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## International Law of Nuclear Weapons Nonproliferation: Application to Non-State Actors

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# INTERNATIONAL LAW OF NUCLEAR WEAPONS NONPROLIFERATION: APPLICATION TO NON-STATE ACTORS

Imrana Iqbal\*

## ABSTRACT

*International legal responses to the threat of nuclear terrorism by non-state actors have been many but often inconsistent, inadequate, and legally unsound. This Article argues in favor of resorting to successfully-implemented methods of dealing with similar crimes. International law has already expanded from its original statist conceptions and scope to include individuals, such as in international human rights norms and international humanitarian laws. In the latter, in particular, the law has expanded in the context of both international and non-international armed conflict. This Article argues that the advancement of law in these areas can lend much to efforts to bring nuclear terrorism within the scope of International Criminal Court, from whose jurisdiction this crime is currently excluded. This Article also recommends purposefully elevating the prohibition against possession and use of nuclear weapons by non-state actors to jus cogens, making such acts international crimes of the type that do not necessarily require state consent for prosecution by an international tribunal.*

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## I. INTRODUCTION

The concern that terrorists may acquire and use nuclear weapons predates the September 11, 2001 attacks on the United States.<sup>1</sup> The disquiet that terrorists' activities are growing deadlier with time and may culminate in a nuclear terroristic catastrophe deepened with the terrorist violence of September 11, 2001.<sup>2</sup> The fact that the international legal regime of nuclear nonproliferation, founded on the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT" or "Treaty"),<sup>3</sup> is inadequate and provides no reliable protection against the risk of nuclear terrorism by non-State actors has hung over humanity's perceptual horizon even longer.<sup>4</sup>

The preamble of the Treaty bespeaks fear of nuclear wars and prospects of societal benefits of atomic energy as the impetus for establishment of the regime.<sup>5</sup> Accordingly, the Treaty constrains non-nuclear states against acquisition and control of nuclear weapons technology but promises them access to the technology for peaceful purposes.<sup>6</sup> The NPT did not, however, succeed in freeing the world from the danger of nuclear weapons proliferation or create

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<sup>1</sup> SARA DALY ET AL., *AUM SHINRIKYO, AL QAEDA, AND THE KINSHASA REACTOR: IMPLICATIONS OF THREE CASE STUDIES FOR COMBATING NUCLEAR TERRORISM*, vii (2005).

<sup>2</sup> CHARLES D. FERGUSON & WILLIAM C. POTTER, *THE FOUR FACES OF NUCLEAR TERRORISM* 14 (2005).

<sup>3</sup> Treaty on the Non-proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161 [hereinafter NPT].

<sup>4</sup> Joseph F. Pilat, *Dealing with Proliferation and Terrorism Involving WMD*, in *COMBATING WEAPONS OF MASS DESTRUCTION: THE FUTURE OF INTERNATIONAL NONPROLIFERATION POLICY* 9, 16–17 (Nathan E. Busch & Daniel H. Joyner eds., 2009).

<sup>5</sup> NPT, *supra* note 3, pmbl. (establishing a global regime by dividing states into two categories: nuclear-weapon states, which may possess nuclear weapons; and nonnuclear-weapon states, which undertake not to manufacture or acquire nuclear weapons).

<sup>6</sup> NPT, *supra* note 3. The NPT framework forbids nuclear states to transfer weapons technology, *id.* art. I, and non-nuclear states to manufacture nuclear weapons and explosive devices. *Id.* art. II. It encourages nations to nuclear technology for peaceful uses, *id.* art. IV, but it also requires non-nuclear weapons states to submit to the safeguards procedures of the International Atomic Energy Agency against its diversion for production of nuclear weapons, *id.* art. III.

