement gaps in holding both troop-contributing states and the UN accountable for peacekeepers' violations of international law. Reform proposals have been articulated, *inter alia*, around the potential removal of immunity before domestic courts, greater involvement of those courts in sanctioning unlawful behavior, the prospect of shared responsibility between wrongdoing entities, and instituting international bodies to handle such matters. *See, e.g.*, Simone F. van den Driest, *Tracing the Human Rights Obligations of UN Peacekeeping Operations*, in *NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT* 179 (James Summers & Alex Gough eds., 2018); Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 CHI. J. INT'L L. 341 (2016); Andrew Ladley, *Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations*, 1 POL. & ETHICS REV. 81 (2005).

Under the heading of ICIR, I intend to capture any conduct carried out by NSAs or individuals that violates international law—using anti-terrorism obligations as the principal but not exclusive case study—to identify applicable secondary norms of liability and legal consequences flowing from such breaches outside the criminal paradigm. Indeed, international law has long recognized that the commission of an internationally wrongful act triggers the wrongdoing party’s international responsibility and corresponding duty to repair the harm. While this classical doctrine was traditionally applied to sovereign states, I argue that it is valid to extend it to NSAs and individuals through ICIR, both on descriptive and prescriptive grounds. In some ways, therefore, this account attempts to reclaim the doctrine of international responsibility back from the fragmentation of international legal personality. In other words, international lawyers tend to fragment the legal personality of nonstate entities and individuals depending on what type of legal person they are dealing with, presumably to determine the scope and extent of that person’s rights and obligations.

In contrast, this Article argues that it is important to conceive of the meta-category of “nonstate actors” more broadly before nose-diving into more discrete aspects of the overarching problem. Thus, in this Article, I use the term “individual responsibility” in international law as a default category to capture responsibility concerning all manner of NSAs (for example, armed opposition groups, terrorist networks, and corporations) and individuals (for example, individual terrorists, State officials, and leaders of armed groups). As a corollary, I also use the term “nonstate actors” as a default category to encompass all these actors and others that could fall under this rubric. Otherwise put, it would be methodologically imprudent to focus solely on individuals (that is, *natural* persons) or nonstate entities (that is, *legal* persons) in the analysis, as the elucidation of ICIR requires acknowledging that both categories are intertwined. This is especially true when considering how the law of state responsibility (“SR”) has been artificially stretched to address the subversive acts of nonstate groups.⁹

The contents and contours of the obligations of NSAs and individuals, both primary and secondary, need greater clarity in certain areas. This account attempts to address this normative dearth. Moreover, it may well be that a single factual complex leads to a concurrence between individual *criminal* liability and individual *civil* liability, another important feature of a would-be ICIR regime this Article acknowledges. In focusing primarily on the civil dimensions of international wrongdoing, this account not only at-

9. In the context of use of force by NSAs, consider Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 EUR. J. INT’L L. 563 (2017) (highlighting the challenges in applying classic state responsibility (“SR”) norms to the subversive conduct of NSAs and advocating a complicity-based model). On a different note, see Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT’L L. 798, 815–16 (2002) (arguing that the extant, codified law of SR is insufficiently forward-looking since it fails to expressly empower NSAs to invoke states’ international responsibility).

tempts to address the abovementioned normative and enforcement voids, but also to advance the discourse on the legal consequences flowing from ICIR. At the core, holding an individual or other NSA internationally liable in civil terms is primarily about generating declarations of illegality and strengthening the narrative against impunity. In developing its sanctions regime, the UNSC has been clear that its aim is preventive rather than punitive. The would-be ICIR regime advocated herein not only aligns with this overarching objective but also proves compatible—and complementary in a meaningful manner—with that general sanctions regime. With this in mind, this account strives to contribute a new perspective to the *Kadi*-related literature.

My objective is also to move the debate beyond these obvious points toward a more robust remedial model, envisaging a general ICIR regime in which compensation is an available remedy along with other measures. In so doing, three central arguments run through the Article to support the elaboration of an ICIR regime, at times mutually reinforcing each other. First, the principled argument suggests that we may extrapolate from existing doctrine, particularly SR law and the broader framework and language of international responsibility, to inform and shape a general ICIR regime. Second, the precedent argument implies that, since the UNSC interprets its powers very broadly and imposes several measures reconcilable with the essence of the international responsibility framework, it could move into a quasi-legislative and implementation space where it regulates and sanctions the unlawful conduct of NSAs more squarely. In fact, it has already done so very plainly with respect to regulation and at times less clearly with respect to implementation of individual responsibility. Finally, the pragmatic policy argument signals that the international community must take effective measures against subversive individuals and NSAs (for example, terrorist groups, guerrilla leaders, and irresponsible corporations), especially given the regulatory and enforcement gaps identified above.

Part II examines the extant individual *civil* responsibility legal regime (or lack thereof) and highlights the networks of multi-leveled relationships of responsibility and the multi-actor processes that serve as incubators for actuating individual responsibility. Focusing on the problematic regulation and accountability of nonstate terrorist actors and emphasizing the interaction between relevant legal regimes, the Article discusses the UNSC's role within this framework. In Part III, I analyze some of the UNSC's "legislative" forays, primarily but not exclusively in the counterterrorism field, assessing their impact on the prospect of enhancing international individual responsibility mechanisms beyond criminal responsibility.

Part IV explores the UNSC's role in implementing individual responsibility stemming from NSAs' wrongful acts, emphasizing that organ's attribution of illegal conduct and/or responsibility to such entities. Drawing from SR logic, I canvass select aspects of relevant practice in which the UNSC imposed a range of secondary, remedial obligations on wrongdoing individuals/groups. This Part also reviews other proposals to enhance individual

accountability mechanisms—including a role for the UNSC in combating terrorism—which remain complementary with a would-be ICIR regime. These include UNSC referrals under the Rome Statute and broadening the International Criminal Court’s (“ICC”) jurisdiction to encompass “terrorism.” Part V offers reflections on the prospects and limits of the proposed ICIR model.

II. MAKING INDIVIDUAL RESPONSIBILITY MORE EFFECTIVE: THE IMPORTANCE OF REGIME INTERACTION AND THE UNSC’S ROLE

International law currently lacks a general framework for ICIR. Recent developments in international law across a variety of regimes, however, suggest a growing demand, or at least an interest, in promulgating an operative notion of international civil individual responsibility. This Article builds upon those developments by outlining a potential framework for ICIR, one that draws from the SR repertoire but calls for accordant adjustments to fit the peculiarities of ICIR.

A. *Nonstate Actors and the Current Regime of International Responsibility*

NSAs have gained increasing importance internationally, first and foremost as trendsetters but also as norm-creators and norm-enforcers.¹⁰ As the world shifts toward a multipolar reality, NSAs’ participation and influence in international law should not be underestimated.¹¹ For instance, the emergence of transnational terrorist networks has illuminated potential deficiencies in the extant international legal system, particularly as regards attribution principles and self-defense standards.¹² The actions of groups like

10. See, e.g., ROBERT MANDEL, *GLOBAL SECURITY UPHEAVAL: ARMED NONSTATE GROUPS USURPING STATE STABILITY FUNCTIONS* (2013); *VIOLENT NON-STATE ACTORS IN WORLD POLITICS* (Klejda Mulaj ed., 2010); *NON-STATE ACTORS AS STANDARD SETTERS* (Anne Peters et al. eds., 2009); Eric Dannenmaier, *The Role of Non-State Actors in Climate Compliance*, in *PROMOTING COMPLIANCE IN AN EVOLVING CLIMATE REGIME* 149 (Jutta Brunnée et al. eds., 2012); Douglas Guilfoyle, *Somali Pirates as Agents of Change in International Law-Making and Organisation*, 1 *CAMBRIDGE J. INT’L & COMP. L.* 81 (2012).

11. See generally *HUMAN RIGHTS AND NON-STATE ACTORS* (Andrew Clapham ed., 2013); *NON-STATE ACTORS AND HUMAN RIGHTS* (Philip Alston ed., 2005); *PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW* (Jean d’Aspremont ed., 2011).

12. For instance, it is unclear whether classical rules have been adjusted, supplanted, or modified to accommodate self-defense against nonstate terrorists when the territorial state is “unwilling or unable” to thwart their activities, even absent a clear nexus (that is, attribution) between that state and the terrorists’ conduct. A sovereignty-corrosive loosening of self-defense principles might pose serious challenges in the North-South divide. Cf. Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 *VA. J. INT’L L.* 483 (2012); Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 *AM. J. INT’L L.* 244 (2011); Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 *CASE W. RES. J. INT’L L.* 15

Al-Qaeda, Daesh/ISIL, and Al-Shabaab, which sometimes wield state-like territorial control, influence, and military capacity, elude classical attribution theory, at least if centered on a strict agency paradigm. Indeed, agency seems to be the dominant model under the International Law Commission's ("ILC") 2001 Articles on Responsibility of States for Internationally Wrongful Acts ("the ARSIWA"), thereby highlighting their inadequacy in addressing the unlawful conduct of subversive NSAs.

By contrast, a group like Hezbollah falls into the interstices of different heads of attribution, eschewing straightforward classification and blurring the distinction between "acts of State" and non-attributable conduct. Its relationship to the Lebanese government likely belongs somewhere between the two extremes along the complete autonomy–complete dependency continuum.¹³ While some argue that Lebanon's responsibility could be engaged for Hezbollah's terrorist activities,¹⁴ what is important for present purposes is that the UNSC required "the disbanding and disarmament of all Lebanese and non-Lebanese militias" in Lebanon,¹⁵ encompassing Hezbollah's armed wing, however defined under SR, *and* other nonstate extremist groups.

The UNSC addressed similar disarmament calls to Boko Haram and Daesh/ISIL in even more straightforward language. The UNSC added that individuals and groups responsible for perpetrating terrorist attacks and violations of international humanitarian law ("IHL") and HR law should be held legally accountable.¹⁶ That said, these resolutions also oblige states to take measures to counteract the unlawful conduct of individuals and NSAs, a phenomenon which also runs through both the UNSC's comprehensive sanctions against individual states and its targeted sanctions against individuals suspected of supporting or engaging in terrorism.¹⁷ Therefore, in such scenarios, the targeted individuals and/or nonstate entities are still largely

(2016); Kimberley N Trapp, *Actor-Pluralism, the 'Turn to Responsibility' and the Jus ad Bellum: 'Unwilling or Unable' in Context*, 2 J. USE FORCE & INT'L L. 199 (2015).

13. See Gérard Cahin, *The Responsibility of Other Entities: Armed Bands and Criminal Groups*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 331, 335 (James Crawford et al. eds., 2010); Enzo Cannizzaro, *Entités Non-étatiques et Régime International de l'Emploi de la Force: Une Etude Sur Le Cas de la Réaction Israélienne au Liban*, 111 REVUE GENERALE DE DROIT INT'L PUB. 333, 339 (2007).

14. See Stefan Kirchner, *Third Party Liability for Hezbollah Attacks Against Israel*, 7 GERMAN L.J. 777, 779 (2006).

15. S.C. Res. 1559, ¶ 3 (Sept. 2, 2004).

16. See S.C. Res. 2396, ¶ 19 (Dec. 21, 2017); S.C. Res. 2349, ¶ 1 (Mar. 31, 2017). See generally S.C. Res. 2354, at pmbl. (May 24, 2017).

17. For instance, one common formulation employed by the UNSC is to call upon "all States to take appropriate measures to ensure that individuals and companies in their jurisdiction . . . act in conformity with United Nations embargoes, . . . and, as appropriate, take the necessary judicial and administrative action to end any illegal activities by those individuals and companies" See S.C. Res. 1343, ¶ 21 (Mar. 7, 2001) (on Sierra Leone); see also S.C. Res. 1408, ¶ 18 (May 6, 2002).

“mediated through their States (or, in the case of the EU, through the EU).”¹⁸

Nevertheless, these UNSC forays suggest that it is targeting nonstate groups/individuals with its prescriptions. While SR may address state failures to give effect to them, individual responsibility also remains relevant in the post-breach calculus. For instance, the UNSC recently emphatically condemned “all attacks, including improvised device attacks, suicide attacks, assassinations and abductions, targeting civilians and Afghan international forces and their deleterious effect on the stabilization, reconstruction and development efforts in Afghanistan”¹⁹ It further condemned “the use by the Taliban, including the Haqqani Network as well as Al-Qaida, ISIL (Da’esh) affiliates, and by other terrorist groups, violent and extremist groups, and illegal armed groups of civilians as human shields,”²⁰ More importantly, the Council not only emphasized the importance of establishing the individual responsibility of such NSAs, but it confirmed the interdependence between states’ obligations (the violation of which can trigger SR) and the establishment of individual responsibility. It underscored “the need to hold [the abovementioned] perpetrators, organizers, financiers and sponsors of such acts accountable and bring them to justice”²¹ It also “urge[d] all states, in accordance with their obligations under international law and relevant Security Council resolutions, to cooperate actively with the Government of Afghanistan and all other relevant authorities in this regard”²²

Unsurprisingly, post-9/11 events prompted scholars to investigate SR’s role in combating terrorism.²³ More generally, the above developments share some connection with broader efforts to better define the individual’s role and place within the international legal system.²⁴ Within SR, this quest

18. PETERS, *supra* note 3, at 94.

19. S.C. Res. 2405, ¶ 23 (Mar. 8, 2018).

20. *Id.*

21. *Id.*

22. *Id.*; *see id.* ¶ 33 (denouncing “the continued high levels of child casualties and recruitment and use of children in Afghanistan, in particular by terrorist and extremist groups”, and calling for “those responsible to be brought to justice”).

23. *See* ROBERT P. BARNIDGE, JR., 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); VINCENT-JOËL PROULX, TRANSNATIONAL TERRORISM AND STATE ACCOUNTABILITY: A NEW THEORY OF PREVENTION (2012); KIMBERLEY N. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM (2011).

24. *See generally* KATE PARLETT, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW (2011); STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS (Albrecht Randelzhofer & Christian Tomuschat eds., 1999); 34 THESAURUS ACROASIMUM: STATE RESPONSIBILITY AND THE INDIVIDUAL (Kalliopi Koufa ed., 2006); Andrew Clapham, *The Role of the Individual in International Law*, 21 EUR. J. INT’L L. 25 (2010);

to circumscribe the individual's legal situation has directly affected the modalities of secondary norms and the types of responsibility envisaged to capture private entities' wrongful conduct. Indeed, "[p]ast efforts to distinguish between direct and indirect responsibility were explained by the need to locate the individual within the system."²⁵

Moreover, conceptual, evidentiary, and practical limitations of SR precepts in tackling terrorism are further exacerbated when transposed to the cyber-realm, in which case extant legal standards are inadequate to govern cyber-terrorism and cyber-warfare.²⁶ Recent developments suggest that the post-World War II, bilateral typology of international relations, including SR and use of force rules, is no longer suitable to govern situations falling outside a strict state-based bilateral and/or symmetric paradigm, especially regarding the subversive acts of powerful NSAs (for example, transnational terrorist networks). We must identify outside-the-box solutions to regulate individual accountability beyond criminal responsibility in order to address the blind spots of SR and other legal schemes premised on perhaps outdated (read: overly bilateral or state-centric) logic.²⁷ For one thing, the mechanism of criminal responsibility might become ineffective given the inability to secure custody over accused individuals, prosecutorial discretion, resource constraints, etc.

As a starting-point, the ARSIWA include a savings clause ensuring that the ILC's finalized text does not impinge on the further development of international individual responsibility mechanisms. Article 58 provides that

25. Emmanuel Roucouas, *Non-State Actors: Areas of International Responsibility in Need of Further Exploration*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 391, 392 (Maurizio Ragazzi ed., 2005) (citation omitted) (alteration in original); see also JAMES CRAWFORD, INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 61–65, 91–122 (2002).

26. See, e.g., Constantine Antonopoulos, *State Responsibility in Cyberspace*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE 55 (Nikolaos Tsagourias & Russell Buchan eds., 2015); Zhxiong Huang, *The Attribution Rules in ILC's Articles on State Responsibility: A Preliminary Assessment on Their Application to Cyber Operations*, 14 BALTIC YEARBOOK INT'L L. 41 (2014); Peter Margulies, *Sovereignty and Cyber Attacks: Technology's Challenge to the Law of State Responsibility*, 14 MELB. J. INT'L L. 496 (2013). On the inadequacy of "control"-based legal standards under attribution theory, see Kristen E. Boon, *Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines*, 15 MELB. J. INT'L L. 330 (2014).

27. Cf. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); José Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223 (2011); Martti Koskenniemi, *The Future of Statehood*, 32 HARV. INT'L L.J. 397 (1991); Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993); Susan Marks, *State-Centrism, International Law, and the Anxieties of Influence*, 19 LEIDEN J. INT'L L. 339, 340 (2006); Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7 (1998); Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447 (1993); James D. Willets, *The Demise of the Nation-State: Towards a New Theory of the State Under International Law*, 17 BERKELEY J. INT'L L. 193 (1999).

“[t]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.”²⁸ Particularly relevant is the commentary to that provision. It confirms that the term “individual responsibility” does not exclusively connote criminal liability since “it is not excluded that developments may occur in the field of individual *civil* responsibility.”²⁹ The drafting history suggests that Article 58’s primary rationale was to maintain a rigid distinction between individual *criminal* responsibility and SR, driven by the desire to avoid concluding that every finding of SR also *ipso facto* results in a finding of individual criminal liability. However, that same record indicates that this provision is sufficiently broad to capture something qualitatively different from criminal responsibility.³⁰ Furthermore, there is every indication that Article 58 should not be read as exhaustive, in that international law may develop to recognize the international civil liability of private persons *not* acting on behalf of a State. Otherwise put, even though the provision only refers to individual responsibility for individual conduct “‘on behalf of the State,’ it does not prohibit individual responsibility under international law for purely private conduct without direction by the State.”³¹ In fact, there is ample evidence that such liability already exists in certain circumstances.³²

For example, the UN Convention against Torture (“UNCAT”) primarily requires states parties to fulfill certain obligations (for example, legislate, investigate, and extradite) for the purposes of submitting the prohibited conduct to their competent authorities for criminal prosecution. Individuals carry out the proscribed behavior, be they acting under the color of state authority or in their private capacity. In addition, this instrument also enshrines a provision that ensures the ability to secure civil liability-type repa-

28. Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, at 30, art. 58 (2001); [hereinafter the ARSIWA]. Conversely, the ARSIWA also reserve the right of NSAs to invoke and implement SR. *See id.* art. 33, ¶ 2; *see also id.* pt. III, ch. I, cmt. On the ARSIWA’s shortcomings in bolstering SR invocation and implementation mechanisms for NSAs, see Brown Weiss, *supra* note 9, at 799.

29. The ARSIWA, *supra* note 28, art. 58, cmt., ¶ 2 (emphasis added); *see also* CRAWFORD, *supra* note 25, at 312; PETERS, *supra* note 3, at 164 (expounding from that fact that the individual can be the subject of a broader international responsibility, implying an “advanced process of ‘humanization’ of international law”).

30. *See, e.g.,* Katja Creutz, *International Responsibility and Problematic Law-Making*, in *INTERNATIONAL LAW-MAKING: ESSAYS IN HONOUR OF JAN KLABBERS* 171, 173–75 (Rain Liivoja & Jarna Petman eds., 2014) (inferring that “technically Article 58 is not limited to an individual’s criminal responsibility only, but also includes individual civil responsibility”).

31. PETERS, *supra* note 3, at 152 (adding that “[t]he provision is found in a text that otherwise deals only with State responsibility. Its purpose is merely to cut off the argument that the codified articles might rule out the individual responsibility of officeholders in addition to State responsibility.”).

32. *See id.* at 152–53 and authorities cited therein; *see also* CRAWFORD, *supra* note 25, at 312–13. On the civil liability of public officials in international law, *see infra* note 75 and accompanying text.

ration, albeit pursued and ultimately implemented in the states parties' domestic jurisdictions. Indeed, Article 14 of the UNCAT provides that:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.³³

Similar remedial avenues exist concerning the underexplored and ill-defined potential ICIR arising from crimes falling under the ICC's jurisdiction, especially given that Article 75(6) of the Rome Statute does not prejudice the rights of victims to secure *civil* reparation under international or domestic law.³⁴ In many ways, Article 75 constitutes an important innovation, granting victims the right in some circumstances to secure reparations for international crimes.³⁵ Prior to the adoption of that instrument, victims disposed of severely limited legal avenues outside of domestic contexts to pursue *civil*-type reparations for international crimes. Pursuant to Article 79 of the Rome Statute, the Trust Fund for Victims was instituted by the Assembly of States Parties with a view, *inter alia*, to assisting victims in securing reparations.³⁶ This development constitutes an integral and significant

33. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT]; see also the ARSIWA, *supra* note 28, art. 58, cmt., ¶ 2, n.838. International tribunals have confirmed that individual criminal responsibility can be triggered when private individuals carry out acts of torture, without the need for State involvement. See, e.g., Prosecutor v. Kunarac, Case Nos. IT-96-23; IT-96-23/1-A, Judgment of the Appeals Chamber, ¶ 148 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002). For a recent judicial interpretation of this provision, see *infra* nn. 273–81 and accompanying text.

34. On this eventuality with respect to the crime of aggression, see Friedrich Rosenfeld, *Individual Civil Responsibility for the Crime of Aggression*, 10 J. INT'L CRIM. JUST. 249 (2012). On the UNSC's reluctance to determine individual responsibility for aggression, see PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 127–28 (2013). See also Rome Statute of the International Criminal Court, art. 75, ¶ 6, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (“Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law”).

35. See generally Carla Ferstman & Mariana Goetz, *Reparations Before the International Criminal Court: The Early Jurisprudence on Victim Participation and Its Impact on Future Reparations Proceedings*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 313 (Carla Ferstman et al. eds., 2009); Gioia Greco, *Victims' Rights Overview Under the ICC Legal Framework: A Jurisprudential Analysis*, 7 INT'L CRIM. L. REV. 531 (2007).

36. See *Reparation Orders*, TRUST FUND FOR VICTIMS, <https://www.trustfundforvictims.org/en/what-we-do/reparation-orders> (last visited Mar. 16,

feature of the ICC's reparations practice and culture. More importantly, it suggests that, by incorporating both criminal and reparative (that is, *civil*) aspects, which work together, the ICC's framework further indicates that recovery based on ICIR might be available in international or domestic settings. Granted, under the ICC framework, reparations may only be sought before the Court once there is a conviction, not to mention that the underlying offenses must fall within the Court's jurisdictional purview.³⁷ Nevertheless, this limitation in no way precludes pursuing other avenues of recovery based on ICIR in other domestic or transnational forums.

Despite these overtures, no general international legal framework to invoke and implement NSAs' ICIR exists.³⁸ Former ILC Special Rapporteur James Crawford confirms as much: “[a] more recent addition to the discourse on international responsibility is the possibility of civil claims against non-state actors,” but “[n]o manifestation of this concept yet exists on the international plane.”³⁹

The fact that the ILC itself has not substantially addressed the legal situation of the individual in its work, including the vexed question of non-criminal individual responsibility, perhaps suggests that it is an intractable topic. That said, the Commission considered and produced draft articles on tangentially related sub-topics. For instance, it has studied and delivered work on the issue of nationality, including the question of statelessness.⁴⁰ As

2019); see also Peter G. Fischer, *The Victims' Trust Fund of the International Criminal Court—Formation of a Functional Reparations Scheme*, 17 EMORY INT'L L. REV. 187, 200–01, 204–08 (2003); Dinah L. Shelton, *Reparations for Victims of International Crimes*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 137 (Dinah L. Shelton ed., 2000). See generally STANISLAS KABALIRA, THE RIGHT TO REPARATIONS UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC) (2016).

37. See Rome Statute, *supra* note 34, art. 75, ¶¶ 2, 4 (empowering the Court, *inter alia*, to “make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims,” and “order that the award for reparations be made through the Trust Fund provided for in article 79.”).

38. See generally Christian Tomuschat, *Private Individuals*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 13, at 317–29. The topic of international individual responsibility beyond criminal liability has generated very little attention beyond the human rights field. One study exploring international individual obligations, the individual's international responsibility, and rights arising from such responsibility is found in PETERS, *supra* note 3, at 60–193.