a perception in the fairness of its provisions.<sup>7</sup> In the post-Cold War world, non-nuclear weapon states have particularly clamored for equality in the “bargain.”<sup>8</sup> Article VI of the NPT, the disarmament provision, has particularly been a contentious issue.<sup>9</sup> Under article VI, the NPT binds “[e]ach of the Parties to the Treaty” to begin good faith negotiations to end nuclear arms race and effectuate nuclear disarmament.<sup>10</sup> The fact that nuclear weapons states have largely ignored article VI has considerably weakened the perception of fairness of the bargain that the NPT sought to strike between nuclear weapons states, on the one hand, and non-nuclear weapons states, on the other. Non-state actors do not figure in the NPT-based arrangement.<sup>11</sup>

The question, then, arises as to whether, generally speaking, non-state actors figure in international law—a question of enduring interest and discussion among international law scholars. More narrowly-focused questions are whether international law can

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<sup>7</sup> See Jaswant Singh, *Against Nuclear Apartheid*, 77 FOREIGN AFF. 41, 48 (1998) (defending India’s decision to stay outside the international nuclear nonproliferation regime, denouncing it as a system of “nuclear apartheid”).

<sup>8</sup> Nina Tannenwald, *Justice and Fairness in the Nuclear Nonproliferation Regime*, 27 ETHICS & INT’L AFF. 299, 302 (2013).

<sup>9</sup> *Id.* (noting that the nuclear weapon states, particularly the United States, refused to acknowledge in the 2005 Review Conference for the NPT previously agreed-upon disarmament obligations); see also Wilfred Wan, *Why the NPT Review Conference Outcome Matters*, U.N. U. CTR. FOR POL’Y RES. (Mar. 10, 2015), <https://cpr.unu.edu/why-the-npt-review-conference-outcome-matters.html>. Wilfred pointed out that the failure of the parties to the Treaty to reach a consensus on disarmament weakens non-nuclear weapon states’ commitment to their side of the bargain. *Id.*

<sup>10</sup> It is unclear why this article is directed toward all parties when, clearly, only a few states possessed nuclear weapons at that time. In contrast, article I is specifically directed toward nuclear weapons states, and the two subsequent articles are specifically directed toward non-nuclear weapons states. See NPT, *supra* note 3, arts. I–III.

<sup>11</sup> It will be short-sighted to state, however, that the NPT does not at all limit non-State actors’ opportunities to acquire, build, or transport nuclear weapons or materials. It does so, indirectly, by delimiting states’ nuclear activities and by seeking to make diversion of state-controlled nuclear materials detectable and punishable. It does so also by seeking to crystallize the world consensus that nuclear weapons must not be allowed to proliferate. The NPT, however, does not directly reach non-State actors.

constrain non-state actors' activities that can potentially lead to nuclear terrorism and whether international law is capable of punishing non-state actors if they commit acts of nuclear terrorism. These are central questions with which this Article deals.

Following the genocides in Rwanda and Bosnia in the late 1990s and the generally-perceived failure of the United Nations to meet the post-Cold War challenges of containing intensified interstate hostilities, scholars both questioned the value of the UN-founded international legal system in creating abiding rules and norms and realized the ever-greater need for international laws.<sup>12</sup> Following the September 11, 2001 attacks, scholars expressed dismay that the terrorists could not be prosecuted under international law and exhorted in favor of deliberation on holding individual terrorists culpable under international law through collective international legal action.<sup>13</sup>

International law has been continually evolving to respond to new, emerging realities.<sup>14</sup> Over time, the international legal regime's primary principles of equality and justice—laid out in the Charter of the United Nations<sup>15</sup>—have come to be encoded in various multilateral treaties concluded under the auspices of the

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<sup>12</sup> Charlotte Ku & Paul F. Diehl, *International Law as Operating and Normative Systems: An Overview*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 1 (Charlotte Ku & Paul F. Diehl eds., 2nd ed. 2003); see also Harold Hongju Koh, *Why do Nations Obey International Law?*, YALE L.J. 2599, 2600–01, 2659 (1997) (Faculty Scholarship Series) (concluding that the processes of international law propel a “normative and constitutive dynamic” whereby nations interpret global norms—incorporating them into national laws—and re-shape national interests and national identities); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 25 (1995) (arguing treaty regimes unfold a dynamic of compliance through “an iterative process of discourse among the parties, the treaty organization, and the wider public”).