39. JAMES CRAWFORD, STATE RESPONSIBILITY 81 (2013) (adding that States rather “incorporate international law norms into their own legal systems, thereby enabling the making of civil claims as an exercise of domestic jurisdiction.”); see also Tomuschat, *supra* note 38, at 318 (stating that “there is no general law regulating the status of private individuals in international law.”). Even prior to the ARSIWA's adoption, publicists lamented the lack of reliable mechanisms to engage “the responsibility of international civil society[.]” which “comprises non-State actors” See Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387, 392 (1999).

40. See Int'l Law Comm'n, Rep. on the Work of its Sixth Session, U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n 140, U.N. Doc. A/CN.4/SER.A/1954/

discussed below, the topic of international individual responsibility beyond criminal liability is increasingly relevant and is attracting attention in some specialist circles. For instance, the International Law Association constituted a Study Group on Individual Responsibility in International Law, which has studied the question for several years.⁴¹ The ILC and other important institutions should no longer ignore this topic.⁴² It should be explored with a view to developing corresponding intellectual and conceptual foundations, irrespective of its challenging nature and the parsimony of relevant practice.

Given the overall literary dearth on this question in scholarly and policy circles, this Article attempts to articulate some embryonic foundations of a potential framework to address it. In so doing, I rely on parallels with SR law to inform a would-be ICIR regime relating to individuals and other NSAs. This approach is not entirely foreign to the broad field of international responsibility. Indeed, the SR repertoire may and should be brought to bear upon the present inquiry as an analogical tool. By way of example, it has long been accepted that the law of treaties, originally envisaged as a strictly interstate field, can be extended, analogized, and applied to other international actors (read: “nonstate” actors), such as international organizations or other nonstate entities (for example, armed opposition groups at the end of armed hostilities or investors in the field of investment law). Much in the same vein, SR law becomes a frame of reference for analyzing, dissecting, and articulating other modes of international responsibility beyond the interstate paradigm, including in spaces corraling individuals and other NSAs. Unsurprisingly, the SR repertoire was instrumental in guiding the ILC when developing draft articles governing the responsibility of one type of NSA—international organizations—although charges of a misplaced “copy/paste” approach were leveled against it in that context, prompting it to adjust its final product accordingly.⁴³

The ARSIWA’s central syllogistic device should also inform any legal regime governing ICIR. Thus, once a state (in the proposed model, an indi-

Add.1, at 140, 147–49; see also CRAWFORD, *supra* note 39, at 49 n.8. See generally PARLETT, *supra* note 24.

41. See *Study Groups*, INT’L L. ASS’N, <http://www.ila-hq.org/index.php/study-groups> (last visited Mar. 16, 2019).

42. On the ILC’s past treatment of legal issues involving NSAs, see Gentian Zyberi, *Non-State Actors from the Perspective of the International Law Commission*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW, *supra* note 11, at 165.

43. Compare the ARSIWA, *supra* note 28, with Int’l Law Comm’n, Rep. on the Work of its Sixty-Third Session, U.N. Doc. A/66/10/Add.1, at 39–105 (2011). On the unsuitability of certain SR norms for transposition to the international organizations context, see generally Vincent-Joël Proulx, *An Uneasy Transition? Linkages between the Law of State Responsibility and the Law Governing the Responsibility of International Organizations*, in RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE 109 (Maurizio Ragazzi ed., 2013). But see Christiane Ahlborn, *The Use of Analogies Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the “Copy-Paste Approach,”* 9 INT’L ORG. L. REV. 53 (2012).

vidual/NSA/group) breaches a primary norm of substantive conduct (for example, perpetrating terrorism offenses or financing/supporting terrorism), international law sets in motion the application of secondary (remedial) norms, which translate into legal consequences stemming from the violation.⁴⁴ Hence, the ARSIWA's borrowed syllogistic reasoning consists of a wrongful act committed by the NSA (as opposed to a state), amounting to an action or omission invariably constituting a breach of its international obligation(s), which is then attributable to that entity/individual, thereby triggering legal consequences enforceable against it.⁴⁵ Presumably, when undertaking any analysis in the realm of ICIR, questions surrounding the would-be international legal personality of the relevant individual, NSA, or group and its limits (that is, is it sufficient to generate legal responsibility?) will arise and warrant consideration at the outset. After all, it must be recalled that, in its famous *Reparations Advisory Opinion*, the International Court of Justice ("ICJ") equated the expressions "international person" and "subject of international law."⁴⁶

Thus, SR's normative scheme only gets us so far. An obvious limitation resides in the intrinsically different nature and character of the artificial construct of the state when compared to the wide gamut of NSAs, including non-governmental organizations ("NGOs").⁴⁷ Moreover, once an international law violation is established between states, it creates a legal relationship which remains "on a level of parity" between the two players, despite the wrongful act. Absent a competent international jurisdictional body to decide the matter/order appropriate reparation, both the responsible state and injured state "remain sovereign entities," with the latter left to navigate potential unilateral remedies to implement liability against the former.⁴⁸

Because of this peculiar structure, the prospect of an injured state unilaterally invoking/implementing SR entails a process of auto-qualifying the dispute's various aspects and, ultimately, self-judging both the legal breach and its consequences.⁴⁹ By contrast, a NSA that commits an international

44. See generally Tomuschat, *supra* note 38, at 318. On the primary/secondary obligation dichotomy, see Eric David, *Primary and Secondary Rules*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 13, at 27; Giorgio Gaja, *Primary and Secondary Rules in the International Law on State Responsibility*, 4 *RIVISTA DI DIRITTO INTERNAZIONALE* 981 (2014).

45. For this syllogism under extant SR repertoire, see the ARSIWA, *supra* note 28, art. 2 (on the wrongful act–breach attribution sequence); *id.* art. 28 (on the ensuing legal consequences).

46. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 179 (Apr. 11); see also PETERS, *supra* note 3, at 35–44, 414.

47. On the potential international responsibility of NGOs, see Anna-Karin Lindblom, *The Responsibility of Other Entities: Non-Governmental Organizations*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 13, at 343.

48. See Tomuschat, *supra* note 38, at 320.

49. For a variety of views, see Denis Alland, *The Definition of Countermeasures*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* *supra* note 13, at 1129; RENÉ PROVOST,

law breach can be labeled the author of a criminal act or, as argued here, the perpetrator of an internationally (civil) wrongful act. Consequently, nothing prevents that juridical person/entity or an individual from being subjected to an appropriate criminal or economic sanction. However, it should be stressed that “[a] private individual does not have the same ‘ceremonial dignity’ as a State.”⁵⁰ Here, a key distinction lies in the horizontal enforcement system endemic to SR and interstate disputes, as compared with the top-down enforcement approach applicable to individuals and NSAs. This is a clear distinguishing factor between state-based liability and individual and/or NSA-based liability, which is also reminiscent of one major difference between the international legal order and domestic legal systems.

Consequently, it is imperative to exercise caution in fashioning a secondary normative regime to govern NSAs’ (non-criminal) international responsibility. For instance, some SR remedial provisions would carry over rather awkwardly to the realm of NSAs. Consider the oft-awarded remedy of satisfaction, codified in Article 37 of the ARSIWA. It operates rather seamlessly between sovereign states and is routinely relied upon by the ICJ as adequate redress.⁵¹ Stepping away from the interstate dynamic, “[a]pologies or expressions of regret . . . presented by an individual are no more than a gesture of courtesy and do not have the same weight as official apologies offered by a State.”⁵² Moreover, the immunity that most states enjoy with respect to their international jurisdiction further informs the overarching distinction between state-based liability and individual and/or NSA-based liability. A vital query for the architects of an ICIR regime will be to determine why and in what circumstances individuals and other NSAs should be held civilly liable at the international level. With respect to *criminal* liability, the traditional response has been that the international legal system will fill the void when municipal jurisdictions are unable or unwilling to prosecute domestically.⁵³ The question remains, however, whether this standard could also be transposed and applied to the *civil* international responsibility of individuals and NSAs.

The sources and content of relevant primary norms may be difficult to ascertain in some instances given that ICIR is an emerging conceptual field, not to mention that it suffers from a paucity of relevant practice. Despite this normative uncertainty, certain primary norms—the violation of which may

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 338 n.2 (2002); Leo Gross, *States as Organs of International Law and the Problem of Autointerpretation*, in *SELECTED ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 167 (Leo Gross ed., 1993); HANS KELSEN, *PEACE THROUGH LAW* 13–14 (1944).

50. Tomuschat, *supra* note 38, at 320.

51. See the ARSIWA, *supra* note 28, art 37. For a critical take on the ICJ’s use of satisfaction, see Juliette McIntyre, *The Declaratory Judgment in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility?*, 29 *LEIDEN J. INT’L L.* 177 (2016).

52. Tomuschat, *supra* note 38, at 320.

53. See, e.g., the complementary nature of the ICC’s jurisdiction, which also affects the admissibility of claims it can hear. Rome Statute, *supra* note 34, at pmb., arts. 1, 17.

lead to establishing ICIR—can nonetheless be grounded in specific international instruments. Indeed, classical publicists confirmed that certain treaty provisions directly obligate individuals to observe certain behavioral requirements and establish ICIR in the case of breach, even if the resulting reparation is defined and ultimately governed by domestic legal systems.⁵⁴

Draft conventions in international nuclear and environmental law have included civil liability provisions for maritime oil pollution, nuclear damage, and transboundary movement of hazardous wastes.⁵⁵ While these instruments would engender the liability of private persons and operators in specific circumstances, they have not entered into force. Nevertheless, that states and other relevant actors have drafted such conventions suggests a movement toward ICIR, as these draft instruments must be contrasted with treaties whose violation entails state-based liability. A key cross-sectoral civil liability convention of this kind is the Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which also has yet to enter into force.⁵⁶ The above draft instruments seek to introduce secondary obligations binding upon NSAs and individuals to regulate their liability in the event they carry out conduct falling within the purview of the conventions (for example, pollution). However, whether such instruments also ground primary substantive norms of conduct governing the behavior of individuals and enterprises directly remains a more vexed question. One attractive construction would be to simply surmise that “the treaties place duties on businesses not to cause pollution.”⁵⁷ A more careful analysis might reveal stricter conditions in which primary norms binding individuals and NSAs directly could be read into those instruments.⁵⁸

These conventions generally require signatory states to impose sanctions to assist in enforcing the obligations of private actors (typically business entities)—whose unlawful conduct may attract liability under the relevant instruments—and ensure the implementation of their duty to provide compensation. Consequently, the more traditional construction of most of these instruments implies that they cannot give rise to liability of private en-

54. See Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 537–38 (1943) (discussing Article II of the International Convention for the Protection of Submarine Telegraph Cables).

55. See PETERS, *supra* note 3, at 153–54.

56. See generally Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, E.T.S. No. 150 (not in force).

57. Steven R. Ratner, *Business*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 807, 814 (Daniel Bodansky et al. eds., 2007).

58. See PETERS, *supra* note 3, at 154. See generally *id.* At 60–114. For a cynical take on whether international liability regimes “will play a significant role as a tool for environmental protection[.]” see Jutta Brunnée, *Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection*, 53 INT’L & COMP. L.Q. 351, 367 (2004).

tities directly under international law.⁵⁹ Yet, upon closer inspection, the wording of some of these instruments suggests that international individual responsibility could be established for their violation, although they would need to be “sufficiently specific and complete in the sense that no further national provisions would be needed to specify” the relevant obligations.⁶⁰ Otherwise put, to achieve this standard, the instruments must enshrine “unambiguous substantive standards” (that is, “general principles of liability”) and provisions circumscribing the scope of liability along with the financial and temporal parameters of such liability.⁶¹ While these criteria are met by some of the conventions, this is a far cry from establishing a general regime of international *civil* responsibility governing the conduct of NSAs and individuals, be it in relation to primary and/or secondary norms. These questions remain rather academic if states ultimately decline to sign and ratify the relevant conventions. This does not mention that, if they do enter into force, the “diffuseness of global environmental problems” and issues related to causation might pose challenges to establishing liability under these instruments.⁶²

Given my focus in subsequent pages on “terrorism”⁶³ as a principal case study and the UNSC as would-be implementer/facilitator of ICIR, I argue that this body can set specific obligations (that is, primary norms) incumbent upon NSAs. In fact, the UNSC imposed many of the relevant primary obligations (that is, prohibition of conduct amounting to “terrorism” or lending material support to “terrorism”), thereby prompting an assessment of its practice and role in ICIR implementation. After all, the *Kosovo Advisory Opinion* indicated that the UNSC may promulgate legal obligations that bind nonstate subjects.⁶⁴

59. See, e.g., Tomuschat, *supra* note 38, at 324–25 (adding that, under the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea and its Protocol, “the relationships between the person causing the damage and the victims of the damage are essentially placed under the domain of national laws of one of the contracting parties, save for the specific rules established under the convention which have become an integral part of national laws.”). See also PETERS, *supra* note 3, at 156–57.

60. PETERS, *supra* note 3, at 155–60 (analyzing the relevant provisions of several conventions and their protocols).

61. *Id.* At 158 (adding that the “conventions would also have to contain clearly specified minimum standards governing the forum, standing, the applicable law, and the recognition and enforcement of judgments.”).

62. *Id.* at 161. On causation and related matters, see also *infra* note 110 and accompanying text.

63. The present account does not purport to advance a categorical position on the definitional polemic surrounding the concept of “terrorism.” It loosely proceeds from the expansive working definition provided in S.C. Res. 1566, ¶ 3 (Oct. 8, 2004).

64. See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶¶ 115–17 (July 22); see also PETERS, *supra* note 3, at 96–98 (concluding that this precedent confirms that the UNSC “unambiguously impose[s] strict legal obligations on private actors in situations of *non-*

It is also apparent from several resolutions that the UNSC itself considers that its pronouncements (and the authorizations it issues for certain actors to engage in certain conduct) might have a law-shaping impact on general international law. The UNSC sometimes confines a given resolution to the specific matter under study and expressly states that it “shall not be considered as establishing customary international law” (nor as affecting/modifying the addressees’ existing legal rights and obligations).⁶⁵ *A contrario*, this implies that, absent this proviso, a UNSC resolution might have lawmaking features in certain instances.⁶⁶ For example, the Council expressly precludes broader lawmaking implications in a series of resolutions regulating piracy off the coast of Somalia.⁶⁷ It also included near-identical disclaimers in resolutions targeting Libya on the issues of illicit export of crude oil⁶⁸ and migrant smuggling and human trafficking.⁶⁹ This is not to mention that several international courts and international law institutions recognize the UNSC’s ability to contribute to customary international law, including the ICJ,⁷⁰ the International Criminal Tribunal for the former Yugoslavia (“ICTY”),⁷¹ the Inter-American Court of Human Rights,⁷² the ILC in its

international armed conflict.”) (emphasis in original); Gleider I. Hernández, *Non-State Actors from the Perspective of the International Court of Justice*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW, *supra* note 11, at 145.

65. See also 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, 656 (2018).

66. See *id.*

67. See S.C. Res. 2184, ¶ 14 (Nov. 12, 2014); S.C. Res. 2182, ¶ 21 (Oct. 24, 2014); S.C. Res. 2125, ¶ 13 (Nov. 18, 2013); S.C. Res. 2077, ¶ 13 (Nov. 21, 2012); S.C. Res. 2020, ¶ 10 (Nov. 22, 2011); S.C. Res. 1950, ¶ 8 (Nov. 23, 2010); S.C. Res. 1897, ¶ 8 (Nov. 30, 2009); S.C. Res. 1851, ¶ 10 (Dec. 16, 2008); S.C. Res. 1846, ¶ 11 (Dec. 2, 2008); S.C. Res. 1838, ¶ 8 (Oct. 7, 2008); S.C. Res. 1816, ¶ 9 (June 2, 2008). On Resolution 1816’s wording, see Stephen D. Mathias, *The Work of the International Law Commission on Identification of Customary International Law: A View from the Perspective of the Office of Legal Affairs*, 15 CHINESE J. INT’L L. 17, 27 (2016).

68. S.C. Res. 2146, ¶ 9 (Mar. 19, 2014).

69. S.C. Res. 2240, ¶ 11 (Oct. 9, 2015).

70. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 81 (July 22). See generally Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT’L L. 879, 879–80 (2005).

71. *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶133 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

72. *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 107 (Sept. 26, 2006).

work on SR,⁷³ and the International Committee of the Red Cross (“ICRC”).⁷⁴

In summary, the rising importance of individuals and NSAs on the international plane has increased the need for alternate modes of liability beyond classic criminal responsibility. The picture that emerges is one where some key building blocks of a general ICIR regime are already in place, but where uncertainty persists. This uncertainty is particularly acute in respect of the origin and content of relevant primary norms and the mechanics surrounding the application of secondary remedial norms. In developing a would-be ICIR regime, steadier conceptual and theoretical foundations must be articulated. In this regard, the law of SR offers a mixed bag of analogical tools. On one hand, its principal aims and rationales could be adjusted accordingly and transposed to the realm of individuals and NSAs and yield effective results. On the other hand, that normative scheme is of limited utility given the qualitatively different legal personality of NSAs, the peculiarities related to the abstract construct of the state, and the unique features of enforcement measures between sovereign states. New directions and solutions must be sought, including through the UNSC as argued in the present account.

B. *Regime Interaction and the UNSC’s Role*

International individual responsibility is of vital and topical importance, especially given the rapid expansion of certain subversive nonstate armed entities and the emergence of equally subversive individuals.⁷⁵ Groups like Daesh/ISIL, Al-Shabaab, and Boko Haram wield almost state-like power and control over both territory and populations in certain areas. These groups perpetrate various international law violations, largely with impunity and with no functional territorial state on which responsibility can be pinned. In large territorial swathes of Syria, Iraq, Yemen, Nigeria, and So-

73. See the ARSIWA Commentary, *supra* note 28, at 53, 89, 92–93, 114–15, 132.

74. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 39 n.13, 94 n.97, 100 n. 139, 107 nn.14 & 17, 109 n.24, 111 n.40, 113 nn.6–8, 137 n.60, 147 n.25, 184 n.79, 188 n.22, 195–96 nn.70–73, 198 n.87, 199 n.98, 201 nn.105–07 (2005).

75. A related area—falling within a broader research and policy program on international civil individual responsibility (“ICIR”)—might presumably include the individual civil liability of state officials. As Lauterpacht cautioned, the international legal system might be doomed should an individual, acting in an official state capacity (that is, as an organ), be permitted to violate international law in that capacity but ultimately eschew liability by seeking refuge behind the artificial construct of the “state.” See Hersch Lauterpacht, *Règles Générales du Droit de la Paix*, 62 RECUEIL DES COURS 95, 297 (1937). While there might be both sound policy and legal bases for envisaging civil liability of state officials, the reality is that states are generally reluctant to accept such a prospect. For one application, see Bardo Fassbender, *Can Victims Sue State Officials for Torture?*, 6 J. INT’L CRIM. JUST. 347, 369 (2008) (declaring that the “advanced process of ‘humanization’ of international law would surely suggest such a liability. [But that] so far States have not been ready to agree on it.”).

malia, for example, the host state has been eviscerated of its effective control over the relevant region, which has been appropriated by extremist groups.⁷⁶

Consequently, individual accountability regimes must enhance their ability to combat impunity. This is a challenging task. We are often dealing with irregulars who cannot be swayed by the prospect of deterrence or convinced of the value of reciprocity and proportionality (should those principles be applied in irregular combat). In many cases, long gone are the days of “clean” theaters of war; asymmetric warfare and all its attendant legal complexities are increasingly prevalent.⁷⁷ It is messy, murky terrain, and the evolving international legal framework to address these challenges—if it exists—also mirrors this general impression.

The rules of the game are changing in areas highly relevant to NSA conduct, such as HR. The discourse is “therefore moving away from the traditional view that under [HR] law the individuals hold the rights while only states bear the obligations.”⁷⁸ In fact, this shift is part and parcel of a broader recognition of the individual’s (and NSAs’) situation as international law subjects beyond the traditional paradigm.⁷⁹ Indeed, the *LaGrand Case (Germany v. United States of America)* confirmed that the Vienna Convention on Consular Relations not only enshrines states’ rights pertaining to

76. However, despite this lack of control by the territorial state, the UNSC remains resolute in emphasizing the state’s counterterrorism and related capacity-building obligations. For example, after condemning recent terrorist attacks in Mogadishu orchestrated by Al-Shabaab and the presence in Somalia of groups affiliated with Daesh/ISIL, it called upon the UN Assistance Mission in Somalia to continue “strengthen[ing] Somalia’s capacity to prevent and counter terrorism, consistent with its international obligations, relevant Security Council resolutions and implement the UN Global Counter-Terrorism Strategy” S.C. Res. 2408, ¶ 7 (Mar. 27, 2018); *see also* S.C. Res. 2344, ¶ 19 (Mar. 17, 2017) (emphasizing similar obligations for Afghanistan). Some might also lump organizations like Hamas into the same category, while others might equate Hamas with a state actor. For one view, see Amnon Aran, *Containment and Territorial Transnational Actors: Israel, Hezbollah and Hamas*, 88 INT’L AFF. 835, 854 (2012).

77. *See* WILLIAM BANKS, COUNTERINSURGENCY LAW: NEW DIRECTIONS IN ASYMMETRIC WARFARE (2013); PAULINE M. KAURIN, THE WARRIOR, MILITARY ETHICS AND CONTEMPORARY WARFARE: ACHILLES GOES ASYMMETRICAL 7–8 (2014); MAX G. MANWARING, THE COMPLEXITY OF MODERN ASYMMETRIC WARFARE 3 (2012); NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE 8 (William C. Banks ed., 2011).

78. Eric de Brabandere, *Non-State Actors, State-Centrism and Human Rights Obligations*, 22 LEIDEN J. INT’L L. 191, 192 (2009). Over two decades ago, Thomas Franck already identified the inversely proportional relationship between individuals’ HR and their obligations/potential legal accountability. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 264 (1998).

79. *See* Tomuschat, *supra* note 38, at 318–19; PETERS, *supra* note 3, at 152–66. *But cf.* Jean d’Aspremont, *Non-State Actors from the Perspective of Legal Positivism: The Communitarian Semantics for the Secondary Rules of International Law*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW, *supra* note 11, at 25.

consular relations but also that Article 36(1)(b) “creates *individual rights*, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person.”⁸⁰ Further, the Court was careful not to qualify those rights as HR, arguably signaling a departure from the traditional posture regarding the individual’s situation as an international law subject. In fact, the ICJ expressly declined to consider Germany’s additional argument that the relevant right “was not only an individual right but has today assumed the character of a human right.”⁸¹

Similarly, the ILC echoed the ICJ’s conclusion that individuals (and other NSAs) can obtain enforceable rights in the international legal order while firmly stating that they can also assume international legal obligations. In the context of the responsibility of international organizations, the ILC Special Rapporteur construed this precedent as the “[t]he Court stat[ing] . . . that individuals are also subjects of international law.”⁸² This prompted the Rapporteur to ponder that “[i]t would be difficult to understand why individuals may acquire rights and obligations under international law while the same could not occur with any international organization, provided that it is an entity which is distinct from its members.”⁸³ Consequently, Professor Gaja opined that this approach double-coated the protection afforded individuals under international law. Such individuals would benefit from their home state’s exercise of diplomatic protection or some other interstate claim while again enjoying protection where a “treaty provides for remedies that are directly actionable by individuals . . .”⁸⁴ On one view of the *LaGrand* precedent, it is significant that the Court declined to frame the individuals’ rights as HR. If individuals can have enforceable rights beyond HR, the argument presumably goes, individuals and/or other NSAs should be able to assume obligations beyond the traditional criminal prohibitions and “core” international crimes (for example, crimes against

80. *LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, ¶ 77 (June 27) (emphasis added).

81. *Id.* ¶ 78; see also Pierre-Marie Dupuy & Cristina Hoss, *LaGrand Case (Germany v United States of America)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 16–19, 33–36 (Rüdiger Wolfrum ed., 2012) (underscoring that *LaGrand* “also gained some prominence for having raised the issue of individual rights flowing from the [Convention].”). For a critical take on its aftermath, see Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT’L L. 427, 427 (2002). In a subsequent, factually similar case, the Court emphasized the “interdependence of the rights of the State and of individual rights” in this context, underscoring that the applicant state could, “in submitting a claim in its own name, request the Court to rule on the violation of rights which it claim[ed] to have suffered both directly and through the violation of individual rights conferred on [its] nationals under the [Convention].” *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. Rep. 12, ¶ 40 (Mar. 31).

82. Giorgio Gaja (Special Rapporteur), *First Report on Responsibility of International Organizations*, ¶ 17, U.N. Doc. A/CN.4/532 (Mar. 26, 2003).

83. *Id.*; see also Clapham, *supra* note 24, at 28.

84. Giorgio Gaja, *The Position of Individuals in International Law: An ILC Perspective*, 21 EUR. J. INT’L L. 11, 14 (2010).

humanity, war crimes, genocide, and aggression), the violation of which could engage ICIR.⁸⁵

This proposition also aligns with recent scholarly proposals to reconceptualize the frame of reference concerning the individual's role and place in international law, steering the inquiry away from exclusive focus on HR as the "central and entirely undisputed element of the international legal status of the individual."⁸⁶ The next logical step in this thinking is to acknowledge that NSAs' assumption of primary (substantive) obligations would be rendered meaningless absent their (potential and actual) enforcement through secondary norms. In summary, when the abovementioned

85. See also Clapham, *supra* note 24, at 30. This line of argument must be appreciated with caution, as illustrated by the challenging history of corporate liability for HR violations. Given the considerable resistance against, and concerns voiced over, adopting a more robust liability regime to address corporations' HR abuses, the UN Secretary-General's Special Representative for Business and HR John Ruggie ultimately opted for a more measured and grounded position. Consequently, the resulting document, which uses hortatory language in relevant parts, speaks solely of the "responsibility of business enterprises to respect [HR]" as opposed to couching the language in mandatory legal terms. See U.N. Human Rights Office of the High Comm'r, Guiding Principles on Business and Human Rights, U.N. Doc. HR/PUB/11/04, at 13–26 (June 16, 2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (especially Principle 23). In fairness, the document and its commentary, *id.* at 10, invites states to explore adopting corporate civil liability mechanisms for HR violations, recognizes, *id.* at 14, that the issues of *legal* responsibility and enforcement "remain defined largely by national law provisions in relevant jurisdictions," some of which provide for civil actions for corporations' complicity in HR violations, *id.* at 19, and encourages, *id.* at 25, corporations to treat the risk of being found complicit in such violations "as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims." *Id.* at 26. The document also stresses that "corporate directors, officers and employees may be subject to individual liability for acts that amount to gross [HR] abuses" and, in various parts, maps out the HR "due diligence" that business enterprises should conduct. See *id.* at 15–26.

For different views on this project and its implications, see JOHN RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (2013); Susan Ariel Aaronson & Ian Higham, "Re-Righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms, 35 HUM. RTS. Q. 333 (2013); Jonathan Bonnitche & Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F. Sherman, III*, 28 EUR. J. INT'L L. 929 (2017); Carola Glinski, *The Ruggie Framework, Business Human Rights Self-Regulation and Tort Law: Increasing Standards Through Mutual Impact and Learning*, 35 NORDIC J. HUM. RTS. 15 (2017); Carlos López, *The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility?*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 58 (Surya Deva & David Bilchitz eds., 2013); John Ruggie, *Protect, Respect, and Remedy: The UN Framework for Business and Human Rights*, in INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 519 (Mashood A. Baderin & Manisuli Ssenyonjo eds., 2010); John Ruggie & John Sherman, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitche and Robert McCorquodale*, 28 EUR. J. INT'L L. 92 (2017); THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION (Radu Mares ed., 2012). But see *infra* note 297.

86. PETERS, *supra* note 3, at 32.

principled argument and precedent argument are appreciated in tandem, those actors' international legal personality—however limited—cannot be dissociated from the prospect of international individual responsibility beyond strict criminal liability. If accepted, this conclusion would considerably facilitate the transition of the individual into a key subject of international law.⁸⁷

As shown in Part III, the UNSC recently shifted away from requiring that states regulate the conduct of NSAs and individuals themselves—for example, by implementing legislation, exercising jurisdiction over criminals, punishing unlawful behavior, etc.—thereby initially only *indirectly* or *implicitly* regulating and binding NSAs. The UNSC moved to *directly* regulating the conduct of NSAs in its resolutions. Coupled with scholarly attempts to situate the role and place of NSAs and individuals as both holders of rights and bearers of obligations on the international plane,⁸⁸ these developments not only suggest their increasing importance in this context but also a fundamental misunderstanding of the nature and extent of their international legal personality.⁸⁹

Before addressing the UNSC's potential contribution, creative solutions to palliate SR's failures to properly capture the role of individuals (that is, its inherent bilateral/state-centric inclination) warrant mention. In other words, reconceptualizing or enhancing SR or imposing more onerous due diligence obligations on states across the board as the sole strategy is an inadequate and overly statist approach. It fails to recognize the shift of power away from nation-states in many contexts. As a corollary, the international

87. See generally *id.* at 21–34, 165 (also observing that the imposition of secondary obligations upon individuals would entail their duty to compensate victims for international law violations). This line of argument aligns with the view that the “present era – which is often perceived as a period of crisis in positive international law – has seen a renaissance of *natural law*, in which the individual is celebrated as the ‘true subject’ of international law.” *Id.* at 23 (emphasis in original). It is also compatible with several scholarly pronouncements on the importance of the international legal personality of the individual. See, e.g., JANNE ELISABETH NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* 473 (2004); Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, 316 *RECUEIL DES COURS* 9, 33–34, 57, 147, 252, 265–267, 274, 282 (2005); see also RAFAEL DOMINGO, *THE NEW GLOBAL LAW* 124–26 (2010); ROLAND PORTMANN, *LEGAL PERSONALITY IN INTERNATIONAL LAW* 2–3 (2010).

88. See, e.g., PETERS, *supra* note 3, at 152–66; PARLETT, *supra* note 24; PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW, *supra* note 11; Clapham, *supra* note 24.

89. For a recent provocative treatment, see ASTRID KJELDGAARD-PEDERSEN, *THE INTERNATIONAL LEGAL PERSONALITY OF THE INDIVIDUAL* (2018). For more classical treatments, compare David Feldman, *International Personality*, 191 *RECUEIL DES COURS* 343, 359 (1985) (arguing that the ability to hold rights in international law constitutes a sufficient predicate for international legal personality), with Prosper Weil, *Le Droit International en Quête de son Identité: Cours Général de Droit International Public*, 237 *RECUEIL DES COURS* 9, 122 (1992) (expounding that international legal personality must be premised on lawmaking and law enforcement powers).

community's excessive focus on individual criminal responsibility is equally problematic. Contemporaneous events suggest that nonstate groups and entities, as opposed to individuals, are securing and consolidating that power.⁹⁰ Similarly, Mégret has argued that to enforce obligations *erga omnes*—of which some counterterrorism undertakings unquestionably form part—"[p]erhaps a better ground is the idea that, if crimes are committed by individuals, then other individuals should also be allowed to stop their perpetration."⁹¹ This reasoning can also be extended to other NSAs and their subversive activities.

In a different context, the recent saga surrounding the ICJ's *Marshall Islands* cases demonstrated that judicial organ's inherent structural shortcomings (both jurisdictional and admissibility-based) to deal with multilateral disputes involving alleged violations of interdependent/interrelated obligations (potentially *erga omnes*),⁹² the violation of which may be facilitated by state *and* nonstate actors. For starters, only states can appear before the ICJ. Individuals and other NSAs do not possess the quality of sovereignty (or sovereign equality), nor the requisite international legal personality to do so. In relevant state-to-state cases, however, the Court may be called upon to weigh in on legal issues that also relate to the unlawful acts of NSAs—sometimes indirectly—as part of the broader factual complex before it.⁹³ One first obstacle is that such issues might arise in connection with complex multilateral disputes over which the Court may decline to exercise jurisdiction⁹⁴ or reject on the ground of inadmissibility.⁹⁵ In such scenarios,

90. See Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. & POL. 265, 306 (2004).

91. Frédéric Mégret, Beyond "Freedom Fighters" and "Terrorists": When, if Ever, Is Non-State Violence Legitimate in International Law? 10 n.45 (Apr. 6, 2009) (unpublished manuscript), <http://ssrn.com/abstract=1373590> (also underscoring that "the articles on state responsibility are really too steeped in inter-state considerations to provide much of a foothold for a truly erga omnes (i.e.: also encompassing individuals) reaction to fundamental illegality.").

92. For a critical account, see Vincent-Joël Proulx, *The World Court's Jurisdictional Formalism and its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes*, 30 LEIDEN J. INT'L L. 925 (2017).

93. Despite the Court's state-centric mode of dispute settlement, which denies individuals and NSAs standing before the Court, the ICJ has nonetheless delivered several key pronouncements dealing with the rights and obligations of NSAs under international law. In addition, the Court has examined wrongful conduct authored by NSAs for the purposes of determining whether that behavior could be attributed to states for the purpose of establishing SR. The Court has also weighed in on the rights and obligations of NSAs in advisory proceedings. For a review of relevant jurisprudence, see Hernández, *supra* note 64, at 140–64.

94. For optimistic views that the Court can and should accept to adjudicate complex multilateral disputes, see Béatrice Bonafé, *Establishing the Existence of a Dispute Before the International Court of Justice: Drawbacks and Implications*, 45 QUESTIONS INT'L L. 3, 27–28 (2017). Some publicists stress that, by adopting a more procedurally flexible approach, the Court could avoid undesirable scenarios where access to justice is impeded by judicial formal-

it is possible that the Court's predominantly state-centric structure and bilateral process would meet their match, leaving it unable to contribute meaningfully to the development of ICIR (especially when it rejects cases on jurisdictional and/or admissibility grounds).

More importantly, a second challenge would emerge in tandem with the fact that the ICJ does not have jurisdiction *ratione personae* over NSAs, which then begs the question whether the only determinations the Court could make on ICIR—in strictly interstate disputes—would be done indirectly or by way of “incidental censure.”⁹⁶ Irrespective of the answer to this query, one thing remains clear: the ICJ does not constitute a reliable or even relevant forum for invoking or establishing the international responsibility of NSAs, let alone attempting to secure remedies for their international law breaches. In other words, not every case before the Court will be as straightforward as *Belgium v. Senegal* from procedural and admissibility standpoints,⁹⁷ nor will every case offer a potential entry-point for considerations related to international individual responsibility. This partly explains why this Article's emphasis is on legal tools the UNSC can use to enhance individual responsibility. While potential ICIR enforcement amongst NSAs could be explored as a form of “soft law,” with domestic legal regimes and relevant transnational frameworks remaining the more central players, the ICJ's structure, make-up, and recent jurisprudence suggest a decidedly less relevant model for developing and implementing ICIR.

Thus, this Article's focus on the UNSC is informed by three additional rationales. First, scholars have recently examined the UNSC's role in preventing/suppressing global security threats, with insistence on the subversive activities of NSAs in the framework of states' obligations. Consequently, the UNSC can play a role, sometimes determinant, in implementing SR for state failures to prevent terrorism or violations of other important counterterrorism obligations.⁹⁸ Indeed, the use of legal rhetoric in UNSC deliber-

ism. See, e.g., Surabhi Ranganathan, *Nuclear Weapons and the Court*, 111 AJIL UNBOUND 88 (2017); Ingo Venzke, *Public Interests in the International Court of Justice—A Comparison Between Nuclear Arms Race (2016) and South West Africa (1966)*, 111 AJIL UNBOUND 68 (2017).

95. On this point, see Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Races and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections, 2016 I.C.J. Rep. 833, ¶¶ 33–41 (Oct. 5) (separate opinion by Judge Tomka). See also Vincent-Joël Proulx, *The Marshall Islands Judgments and Multilateral Disputes at the World Court: Whither Access to International Justice?*, 111 AJIL UNBOUND 96, 99–100 (2017).

96. This expression is borrowed from a different, yet still relevant, context. See Gaetano Arangio-Ruiz, *Article 39 of the ILC First-Reading Draft Articles on State Responsibility*, 83 RIVISTA DI DIRITTO INTERNAZIONALE 747, 765 n.31 (2000); see also Karel Wellens, *The UN Security Council and New Threats to the Peace: Back to the Future*, 8 J. CONFLICT & SECURITY L. 1, 49 (2003).

97. See *infra* nn. 114–17 and accompanying text.

98. See generally VINCENT-JOËL PROULX, INSTITUTIONALIZING STATE RESPONSIBILITY: UN ORGANS AND GLOBAL SECURITY (2016) [hereinafter PROULX, INSTITUTIONALIZING]; Vincent-Joël Proulx, *An Incomplete Revolution: Enhancing the Securi-*

ations is more commonplace than some might think. Sometimes, international law arguments might have considerable purchase in swaying UNSC decision-making constituencies toward a particular outcome.⁹⁹ This account continues this line of inquiry: this logic—and the UNSC’s occasional use of international law—could likely enhance ICIR mechanisms.

Second, the impetus toward revisiting individual responsibility mechanisms, beyond international criminal law (“ICL”), stems largely from SR’s failures. The idea of “international responsibility”¹⁰⁰ must be understood broadly, encompassing various processes, actors, and levels of wrongdoing/accountability. A more comprehensive and effective international responsibility system must increasingly grapple with the involvement of multiple private actors internationally. They operate alongside state and institutional players, which frequently contribute to shaping legal rapports and consequences across networks of multi-leveled relationships of responsibility.

One criticism leveled against the ARSIWA is that they fail to consider the growing importance of NSAs, focusing almost exclusively on “bilateral,” “individualistic,” and “privatistic” conceptions of SR.¹⁰¹ In some sectors, private actors obviate the need for regulation by self-regulating, for instance by adopting corporate codes of conduct or relying on “soft law” regimes.¹⁰² A case in point is the Montreux Document, which was premised on a shared understanding that private military and security companies would self-regulate.¹⁰³ The flipside is that states should not be able to elude responsibility or disguise their participation in armed hostilities by hiding

ty Council’s Role in Enforcing Counterterrorism Obligations, 8 J. INT’L DISP. SETTLEMENT 303 (2017) [hereinafter Proulx, *An Incomplete Revolution*].

99. See IAN JOHNSTONE, THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS (2011) (especially chapters 5 and 8) [hereinafter JOHNSTONE, THE POWER]; Ian Johnstone, *Legal Deliberation and Argumentation in International Decision-Making*, in THE FAULT LINES OF LEGITIMACY 175 (Hilary Charlesworth & Jean-Marc Coicaud eds., 2010); Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT’L L. 437 (2003); Ian Johnstone, *The Security Council and International Law*, in THE UN SECURITY COUNCIL IN THE 21ST CENTURY 771 (Sebastian von Einsiedel et al. eds., 2016).

100. See THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 13.

101. See generally Riccardo Pisillo Mazzeschi, *The Marginal Role of the Individual in the ILC’s Articles on State Responsibility*, 15 ITALIAN Y.B. INT’L L. 39 (2004).

102. On “soft law” mechanisms, see Tomuschat, *supra* note 38, at 327–28. Moreover, reliance on “soft law” mechanisms might prove problematic in some instances as the underlying norms might be perceived as imprecise or non-binding. See generally Kenneth W. 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).

103. See Letter Dated 2 October 2008 from the Permanent Representative of Switzerland to the U.N. Addressed to the Secretary-General, U.N. Doc. A/63/467-S/2008/636 (Sept. 17, 2008).

behind private military firms.¹⁰⁴ Perhaps counterintuitively, “soft law” instruments promulgated by international organizations might in fact “generate as much or sometimes greater compliance than formally binding sources of international obligation like treaties,” even though it remains unclear whether their violation amounts to an internationally wrongful act.¹⁰⁵

Third, if we are truly to rethink individual responsibility outside the box, then regime interaction will be central in that inquiry. Individual responsibility often crops up in factually complex scenarios. In any given case, such responsibility might arise through a multi-leveled process involving multiple actors and different decisionmakers, including the ICJ and UNSC (that is, a network of multi-leveled relationships of responsibility). Consequently, different legal regimes (such as ICIR, ICL, HR, IHL, and SR) might be superimposed, intersect, or interact. An obvious interaction might happen between individual responsibility and SR,¹⁰⁶ as there is nothing precluding SR from applying coextensively with individual responsibility schemes.¹⁰⁷ However, the ICJ emphasized that individual criminal responsibility and SR constitute distinct legal schemes and pursue different

104. See Oliver R. Jones, *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, 24 CONN. J. INT'L L. 239, 258 (2009).

105. JOSÉ E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW 351, 359 (2017) (also arguing that international law generated by international organizations exists along a continuum of bindingness, thereby eluding the classical positivist tendency to search for an “on/off” switch where something is or isn't law,); see also Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998).

106. This sometimes entails complementarity between SR and international (criminal) individual responsibility. See Antônio Augusto Cançado Trindade, *Complementarity Between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER, *supra* note 25, at 259. On the interplay between SR and individual responsibility, see BÉATRICE I. BONAFÈ, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES (2009); Pierre-Marie Dupuy, *International Criminal Responsibility of the Individual and International Responsibility of the State*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1085–99 (Antonio Cassese et al. eds., 2002); Hazel Fox, *The International Court of Justice's Treatment of Acts of the State and in Particular the Attribution of Acts of Individuals to the States*, in LIBER AMICORUM JUDGE SHIGERU ODA 147 (Nisuke Ando et al. eds., 2002); Nolkaemper, *supra* note 2, at 615–40; Marina Spinedi, *State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?*, 13 EUR. J. INT'L L. 895 (2002); Andreas Zimmermann, *Comment: Responsibility for Violations of International Humanitarian Law, International Criminal Law and Human Rights Law – Synergy and Conflict?*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 215 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).

107. See George T. Yates, III, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 213 (Richard B. Lillich ed., 1983).

aims. A finding of responsibility under one regime does not necessarily entail the same conclusion under the other.¹⁰⁸

Sometimes, the same factual complex will involve wrongful conduct by different actors, be they states, individuals, or nonstate entities (for example, organizations or corporations), which can lead to shared responsibility between actors for the same wrongful act or for a series of interrelated wrongful acts.¹⁰⁹ In the counterterrorism context, a single terrorist strike can be facilitated by multiple state failures to thwart preparatory acts spanning several territories. The consequences of such attack may be exacerbated by state complacency or failure to act on intelligence reports. Different individuals and/or entities may have funded that terrorist enterprise. Other groups or individuals may have trained the operatives involved in the terrorist excursion. Different individuals or entities may have provided valuable logistical assistance, for example by forging documents or offering travel assistance. This is not to mention the actual underlying terrorist act(s) carried out by NSAs during the strike. Ultimately, a complex web of wrongdoing and multi-leveled relationships emerges: what role and to what degree will “individual responsibility” be brought to bear on this chain of events? This inquiry will invariably involve difficult determinations related to evidence, causation, the apportionment of liability, standing, and enforcement/implementation of responsibility.¹¹⁰

108. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3, ¶¶ 127–29 (Feb. 3). On its implications and related questions, see Beatrice I. Bonafè, *Reassessing Dual Responsibility for International Crimes*, 73 SEQÜÊNCIA 19 (2016). For a critical take on this type of reasoning in a different, but related, case, see Antonio Cassese, *A Judicial Massacre* (Feb 27, 2007 2:50 PM), GUARDIAN, <https://www.theguardian.com/commentisfree/2007/feb/27/thejudicialmassacreofsrebr>.

109. “Shared” international responsibility and related questions have received considerable academic coverage. See DISTRIBUTION OF RESPONSIBILITIES IN INTERNATIONAL LAW (André Nollkaemper & Dov Jacobs eds., 2015); PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART (André Nollkaemper & Ilias Plakokefalos eds., 2014); Jean d’Aspremont et al., *Sharing Responsibility Between Non-State Actors and States in International Law: Introduction*, 62 NETH. INT’L L. REV. 49 (2015); André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT’L L. 359 (2013). On shared responsibility and non-state terrorists, see Kimberley N. Trapp, *Shared Responsibility and Non-State Terrorist Actors*, 62 NETH. INT’L L. REV. 141 (2015).

110. See generally *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), Preliminary Objections, 1992 I.C.J. Rep. 240, 258–59 (June 26); André Nollkaemper, *Introduction: Procedural Aspects of Shared Responsibility in International Adjudication*, 4 J. INT’L DISP. SETTLEMENT 277 (2013); André Nollkaemper, *Issues of Shared Responsibility Before the International Court of Justice*, in EVOLVING PRINCIPLES OF INTERNATIONAL LAW 199 (Eva Rieter & Henri de Waele eds., 2012); John E. Noyes & Brian D. Smith, *State Responsibility and the Principle of Joint and Several Liability*, 13 YALE J. INT’L L. 225 (1988). On the challenges posed by causation under SR, see Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*, 26 EUR. J. INT’L L. 471 (2015). See also PETERS, *supra* note 3, at 166 (highlighting difficulties in defining the

The key takeaway is that international individual responsibility—especially when envisaged beyond the traditional “criminal” paradigm—will often arise in combination with other levels of responsibility. Let us review two brief examples. Following the Lockerbie incident, Libya’s SR was bound up with the actual perpetrators’ individual responsibility for the airplane bombing, which ultimately facilitated investigation and prosecution by domestic institutions. Consequently, the UNSC dealt with Libya’s SR, as advocated by France, the United States, and the United Kingdom, while the ICJ was seized of the disputes over the culprits’ potential extradition under the Montreal Convention. In the end, the UNSC held Libya internationally responsible, but not without some ambiguity surrounding attribution standards.¹¹¹ The ICJ never had the opportunity to rule on the merits of the disputes submitted to it in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom) (Libya v. United States)*.¹¹²

The Lockerbie disputes were state-to-state, handled by different UN organs. However, underlying these disagreements was the individual responsibility of the persons who committed the wrongful act (the Lockerbie bombing), which arose concomitantly with the processes described previously. It was only years later that suspicion arose that the bombing was directly ordered by Libya’s political leadership. Almost a decade earlier, the finding of individual responsibility facilitated (or catalyzed) Libya’s acceptance of its “civil” responsibility for the incident, given 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.”¹¹³

legal regime governing “parallel responsibility” for international law breaches existing simultaneously between state actors and individuals).

111. For a full-fledged discussion of this precedent, see PROULX, INSTITUTIONALIZING, *supra* note 98, §§ 2.4.2, 3.1.5.1, 3.2.1, 3.2.1.1, 3.2.2, 4.1, 4.4.1, 4.4.5, 4.4.9, 4.5.1, 4.5.2 and 4.6.1.

112. The Court also dealt with requests for provisional measures in both cases. 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.S.)*, Provisional Measures, 1992 I.C.J. Rep. 114 (Apr. 14). During that phase of the proceedings, the ICJ rejected the argument that Libya was stripped of the exercise of its rights under the Montreal Convention, alleged on the ground that the UNSC was seized of a related matter and imposed certain obligations upon that state. Central was the fact that the Court had taken jurisdiction before the UNSC issued the relevant resolutions. See *Libya v. U.S.* ¶¶ 38, 44; see also Andreas L. Paulus, *Jurisprudence of the International Court of Justice: Lockerbie Cases*, *Preliminary Objections*, 9 EUR. J. INT’L L. 550 (1998); Pieter H.F. Bekker, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) and (Libyan Arab Jamahiriya v. United States)*, *Preliminary Objections, Judgements*, 92 AM. J. INT’L L. 503 (1998).

113. TRAPP, *supra* note 23, at 236. For details on the criminal conviction and the relevant individual’s subsequent release to Libya on compassionate grounds, see *id.* at 236 n.33.

Another example arose in the *Belgium v. Senegal* case. Here, the ICJ was confronted, *inter alia*, with Senegal's failure to comply with the obligation to extradite or prosecute under the UNCAT regarding Mr. Hissène Habré, the former Chadian leader who orchestrated and directed various HR abuses, including acts of torture, during a specific time period.¹¹⁴ When an individual who violated the Convention is located on its territory, Article 7(1) requires each party to, "if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."¹¹⁵ This litigation raised a series of interesting questions, including whether Senegal would have fulfilled its obligation had it referred the case to the ICC. Otherwise put, did the "prosecute" component of the *aut dedere aut judicare* duty (the obligation to extradite or prosecute) necessarily mean *domestic* prosecution? In this instance, Senegal did not submit the case to the ICC by the time the ICJ heard the dispute, and it created numerous delays in bringing the matter forward in its own jurisdiction. Granted, a plain reading of the Convention might suggest that Senegal was expected to submit the case to its own authorities for the purposes of domestic criminal prosecution (though, as shown below, the outcome reached was not purely "domestic").