<sup>13</sup> Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 993–94, 1001 (2001).

<sup>14</sup> Ku & Diehl, *supra* note 12, at 2 (“International organizations, nongovernmental organizations (NGOs), multinational corporations, and even private individuals have come to play an increasing role in international relations, and accordingly international legal rules have evolved to engage these new actors.”).

<sup>15</sup> U.N. Charter pmbl., ¶ 1.

United Nations. Of particular interest to this Article are the treaties that enshrine humanitarian laws, such as the Geneva Treaties and their Additional Protocols. Those laws, applicable to state *and* non-state actors, in international *and* non-international armed conflicts, are legal representation of norms that the U.N. principles helped to emerge.<sup>16</sup> This Article postulates that international law is capable of advancing the same values in the area of proliferation and use of nuclear weapons and explosive devices by non-state actors. Those values can spur further evolution of international law, expanding it to bring nuclear terrorism within the jurisdiction of international law, either under the international humanitarian laws or international laws of nuclear non-proliferation. While gradual widening of the scope of international law is patently discernable, this Article proposes the direction of that change. The proposed modification of international law comports with a “*normative consensus*”<sup>17</sup> emerging with regard to possession and use of nuclear weapons.

## II. INTERNATIONAL LAWS OF NUCLEAR PROLIFERATION

### A. *International Legal Regime of Nuclear Nonproliferation*

Soon after the first use of nuclear weapons by the United States against Japan, international community formed international law rules to prevent nuclear weapons proliferation among states. The foundational structure for the international legal regime of nuclear non-proliferation comprises the NPT and its supporting organizational arrangement of International Atomic Energy Agency (“IAEA”) for monitoring compliance of NPT member states with NPT’s provisions.

The NPT applies directly only to states. It extracts two basic promises from member states: (1) that nuclear weapons states will

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<sup>16</sup> For the purposes of this Article, I adopt the Ku and Diehl’s argument that some normative elements of international law have a “legally binding character.” Ku & Diehl, *supra* note 12, at 12. Their broader postulation is that, in international law, some underlying values direct the emergence of norms and that some norms shape behaviors of states and other actors—as opposed to other norms that might exist in state interactions out of considerations of comity. *Id.*

<sup>17</sup> Ku & Diehl, *supra* note 12, at 2 (emphasis in original).

not help non-nuclear weapon states acquire nuclear weapons<sup>18</sup> and (2) that non-nuclear weapon states will not acquire nuclear weapons and will accept the International Atomic Energy Agency (“IAEA”) safeguards to ensure that their nuclear activities are undertaken only for peaceful purposes.<sup>19</sup> The NPT, however, acknowledges nations’ right to use nuclear technology for peaceful purposes and promises that countries possessing nuclear technology will share the technology with others for peaceful uses.<sup>20</sup> Further, the NPT requires that members shall strive toward cessation of nuclear arms race and eventual nuclear disarmament.<sup>21</sup>

As Sievert noted, the NPT struck a “bargain” wherein the signatory non-nuclear weapon nations were promised access to nuclear energy for peaceful purposes in return for a promise that they would desist from manufacturing nuclear *weapons* or transferring nuclear weapons-related materials and technologies.<sup>22</sup> As part of the bargain, the nuclear-weapons states promised to begin

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<sup>18</sup> NPT, *supra* note 3, art. I. (“Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.”).

<sup>19</sup> *Id.* art. II (“Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.”).

<sup>20</sup> *Id.* art. IV, ¶ 1 (“Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.”).

<sup>21</sup> *Id.* art. VI (“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”).