Unsurprisingly, the Court found that Senegal violated its obligation by failing to submit the case to its competent authorities for criminal prosecution, stressing that it had to, "without further delay," comply with this duty.¹¹⁶ Mr. Habré was ultimately tried and convicted in Senegal following many delays. He was sentenced to life in prison for crimes against humanity by the Extraordinary African Chambers, a court instituted by the African Union and Senegal.¹¹⁷ This precedent shows that establishing individual responsibility is typically tied to or facilitated by the prior establishment of SR, or at least by the intercession of an authoritative decisionmaker outside the strict realm of individual criminal responsibility judicial decision-making.

Here, it so happened to be the ICJ, but the UNSC can also be relevant in this regard. The Court's settlement of the interstate dispute helped incentivize Senegal to forge ahead with the prosecution, ultimately resulting in a formal judicial finding of individual responsibility. This regime interaction

On Libya's acceptance of responsibility, see S.C. Res. 1506, at pmb. (Sept. 12, 2003); Letter Dated 15 August 2003 from the Chargé d'Affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the U.N. Addressed to the President of the Security Council, U.N. Doc. S/2003/818 (Aug. 15, 2003).

114. For commentary, see André Nollkaemper, *Wither Aut Dedere? The Obligation to Extradite or Prosecute After the ICJ's Judgment in Belgium v. Senegal*, 4 J. INT'L DISP. SETTLEMENT 501 (2013).

115. UNCAT, *supra* note 33, art. 7, ¶ 1.

116. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Merits, 2012 I.C.J. Rep. 422, ¶ 122(6) (July 20).

117. See Ruth Maclean, Chad's Hissène Habré Found Guilty of Crimes Against Humanity, GUARDIAN (May 30, 2016, 1:22 PM), <https://www.theguardian.com/world/2016/may/30/chad-hissene-habre-guilty-crimes-against-humanity-senegal>.

and mutual reinforcement of different responsibility-seeking processes also works the other way, namely, where a prior finding of individual *criminal* responsibility can inform a court's analysis on a SR claim related to the same underlying facts, albeit transposed to the interstate level. For example, the ICJ's *Bosnian Genocide* and *Croatia v. Serbia* decisions, both dealing with alleged violations of the Genocide Convention, drew considerable inspiration from the factual findings on individual responsibility formulated by the ICTY.¹¹⁸

Any project aiming to expand the scope of individual/international responsibility—and to presumably enhance accountability and reduce impunity—must acknowledge that establishing individual responsibility will sometimes be dependent on a multiplicity of (sometimes mutually reinforcing) legal *and* political processes, involving various actors. This includes a role for the UNSC. Recent developments support the need for alternate modes of liability in international law, beyond criminal responsibility. They indicate a shift toward the gradual recognition that individuals and NSAs can assume *direct* legal obligations under international law, of an increasing variety. This conclusion raises the related question of how those obligations are to be implemented and enforced. Conventional wisdom dictates that the traditional enforcement mechanisms to implement obligations between sovereign states, be they legal, judicial, diplomatic or political, have little to contribute to this debate in terms of being the sole implementers of ICIR. In combination with other transnational/domestic legal and political processes, actors, and institutions, however, they may become effective means to establish and implement ICIR. This approach might go a long way in palliating some of the normative and enforcement voids described earlier.

As shown below, the UNSC disposes of some tools to bolster efforts toward fulfilling these objectives within a broader framework of concurrent legal regimes and institutions. Particularly valuable are the UNSC's potential and actual contributions in formulating primary obligations incumbent upon individuals and NSAs. In a recent resolution addressing terrorism in Somalia, the Council reiterated its oft-repeated call to combat terrorism by “all means”¹¹⁹ It then specifically subsumed “international law” within those means, including international human rights law, refugee law, and IHL, but not limiting its approach to those facets of international law.¹²⁰ This posture suggests two key developments. First, the UNSC can play a role in developing international legal standards, particularly but not exclusively in

118. See generally Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croat. v. Serb.*), Judgment, 2015 I.C.J. Rep. 3 (Feb. 3); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. and Montenegro*), Judgment, 2007 I.C.J. Rep. 43, ¶¶ 278–376, (Feb. 26) (especially at ¶ 297) (finding that a genocide, within the meaning of the Convention, was perpetrated at Srebrenica).

119. S.C. Res. 2444, at pmb1. (Nov. 14, 2018).

120. *Id.*

the field of counterterrorism. Second, it follows logically from that power that the Council can also play a role in enforcing and implementing those standards and other extant international law duties in apposite scenarios. More broadly, recent developments highlight the variety of legal obligations individuals and NSAs assume under international law, extending beyond the familiar HR and IHL commitments.¹²¹ Thus, it is now up to scholars and policy-makers to identify meaningful and effective enforcement mechanisms for such obligations.

III. THE UNSC AS LEGISLATOR: IMPACT ON INDIVIDUAL RESPONSIBILITY

Since 9/11, the UNSC has been a central force in driving counterterrorism agendas to enhance individual responsibility, including setting up a novel security apparatus like the Counter-Terrorism Committee (“CTC”)¹²² and further developing the “targeted” or “smart” sanctions regime. Indeed, the “targeted” sanctions regime has come under increasing scrutiny in recent years and generated considerable legal and policy debate.¹²³ While the “smart sanctions” regime has some relevance for ICIR, this Article attempts to identify other modes and spaces for individual accountability. In other words, it seeks to offer a complementary understanding of other international individual responsibility mechanisms to remedy the dearth in scholarship. In so doing, it advocates a central role for a UNSC-driven general responsibility model to be considered alongside the UN “targeted sanctions” model. That said, the “targeted” sanctions regime remains important in articulating the foundations of a general ICIR regime, given that the UNSC sanctions committees hand down decisions that are directly binding on individuals. For example, the Al Qaeda and Taliban Sanctions Committee designated individuals in fulfilling its mandate.¹²⁴

121. See also *supra* nn. 54–62 and accompanying text.

122. On the creation of the CTC, see Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism*, 97 AM. J. OF INT’L L. 333 (2003). For a recent CTC-related resolution, see S.C. Res. 2395 (Dec. 21, 2017).

123. A full review of its implications has been carried out elsewhere, resulting in a rich literature. See generally Lisa Ginsborg, *The United Nations Security Council’s Counter-Terrorism Al-Qaida Sanctions Regime: Resolution 1267 and the 1267 Committee*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 608 (Ben Saul ed., 2014). More broadly, see Kristen E. Boon, *U.N. Sanctions as Regulation*, 15 CHINESE J. INT’L L. 543 (2016). The “targeted sanctions” regime has also raised important questions regarding UNSC accountability and transparency, as seen in DEVIKA HOVELL, *THE POWER OF PROCESS: THE VALUE OF DUE PROCESS IN SECURITY COUNCIL SANCTIONS DECISION-MAKING* (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); Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT’L L. 1, 9 (2016).

124. See, e.g., S.C. Res. 1333, ¶ 8(c) (Dec. 19, 2000); see also PETERS, *supra* note 3, at 95. On the Committee’s listing and delisting processes, along with its background and proce-

A. The UNSC's "Quasi-Legislative" Excursions

From a "quasi-legislative" standpoint, the UNSC formulated several primary legal norms, the observance of which concerns both states and NSAs and the violation of which could trigger both SR and ICIR. The UNSC's most important initial contribution stemmed from Resolution 1373, which instituted the CTC. That landmark document is widely perceived as a prime example of the Council "legislating" relevant primary counterterrorism norms for both NSAs and states.¹²⁵ From a broader systemic perspective, this UNSC lawmaking foray corresponds to a "legislative" trend associated with international organizations generally. This precedent and other similar subsequent overtures by the Council have also been specifically equated with a UNSC-driven "legislative" trend, especially in counterterrorism contexts.¹²⁶

Resolution 1373 primarily addressed states by universalizing certain obligations pertaining to terrorist financing and its criminalization, requiring the criminalization of other terrorism-related offenses in states' legal systems, and prohibiting the direct/indirect support of terrorism. While this document requires states to monitor and regulate NSA conduct,¹²⁷ it does not expressly address the potential responsibility of NSAs. Therefore, the violation of its prescriptions might be more relevant to SR deployment in the event of a breach.

dure, see *Sanctions List Materials*, U.N. SECURITY COUNCIL, https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list (last visited Mar. 17, 2019).

125. Although, in fairness, the resolution's principal addressees are states. See BARDO FASSBENDER, *THE UNITED NATIONS AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY* 96–97 (2009). More generally, see also José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 874 n.7 (2003).

126. ALVAREZ, *supra* note 105, at 116–27 (reviewing relevant counterterrorism resolutions as a manifestation of global "legislation"); see JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 195–217 (2005); JOHNSTONE, *THE POWER*, *supra* note 99, at 93–105; Alan Boyle, *International Lawmaking: Towards a New Role for the Security Council?*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 172, 178–80 (Antonio Cassese ed., 2012); Ian Johnstone, *Law-Making by International Organizations: Perspectives from IL/IR Theory*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 266, 272–73 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013); Ian Johnstone, *Law-Making Through the Operational Activities of International Organizations*, 40 GEO. WASH. INT'L L. REV. 87 (2008); Ian Johnstone, *The Security Council as Legislature*, in *THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY* 80, 80–82, 90 (Bruce Cronin & Ian Hurd eds., 2008); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901–05 (2002); Stefan Talmon, Note and Comment, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 175–78 (2005).

127. For some, Resolution 1373 "might be seen as approval of an expanded theory of state responsibility attributing the behavior of non-state terrorists to a state that knowingly 'harbors' terrorists and does not take action to prevent further terrorist attacks." *E.g.*, J. Patrick Kelly, *The International Law of Force and the Fight Against Terrorism*, DEL. LAW., Summer 2003, at 18, 19.

The resolution's putative state centrism might be explained by its general legislative tenor and the fact that it did not fix any applicable geographical or temporal limits to its application. It was adopted "in a general context not directly related to disciplining any individual country or particular non-state actor."¹²⁸ However, the underlying obligations incumbent upon NSAs are implicit and flow from the wording of the document, especially when coupled with other landmark documents and the slew of subsequent thematic and specific counterterrorism resolutions. Furthermore, there is validity to the idea that, in many instances, UNSC resolutions govern the conduct of NSAs, at least indirectly, by requiring states to regulate and counteract the unlawful actions of nonstate entities and individuals.¹²⁹ A clear example of such UNSC action is evidenced by several resolutions obligating states to adopt various measures against terrorist groups and individuals.¹³⁰ Another illustration of this practice resides in the UNSC's creation of various "smart" sanctions regimes, over twenty-five since the end of the Cold War. They aim to constrict—with the support of national legislations and institutions—the movements and capacity of subversive groups and individuals through, *inter alia*, "financial sanctions, travel bans, commodity trade restrictions and sectoral economic means."¹³¹ Admittedly, this exercise of UNSC functions aligns more squarely with the objective of implementing individual responsibility, although such use of its powers remains intimately tied to UNSC "quasi-legislation." More importantly, construing such UNSC measures as "indirect" regulation of NSAs might rest on an artificial distinction with "direct" regulation, especially since "these sanctions are triggered by and designed to reverse acts of non-state entities."¹³² Nevertheless, in other instances, the UNSC directly and unequivocally regulates NSAs *themselves* without directing states or institutional actors to mediate or facilitate its prescriptions.¹³³

128. Emilio J. Cárdenas, *The United Nations Security Council's Quest for Effectiveness*, 25 MICH. J. INT'L L. 1341, 1341 (2004).

129. See 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 800–02 (Bruno Simma et al. eds., 3d ed. 2012); Fox et al., *supra* note 65, at 700.

130. See *Resolutions*, U.N. SEC. COUNCIL COUNTER-TERRORISM COMMITTEE, <https://www.un.org/sc/ctc/resources/security-council/resolutions/> (last visited March 17, 2019).

131. Mikael Eriksson & Peter Wallensteen, *Targeting Sanctions and Ending Armed Conflicts: First Steps Towards a New Research Agenda*, 91 INT'L AFF. 1387, 1388 (2015); see also Boon, *supra* note 123, at 560–61.

132. Fox et al., *supra* note 65, at 700 (observing that "the indirect nature of the punitive measures is not a meaningful distinction from direct measures.").

133. International Law Association Non State Actor Committee Washington Conference, *Third Report Prepared by the Co-Rapporteurs, Cedric Ryngaert and Jean d'Aspremont*, 6–7 (2014) (remarking that the UNSC has required NSAs to observe HR duties); 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, 354–355 (Jarna Petman & Jan Klabbers eds., 2003) (suggesting that imposing obligations upon NSAs must be justified); P.H. Kooijmans, *The Security Council and*

In the same vein, the UNSC subsequently arrogated further lawmaking powers and extended its coverage of terrorism-related prescriptions to nuclear disarmament and nonproliferation, this time clearly carving out obligations for NSAs. It emphasized the clear nexus between its counterterrorism resolution-making and NSAs' potential individual responsibility. In Resolution 1540's preamble, adopted unanimously, the UNSC stated that it was

[g]ravelly concerned by the threat of terrorism and the risk that non-State actors such as those identified in the [UN] list established and maintained by the Committee established under [UNSC] resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery¹³⁴

Moreover, the UNSC defined the term "[n]on-State actor" as an "individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution."¹³⁵ In the operative part adopted under Chapter VII of the UN Charter, the UNSC decided—presumably still assuming that the underlying prohibited conduct could trigger individual responsibility—that "all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery"¹³⁶ It further decided that all States shall, "in accordance with their national procedures, . . . adopt and enforce appropriate effective laws which prohibit any non-State actor" to pursue the aims enumerated above.¹³⁷

This last obligation was reiterated by the Council in a subsequent resolution, which also reemphasizes much of Resolution 1540's content.¹³⁸ This development is significant because it takes the Council's rhetoric and measures outside of the familiar fields of IHL and HR, expanding its regula-

Non-State Entities as Parties to Armed Conflicts, in INTERNATIONAL LAW: THEORY AND PRACTICE 333, 333–46 (Karel Wellens ed., 1998); see also *infra* Part IV.

134. S.C. Res. 1540, at pmbl. (Apr. 28, 2004) (italization in original). The UNSC has also issued directions to prevent nonstate terrorist actors from acquiring other types of weaponry. See, e.g., S.C. Res. 2370 ¶¶ 7, 9, 13 (Aug. 2, 2017). But see PETERS, *supra* note 3, at 93–94.

135. S.C. Res. 1540, *supra* note 134, at pmbl.

136. *Id.* ¶ 1.

137. *Id.* ¶ 2; see also Daniel H. Joyner, *The Security Council as Legal Hegemon*, 43 GEO. J. INT'L L. 225, 227–38 (2012); Roberto Lavalle, *A Novel, If Awkward Exercise in International Law Making: Security Council Resolution 1540 (2004)*, 51 NETH. INT'L L. REV. 411, 429–34 (2004).

138. See S.C. Res. 2325, ¶ 15 (Dec. 15, 2016). On the UNSC's broader role in reducing proliferation by NSAs, see Marco Pedrazzi, *The Role of the Security Council in the Framework of International Efforts to Fight Proliferation by Non-State Actors*, in NUCLEAR WEAPONS: STRENGTHENING THE INTERNATIONAL LEGAL REGIME 179 (Ida Caracciolo et al. eds., 2016).

tory scope to a range of prohibited activities connected, *inter alia*, to the manufacturing, transmission, sale, and movement of harmful chemical, biological, and nuclear materials. These developments, paired with the UNSC's regulation of terrorist NSAs described below, signal that the Council's formulation of international obligations can also be envisaged outside the well-trodden paths of its past lawmaking on HR and humanitarian matters. Surely, this manifestation of power confirms that the Council might contribute to enhancing individual responsibility frameworks on a predominantly *civil* plane.

B. *The UNSC's Direct Move Toward Regulating Nonstate Actors*

The UNSC recently "legislated" to regulate directly the conduct of individuals attempting to travel abroad to receive terrorist training or join the ranks of terrorist organizations, particularly singling out Al Qaeda, Daesh/ISIL, and the Al-Nusra Front ("ANF") in Syria and Iraq.¹³⁹ When compared to the practice canvassed in the preceding section, this recent move by the Council connotes more direct engagement with and regulation of NSAs, whereas its previous resolution-making was primarily addressed to states and only indirectly related to NSA conduct. At this juncture, detractors of this use of UNSC powers might voice concerns over the prospect of that organ overstepping its bounds and assume its inability to bind non-member states or nonstate entities because they fall outside of the UN's membership. Certainly, this type of "law of treaties" argument, which is very much of classic vintage, acquired traction in some circles and might find further grounding in one passage of the *Namibia Advisory Opinion*.¹⁴⁰ However, the UNSC's practice over the last decades tells a different story. Its resolutions have generated a solid track record of compliance, confirming the pervasive reach of its prescriptions, particularly but not exclusively in the counterterrorism field. For instance, there is ample empirical evidence that the UNSC can bind non-member states with its resolutions, a proposition which has also been endorsed in the literature.¹⁴¹ Of course, such power

139. In addition to the resolutions canvassed below, see also the entries in *Foreign (Terrorist) Fighters: Prospects and Challenges*, 112 ASIL PROC. 301, 301–314 (2019) (including contributions by David DeBartolo, Sandra Krähenmann, Moira Macmillian, and Vincent-Joël Proulx).

140. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 126 (June 21). For scholarly takes on the reach of this passage, see Kelvin Widdows, *Security Council Resolutions and Non-Members of the United Nations*, 27 INT'L & COMP. L.Q. 459, 461–62 (1978); Philippe Cahier, *La Charte des Nations Unies et les Etats Tiers*, in CURRENT PROBLEMS OF INTERNATIONAL LAW: ESSAYS ON U.N. LAW AND ON THE LAW OF ARMED CONFLICT 81, 99–100 (Antonio Cassese ed., 1975); see also Öberg, *supra* note 70, at 885.

141. See, e.g., JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 65–67 (2007); Devon Whittle, *The Limits of Legality and the United Nations Security*

is of limited practical importance since virtually all states are members in good standing of the UN.

That said, accepting that the UN Charter enjoys a quasi-constitutional status within the international community might make the prospect of the UNSC binding both non-member states and individuals/NSAs through its resolutions more palatable.¹⁴² Indeed, leading publicists rely on these developments and highlight the “trend towards the constitutionalization of the international legal system,” which they explain mostly through increasing institutionalization and an enhanced emphasis on individual rights on the international scene¹⁴³ (to which one should add the emergence of individual obligations as well). Given its role and features, the UNSC, while not strictly a “judicial” organ, can exercise “both decision-making and executive powers.”¹⁴⁴ This enables it to act to protect the interests of the international community. In summary, while it is not endowed with “judicial” powers, “it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings[,]”¹⁴⁵ which presumably also cover issues surrounding ICIR. The ICJ’s *Kosovo Advisory Opinion*¹⁴⁶ further suggests that the UNSC can formulate legal obligations directly binding upon individuals and NSAs, either expressly or implicitly, although any implicitly formulated obligation should be approached with caution because it might contravene the principle of legality.¹⁴⁷

In Resolution 2170, the UNSC required states to take “national measures to suppress the flow of foreign terrorist fighters”¹⁴⁸ Acting under Chapter VII of the Charter, the UNSC further enumerated a series of

Council: Applying the Extra-Legal Measures Model to Chapter VII Action, 26 EUR. J. INT’L L. 671, 674 (2015). Some of the relevant resolutions are also canvassed in the present account.

142. For leading accounts framing the UN Charter as the constitution of the international legal system, see FASSBENDER, *supra* note 125; Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529, 531 (1998). See also PETERS, *supra* note 3, at 99. On the constitutional impact of the law of international responsibility, see generally André Nollkaemper, *Constitutionalization and the Unity of the Law of International Responsibility*, 16 IND. J. GLOBAL LEGAL STUD. 535 (2009).

143. See Vera Gowlland-Debbas & Vassilis Pergantis, *Rule of Law, in POST-CONFLICT PEACE BUILDING: A LEXICON* 320, 320–326 (Vincent Chetail ed., 2009); Vera Gowlland-Debbas, *Security Council Change: The Pressure of Emerging International Public Policy*, 65 INT’L J. 119, 131 (2009-2010).

144. See, e.g., Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 37 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

145. *Id.*

146. See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 116 (July 22); text accompanying *supra* note 64.

147. See also PETERS, *supra* note 3, at 97. For arguments cautioning against expanding the UNSC’s powers, see Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT’L L. 325 (1995).

148. S.C. Res. 2170, ¶ 8 (Aug. 15, 2014).

condemnations and counterterrorism obligations incumbent upon individuals/NSAs, including:

- (i) Strongly condemning the indiscriminate killing and targeting of civilians, along with other atrocities perpetrated in Syria and Iraq;¹⁴⁹
- (ii) Demanding that all nonstate terrorist groups cease all violent acts and disarm immediately;¹⁵⁰
- (iii) Condemning recruitment of individuals by those terrorist entities, which exacerbates ongoing conflicts and contributes to violent radicalization;¹⁵¹
- (iv) Noting with concern that certain terrorist groups and individuals control oilfields and related infrastructure, supplementing their income and recruitment efforts;¹⁵²
- (v) Condemning any direct/indirect trade involving such terrorist groups or individuals;¹⁵³ and
- (vi) Linking the actions of such organizations and individuals to its terrorism sanctions regime, reiterating that it is prepared to list relevant actors under that system.¹⁵⁴

As discussed in Part IV, these “quasi-judicial” moves might be more aptly equated with the establishment/implementation of individual responsibility as opposed to constituting pure manifestations of (quasi-) “legislative” power. Most importantly, in Resolution 2170, the Council established an unequivocal connection between those terrorist factions’ conduct and the potential individual responsibility of the authors of the atrocities, including international criminal responsibility. The UNSC addressed NSAs directly and categorically obligated them to prevent terrorism when it

[r]ecall[ed] 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*, emphasize[d] 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 [HR] and violations of [IHL], [and] urge[d] *all parties* to prevent such violations and abuses¹⁵⁵

149. *Id.* ¶ 2.

150. *Id.* ¶ 4.

151. *Id.* ¶ 7.

152. *Id.* ¶ 13.

153. *Id.* ¶ 14. The UNSC imposed similar obligations in other resolutions concerning Daesh/ISIL, ANF, and all other individuals and groups associated with Al Qaeda. *See, e.g.*, S.C. Res. 2199 (Feb. 12, 2015); S.C. Res. 2347, ¶ 2 (Mar. 24, 2017).

154. S.C. Res. 2170, *supra* note 148, ¶ 7.

155. *Id.* ¶ 3 (emphases added); *see also id.*, at pmbl. (“[r]eaffirming that those who have committed or are otherwise responsible for violations of [IHL] or violations or abuses of [HR]

The UNSC continued building on these pronouncements. As “one of the most important quasi-legislative efforts of the Council since resolution 1373 (2001),”¹⁵⁶ Resolution 2178 was adopted one month after Resolution 2170, following a special sitting chaired by President Barack Obama and corraling many heads of state and/or government.¹⁵⁷ It pursues the legacy of Resolutions 1373, 2161, and 2170 by requiring states to implement several measures constricting the movement and recruitment of foreign terrorist fighters. This development further bolstered the UNSC’s comprehensive counterterrorism strategy.¹⁵⁸ Moreover, Resolution 2178 stresses the importance of de-radicalization/counter-radicalization efforts, particularly by advocating a grassroots and concerted approach to achieve those objectives. This approach further reinforces the notion that individuals who commit terrorist acts or support such conduct are liable to engage their ICIR. Strikingly, the resolution directly addresses individuals in its first operative paragraph, when the Council “demand[ed] that all foreign terrorist fighters disarm and cease all terrorist acts and participation in armed conflict.”¹⁵⁹

in Iraq and Syria, including persecution of individuals on the basis of their religion or belief, or on political grounds, must be held accountable . . .”) (italicization in original).

156. Marko Milanovic, *UN Security Council Adopts Resolution 2178 on Foreign Terrorist Fighters*, EJIL: TALK! (Sept. 24, 2014), <https://www.ejiltalk.org/un-security-council-adopts-resolution-2178-on-foreign-terrorist-fighters/>.

157. See also MYRIAM FEINBERG, SOVEREIGNTY IN THE AGE OF GLOBAL TERRORISM: THE ROLE OF INTERNATIONAL ORGANISATIONS 40–42 (2016) (arguing that Resolution 2178 “goes at least one step further than Resolution 1373,” largely because of its treatment of states’ obligations regarding the freezing of individuals’ assets). For critical takes, see Kent Roach, *Comparative Counter-Terrorism Law Comes of Age*, in COMPARATIVE COUNTER-TERRORISM LAW 1, 14–15 (Kent Roach ed., 2015) (lamenting the resolution’s “definitional ambiguity,” opining that it “will increase the risk that dissenters will be investigated and punished as terrorists. This may undermine the legitimacy of some counter-terrorism efforts.”); Kai Ambos, *Our Terrorists, Your Terrorists? The United Nations Security Council Urges States to Combat “Foreign Terrorist Fighters”, but Does Not Define “Terrorism,”* EJIL: TALK! (Oct. 2, 2014), <https://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/>; Martin Scheinin, *Back to Post-9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters*, JUST SECURITY (Sept. 23, 2014), <https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>.

158. See S.C. Res. 2178 (Sep. 24, 2014). On foreign fighters, including various aspects of Resolution 2178, see FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND (Andrea de Guttry et al. eds., 2016). On Resolution 2178’s potential effects on the obligations of individuals, see Anne Peters, *Security Council Resolution 2178 (2014): The “Foreign Terrorist Fighter” as an International Legal Person, Part I*, EJIL: TALK! (Nov. 20, 2014), <https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/>; Anne Peters, *Security Council Resolution 2178 (2014): The “Foreign Terrorist Fighter” as an International Legal Person, Part II*, EJIL: TALK! (Nov. 21, 2014), <https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-ii/>.

159. S.C. Res. 2178, *supra* note 158, ¶ 1 (italicization in original). On the direct effect of this resolution under international law, see PETERS, *supra* note 3, at 94, 508–09 (arguing that

This survey of recent practice highlights several key ideas. First and foremost, these resolutions establish a clear nexus between terrorism and the prospect of international individual responsibility. Second, by “legislating” and formulating important primary obligations for both individuals/groups *and* states, the UNSC has signaled that the violation of these duties will have important implications for the deployment of different levels of responsibility. As a result, relevant UNSC “legislative” forays and subsequent enforcement of its legislated counterterrorism norms under Chapter VII reinforced their binding character and bolstered the case for ICIR.

The UNSC thus sends important messages to actual and potential violators of international law and enhances the legal system’s overall coherence and robustness. The UNSC also offers valuable guidance for the post-breach calculus and clarifies relevant primary obligations, which will illuminate situations in which individuals and NSAs engage in wrongful conduct. Indeed, UNSC determinations of individual responsibility can serve as an instructive benchmark and powerful registration of legal guilt “on the record,” which will facilitate subsequent processes seeking to implement the concerned actor’s/actors’ responsibility in another setting, be it judicially or in some less formal avenue.¹⁶⁰

Third, these precedents suggest that it is difficult to completely dissociate (or disentangle) the prospect of individual responsibility from SR considerations. Rethinking the contents and contours of individual responsibility must be done against the backdrop of a comprehensive strategy, taking due account of states’ role(s) (and their obligations) in combating terrorism. The UNSC’s post-9/11 discourse is replete with responsibility-expansive language regarding states’ duties and also those of NSAs by implication. Indeed, in areas such as transboundary pollution and terrorism, states’ compliance with their primary obligations will often remain dependent on the actions of private individuals/legal persons within their jurisdiction, over which those states may or may not exert sufficient control for the purposes of both prevention and attribution under SR.

Last, on a related point, even when contemplating individual responsibility, the role of states cannot be excised altogether from the equation. The effectiveness and enforcement of global counterterrorism efforts can only be achieved by enlisting their assistance, particularly through the exercise of their legislative power.¹⁶¹ Even a brief survey of domestic legislation con-

the prohibition on travelling to a region to participate in, support or finance terrorism found at paragraphs 1, 6 and 8 might create directly enforceable obligations under international law).

160. For a compatible argument concerning SR, see Giorgio Gaja, *Réflexions sur le Rôle du Conseil de Sécurité dans le Nouvel Ordre Mondial: A Propos des Rapports entre Maintien de la Paix et Crimes Internationaux des États*, 97 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 297, 309 (1993) (Fr.).

161. See also High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶ 34, U.N. Doc. A/59/565 (Dec. 2, 2004) (“States are still the front-line responders to today’s threats.” These threats include “terrorism”). More recently, in a resolution highly relevant for the regulation of unlawful activity carried out by indi-

firms that several states have criminalized individuals' attempts to travel abroad to join or receive training from terrorist organizations.

UNSC Resolutions 2170 and 2178 apparently did not envisage a broader conception of "individual responsibility" by focusing exclusively on "terrorist" fighters. While preventing individuals from joining the ranks of terrorist organizations is an important objective, these resolutions do not contemplate emerging challenges that may have unforeseen implications for ICIR. For instance, they would presumably fail to capture mercenaries or humanitarian do-gooders traveling abroad to fight *against* Daesh/ISIL. In some instances, anti-ISIL militias have perpetrated IHL or HR violations, which could potentially trigger the wrongdoing individuals' legal accountability under an expanded theory of international individual responsibility.

What about a medic who travels to Syria but stays beyond the frontlines, only providing support to an anti-ISIL militia that perpetrates HR/IHL violations? What if the sideline supporter decides to take up arms against Daesh/ISIL and, in the process, violates IHL or HR norms? These types of scenarios are both increasingly frequent and reveal policy and legal gaps in regimes governing individual responsibility for acts falling outside of strictly defined "terrorist" activities.¹⁶² Setting aside the question whether there is a moral equivalency between the types of "foreign fighter" in these examples, the UNSC refers to "foreign *terrorist* fighters" and connects the threat such individuals represent not only to their acts but also to their "providing or receiving of *terrorist* training . . ." ¹⁶³ These new and difficult scenarios raise more queries than solutions, but they must be addressed squarely going forward in devising individual responsibility models.

viduals—in particular, foreign (terrorist) fighters—the UNSC stressed that "Member States have the primary responsibility in countering terrorist acts and violent extremism conducive to terrorism." See S.C. Res. 2395, *supra* note 122, at pmb1. (reiterating, throughout the resolution, several state-based obligations to prevent individuals from perpetrating or supporting terrorist activities). See, e.g., *id.*, ¶¶ 16, 21–23.

162. A few interesting cases have arisen in Singapore. See, e.g., Shashi Jayakumar, *The Curious Case of Wang Yuandongyi*, STRAITS TIMES (Apr. 2, 2016), <https://www.straitstimes.com/opinion/the-curious-case-of-wang-yuandongyi>; Yan Liang Lim, *4 Singaporeans Arrested Under ISA for Involvement in Armed Violence Abroad*, STRAITS TIMES (Mar. 16, 2016), <https://www.straitstimes.com/singapore/4-singaporeans-arrested-under-isa-for-involvement-in-armed-violence-abroad> (recounting the 2016 arrest of four citizens who planned to travel to Syria and Yemen. At least one individual was intent on fighting *against* Daesh/ISIL in Syria, but all four men were arrested since they had "demonstrated a readiness to use violence to pursue their religious cause. . . . [T]hey [were] assessed to pose a security threat to Singapore.").

163. S.C. Res. 2178, *supra* note 158, ¶¶ 4–5 (emphasis added); see also 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). More recently, the UNSC enhanced its regulation of foreign terrorist fighters, arguably extending previous coverage of individuals' and NSAs' international legal obligations beyond what is mandated by both Res. 1373 and the sectoral anti-terrorism conventions. See S.C. Res. 2396, *supra* note 16.

IV. THE UNSC AS IMPLEMENTER: IMPACT ON INDIVIDUAL RESPONSIBILITY

As prefaced above, the “targeted” sanctions regime remains considerably relevant for this account. The freezing of terrorist assets and the terrorism sanctions regime have been used, supplemented, and refined liberally by the UNSC through a series of resolutions.¹⁶⁴ In addition, there are at least two other principal ways in which UNSC action can enhance the individual responsibility (broadly understood) of private terrorists on the international plane. On one hand, the UNSC may pave the way for establishing individual criminal responsibility, either through hortatory language or binding prescriptions in its resolutions or by exercising its referral power under the Rome Statute. On the other hand, the Council may enlist the logic and conceptual tools of the law of SR to address the wrongful conduct of individuals and NSAs. Both options are discussed in turn below.

A. *The UNSC and Criminal Liability*

First, the UNSC considers that some terrorist atrocities could result in individual criminal responsibility. For instance, in Resolutions 2170 and 2379, the UNSC considered that some terrorist acts might qualify as crimes against humanity, war crimes, or genocide and insisted that their authors should be held accountable.¹⁶⁵ In many resolutions, the UNSC only addresses NSAs directly to the extent that it reiterates that they must comply with existing IHL or HR obligations or duties arising under a peace treaty to which they are parties in armed conflict contexts.¹⁶⁶ However, that trend is rapidly changing, at least following recent UNSC “quasi-legislative” forays concerning “foreign terrorist fighters” (and sometimes “hybrid” forays, combining “quasi-legislative” and “quasi-judicial” elements).

Indeed, the co-extensiveness between individual *criminal* responsibility and other normative schemes comes into relief when investigating regime interaction under the broad umbrella of “individual responsibility.” In many instances, this symbiosis cannot and should not be avoided as those regimes can be mutually reinforcing. Such interplay should be encouraged to bolster all relevant legal mechanisms deployed to enhance individual accountability and combat impunity. The promotion of increased civil/legal accountability,

164. For the ISIL/Al Qaeda Sanctions Committee, see, for example, S.C. Res. 1267 (Oct. 15, 1999); S.C. Res. 1333, *supra* note 124; S.C. Res. 1730 (Dec. 19, 2006); S.C. Res. 1904 (Dec. 17, 2009); S.C. Res. 1989 (June 27, 2011); S.C. Res. 2161 (June 17, 2014); S.C. Res. 2253 (Dec. 17, 2015).

165. See S.C. Res. 2379, ¶ 1 (Sept. 21, 2017); *supra* note 155 and accompanying text.

166. Cahin, *supra* note 13, at 340. In addition to calling upon nonstate groups to observe undertakings under internationalized peace treaties, the UNSC has also directed such entities “to comply with the provisions of the Charter of the United Nations and with rules and principles of international law, in particular [IHL], [HR] and refugee law, and to implement fully the relevant decisions” or cease the violations of such obligations immediately. See S.C. Res. 1296, at pmbl. (Apr. 19, 2000).

at any level of governance, will reinforce norms and narratives against impunity. Insofar as it does, key stakeholders will be incentivized to block harmful activity, repair past breaches, facilitate attribution of responsibility to wrongdoing actors, and better prevent and/or deter future harms.¹⁶⁷ After all, the UNSC has a key—even if at times troubled—role to play in strengthening and promoting the international rule of law.¹⁶⁸ This likely encompasses its involvement in determining and implementing international responsibility for wrongful conduct in apposite circumstances.

Within the confines of individual *criminal* responsibility—which can remain co-extensive with a would-be ICIR regime—there are ways the UNSC can bolster existing accountability mechanisms. More generally, it could make more use of its Article 13(b) referral power under the Rome Statute. This mechanism enables the ICC to assume jurisdiction over a “situation in which one or more” of the crimes enumerated in Article 5 “appears to have been committed [and] is referred to the Prosecutor by the Security Council acting under Chapter VII.”¹⁶⁹ This course of action, however, poses several obstacles. First, such a robust exercise of power by the UNSC and consequently the ICC could harm the ICC’s already shaky reputation in some regions of the world. For instance, several African nations have withdrawn or announced their intention to withdraw as parties to the Rome Stat-

167. This argument is perhaps strengthened in situations where reparation beyond a mere determination of breach/non-pecuniary remedies can be envisaged. Indeed, some publicists associate retributive, punitive and deterrent dimensions with the concept of compensatory reparation. See, e.g., ANTONIO AUGUSTO CANÇADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM* 371 (2010). Unsurprisingly, at the interstate level, an international law violation entails the duty to repair any resulting harm. This oft-cited principle finds one of its earliest judicial expressions in *Factory at Chorzów* (Ger. v. Pol.), Jurisdiction, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26) and has since been invoked countless times in different settings and codified by the ILC. See, e.g., *Factory at Chorzów* (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13); ROSALYN HIGGINS, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 148 (1994); Constantin Economides, *La Responsabilité de l'État pour Fait Internationalement Illicite*, in 34 *THE SAURUS ACROASIMUM: STATE RESPONSIBILITY AND THE INDIVIDUAL*, *supra* note 24, at 165, 203–04; Christine Gray, *Is There an International Law of Remedies?*, 56 *BRIT. Y.B. INT'L L.* 25, 29 (1985); Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 *AM. J. INT'L L.* 833, 835 (2002). The outstanding query, however, remains whether this general principle can be extrapolated and applied to NSAs (that is, individuals and groups). Based on the arguments advanced in this Article, it appears that this transposition could be envisaged in some ICIR scenarios.

168. See generally *STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL* (Jeremy Farrall & Hilary Charlesworth eds., 2016).

169. Rome Statute, *supra* note 34, art. 13(b). For a recent account addressing the relationship between the UNSC and ICC and exploring the centrality of the referral mechanism in that dynamic, see GABRIEL M. LENTNER, *THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT: THE REFERRAL MECHANISM IN THEORY AND PRACTICE* (2018) (assimilating the nature of this referral mechanism to a conferral of powers from the UNSC to the ICC).

ute on the grounds that the ICC harbors an African bias.¹⁷⁰ If the UNSC used its Chapter VII powers to initiate cases that predominantly involved African countries, that bias narrative would gain further traction. Second, there exists a broader concern about jurisdiction and consent. The Article 13(b) mechanism is perceived by some as operating as a “back door” type jurisdictional hook by permitting the ICC to investigate and prosecute cases concerning locales that have not consented to the Rome Statute.¹⁷¹ While there are compelling reasons for this authority to exist, there are also compelling reasons that the UNSC exercise it only in the most extreme of circumstances.

This mechanism is attractive in theory, but its infrequent invocation illustrates states’ lack of political will as one of many factors prompting them not to support ICC proceedings resulting from UNSC referrals.¹⁷² Those states include Rome Statute parties—for example, South Africa, Nigeria, Uganda, Djibouti, and Chad. For instance, ICC arrest warrants against Sudanese President Omar al-Bashir followed from a situation referred by the UNSC.¹⁷³ Yet, President al-Bashir visited several countries after the indictment, and they refused to arrest and extradite him.¹⁷⁴ While I am not sug-

170. See, e.g., Brendon J. Cannon et al., *The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative*, 2 AFR. J. INT’L CRIM. JUST. 6, 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, 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, *Shift by South Africa on International Criminal Court*, N.Y. TIMES, Mar. 9, 2017, at A9; Agence France-Presse, *Burundi Becomes First Nation to Leave International Criminal Court*, GUARDIAN, (Oct. 28, 2017, 8:34 PM), <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court>; Jason Burke, *South African Judge Blocks Attempt to Withdraw from ICC*, GUARDIAN, (Feb. 22, 2017, 5:59 AM), <https://www.theguardian.com/world/2017/feb/22/south-african-judge-blocks-attempt-to-withdraw-from-international-criminal-court>.

171. See, e.g., Sherif Elgebeily, *The Politicization of International Criminal Law through the UN Security Council—Article 13(b) and the Flawed Backdoor to Prosecution*, in THE POLITICS OF INTERNATIONAL CRIMINAL LAW (Holly Cullen et al. eds., forthcoming, 2019). For a neocolonialism-based critique of the Article 13(b) mechanism, see generally 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). On the controversial relationship between the UNSC and the ICC, see also Vera Gowlland-Debbas, *The Security Council and the ICC*, in DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 25 (Laurence Boisson de Chazourmes et al. eds., 2013).

172. See, e.g., *Statement of ICC Prosecutor, Fatou Bensouda, Before the United Nations Security Council on the Situation in Darfur, Pursuant to UNSCR 1593 (2005)*, INT’L CRIM. CT., ¶ 14 (Dec. 13, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=161213-otp-stat-uns-c-darfur>.

173. See S.C. Res. 1593 (Mar. 31, 2005).

174. See also 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 la-

gesting that these omissions necessarily entailed legal effects, the lack of political will of those states to support ICC proceedings, many of which were parties to the Rome Statute, clearly evidenced the shortcomings of the ICL system.¹⁷⁵ Of course, many other factors could be at play, such as a lack of appetite among the UNSC Permanent Members to refer situations to the ICC. It could also be that the UNSC has declined to recognize situations as sufficiently severe to warrant referral. Conversely, there have likely been genuine missed opportunities as well.¹⁷⁶ When situations were referred to the ICC under Article 13(b), states' subsequent inaction might also be explained by their misguided belief that international law prevents them from arresting a head of state.

An indictment could also be issued by the ICC Prosecutor against the Filipino President Mr. Rodrigo Duterte in light of alleged large-scale extrajudicial killings and other abuses in his "war on drugs." Indeed, the Prosecutor hinted at this possibility in 2016, not to mention that the ICC opened a preliminary examination into the matter in February 2018.¹⁷⁷ However, no UNSC referral would be required in such a case since the Philippines was a Rome Statute party at the material time, despite recently withdrawing from the ICC.¹⁷⁸ A unique feature of that instrument resides in Article 27, which disables official capacity or head-of-state immunity from barring the Court's jurisdiction.¹⁷⁹ In broader terms, these examples and others only

menting the UNSC's inaction), https://www.icc-cpi.int/iccdocs/otp/23-otp-rep-UNSC-darfur_ENG.pdf.

175. For a critical take from the perspective of counterterrorism, see generally Vincent-Joël Proulx, *Counterterrorism and National Security: The Domestic/International Law Interface*, in *THE POLITICS OF INTERNATIONAL CRIMINAL LAW*, *supra* note 171.

176. See generally Elgebeily, *supra* note 171.

177. See Nikko Dizon, *International Court Warns PH on Killings*, PHILIPPINE DAILY INQUIRER (Oct. 16, 2016, 1:36 AM), https://globalnation.inquirer.net/146810/international-court-warns-ph-on-killings?utm_expid=.XqNwTug2W6nwDVUSgFJXed.1. On the ICC's preliminary examination, see *Preliminary Examination: The Philippines*, INT'L CRIM. CT., <https://www.icc-cpi.int/philippines>. (last visited Mar. 17, 2019).

178. In fact, there is a pending case before The Philippines' Supreme Court challenging the constitutionality of the announced withdrawal. See also Felipe Villamor, *Duterte Says Philippines to Exit Court at The Hague*, N.Y. TIMES, Mar. 15, 2018, at A6. The fate of this constitutional challenge is now unknown, however, since the Philippines' withdrawal from the ICC became effective on March 17, 2019. The withdrawal should not affect the ongoing examination and potential future proceedings against Mr. Duterte since "the ICC retains its jurisdiction over crimes committed during the time in which the State was party to the Statute and may exercise this jurisdiction over these crimes even after the withdrawal becomes effective." *ICC Statement on The Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law*, INT'L CRIM. CT. (Mar. 20, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=161213-otp-stat-uns-c-darfur>. See also Raul Dancel, *Philippines Leaves International Criminal Court as it Probes Duterte's Drugs Crackdown*, STRAITS TIMES (Mar. 16, 2019), <https://www.straitstimes.com/asia/se-asia/philippines-leaves-international-criminal-court-as-it-probes-dutertes-drugs-crackdown>.

179. One potential problem arises when attempting to remove immunity *rationae materiae* to downgrade heads of state, or other high-level officials, to the status of regular interna-

evinced the inherent political implications of such a procedure while confirming the paucity of relevant precedents related to “terrorism” and other subversive activities perpetrated by NSAs.

The biggest stumbling block to this approach resides in the fact that the Rome Statute failed to create a stand-alone jurisdictional basis for adjudicating “terrorism” crimes. But all is not lost. Through creative arguments, one can “read in” terrorist acts meeting all other Rome Statute “threshold” requirements of core crimes in apposite factual scenarios. After 9/11, some advocated a rapprochement between terrorist acts of a sufficient scale to qualify as either crimes against humanity (for example, the 9/11 attacks)¹⁸⁰ or war crimes¹⁸¹ and ICC jurisdictional requirements. Arguably, these postures were later assisted by jurisprudential developments at the ICTY¹⁸² and Special Tribunal for Lebanon (“STL”).¹⁸³ That said, the consensus remains that the ICC currently does not have jurisdiction over “terrorism” as a stand-alone crime.¹⁸⁴ An amendment to the Rome Statute would be required to create such a category.

tional individuals, subject to a would-be ICIR. In such cases, the applicable legal regime is ill-defined, despite some publicists’ hopeful outlook. See Lorna McGregor, *State Immunity and Human Rights: Is There a Future after Germany v. Italy?*, 11 J. INT’L CRIM. JUST. 125, 139–44 (2013).

180. See Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 26–41, 52 (2002); 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, 1080 (2004); ROBERTA ARNOLD, *THE ICC AS A NEW INSTRUMENT FOR REPRESSING TERRORISM* 202–72 (2004).

181. See Sébastien Jodoin, *Terrorism as a War Crime*, 7 INT’L CRIM. L. REV. 77, 77, 108 (2007).

182. The ICTY confirmed the existence of a customary war crime of “spreading terror amongst a civilian population.” *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Judgment, ¶¶ 79, 87–90 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); see also Ben Saul, *Crimes and Prohibitions of “Terror” and “Terrorism” in Armed Conflict: 1919–2005*, 4 J. INT’L L. PEACE & ARMED CONFLICT 264, 269 (2005). Previously, some scholars had advanced that “terrorism” amounted to an international customary crime. See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 120–30 (2003).

183. In 2011, the Special Tribunal for Lebanon’s (“STL”) Appeals Chamber found that a customary international crime of terrorism exists during peacetime. See *Prosecutor v. Ayyash*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶¶ 83–113, 145–48 (Special Trib. for Leb. Feb. 16, 2011). For critical takes, see 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).

184. See Andreas Zimmermann, *Jurisdiction, Admissibility and Applicable Law: Article 5*, in *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 111, 113–15 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016); Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993, 994 (2001).

Some “first wave” scholars argued that the UNSC can facilitate ICC prosecutions by referring cases to the Court. They suggested that the Council could do so when confronted with individuals/organizations that committed terrorist acts conforming with the requirements of Article 7 of the Rome Statute (that is, crimes against humanity).¹⁸⁵ Recently, there has been a re-rerudescence of this line of argument, or at least a push toward broadening the ICC’s jurisdictional scope to encompass “terrorism” crimes,¹⁸⁶ while considerable skepticism over the viability of such a prospect continues to animate other camps.¹⁸⁷ Nevertheless, the practical and conceptual problem with this prospect lies in the fact that, to qualify as “war crimes,” terrorist acts must necessarily be committed in armed conflict.

Moreover, to qualify as “crimes against humanity,” the facts underlying any terrorist acts presumably falling within ICC jurisdiction must fulfil the requisite elements of this core crime under Article 7. Ultimately, one would still be faced with crimes against humanity (because the underlying acts meet all statutory and jurisprudential requirements for that category of crime) *that also happen to constitute* “terrorism,” irrespective of how that term is defined.¹⁸⁸ Hence, this conclusion would strictly be a factual appreciation with no legal implications or effect whatsoever under the current ICC structure. That is a far cry from digging a new jurisdictional furrow in which “terrorism” can be accommodated on a standalone basis. An alternate avenue is to create a specialized international/hybrid tribunal to handle terrorism cases. The UNSC could also institute an ad hoc tribunal, but this path is fraught with many potential pitfalls, chief amongst them being the lack of a universally agreed upon definition of “terrorism.”¹⁸⁹ More importantly,

185. See, e.g., Proulx, *supra* note 180, at 1018–19. *But see generally* Robert Cryer, *Terrorism and the International Criminal Court*, 82 AUSTL. L. REFORM COMMISSION REFORM J., Autumn 2003, at 14 (arguing that the UNSC should not rewrite the Rome Statute through its resolutions).