<sup>22</sup> Ronald J. Sievert, *Working Toward a Legally Enforceable Nuclear Non-Proliferation Regime*, 34 *FORDHAM INT’L L.J.* 93, 93 (2010).



good faith negotiations on measures to stop the ongoing nuclear arms race and, over time, achieve nuclear disarmament.<sup>23</sup> The NPT required, under Article III, non-nuclear weapons signatory states to submit to the IAEA inspection and verification regime to assure the international community that they were not diverting nuclear materials and technologies for belligerent purposes. The NPT-based regime was amended with the Additional Protocol in 1977 to supplement the existing IAEA safeguards system. The objective of the Additional Protocol was to tighten regulations against countries that, with access to nuclear materials, knowledge, and technologies that the NPT membership granted, could surrender to temptations to develop nuclear weapons.

This whole NPT-based arrangement applied to consenting states that voluntarily agreed to be bound by it. The legal rules of the NPT-based regime of nuclear nonproliferation have had no competence for controlling non-state actors' activities. Thus, in the context of possible nuclear terrorism, NPT-based international laws of nuclear nonproliferation are irrelevant, except to the extent that they seek to control states' nuclear behaviors, such as transference of nuclear materials, expertise, and know-how in ways that create risk of nuclear weapons falling into terrorists' hands.

*B. Perceived Effectiveness of International Legal Regime for Nuclear Weapons Nonproliferation*

The U.N. Charter does not mention "proliferation," as the issue did not exist at the time the document was written. It mentions, however, "disarmament," in articles 11, 26, and 47. In article 11(1) disarmament and regulation of armament appear as principles, among others, that signatory nations are required to follow and cooperate upon for maintenance of international peace and security. Article 26(1) holds the Security Council responsible, with assistance from the Military Staff Committee, for planning a system of regulating disarmament. Article 47(1) enjoins the Military Staff Committee to advise and assist the Security Council on matters related to regulation and possible disarmament.

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<sup>23</sup> *Id.* at 93–94.

While under the Covenants of the League of Nations, disarmament had meant absence of arms,<sup>24</sup> under the U.N. Charter, it came to mean arms control under international law as, by then, experience had taught that maintenance of a certain level of arsenal was necessary.<sup>25</sup>

Soon after the writing of the U.N. Charter, the issue of nuclear weapons proliferation surfaced, but the Charter made no distinction between conventional and non-conventional weapons. Non-proliferation issues, therefore, fell under the general category of issues regarding arms control.<sup>26</sup>

The main weakness of international laws, including provisions of the Charter of the United Nations, and the one which renders these laws ineffectual against non-state actors, has been traditionally regarded as their state-centric character.<sup>27</sup> For that

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<sup>24</sup> Andrew Webster, *The Transnational Dream: Politicians, Diplomats and Soldiers in the League of Nations' Pursuit of International Disarmament, 1920–1938*, 14 CONTEMP. EUR. HIST. 493, 493 (2005).

<sup>25</sup> Daniel H. Joyner, *Non-proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council*, 20 LEIDEN J. INT'L L. 489, 491 (2007).

<sup>26</sup> *Id.*

<sup>27</sup> Since early in the development of international law, scholars have pointed out that the effectiveness of international law lies not in its power of enforcement of laws but in its influence in regulating international relations and struggle for power. Unlike a national legal system, where the government exercises coercive powers over its subjects, international law lacks enforceability due to the consent requirement for its enforcement measures, its decentralized character, the imprecise nature of its obligations, the varied interpretations of law that nations are able to construe to suit their individual interests, and the multiple ways in which nations can implement the law to fit their preferences and purposes. It follows that an individual perpetrator of a crime like nuclear terrorism can be punished by the state of which the individual is subject: international law does not directly reach the individual—at least not as yet. See HANS J. MORGENTHAU ET AL., *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 293–327 (7th ed. 1978); see also Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 419–420, 441 (1983) (discerning in the last quarter of the twentieth century, a shift in the axis of general international law from states to the community of states for directing expansion of binding international legal rules). Bederman wrote in the early twenty-first century that the international legal order is still state-centered. DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 50 (2002); Ku and Diehl, *supra* note 12, at 2 (noting that the scope of international law has expanded to include international