186. See 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); 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).

187. See, e.g., Amos N. 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); Mohammed Saif-Alden Wattad, *From Rome to Nuremberg with Romanticism: On Terrorism*, 38 HOUS. J. INT’L L. 689, 710–11 (2016).

188. See ANDREA BIANCHI & YASMIN NAQVI, *INTERNATIONAL HUMANITARIAN LAW AND TERRORISM* 247–56 (2011).

189. On this aspect and the challenges of setting up a specialized “terrorism” tribunal, see Bibi van Ginkel, *Combating Terrorism: Proposals for Improving the International Legal Framework*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW*, *supra* note 126, at 461, 470. After 9/11, some commentators nonetheless suggested the creation of an ad hoc international tribunal to address Al Qaeda’s unlawful conduct. See, e.g., Christopher Greenwood, *International Law and the ‘War Against Terrorism,’* 78 INT’L AFF. 301, 305 (2002).

these considerations echo my earlier remark that the international community's overemphasis on individual *criminal* responsibility might be misguided, overly selective/arbitrary, and ultimately counterproductive in identifying and developing richer individual accountability models.

B. *The UNSC and Civil Liability*

The second and more relevant approach available to the UNSC is to follow what could be characterized as "SR logic," but transposed to an individual responsibility setting. In fact, the UNSC has sometimes done so very plainly. As a preliminary matter, any apprehension about potentially elevating subversive NSAs to an undesirable level by granting them (limited) legal personality for the purposes of holding them legally accountable must be dispelled. Indeed, "it is necessary not to give too much weight to the fear, often stated in the academic literature, that such groups would thereby be accorded legitimacy and the legal personality, even if functional and limited, which is the necessary corollary of responsibility."¹⁹⁰ A purist's objection to this approach might be rooted in the belief that NSAs have no formal role to play, or any at all, within international law's universe, either as law-making entities or formal/direct subjects of the discipline.¹⁹¹ However, this view is increasingly (and rightly) rejected by many publicists as antiquated, overly state-centric, and simply impractical in light of present-day security threats.¹⁹² For example, such a rigid and overly formalistic construction stands in opposition to the reality of non-international armed conflicts. It faces persuasive functionalist claims "assert[ing] a need to recognize greater legal parity among parties to [such conflicts] where rebels control substantial territory and in other ways act like states."¹⁹³ Above all, the simple fact

190. Cahin, *supra* note 13, at 338.

191. See, e.g., d'Aspremont, *supra* note 79, at 25.

192. See HUMAN RIGHTS AND NON-STATE ACTORS, *supra* note 11; NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 11; PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW, *supra* note 11. See generally NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT, *supra* note 8; BARBARA WOODWARD, GLOBAL CIVIL SOCIETY IN INTERNATIONAL LAWMAKING AND GLOBAL GOVERNANCE (2010); Agata Kleczkowska, *Armed Non-State Actors and Customary International Law*, in NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT, *supra* note 8, at 60; Math Noortmann & Cedric Ryngaert, *Non-State Actors: Law-Takers or Law-Makers? Is That the Question?*, in NON-STATE ACTORS DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 195 (Math Noortmann & Cedric Ryngaert eds., 2010).

193. Fox et al., *supra* note 65, at 669. For views on both sides of this debate, see William Worster, *Relative International Legal Personality of Non-State Actors*, 42 BROOK. J. INT'L L. 207, 229–40 nn. 78–131 (2015). For a review of the legal implications of "territorial nonstate actors" in different contexts, see Natalia Cwicsinskaja, *International Human Rights Law and Territorial Non-State Actors: Cases of the Council of Europe Region*, in NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT, *supra* note 8, at 260–84; Yaël Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46 CORNELL INT'L L.J. 21 (2013).

remains that for international law to ignore the importance and role of NSAs in norm creation and enforcement is to ignore reality.¹⁹⁴

A vital objective in articulating a general ICIR regime is to facilitate the development of a narrative against impunity. The power of that rhetoric might in turn embolden key constituencies and stakeholders to pursue claims against wrongdoing individuals and NSAs, which may lead to civil lawsuits, reparation, or the shaming of unlawful conduct and/or actors. This narrative might also incentivize some states to better monitor and regulate the activities of subversive NSAs under their jurisdiction or control. At the same time, it is imperative that the conceptual architecture of a general ICIR regime operate on the understanding that a necessarily *limited* legal personality be conferred to NSAs within this framework. It follows that, “[i]n reality, legal personality is only of value to the extent of its social utility, which in this case is the aim of making the formidable power to cause harm of such entities, a power which is not reducible to the individual acts of their members, coincide with a corresponding capacity to be held responsible.”¹⁹⁵ In short, the architects of a general ICIR regime must be cautious not to produce the absurd result of unduly legitimizing subversive and/or unlawful NSAs. Similarly, the resulting regime must not grant such actors rights incompatible with the nature of their mission statements and actions. For most, it would be unthinkable to formally recognize Daesh/ISIL’s or Boko Haram’s right to claim territorial control and political independence or their right to sue. These considerations must be woven into the ICIR regime’s conceptual and theoretical fabric.

Relevant precedents confirm that the UNSC can implement SR for state failures to prevent terrorism or violations of other counterterrorism duties.¹⁹⁶ Indeed, the UNSC sometimes attributes wrongful conduct to states and cor-

194. By way of example, NGOs have been instrumental in expanding the enforcement of HR in the counterterrorism context. See, e.g., Jeffrey Davis, *NGOs in Terrorism Cases: Diffusing Norms of International Human Rights Law*, in NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT, *supra* note 8, at 459.

195. Cahin, *supra* note 13, at 338.

196. See PROULX, INSTITUTIONALIZING, *supra* note 98; Proulx, *An Incomplete Revolution*, *supra* note 98. On the UNSC and SR generally, see Marc Perrin de Brichambaut, *The Role of the United Nations Security Council in the International Legal System*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 269 (Michael Byers ed., 2000); Giorgio Gaja, *Comment: The Impact of Security Council Resolutions on State Responsibility*, in PEACE THROUGH INTERNATIONAL LAW: THE ROLE OF THE INTERNATIONAL LAW COMMISSION 53–60 (Georg Nolte ed., 2009); Vera Gowlland-Debbas, *The Functions of the United Nations Security Council in the International Legal System*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW, *id.*, at 277; Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT’L & COMP. L.Q. 55 (1994) [hereinafter Gowlland-Debbas, *Security Council Enforcement Action*]; Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT’L L. 1 (1970).

respondingly devises legal consequences flowing from the breaches it has determined.¹⁹⁷ This translates into the imposition of secondary obligations upon the responsible states. When it holds states accountable, the Council thus draws heavily on the SR repertoire, sometimes without expressly labeling its decisions accordingly. It nonetheless imposes obligations of cessation, assurances of non-repetition, satisfaction, other forms of reparation under Chapter VII, and other secondary obligations outside Chapter VII (including reparation broadly and compensation specifically).¹⁹⁸

Similar logic could govern ICIR and manifest in the UNSC's attribution of wrongful conduct to NSAs, subject to the caveats expressed in section II(A) concerning the elaboration of a remedial normative scheme that heeds the distinct nature and character of NSAs. Hence, "[t]he criminal responsibility of the members of various armed groups," affirmed by UNSC resolutions, "does not constitute the only way in which those individuals may be held to account for illegal acts which are attributable to them."¹⁹⁹ In fact, "[a]nother form of responsibility may be said to exist, as a result of the 'sanctions' adopted by the Security Council against such groups"²⁰⁰ In contrast to the above situations, however, the UNSC has stopped short of ordering reparation or pecuniary compensation when holding NSAs responsible.

That said, "there is no justification for subjecting non-State groups to rules which are substantially different from those applicable to States. An evolution of the practice of the [UNSC] in this regard is not to be excluded"²⁰¹ This reality not only stems from the nexus between SR and individual responsibility but also from the blind spots characterizing the former regime discussed above. After all, this Article's introductory remarks must be reiterated in respect to armed bands and criminal groups. While, in principle, nothing precludes the law of SR from being applied coextensively with individual responsibility mechanisms, it is precisely SR's inefficiency in dealing with such actors that would justify recognizing an international responsibility of armed bands and criminal groups. At least, this line of argument has been persuasively defended by some commentators.²⁰²

197. See, e.g., PROULX, INSTITUTIONALIZING, *supra* note 98, at 155–260; Gowlland-Debbas, *The Functions of the United Nations Security Council in the International Legal System*, *supra* note 196; Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 196.

198. For relevant arguments and practice, see generally PROULX, INSTITUTIONALIZING, *supra* note 98; Proulx, *An Incomplete Revolution*, *supra* note 98.

199. Cahin, *supra* note 13, at 339.

200. *Id.*

201. *Id.* at 340.

202. *Id.* at 335–36. Relatedly, existing scholarship has generally treated the legal responsibility of armed opposition groups as a question governed by ICL, IHL, and HR. See LIESBETH ZEGVELD, *THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* (2002).

Stepping outside the familiar HR and IHL fields, on at least one occasion the UNSC transposed a fundamental international legal norm expressly reserved for sovereign states to NSAs. It is widely known that the definition of “aggression” in international law was originally adopted to capture unlawful use of force carried out by states.²⁰³ Nevertheless, in 1977, the UNSC attributed an act of aggression to nonstate mercenaries for their subversive activities in Benin.²⁰⁴ What is more, the Council noted that “the Government of Benin ha[d] reserved its right with respect to any eventual claims for compensation which it may wish to assert”²⁰⁵ This precedent is significant because it evidences the UNSC’s willingness to transpose state-centric legal rationales to the unlawful acts of NSAs. It directly supports this Article’s central argument in that regard. In addition, the Council was cautious not to specify which entity could be the target of Benin’s eventual reparative case, not to mention that it used the plural form when suggesting that the victim state might have actionable compensation claims. At a minimum, this conclusion suggests that multiple undefined parties might have been responsible for that wrongful act (and on the hook for compensation). In the best-case scenario for present purposes, this UNSC resolution suggests that those responsible parties could include nonstate entities. Irrespective of one’s interpretation of that precedent, it bolsters the case for ICIR in international law.

While the UNSC has generally been reluctant to impose direct orders on private businesses and/or individuals, it certainly has the ability to do so. For example, the UNSC could impose a financial embargo and determine to which firms that measure applies.²⁰⁶ Yet, the Council has not done this, which begs the question—why? One answer, at least in part, might be the absence of a comprehensive legal regime governing this type of situation. The particular legal relationships and the consequences thereof lack definition and are thus not operative.

Moreover, conventional wisdom dictates that states are better situated to induce individuals under their jurisdiction to comply with constraining legal orders.²⁰⁷ There is no reason why more targeted UNSC-prescribed individual

203. See G.A. Res 3314 (XXIX) (Dec. 14, 1974).

204. See S.C. Res. 405, ¶ 2 (Apr. 14, 1977) (“*Strongly condemns* the act of armed aggression perpetrated” by the NSAs) (italicization in original); see also Cohen, *supra* note 186, at 249–50. For a compatible UNSC resolution on the unlawful activities of nonstate mercenaries against the Democratic Republic of the Congo, see S.C. Res. 239 (July 10, 1967).

205. S.C. Res. 405, *supra* note 204, ¶ 9.

206. Tomuschat, *supra* note 38, at 319.

207. See *id.* However, the UNSC exercising such power might help palliate shortcomings of domestically-based transnational HR litigation, especially given recent developments surrounding ATCA’s application and the European Court of Human Rights’ (“ECtHR”) rejection of universal civil jurisdiction. With respect to ATCA, consider the following passage from the U.S. Court of Appeals: “No corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected

responsibility measures could not be facilitated by those same states. Just because the measures emanate from the Council does not mean that they cannot be given simultaneous legal effect domestically, internationally, and perhaps even transnationally. On this last point, it may well be that relevant UNSC measures could enlist the support of other NSAs for more effective implementation. For example, the Financial Action Task Force (“FATF”) has been pivotal in developing “soft law” standards to combat terrorist financing, efforts which could be extended to support UNSC-imposed consequences targeting particularly subversive NSAs in the global financial sector.²⁰⁸

C. Relevant UNSC Practice

While it might not have ordered pecuniary compensation as a direct consequence of its findings of individual responsibility, the UNSC has attributed wrongful conduct and, by extension, individual responsibility to NSAs in the past, including the National Union for the Total Independence of Angola (“UNITA”),²⁰⁹ Bosnian Serb paramilitary units,²¹⁰ Al Qaeda in Afghanistan,²¹¹ the Janjaweed in Sudan,²¹² and other terrorist groups.²¹³ In

the idea of corporate liability. Thus, corporate liability has not attained a discernible, much less universal, acceptance among nations of the world in their relations inter se, and it cannot, as a result, form the basis of a suit under the [ATCA]. Acknowledging the absence of corporate liability . . . is . . . a recognition that the States of the world, in their relations with one another . . . have determined that moral and legal responsibility for heinous crimes should rest on the individual whose conduct makes him or her ‘hostis humani generis, an enemy of all mankind.’ ”

Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 148–49 (2d Cir. 2010) (citations omitted); see also *id.* at 121. On more recent developments, see *infra* Part V.

208. See *Terrorist Financing: FATF’s Strategy on Combating Terrorist Financing*, FATF, <http://www.fatf-gafi.org/publications/fatfgeneral/documents/terroristfinancing.html> (last visited Mar. 17, 2019). On the FATF’s contributions to combating terrorist financing, see Ben Saul, *The Emerging International Law of Terrorism*, 1 IND. Y.B. INT’L L. & POL. 1, 10–12 (2010).

209. See *infra* nn. 223, 232, 240, 246, and accompanying text; see also S.C. Res. 1127 (Aug. 28, 1997).

210. See S.C. Res. 819, ¶ 7 (Apr. 13, 1993) (“[r]eaffirm[ing] its condemnation of all violations of [IHL], in particular the practice of ‘ethnic cleansing’ and reaffirm[ing] that those who commit or order the commission of such acts shall be held individually responsible in respect of such acts;”) (markings omitted); see also S.C. Res. 713 (Sept. 25, 1991).

211. See S.C. Res. 1390, at pmb. (Jan. 16, 2002) (“[c]ondemning the Al-Qaida network and other associated terrorist groups, for the multiple criminal, terrorist acts, aimed at causing the deaths of numerous innocent civilians, and the destruction of property,”) (italization in original).

212. See S.C. Res. 1564, at pmb. (Sept. 18, 2004); see also *id.*, ¶¶ 1, 7.

213. See Gowlland-Debbas, *The Functions of the United Nations Security Council in the International Legal System*, *supra* note 196, at 307–08; Vera Gowlland-Debbas, *Responsibility and the United Nations Charter*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 13, at 129; Pierre-Marie Dupuy, *State Sponsors of Terrorism: Issues of International Re-*

2015, it attributed a series of attacks to Daesh/ISIL in straightforward terms, including the destruction of a Russian airliner over Egypt's Sinai desert. In that context, the Council

[u]nequivocally condemn[ed] in the strongest terms the horrifying terrorist attacks perpetrated by ISIL also known as Da'esh which took place on 26 June 2015 in Sousse, on 10 October 2015 Ankara, on 31 October 2015 over Sinai, on 12 November 2015 in Beirut and on 13 November 2015 in Paris, and all other attacks perpetrated by ISIL also known as Da'esh, including hostage-taking and killing, and note[d] it has the capability and intention to carry out further attacks and regard[ed] all such acts of terrorism as a threat to peace and security²¹⁴

This resolution followed UNSC Resolution 2166. There, the Council condemned in equally severe terms the downing of Malaysia Airlines flight MH17 in Donetsk Oblast, Ukraine, and “[d]emand[ed] that those responsible . . . be held to account and that all States cooperate fully with efforts to establish accountability,” again demonstrating the important synergy between SR and individual responsibility.²¹⁵

Similarly, the UNSC “condemn[ed] in the strongest terms recent terrorist attacks perpetrated by Al-Shabaab in Somalia and the region”²¹⁶ It noted “with concern the number of attacks in Mogadishu,” before “express[ing] further concern that Al-Shabaab continue to carry out terrorist acts in Somalia”²¹⁷ Most important, the Council emphasized a direct nexus between its attribution of the terrorist attacks and the importance of individual responsibility, at least in a rhetorical and sweeping sense. It nonetheless resulted in a strong message of deterrence and accountability. In one operative clause, the UNSC “underline[d] the importance of holding perpetrators to account (in full compliance with international law)”²¹⁸ Moreover, the Council’s conclusion here unequivocally links its opprobrium with *normative* and *legal* consequences under international law, suggesting that it could assume some role—however limited or infrequent—through a general regime for the establishment and implementation of ICIR. In a more recent resolution dealing with Somalia, the UNSC strongly condemned the devas-

sponsibility, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 3, 8 (Andrea Bianchi ed., 2004).

214. S.C. Res. 2249, ¶ 1 (Nov. 20, 2015) (italization in original). On the airliner attack, see Gwyn Topham et al., *Egypt Plane Crash: Russia Says Jet Was Bombed in Terror Attack*, GUARDIAN (Nov. 17, 2015 1:59 PM), <https://www.theguardian.com/world/2015/nov/17/egypt-plane-crash-bomb-jet-russia-security-service>.

215. S.C. Res. 2166, ¶¶ 1, 11 (July 21, 2014) (italization in original). On follow-up action and obstacles, see Michael Ramsden, *Uniting for MH17*, 7 ASIAN J. INT’L L. 337, 337–39 (2017).

216. S.C. Res. 2158, ¶ 7 (May 29, 2014).

217. *Id.*

218. *Id.* (italization in original).

tating terrorist attacks carried out by Al-Shabaab in Mogadishu in October of 2017 and February of 2018, emphatically denounced the presence of groups affiliated with Daesh/ISIL in Somalia, and imposed an obligation of cessation upon those NSAs to ensure a return to legality.²¹⁹ After “[e]xpress[ing] concern about all violations of [IHL] and violations and abuses of [HR] including by Al-Shabaab and affiliates linked to [Daesh/ISIL],” the Council “call[ed] on all parties to comply immediately with their obligations under international law and to fulfil their obligations under [IHL]”²²⁰

The breach–attribution–consequence syllogism, central in SR, also animated other UNSC resolutions where it directed the application of secondary remedial norms to NSAs. When confronted with complex armed hostilities, the UNSC imposed an obligation of cessation upon state and nonstate actors. Dealing with the Rwandan conflict, it “[d]emand[ed] that all parties to the conflict immediately cease hostilities, agree to a cease-fire, and bring an end to the mindless violence and carnage engulfing Rwanda”²²¹ Handling the repression of civilians in Kosovo, coupled with grave HR and IHL violations, the UNSC again drew inspiration from international responsibility logic and directed its prescriptions to both states and nonstate actors, demanding “that all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo”²²² Similarly, in a different context the UNSC demanded “that all Somali parties, including movements and factions,” observe their obligations previously articulated in a ceasefire and disarmament agreement.²²³ More recently, it relied on this logic when addressing escalating violence in Syria by calling on *all parties*, including nonstate terrorist actors, to cease any attacks against civilians and civilian objects.²²⁴

Similarly, in 1999 to 2000, the UNSC, confronted with hostilities transpiring in the Democratic Republic of the Congo (“DRC”), admonished both Uganda and Rwanda for their outside interferences and prescribed ob-

219. See S.C. Res. 2408, *supra* note 76, ¶ 22.

220. *Id.* For a more recent resolution, see S.C. Res. 2444, *supra* note 119, at 1, 7 (condemning a range of unlawful acts by Al-Shabaab and Daesh/ISIL-linked affiliates in Somalia).

221. S.C. Res. 918, ¶ 1 (May 17, 1994).

222. S.C. Res. 1199, ¶ 1 (Sept. 23, 1998); S.C. Res. 1203, ¶ 4 (Oct. 24, 1998); S.C. Res. 1160, ¶ 2 (Mar. 31, 1998); see also S.C. Res. 752, ¶¶ 1, 3–4 (May 15, 1992) (addressing hostilities in Bosnia-Herzegovina and interferences by neighboring states, as well as prescribing obligations of cessation).

223. S.C. Res. 814, ¶ 8 (Mar. 26, 1993); see also S.C. Res. 1010, ¶¶ 1–2 (Aug. 10, 1995) (demanding that the Bosnian Serb party provide access to UN and ICRC personnel and respect their rights); S.C. Res. 1127, *supra* note 209, ¶¶ 2–3 (demanding that UNITA observe its demilitarization duties and provide information on disarmament).

224. See S.C. Res. 2254, ¶ 13 (Dec. 18, 2015); S.C. Res. 2268, ¶ 3 (Feb. 26, 2016); see also, e.g., *supra* nn. 155, 220–222 and *infra* nn. 226–27, 229, 245 and accompanying text.

ligations of cessation in line with international responsibility rationale.²²⁵ In Resolutions 1234 and 1304, it underscored a direct rapprochement between its principal mandate of maintaining international peace and security and international legal norms. This precedent has positive implications for the potential deployment of ICIR under the UNSC's auspices.

This practice also suggests that the UNSC may enhance international individual responsibility efforts. Obviously, further adjustments, along with firmer and clearer formulation of applicable secondary (read: remedial) norms, might be required in the future. In these specific resolutions, the UNSC expressed grave concern in the face of widespread IHL and HR violations in the DRC, including acts of and incitement to ethnic hatred committed by various entities, including NSAs. In its operative language, it called upon *all parties* to "protect [HR] and to respect [IHL]," expressly mentioning within its prescriptions the Geneva Conventions of 1949 and the Additional Protocols of 1977 as well as the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.²²⁶

Addressing secondary obligations to "all parties" is recurrent in UNSC resolutions, especially in those dealing with armed conflict, a practice unequivocally covering individuals and nonstate groups (and potentially their eventual violation of UNSC prescriptions, which could entail ICIR). On this front, the UNSC's language is sweeping in its coverage of potential individual and nonstate actors breaching international law. The Council's resolution-making encompasses "'all parties, including those other than States,' 'all parties, all movements et [sic] all factions,' 'all parties and other interested persons,' or 'all forces and armed groups'"²²⁷ It is also addressed to individually identified nonstate entities, including "'the Serbs of Bosnia,' 'elements of the Croatian Army,' 'the Kosovo Liberation Army or all other groups or individuals'"²²⁸ Similarly, Council resolutions have expressly targeted "'the Burundi Front for the Defence of Democracy (FDD), the former armed forces of Rwanda (ex-FAR)/Interhamwe and the Alliance of Democratic Forces,' 'the RUF, the civil defence forces and other armed groups,' and 'the Sudanese rebel groups, especially the Movement for Justice and Equality/Sudan Liberation Movement.'"²²⁹ This non-exhaustive re-

225. See S.C. Res. 1234, ¶¶ 1–3 (Apr. 9, 1999); see also S.C. Res. 1304, ¶¶ 1–4 (June 16, 2000).

226. S.C. Res. 1234, *supra* note 225, ¶ 6; see also S.C. Res. 1304, *supra* note 225, at pmb., ¶ 15.

227. Cahin, *supra* note 13, at 338. For a recent example, see S.C. Res. 2444, *supra* note 119, ¶ 47 (demanding that "all parties" facilitate and allow humanitarian aid in Somalia).

228. Cahin, *supra* note 13, at 338; see also, e.g., S.C. Res. 1244, ¶ 15 (June 10, 1999) (demanding that the Kosovo Liberation Army and other armed Kosovo Albanian groups cease all hostilities and comply with a range of demilitarization requirements).

229. Cahin, *supra* note 13, at 338. For a range of relevant resolutions, see ERIC DAVID, *PRINCIPES DE DROIT DES CONFLITS ARMÉS* 647 n.2 (5th ed. 2012). For recent examples, see S.C. Res. 2401, ¶ 7 (Feb. 24, 2018) (demanding that all parties observe a range of international law obligations in Syria); S.C. Res. 2216, ¶ 8 (Apr. 14, 2015) (condemning the Houthis'

view of addressees of UNSC prescriptions illustrates that organ's willingness to cast a wide net when attributing wrongful conduct to NSAs and imposing secondary obligations resulting from their unlawful acts.