reason, with its focus on states, the NPT does not represent the dominant legal and political approach when significance of non-state actors striving for dominance with nuclear weapons has increased.<sup>28</sup> Former United States President Barack Obama conveyed this sense to the world in his 2009 speech in Prague, Czech Republic, in which he all but conceded to the failure of the global non-proliferation regime in the new context, noting “[t]errorists are determined to buy, build or steal [nuclear weapons]. Our efforts to contain these dangers are centered on a global non-proliferation regime, but as more people and nations break the rules, we could reach the point where the center cannot hold.”<sup>29</sup>

In our times, there exist ongoing concerns regarding nuclear terrorism.<sup>30</sup> With little confidence that the international legal regime

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organizations, nongovernmental organizations (NGOs), multinational corporations, and even private individuals). Not many international legal scholars would yet say, though, that individuals are direct subjects of international law.

<sup>28</sup> See David P. Fidler, *International Law and Weapons of Mass Destruction: End of the Arms Control Approach?*, 14 DUKE J. COMP. & INT'L L. 39, 64 (2004) (arguing that the state-centric focus in the WMD policies are anachronistic with rise of the threat of WMD terrorism).

<sup>29</sup> Barack Obama, Remarks by President Barack Obama in Prague (Apr. 5, 2009) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-prague-delivered>) (indicating a conviction that the existing global non-proliferation system is inadequate to meet the threat of nuclear terrorism).

<sup>30</sup> The Washington Post, *Nuclear Terrorism FAQ*, HARV. KENNEDY SCH. FOR SCI. & INT'L AFF. BELFER CTR. (Sept. 26, 2007), <https://www.belfercenter.org/publication/nuclear-terrorism-faq>. The Harvard Kennedy School's Belfer Center finds it plausible that terrorists can acquire nuclear weapons and commit nuclear terrorism: “Unfortunately, terrorist use of a nuclear bomb is a very real danger . . . . Published estimates of the chance that terrorists will detonate a nuclear bomb in a U.S. city over the next ten years range from 1 percent to 50 percent. In a 2005 poll of international security experts taken by Senator Richard Lugar (R-Ind.), the median estimate of the chance of a nuclear attack in the next ten years was 29 percent—and a strong majority believed that it was more likely that terrorists would launch a nuclear attack than that a state would. Given the horrifying consequences of such an attack, even a 1 percent chance would be enough to call for rapid action to reduce the risk.” *Id.*; see also William C. Potter, *The NPT and the Sources of Nuclear Restraint*, 2 AM. ACAD. ARTS & SCI. 68, 81 (2010) (arguing that the Treaty's inattentiveness to non-State actors who have risen either as suppliers or potential end-users of nuclear

of nuclear nonproliferation, based on the NPT and its complementary verification regime under the IAEA, can reach non-state actors,<sup>31</sup> many scholars of nuclear terrorism express dismay: they are certain that terrorists will seek and use nuclear weapons to terrorize without impediment from international law. Albright and Hinderstein, for instance, argued that the inability of the global nuclear nonproliferation regime, including the NPT-based system and the system of international export controls, to detect private individuals' and groups' clandestine nuclear activities—such as those of the A. Q. Khan network, which violated global nonproliferation objectives by large scale black market trading of nuclear technologies and material around the world—attests to inadequacy of the system.<sup>32</sup> These scholars argue that international legal tools are fraught with gaps that make nuclear security precarious, with the possibility that terrorists may gain ability to acquire and use nuclear weapons.<sup>33</sup> With heightening perception of the possibility of nuclear terrorism, skeptics doubted whether the international legal system of nuclear nonproliferation could survive the prevailing conditions of the twenty-first century.<sup>34</sup> When scholars, such as Graham Allison, listed ways of preventing possible

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technology, materials, and weapons is one critical challenge that the NPT faces and which may cause the NPT-based regime's demise).