Finally, aside from imposing remedial obligations upon NSAs falling short of monetary compensation (such as cessation or declarations of wrongdoing), the UNSC has imposed sanctions against such actors which were justified by the Council first assigning international responsibility to them. While the UNSC's language is not always firmly couched in ICIR terms in this regard, its relevant resolutions at least operate on a *de facto* finding of NSAs' liability. In these resolutions, the UNSC clearly attributes some violation of the international legal order to nonstate entities or individuals and then imposes consequences, be they in the form of sanctions or some other measures. For example, in Resolution 1474, the Council expressly imposed sanctions upon NSAs by "stress[ing] the *obligation* of all States and *other actors*" to observe a previous resolution instituting an arms embargo concerning Somalia.²³⁰ In sanctions resolutions dealing with the DRC, the UNSC made individuals who recruit child soldiers or attack peacekeepers the object of financial and travel sanctions.²³¹

Outside of the more systematic regime of "targeted" sanctions, the UNSC can also contribute to advancing individual responsibility models through the adoption of ad hoc measures or sanctions based on the factual exigencies of any situation with which it is confronted. It bears repeating that the UNSC already assigns *de facto* ICIR when it imposes sanctions or other measures upon individuals and other NSAs. Indeed, UNSC-imposed sanctions can be reconciled with the ethos of international responsibility given that the Council is essentially handing down specific consequences flowing from a NSA's violation of its international obligation(s). In sanctioning unlawful conduct, the UNSC has, *inter alia*, imposed:

1. A military and oil embargo, the freezing of funds, possessions and other economic resources, and refusal of entry and/or transit of UNITA leaders on or through the territory of any State stemming from that entity's violation of its undertakings under the Lusaka Peace Accords;²³²

aggravation of hostilities and calling on all parties to uphold HR in Yemen). *See also* Fox et al., *supra* note 65, at 702 n.274 (calling such practice by the UNSC "almost routine").

230. S.C. Res. 1474, ¶ 1 (Apr. 8, 2003) (emphasis added); *see also* S.C. Res. 1519, ¶ 1 (Dec. 16, 2003). The arms embargo was imposed in S.C. Res. 733, ¶ 5 (Jan. 23, 1992). For a recent reaffirmation of that arms embargo in the face of evolving security threats, *see* S.C. Res. 2444, *supra* note 119, ¶ 13.

231. *See* S.C. Res. 2136, ¶ 4 (Jan. 30, 2014); *see also* S.C. Res. 1857, ¶¶ 3–4 (Dec. 22, 2008) (applying sanctions to several individuals, including those "operating in the [DRC] and committing serious violations of international law").

232. *See* Farid Wahid Dahmane, *Les Mesures Prises par le Conseil de Sécurité contre les Entités Non-étatiques*, 11 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARE 227, 234 (1999).

2. Similar measures “with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them,” identified by name;²³³
3. Military and logistical embargoes targeting armed groups and foreign militias operating on the DRC’s territory, especially in Kivu and Ituri,²³⁴ and against several NSAs and armed groups carrying out activities in Liberia²³⁵ and in Darfur;²³⁶ and
4. Various measures concerning serious IHL and HR abuses by the above entities and other NSAs.²³⁷

Similarly, the UNSC has directed with relative frequency that armed opposition groups refrain from engaging in various conducts during or in the wake of armed conflict, such as disregarding HR norms, violating IHL, or breaching peace accords.²³⁸ Moreover, the Council’s specific demands of such groups have varied greatly—running the gamut from observing HR/IHL obligations to respecting electoral outcomes—and have targeted NSAs in Afghanistan,²³⁹ Angola,²⁴⁰ Cambodia,²⁴¹ the Central African Republic,²⁴² the DRC,²⁴³ Syria,²⁴⁴ and the former Yugoslavia.²⁴⁵

233. See S.C. Res. 1390, *supra* note 211, ¶ 2.

234. See S.C. Res. 1493 (July 28, 2003); S.C. Res. 1552 (July 27, 2004); S.C. Res. 1596 (Apr. 18, 2005).

235. See S.C. Res. 1521 (Dec. 22, 2003); *see also* S.C. Res. 2237, ¶ 1 (Sept. 2, 2015) (renewing the arms embargo regarding NSAs in Liberia).

236. See S.C. Res. 1556 (July 30, 2004). On the recent use of embargoes in the counterterrorism context, *see* S.C. Res. 2370, *supra* note 134, ¶¶ 3–4.

237. The UN Secretary-General also formulated a proposal that targeted measures be directed against the military and political leadership of the Liberation Tigers of Tamil Eelam (LTTE). *See* U.N. Secretary-General, *Rep. on Children and Armed Conflict in Sri Lanka*, U.N. Doc. S/2006/1006, ¶ 63 (Dec. 20, 2005).

238. *See, e.g.*, S.C. Res. 2113, ¶¶ 4, 15–17 (July 30, 2013) (condemning HR and IHL violations in Sudan); S.C. Res. 2098, ¶ 8 (Mar. 28, 2013) (expressing concern regarding HR and IHL violations in the DRC, and calling for accountability); S.C. Res. 1964, ¶ 15 (Dec. 22, 2010) (condemning HR transgressions in Somalia, and calling for accountability); S.C. Res. 1935, ¶ 9 (July 30, 2010) (requiring all groups in Sudan to observe HR and IHL duties); S.C. Res. 1577, ¶ 5 (Dec. 1, 2004) (devising measures concerning those responsible for HR violations in Burundi); S.C. Res. 1509, ¶ 4 (Sept. 19, 2003) (requiring parties in Liberia to observe their duties under the peace and ceasefire accords).

239. S.C. Res. 1214, ¶ 12 (Dec. 8, 1998) (requiring that “Afghan factions put an end to discrimination against girls and women and other violations [of HR]”).

240. S.C. Res. 851, ¶ 4 (July 15, 1993) (demanding that “UNITA accept unreservedly the results of the democratic elections of 1992 and abide fully by the ‘Acordos de Paz’;”).

241. S.C. Res. 792, ¶ 8 (Nov. 30, 1992) (demanding “that the PDK fulfil immediately its obligations under the Paris Agreements;”).

242. S.C. Res. 2121, ¶ 15 (Oct. 10, 2013) (demanding “that all armed groups, in particular Sekela elements[,] prevent the recruitment and use of children;”).

These sanctions, including the increasingly frequent freezing of assets in counterterrorism contexts, again demonstrate that ICIR's effective deployment remains largely dependent on state action. By the same token, as this pattern of UNSC practice also suggests—particularly but not exclusively in the case of UNITA—when armed opposition groups disregard the Council's directives, they increasingly become subject to sanctions handed down by that organ.²⁴⁶ At least upon first glance, there is a direct consequence for violating international law (even if it falls short of pecuniary compensation), an outcome which is eminently reconcilable with the essence of international responsibility.

Beyond sanctions, in its application of SR norms, the UNSC has interpreted its functions very broadly and imposed far-reaching and diversified secondary obligations flowing from its findings of illegality. It may be pondered why similar creative and expansive solutions could not animate its imposition of secondary norms of *individual* responsibility flowing from NSAs' violations of primary obligations. Of course, the scale, duration, magnitude, authorship, and effects of relevant breaches will undoubtedly inform the scope of UNSC responses to infringements. Nevertheless, the central idea is that the UNSC is less constrained in selecting options from its remedial toolbox when compared with the avenues available to an injured state attempting to implement SR unilaterally.

A case in point is the UNSC's institution of the indemnity fund and UN Compensation Commission ("UNCC") following Iraq's unlawful invasion and occupation of Kuwait, which largely derived from SR and U.S. mass tort claims theory.²⁴⁷ Similar models could be envisaged to facilitate and streamline the administration of claims resulting from ICIR for terrorism, at

243. S.C. Res. 1417, ¶ 4 (June 14, 2002) (reaffirming that the UNSC "holds the Rassemblement Congolais pour la Democratie-Goma, as the de facto authority, responsible to bring to an end all extrajudicial executions, [HR] violations and arbitrary harassment of civilians in Kisangani,")

244. S.C. Res. 2139, ¶ 1 (Feb. 22, 2014) (condemning "widespread violations [of HR and IHL]" by "armed groups, including all forms of sexual and gender-based violence, as well as all grave violations and abuses committed against children in contravention of applicable international law, such as recruitment and use, killing and maiming, rape, attacks on schools and hospitals as well as arbitrary arrest, detention, torture, ill treatment and use as human shields;")

245. S.C. Res. 752, *supra* note 222, ¶ 1 (demanding "that all parties and others concerned in Bosnia and Herzegovina stop the fighting immediately, [and] respect immediately and fully the cease-fire")

246. See, e.g., Nigel D. White, *Sanctions Against Non-State Actors*, in COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW 127, 148–49 (Natalino Ronzitti ed., 2016).

247. On these aspects and relevant UNSC resolutions, see PROULX, *supra* note 23, at 197–98, 299. See also PROULX, INSTITUTIONALIZING, *supra* note 98, at 202–05.

least regarding massive or large-scale violations perpetrated by entities such as Daesh/ISIL.²⁴⁸

V. THE WAY FORWARD: TOWARD A FLAWED BUT WORKABLE MODEL?

There is every indication that the scope of some UNSC resolutions might extend beyond the immediate matters on which the Council is deciding, thereby enjoying more pervasive, general obligation-setting qualities. As demonstrated above, the Council's role in enforcing international legal norms and implementing individual responsibility remains intimately tied to its formulation of primary obligations (read: "quasi-legislative" function). Otherwise put, there is great validity, continuity, and logic to the idea that, once the UNSC promulgates a primary norm binding on states and/or NSAs, it could then proceed to implement and enforce it in the event of its violation by a subject of the UNSC's resolutions (or by an actor whose conduct is captured under the Council's prescriptions). More broadly, this synergy between UNSC "quasi-legislation" and implementation has also had an impact on general international law, particularly in the counterterrorism context but also beyond.²⁴⁹

This approach might strike some as flat-out undesirable primarily because the UNSC might be perceived as unable to set obligations prospectively under customary international law, or because its structural make-up might seemingly make it ill-equipped to engage in lawmaking. There is nonetheless evidence beyond the present account that the UNSC is an active lawmaking entity. For example, a recent and insightful study analyzing a compiled data set of all UNSC resolutions from 1990 to 2013 evinces that organ's undeniable contribution to shaping customary international law on obligations related to non-international armed conflicts (that is, on NSAs' HR obligations, the binding nature of peace agreements in such conflicts, and the importance of holding post-conflict elections in the affected states).²⁵⁰

248. See also Cahin, *supra* note 13, at 340 (discussing UNSC measures against Al Qaeda, the Taliban and other nonstate terrorist actors, and remarking that "[f]rom a technical point of view, the international management of an indemnity fund, composed of blocked funds and assets, is perfectly foreseeable").

249. See, e.g., Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 196; Gowlland-Debbas, *The Functions of the United Nations Security Council in the International Legal System*, *supra* note 196; Vera Gowlland-Debbas, *The Security Council as Enforcer of Human Rights*, in *SECURING HUMAN RIGHTS?: ACHIEVEMENTS AND CHALLENGES OF THE UN SECURITY COUNCIL* 36 (Bardo Fassbender ed., 2011). For a nuanced and critical take, see Koskeniemi, *supra* note 147. On the various limitations of the UNSC's "legislative" functions in counterterrorism matters, see generally Luis Miguel 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).

250. See Fox et al., *supra* note 65, at 649–731. For a more dated, cynical view on the UNSC's ability to alter existing rules of international law, see Wellens, *supra* note 96, at 48–50.

A. *Prospects and Limits:*
International Civil Individual Responsibility as a Way Forward?

The model advocated in this Article is by no means perfect and may well generate arbitrary and selective application of international legal norms in some circumstances. The UNSC's institutional features might ultimately jeopardize the "general" character of the proposed regime of individual civil responsibility advertised in this Article's title. This reality is exacerbated by the fact that the Council's lawmaking pattern and use of international law can mostly be characterized as piecemeal, random, and arbitrary. Consequently, the UNSC should not be turned to as a reliable, uniform, or evenly fair dispenser of international law. For one thing, affording the UNSC with such normative power, both in terms of setting primary obligations of conduct and enforcing secondary norms of liability against NSAs, might unduly vest powerful states with the ability to determine issues of ICIR to the detriment of the developing world. Setting aside these political dimensions, even in situations where the UNSC intervenes to actuate individual responsibility, the twin problems of enforcement and implementation frequently constitute a considerable stumbling block to securing an effective remedy. This is particularly true when the Council targets specific terrorist organizations (such as Daesh/ISIL and Al-Shabaab) that may elude enforcement mechanisms for various reasons. In this light, the question remains whether the prospect of instituting individual responsibility in international law is prompted by the absence of alternative targets of liability as opposed to being driven by existing doctrine. It may be that in the absence of effective control by a territorial state over a terrorist group, the UNSC may be called upon to establish that group's international responsibility. It may also be that this group does not lend itself to the imposition of quasi-SR for a range of reasons, but that some of its key members have been satisfactorily identified as perpetrators of unlawful acts. In such a scenario, the UNSC could again play a role in determining those individuals' international responsibility.

However, enforcement and implementation problems are true of many facets of international law, including, in some cases, when an injured state attempts to implement SR unilaterally in the context of diplomatic relations. Power politics or the prospect of disrupting a previously established pattern of reciprocal relations between the injured and wrongdoing states might preclude the former from securing meaningful redress against the latter.²⁵¹ Consequently, there might be something inherently attractive about submitting some unresolved questions of international responsibility—be they of an individual or interstate nature—for judicial determination by formal dis-

251. For a compatible argument, see Karl Zemanek, *Does the Prospect of Incurring Responsibility Improve the Observance of International Law?*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER, *supra* note 25, at 125, 129.

pute settlement bodies. Quarrelling parties may find comfort in the process of de-politicizing their dispute through formal adjudication, though not every case is destined (nor suited) for such a fate. Furthermore, even formal dispute settlement by international courts or tribunals may not always yield effective enforcement results.²⁵²

There is an element of jurisdictional parity between disputing states, exemplified by the consensual nature of international dispute settlement (or interstate negotiations). This element of parity may be absent in dispute settlement proceedings concerning the implementation of ICIR, for example in cases before regional HR courts and domestic tribunals. This same parity may also be absent in other means of implementation of ICIR, for example when the UNSC establishes the liability of NSAs and imposes resulting secondary obligations. In such scenarios, the object of liability—that is, an individual or group—may not have consented to the jurisdiction of the decision-making entity (or to its decisional power, more broadly). Here, the individual's or group's inability to consent may be attributable to the fact that the decision-making entity's prescriptions are compulsory, such as when the UNSC hands down binding measures or sanctions. Alternatively, the inability to consent might be explained by the fact that the decision-making entity is a jurisdictional body of a compulsory or general nature which can compel the performance of secondary obligations, such as a domestic court. This scenario stands in sharp contrast to the consent-based jurisdictional nature of interstate dispute settlement. This is not to mention that NSAs do not have standing to appear before many non-criminal international tribunals.

Interestingly, consent to jurisdiction is also typically present in so-called “mixed” disputes between investors and the host states of their investments.²⁵³ This makes the settlement of some ICIR disputes qualitatively

252. On the recent saga surrounding the South China Sea dispute, see, for example, Feng Zhang, *The Paradox at the Heart of the South China Sea Ruling*, FOREIGN POLICY (July 28, 2016), <https://foreignpolicy.com/2016/07/28/can-china-actually-be-benefiting-from-south-china-sea-ruling-paradox-hague-philippines/>; Stefan Talmon, *The South China Sea Arbitration and the Finality of 'Final' Awards*, 8 J. INT'L DISP. SETTLEMENT 388 (2017). Similarly, following Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624 (Nov. 19), Colombia refused to abide by some aspects of the ruling and withdrew from the Pact of Bogotá, leading to a second case instituted by Nicaragua alleging violations of its sovereign rights in its maritime spaces. The Court asserted jurisdiction to hear the merits. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), Preliminary Objections, 2016 I.C.J. Rep. 3 (Mar. 17). It must be stressed, however, that the rate of compliance with state-to-state arbitral awards and ICJ decisions is generally high. See, e.g., Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815 (2007).

253. However, there is arguably no parity between a foreign investor and the host state after the capital is invested or, at least, considerably diminishing bargaining power for the investor “[u]nless . . . both sides appreciate that if negotiations fail, compulsory arbitration will follow.” W. Michael Reisman, *International Investment Arbitration and ADR: Married but Best Living Apart*, 24 ICSID REV. 185, 190–91 (2009) (emphasis in original); see also Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361, 369 (2018). For an earlier, empirically-based assess-

different than more “traditional” international dispute settlement proceedings. Moreover, the notion of enforcement and its relevance take on a different complexion in the context of SR as opposed to ICIR. For instance, determinations of SR have implications beyond available remedies such as reputational costs for the concerned state(s), the availability of countermeasures in apposite cases, and an impact on diplomatic relations, all absent features in the ICIR scenario.²⁵⁴ That said, enforcement and compliance issues might arise across the full spectrum of disputes and implementation models of international responsibility (state-based or individual in both judicial and non-judicial contexts), irrespective of jurisdictional considerations.

In addition, one overarching objective of this account was to explore international individual responsibility models beyond the UN “targeted” (or “smart”) sanctions regime. The aim was also to add to the voluminous *Kadi* literature in a complementary fashion and without fully unpacking all potential HR considerations.²⁵⁵ That said, inspiration will need to be drawn from the UNSC sanctions regime in building an eventual ICIR regime. The UNSC sanctions regime offers some points of rapprochement but also considerable differences. After all, the paramount objective of the “smart” sanctions regime bears reemphasis—namely, to induce individuals to align their behavior with what is required by international law and previous UNSC resolutions.²⁵⁶ Yet, this system is seriously deficient from a due process perspective. Invariably, the question of due process should feature centrally in the development and formulation of a general ICIR regime, especially if the

ment, see Stephen J. Kobrin, *Testing the Bargaining Hypothesis in the Manufacturing Sector in Developing Countries*, 41 INT’L ORG. 609 (1987).

254. There is a complicated relationship between interstate enforcement measures, such as ICJ proceedings and countermeasures, and their potential relevance to inducing restitution and/or compensation for the benefit of individual victims of wrongful acts—an area where relevant practice is scarce. See Randelzhofer & Tomuschat, *supra* note 24; see also CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 11–12 (2005). On the reputational costs of states’ conduct, see generally ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008).

255. The *Kadi* literature primarily centers on two cases handed down by the European Union’s (“EU”) judiciary, which addressed the hierarchy between general principles of EU law and international legal norms. The decisions reviewed the legality of European Commission measures imposing sanctions on individuals who had been listed by the UN Sanctions Committee. See, e.g., Peter Margulies, *Aftermath of an Unwise Decision: The U.N. Terrorist Sanctions Regime After Kadi II*, 6 AMSTERDAM L.F. 51 (2014); KADI ON TRIAL: A MULTIFACETED ANALYSIS OF THE KADI TRIAL (Matej Avbelj et al. eds., 2014); Joris Larik, *The Kadi Saga as a Tale of ‘Strict Observance’ of International Law: Obligations Under the UN Charter, Targeted Sanctions and Judicial Review in the European Union*, 61 NETH. INT’L L. REV. 23 (2014); Francesco Francioni, *The Right of Access to Justice to Challenge the Security Council’s Targeted Sanctions: After-Thoughts on Kadi*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 908 (Ulrich Fastenrath et al. eds., 2011).

256. See PETERS, *supra* note 3, at 94.

UNSC is involved in making determinations of unlawful conduct and implementing international responsibility and its consequences.²⁵⁷

Perhaps the strongest argument in favor of developing a general ICIR regime by engaging international institutions lies in the contributions the UNSC could make in filling a normative, regulatory, and enforcement void. Particularly relevant is the Alien Tort Claims Act (“ATCA”) regime,²⁵⁸ which grants U.S. federal courts jurisdiction over cases in which foreign claimants allege violations of customary international law rules by other individuals or legal persons.²⁵⁹ This model clearly shows that ICIR can theoretically be facilitated and enforced by enlisting the assistance of domestic jurisdictions. This has resulted in both private persons and transnational corporations being sued, often involving criminal offenses at the core whose civil dimensions were dealt with by U.S. courts under ATCA.²⁶⁰ Inherent in the U.S. courts’ treatment of ATCA cases is the notion that individuals and other NSAs bear obligations under international law. As a corollary, the breach of such substantive norms remains guided by international law and presupposes the imposition of international responsibility upon individuals and other NSAs.²⁶¹

In the *Alvarez-Machain* case, the U.S. Supreme Court set out two considerable restrictions on the jurisdiction of U.S. courts under ATCA. In short, in any case, the international law norm that is the object of the suit under ATCA must be specific and universally recognized.²⁶² More recently, a suit was brought under ATCA in *Kiobel v. Royal Dutch Petroleum Co.*, alleging that Royal Dutch Shell and its subsidiaries aided and abetted the Nigerian government in perpetrating serious HR violations. In deciding the case, the Second Circuit Court of Appeals held that “customary international law has steadfastly rejected the notion of corporate liability for interna-

257. In the context of “targeted” sanctions, see generally Bardo Fassbender, *Targeted Sanctions Imposed by the UN Security Council and Due Process Rights*, 3 INT’L ORG. L. REV. 437 (2006); see also ALVAREZ, *supra* note 105, at 109–13; *supra* note 123 and accompanying text.

258. Alien Tort Claims Act, 28 U.S.C. § 1350 (2012); see also *supra* nn. 4, 207, and accompanying text.

259. This regime has generated considerable jurisprudence and settlements. See generally David Wallach, *The Alien Tort Statute and the Limits of Individual Accountability in International Law*, 46 STAN. J. INT’L L. 121 (2010).

260. For instance, in 1995 the Serbian leader Karadžić was ordered to compensate Bosnian claimants to the tune of \$745 million for international crimes perpetrated in Bosnia. The U.S. Court of Appeals stressed that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of the state *or only as private individuals*.” See *Kadic v. Karadžić*, 70 F.3d 232, 239 (2d Cir. 1995) (emphasis added); see also PETERS, *supra* note 3, at 162–64.

261. See, e.g., PETERS, *supra* note 3, at 116 (equating this process with the imposition of “public law” responsibility).

262. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

tional crimes,”²⁶³ Therefore, the Second Circuit said that “insofar as plaintiffs bring claims under the [ATCA] against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs’ claims fall outside the limited jurisdiction provided by the [ATCA].”²⁶⁴ In other words, under this approach, which was endorsed in international jurisprudence, the linchpin of the analysis concerned the responsibility of natural, but not legal, persons. Consequently, courts were more inclined to hold the leaders of business entities accountable for HR violations as opposed to imposing liability upon the enterprises themselves.²⁶⁵

Ultimately, on appeal in *Kiobel*, the U.S. Supreme Court affirmed the Second Circuit Court of Appeals—albeit on different grounds—concluding that ATCA does not grant jurisdiction over extraterritorial claims.²⁶⁶ Thus, this precedent arguably left the question of corporate liability under ATCA open. The more recent *Jesner v. Arab Bank* decision revisited the debate over corporate liability, with the Supreme Court holding that foreign corporations cannot be sued under ATCA.²⁶⁷ However, it is likely that the case failed to resolve the issue of corporate liability of U.S. corporations given that the ruling was limited to foreign corporations. Therefore, this series of precedents creates a space in which the UNSC may play a role in bolstering transnational and international individual responsibility regimes.

Another recent development lending further support to the arguments advanced above lies in the rejection by the European Court of Human Rights (the “ECtHR”) of the notion of universal *civil* jurisdiction.²⁶⁸ An in-

263. *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 120 (2d Cir. 2010).

264. *Id.*

265. See, e.g., PETERS, *supra* note 3, at 163.

266. *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 124–25 (2013). For further discussion about the case, see, for example, Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601 (2013); Julian G. Ku, *Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 AM. J. INT’L L. 841 (2013).

267. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018). However, in recent years, the United States has considerably expanded civil liability for foreign terrorist acts against U.S. nationals under the Justice Against Sponsors of Terrorism Act, espousing a more nationalist approach to ICIR. See generally Stephen J. Schnably, *The Transformation of Human Rights Litigation: The Alien Tort Statute, the Anti-Terrorism Act, and JASTA*, 24 U. MIAMI INT’L & COMP. L. REV. 285 (2017) (arguing that the “near demise” of ATCA, coupled with “the growth of anti-terrorism legislation” in the United States, “represent a turn away from a cosmopolitan vision of building a global legal order, in which all states protect human rights regardless of nationality”).

268. This concept, also referred to as “universal tort jurisdiction,” operates without the need to establish a jurisdictional nexus between the decisional forum and the international law violation. See CEDRIC RYNGAERT, *JURISDICTION IN INTERNATIONAL LAW* 135 (2d ed. 2015); see also Menno T. Kamminga, *Universal Civil Jurisdiction: Is It Legal? Is It Desirable?*, 99 ASIL PROC. 123, 123 (2005) (defining universal civil/tort jurisdiction “as the principle under which civil proceedings may be brought in a domestic court irrespective of the location of the unlawful conduct and irrespective of the nationality of the perpetrator or the victim, on the grounds that the unlawful conduct is a matter of international concern.”); Donald Francis Do-

herently attractive argument might be that the future of such jurisdiction is primarily domestic. This militates in favor of broader involvement of national jurisdictions through concepts such as universal jurisdiction for torts or civil wrongdoing—just like the future of international criminal justice might also be predominantly municipal in implementation and enforcement.²⁶⁹ Despite the potential availability of universal civil jurisdiction,²⁷⁰ the international legal system still has a role to play, possibly an important one. In the *Naït-Liman* case, the ECtHR's Chamber was confronted with an attempt by a refugee to seize a Swiss court with a civil claim for damages resulting from torture allegedly sustained in Tunisia after his efforts to vindicate his rights before Swiss courts were rejected. Amongst relevant issues, the Chamber was called upon to determine whether universal civil jurisdiction constituted a requirement under international law, ultimately holding that it was not following a comparative inquiry. Consequently, the complainant's right of access to a tribunal had not been violated under the European Convention of Human Rights.²⁷¹

On appeal, the Grand Chamber of the ECtHR focused on one key issue for present purposes, namely, whether Switzerland had an obligation under international law to entertain the applicant's civil claim. The Grand Chamber affirmed the Chamber's ruling that states enjoy seemingly unfettered appreciation in taking or declining jurisdiction over civil suits concerning extraterritorial torts,²⁷² even where the unlawful act breaches a *jus cogens* norm. Indeed, the Court investigated whether Switzerland was bound to acknowledge universal civil jurisdiction for torture claims under customary international law or conventional law.²⁷³ When analyzing customary law, the Court observed that, out of the legal systems of the thirty-nine member states studied, only the Netherlands recognizes universal civil jurisdiction.²⁷⁴

novan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142 (2006); Donald Francis Donovan, *Universal Civil Jurisdiction—The Next Frontier?*, 99 ASIL PROC. 117 (2005).

269. For a compatible argument in the counterterrorism field, see Proulx, *supra* note 175 (arguing that ICL may be best pursued through a “transnational network of criminal and civil law”).

270. It should be stressed that the existence of this concept is still highly debated. For the Institute of International Law's recent work on the matter, see Andreas Bucher, *Universal Civil Jurisdiction with Regard to Reparation for International Crimes*, 76 Y.B. INST. INT'L L. 1, 7–37 (2015) (mapping out still emergent domestic practices involving reparations sought by and against individuals and against corporate entities).

271. See *Naït-Liman v. Switzerland*, App. No. 51357/07, Judgment (Eur. Ct. H.R. June 21, 2016). For a critical take on the judgment, see Devika Hovell, *The Authority of Universal Jurisdiction*, 29 EUR. J. INT'L L. 427, 450–53 (2018).

272. See Cedric Ryngaert, Note and Comment, *From Universal Civil Jurisdiction to Forum for Necessity: Reflections on the Judgment of the European Court of Human Rights in Naït-Liman*, 100 RIVISTA DI DIRITTO INTERNAZIONALE 782, 805 (2017).

273. *Naït-Liman v. Switzerland* [GC], App. No. 51357/07, Judgment, ¶¶ 45–66 (Eur. Ct. H.R. Mar. 15, 2018) (reviewing relevant international law sources).

274. *Id.* ¶ 183.

While the Court identified limited legal avenues in Canada and the United States enabling claimants to bring civil actions in the context of criminal proceedings,²⁷⁵ it noted the absence of a crystalized customary norm that would have obligated the Swiss courts to hear the applicant's case (though it underscored that relevant practice was evolving).²⁷⁶

The Court then arrived at a similar conclusion under treaty law. It first observed that the Committee against Torture stressed an expansive interpretation of Article 14 of UNCAT, which presumably covers civil claims alleging acts of torture perpetrated outside the forum's territory.²⁷⁷ That said, the Court found that both the Committee's practice and the *travaux préparatoires* of UNCAT did not ground a legal obligation that Switzerland make its domestic courts available to the applicant.²⁷⁸ The Court was nonetheless cautious to emphasize that its holding did "not call into question the broad consensus within the international community on the existence of a right for victims of acts of torture to obtain appropriate and effective redress,"²⁷⁹ It encouraged states to open up such legal avenues and applauded those that did so.²⁸⁰ Underscoring the "dynamic nature of this area," the Court accepted the possibility that international law might evolve in this field and invited states "to take account in their legal orders of any developments facilitating effective implementation of the right to compensation for acts of torture"²⁸¹

When considered in tandem with recent ATCA jurisprudence, the *Naït-Liman* precedent disappointed HR proponents. This is especially true in the post-*Kiobel* legal landscape, with this line of cases having considerably limited available legal options for extraterritorial civil claims. In fact, these de-

275. *Id.* ¶ 184.

276. *Id.* ¶ 187.

277. *Id.* ¶¶ 188–98; *see also* UNCAT, *supra* note 33; text accompanying *supra* note 33. For one example of domestic implementation of this provision, see Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73, 73 (1992) ("TVPA") (instituting a right of "civil action" in U.S. courts against any individual having committed "torture" or "extrajudicial killing"). For a pre-*Naït-Liman* account arguing that Article 14 of UNCAT requires—and TVPA provides for—universal civil jurisdiction, see Christopher Keith Hall, *The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 EUR. J. INT'L L. 921, 931–937 (2007).

278. *Naït-Liman* [GC], ¶¶ 188–98.

279. *Id.* ¶ 218; *see also id.*, ¶ 97.

280. *Id.*

281. *Id.* ¶ 220. It must be recalled that in a previous judgment, exhibiting more laconic reasoning on this point, the Court concluded that the question whether UNCAT "has given right to universal civil jurisdiction" was "far from settled." *Jones v. United Kingdom*, 2014-I Eur. Ct. H.R. 3, ¶ 208. For a critique of the Chamber's *Naït-Liman* judgment, which still holds true regarding the Grand Chamber's judgment, see Hovell, *supra* note 271, at 450–53. The outcome reached by the Grand Chamber might be contrasted with its earlier assertion that "[e]veryone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal." *See Naït-Liman* [GC], ¶ 113.

velopments and the ECtHR's reasoning might induce states to reject universal civil jurisdiction. It may also affect the relevant *opinio juris* adversely and weaken the *jus cogens* character of the prohibition against torture, as forewarned by the dissenting judges in the Chamber's judgment.²⁸² These developments again demonstrate that, while there is growing consensus that certain unlawful acts carried out by individuals and NSAs are proscribed in international law, the legal avenues to enforce their resulting liability are scarce (at least domestically), and the content of both primary and secondary norms is ill-defined concerning certain would-be obligations. As a result, some victims of internationally wrongful acts might be left without standing to enforce their rights and/or access civil remedies (and an appropriate forum). Therefore, this Article has advocated that we consider turning to international institutions in apposite contexts, particularly the UNSC, to address the normative, regulatory, and enforcement gaps left in the realm of ICIR. While this is by no means an ideal or even consistently reliable solution, there is evidence that the UNSC can play a role in shaping and defining relevant primary norms of behavior binding individuals and NSAs in certain areas. It can also play a role in enforcing those and other existing norms through sanctions and other measures. In so doing, the UNSC already disposes of a rich corpus of international legal tools to draw from, including SR law and the broader framework of international responsibility.

B. *A Return to Familiar but Limited Notions*

Invoking international responsibility's primary-secondary mechanics provides the UNSC with the powerful language (and notions) of attribution, responsibility, reparation, cessation, and return to legality.²⁸³ Moreover, the UNSC can bolster its findings of illegality with sanctions in appropriate cases, should its formulated obligations of cessation and non-repetition fail to generate the desired compliance pull. These UNSC measures can become robust and complementary enforcement mechanisms, which may enlist the support of domestic jurisdictions for more effective implementation.²⁸⁴ Ultimately, the UNSC may decide to turn to a more ambitious model of "institutionalized" reparation for wrongful acts committed by NSAs. For exam-

282. But, for a sympathetic take on the outcome reached by the Chamber, see Ryngaert, *supra* note 272, at 783 (expressing doubt about the existence, legality, or desirability of an international legal rule that would oblige states to acknowledge universal civil jurisdiction).

283. See PETERS, *supra* note 3, at 164–66 (arguing that the "legal possibility of imposing secondary international legal obligations on individuals as well as primary obligations should be welcomed from an abstract perspective in principle. . . . [As it] represents a fair corollary to the progressive unfolding of individual rights and would consolidate the legal status of the individual as a primary subject of international law." But, adopting a more nuanced and practical stance in assessing the usefulness of such approach).

284. See, e.g., NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY (Vera Gowlland-Debbas ed., 2004); Vera Gowlland-Debbas, *The Domestic Implementation of UN Sanctions*, in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 63 (Erika de Wet & André Nollkaemper eds., 2003).

ple, it may do so by setting up an indemnity fund and accompanying commission to handle mass claims, which might be suited to redress large-scale and/or repeated terrorism, along with systematic and massive HR/IHL violations by armed opposition groups within territories under their control.

Yet, we must be cautious not to overstate the UNSC's potential contributions. The enforcement and implementation of individual responsibility remain challenging in many terrorism scenarios. These concerns may be partly assuaged by the adoption of UNSC "targeted" sanctions and arms/trade embargoes. Yet, such measures might fail to acquire the requisite traction to be effective, especially when terrorists operate in fragile or failed states or wield exclusive control over a territorial enclave. Furthermore, a healthy dose of pragmatism is apposite. The UNSC's process is not without its imperfections, and its attribution of individual responsibility may be subject to factual errors. For instance, in 2004, it attributed the Madrid terrorist attacks to Euskadi Ta Askatasuna ("ETA").²⁸⁵ Subsequently, the UNSC's factual determination and related finding of responsibility were proven to be erroneous.²⁸⁶ This precedent exposes the UNSC's blind spots and potential overbreadth in determining questions of international responsibility. It further reinforces the necessity that due process safeguards be carefully considered and built into any general ICIR regime involving that organ as key decisionmaker.

Conversely, the fact that the UNSC's process remains considerably different than that used by courts does not, in and of itself, dispossess the Council of the ability to make "quasi-judicial" determinations or engage in dispute settlement under the UN Charter.²⁸⁷ In fact, despite the call for greater fact-finding on its part in the Manila Declaration on the Peaceful Settlement of International Disputes²⁸⁸ and the wording of Chapter VI of the UN Charter, it would be unrealistic to expect the UNSC to act like a court of

285. S.C. Res. 1530, ¶ 1 (Mar. 11, 2004).

286. See Gowlland-Debbas, *Responsibility and the United Nations Charter*, *supra* note 213, at 129–30; see also Gowlland-Debbas, *supra* note 143, at 124; Thérèse O'Donnell, *Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)*, 17 EUR. J. INT'L L. 945 (2006).

287. See, e.g., ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, *supra* note 126, at 416–24. On the exercise of the UNSC's "quasi-judicial" powers, see generally Oscar Schachter, *The Quasi-Judicial Role of the Security Council and the General Assembly*, 58 AM. J. INT'L L. 960 (1964); PROULX, INSTITUTIONALIZING, *supra* note 98, at 126–36. On the question of due process and UNSC decision-making, see *supra* nn. 123, 257; *infra* note 289.

288. Manila Declaration on the Peaceful Settlement of International Disputes art. 2, ¶ 4(d), U.N. Doc. A/RES/37/10, annex (Nov. 15, 1982) (calling upon states to "[c]onsider making greater use of the fact-finding capacity of the Security Council in accordance with the Charter;"). On the UNSC's fact-finding role, see generally Eduardo Jiménez de Aréchaga, *Le Traitement des Différends Internationaux par le Conseil de Sécurité*, 85 RECUEIL DES COURS 1, 40 (1954).

law, in both process and substance.²⁸⁹ However, that is a far cry from surmising that no due process concerns whatsoever can be accommodated and ultimately incorporated into an eventual general ICIR regime.

On balance, a more robust individual accountability model for terrorism will likely find steadier footing amidst a comprehensive strategy, entailing a network of multi-leveled relationships of responsibility and involving various actors as well as legal *and* political processes. This is precisely the strategy advocated and reaffirmed by the UNSC in its action against Daesh/ISIL, for example, which also features a central role for states and their obligations in the international responsibility calculus.²⁹⁰

After all, in the *Bosnian Genocide Case*, the ICJ moved toward a multi-lateral expectation that several states, “each complying with its obligation to prevent” where a single state’s efforts have fallen short, might produce the desired outcome of preventing genocide.²⁹¹ This rationale is transposable to terrorism prevention and other important present-day transnational security concerns. The security imperatives of a post-9/11 world and individual responsibility mechanisms will be enhanced if many states and other actors work in concert. This is against the backdrop of interactive, concurrently applicable, and sometimes mutually reinforcing legal regimes. In the “targeted sanctions” field, for instance, at least three possible scenarios of “parallelism” can be identified in which UNSC mandates and ICC action can intersect and lead to varying degrees of formal or informal synergy. These situations of “parallelism” might signal that both distinct—but parallel—legal regimes have their source in UNSC action and address different threats but focus on the same individuals; or address the same threat and are imposed simultaneously; or co-exist simultaneously but have a different origin.²⁹²

Looking to the future, many legal challenges abound, not least the question of how the proposed model would accommodate key HR and procedural guarantees (such as due process). While this contribution has focused on some legal tools available to the UNSC in implementing individual respon-

289. *But cf.* Keith Harpher, *Does the United Nations Security Council Have the Competence to Act as a Court and Legislature?*, 27 N.Y.U. J. INT’L L. & POL. 103 (1994) (advocating that inquiries should be pursued to determine whether the UNSC acted appropriately as a court when it exercises seemingly similar functions, including through the adoption of procedural rules to promote due process and regulate the admissibility/authenticity of evidence, affording parties the ability to be heard, preventing interested parties from self-judging their own cases, striking equality of arms amongst litigants, and publishing the UNSC’s reasons for its decisions).

290. *See* Proulx, *An Incomplete Revolution*, *supra* note 98, at 308–11, 338.

291. 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, ¶ 430 (Feb. 26).

292. *See* Larissa van den Herik, *The Individualization of Enforcement in International Law: Exploring the Interplay between United Nations Targeted Sanctions and International Criminal Proceedings*, in *THE PURSUIT OF A BRAVE NEW WORLD IN INTERNATIONAL LAW* 234 (Tijanjana Maluwa et al. eds., 2017).

sibility, thinking more broadly about this topic requires grappling with other challenging and unpleasant questions. For instance, how can we persuade armed opposition groups/terrorist factions that wield territorial control and have set up their own courts and/or civil administrations (for example, Daesh/ISIL or the Taliban) to uphold fundamental IHL and HR standards?²⁹³ Holding an armed opposition group responsible for IHL and HR violations might be the only way to secure the rights of locals where the nonstate group has taken control over a given territory from the territorial state.²⁹⁴ Is partial, patchy, or even rare compliance with relevant legal standards on their part better than none at all?

Setting aside the thorny issue of enforcement, there is little doubt that such nonstate entities are responsible for upholding basic international law protections and could be held legally accountable if they fail to do so.²⁹⁵ While the state-centric nature of contemporary international law might pose obstacles to a more progressive framework to deal with armed opposition groups, there are compelling policy and legal reasons why such actors should be liable to pay reparations for IHL and HR violations.²⁹⁶ How can we make a convincing case to such NSAs regarding the observance of international law? How effective or realistic would persuasion be in such scenarios? Should that be a consideration at all and, if so, what does that tell us about the prospect of developing an ICIR regime? If the struggle over the elaboration of corporate liability frameworks has taught us anything, it is that a softer, less legalistic approach might be the way forward.²⁹⁷ Is that

293. The classical, but perhaps outdated, view was that nonstate armed groups were not legally bound to uphold HR guarantees codified in treaties as opposed to IHL standards. See U.N. Secretary-General, *Rep. to the Commission on Human Rights: Minimum Humanitarian Standards*, U.N. Doc. E/CN.4/1998/87, ¶ 59 (Jan. 5, 1998). There is now some traction for the idea that NSAs, armed opposition groups, and *de facto* regimes should be bound by HR standards. See generally, e.g., KATHARINE FORTIN, *THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW* (2017); Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INT'L REV. RED CROSS 491 (2006); Asbjørn Eide et al., *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards*, 89 AM. J. INT'L L. 215 (1995); Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Actors*, 31 COLUM. HUM. RTS. L. REV. 81 (1999); Michael Schoiswohl, *De Facto Regimes and Human Rights Obligations—The Twilight of Public International Law?*, 6 AUSTRIAN REV. INT'L & EUR. L. 45 (2003).

294. See, e.g., International Law Association Non State Actor Committee Washington Conference, *supra* note 133, at 6; see also Dapo Akande & Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, 92 INT'L L. STUD. 483, 487 n.15 (2016).

295. See, e.g., RESPONSIBILITIES OF THE NON-STATE ACTOR IN ARMED CONFLICT AND THE MARKET PLACE (Noemi Gal-Or et al. eds., 2015).

296. See, e.g., Paloma Blázquez Rodríguez, *Does an Armed Group Have an Obligation to Provide Reparations to its Victims? Construing an Obligation to Provide Reparations for Violations of International Humanitarian Law*, in NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT, *supra* note 8, at 406.

297. See *supra* note 85 and accompanying text. However, it is nonetheless encouraging that the HR Council is attempting to elaborate an international, legally-binding instrument on

middle-ground approach satisfying? Unfortunately, these are only some of the many legal complexities related to the amorphous threats posed by “terrorists” and other subversive NSAs. These queries warrant serious consideration in seeking richer accountability models.

VI. CONCLUSION

There are compelling legal, political, policy, and moral reasons to enhance frameworks for the establishment and enforcement of the legal accountability of individuals and NSAs in international law. A fundamental motivation for this agenda is that wrongful conduct should not go unaddressed. Violations of international legal obligations should not go unsanctioned. An equally principled reason for turning international legal minds to this question is the need to resolve a significant tension between an important objective and an arguably regressive trend.

On one hand, there is an increasing demand—some might argue a necessity—to articulate more robust international responsibility standards to address the subversive acts of individuals and NSAs, ranging from terrorists to transnational corporations. This impetus cuts across a vast range of international law regimes and is evidenced by the gradual recognition that individuals and nonstate groups can assume a broader set of international obligations. The flipside to this reality is that there should be a corresponding increase in their potential liability for wrongdoing. The ILC’s own work has opened the door to this possibility. This proposition is also supported by myriad factors, including the evolving international legal personality of nonstate entities and its implications for international law, the need to identify alternative targets of liability when a territorial state simply cannot be blamed, doctrinal and practical reasons for circumscribing the role and accountability of NSAs on the international plane, etc. On the other hand, considerable obstacles remain in better defining a would-be regime to govern

transnational corporations and other business enterprises with respect to HR. See Human Rights Council, Draft Res. 26/. . . U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014); Human Rights Council, Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014). In fact, the recently leaked “zero draft” of the would-be treaty uses legally-binding language regarding civil liability. See Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporation and Other Business Enterprises (July 16, 2018), at 2–3, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>. But see Ioana Cismas & Sarah Macrory, *The Business and Human Rights Regime Under International Law: Remedy Without Law?*, in NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT, *supra* note 8, at 222 (arguing that, while there is broad agreement that business entities must provide reparation for HR violations, the content of primary norms they must observe is ill-defined and/or absent). Recent scholarly proposals include a call for the creation of an International Court of Civil Justice to handle complex transnational civil disputes to hold multinational corporations liable for causing large-scale harm to persons, their livelihood, and the environment in developing countries. See MAYA STEINITZ, *THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE* (2019).

the international responsibility of individuals and NSAs, chief among them being the lack of definition of relevant primary norms and uncertainty surrounding the mechanics of secondary remedial norms. What is more, recent American and European jurisprudence has called into question the existence of universal civil jurisdiction, which represents a setback for the development of international individual responsibility beyond criminal liability.

Despite this resistance, however, this is a propitious moment for the international community to move forward on ICIR. As demonstrated in this Article, several key building blocks are already in place. The international obligations of individuals and other NSAs can be traced back to several UNSC resolutions and treaties. The elaboration of a general ICIR regime also makes good policy and legal sense for reasons canvassed above. It would not only generate primary normative content but also help better define the application of secondary norms governing breaches of international law authored by individuals and NSAs. Moreover, such a regime would aim to palliate the considerable normative and enforcement gaps created by the abovementioned jurisprudence on universal civil jurisdiction. The regime's would-be conceptual and theoretical foundations are also defensible when framed within the doctrine of international responsibility, broadly understood. As shown above, there is considerable fluidity and malleability in transposing and adapting concepts from international responsibility discourse (including SR norms) to the universe of NSAs. Granted, this exercise is accompanied by a series of caveats, not least the fact that there are important qualitative differences between states and NSAs that must be accounted for in any ICIR regime.

At the end of the day, we are left with some indication—both in political and legal terms, domestically and internationally—that individuals and NSAs should not escape responsibility for their wrongdoing. Few would quarrel with that basic proposition, at least on an abstract level. Yet, in many ways, we are also left with a profoundly deficient international legal system to fulfil that objective, both from normative and institutional standpoints. To many, the UNSC is the deficient institution *par excellence*. There is no debate that it is indeed a profoundly imperfect institution. Nevertheless, the practice and precedents analyzed in this account demonstrate that international individual responsibility can be actuated, but never in a straight line. It is in its nature to take form amidst the interactions occurring between a multiplicity of legal regimes, institutional and non-institutional actors, and legal and political processes.

Within this multi-leveled framework, the UNSC can play a key role in moving the agenda forward. In fact, it already is by legislating international obligations that bind individuals and NSAs in the counterterrorism field and beyond. Several precedents supporting that conclusion have been explored above. The next logical step is to recognize the UNSC's ability to enforce and implement those norms, or other international law duties, against such actors in a way that is reconcilable with the essence of international responsibility. Ample practice to that effect has also been reviewed and analyzed

in the preceding pages. While these developments might seem abhorrent to some international lawyers, they are inescapable facts of international life.

If the broader ideals shared by many remain to fight impunity, instill life into the ICC's Trust Fund for Victims, remedy environmental harm, hold the perpetrators and financiers of terrorism accountable, redress HR and IHL abuses, and so on, then these developments should be welcome. Regional and domestic courts have proven reluctant to perform their share of the heavy-lifting on this front, so the international legal system must fill the void. As demonstrated above, the UNSC already attributes wrongful conduct and assigns responsibility to both states and nonstate entities. It also devises and imposes consequences flowing from its findings of responsibility on those actors, whether in the form of declarations of wrongdoing, sanctions, or other measures. Thus, future efforts would be better spent on defining the parameters of the framework in which the Council can and should play a role in advancing ICIR. Dwelling on its imperfections will not remedy the fact that the appetite for greater accountability on the international scene is not always matched by a correspondingly adequate normative or institutional arsenal. One step in the right direction is recognizing the Council's limited but sometimes important role in both norm creation and enforcement. An equally vital step is to develop robust safeguards and meaningful checks on its powers.