<sup>31</sup> Gilles Arbellot du Repaire, *The Nuclear Weapon Non-Proliferation Treaty and Terrorism: The Consequences of 11 September 2001 on the Treaty Review Process*, 71 NUCLEAR L. BULL. 15, 17 (2003).

<sup>32</sup> David Albright & Corey Hinderstein, *Unraveling the A. Q. Khan and Future Proliferation Networks*, 28 WASH. Q. 111, 111 (2005).

<sup>33</sup> *Id.* at 111, 113.

<sup>34</sup> MITCHELL B. REISS, COMBATING WEAPONS OF MASS DESTRUCTION: THE FUTURE OF INTERNATIONAL NONPROLIFERATION POLICY ix–xv (Nathan Busch & Daniel H. Joyner eds., 2009) (noting the following current conditions that substantiate the doubt regarding efficacy of the NPT in the 21<sup>st</sup> century: “ongoing political and technical hurdles to corralling and safeguarding the nuclear materials and weapons of the former Soviet Union; concerns over the safety and security of Pakistan's nuclear arsenal; anxieties over the spread of increasingly sophisticated, dual-use biotechnology capabilities; spread of medium- and long-range missiles around the world; fears over the possible acquisition of nuclear weapons or radioactive materials by terrorist groups; and variegated challenges to the Nuclear Nonproliferation Treaty (NPT), International Atomic Energy Agency (IAEA) inspections system, and regional security by the nuclear ambitions of North Korea and Iran”).

nuclear terrorism attempts, they did not take into account the NPT-based international legal regime.<sup>35</sup> The NPT-based system was not designed to deal with subnational terrorism and it does not.

*C. International Attempts to Prevent Nuclear Terrorism Through Other Legal Measures*

With the rise of fear of nuclear terrorism, particularly after the 9/11 attacks on the United States, the international community scrambled to develop other measures to hinder possible attempts by non-state actors to acquire and use nuclear weapons.<sup>36</sup> The international community has sought to close gaps in the current international nuclear nonproliferation laws through various unilateral and multilateral measures, initiatives, and proposals; the growing trend is to establish remedial measures and standards outside the NPT-based nuclear nonproliferation regime.<sup>37</sup>

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<sup>35</sup> See Graham Allison, *How to Stop Nuclear Terror*, 83 FOREIGN AFF. 64, 68–74 (2004). Allison concurs with President Bush's characterization of nuclear terror as the "defining threat the [United States now] face[s]." *Id.* at 64. The scholar proposes a national security strategy "based on the 'Three No's': no loose nukes, no nascent nukes, and no new nuclear states." *Id.* at 65. It is clear that neither the politician, President Bush, nor the scholar, Graham, considered international legal remedies to address the possibility of nuclear terrorism. See also MITCHELL B. REISS, COMBATING WEAPONS OF MASS DESTRUCTION: THE FUTURE OF INTERNATIONAL NONPROLIFERATION POLICY 1 (Nathan Busch & Daniel H. Joyner eds., 2009) (pointing out that the dominant method of preventing nuclear terrorism is state control of sensitive materials through national and international political and legal frameworks). States have, clearly, not considered remedies founded on the NPT-based international legal system to prevent the feared nuclear terrorism.

<sup>36</sup> Robert Litwak, *Preventing a Nuclear 9/11: State-Based Strategies to Deter Non-State Threats*, LAWFARE (July 30, 2017), <https://www.lawfareblog.com/preventing-nuclear-911-state-based-strategies-deter-non-state-threats>. Litwak writes that, following 9/11, the threats of nuclear terrorism led to re-consideration of the two classical deterrence strategies—deterrence by punishment and deterrence by denial. *Id.* The former entails punitive responses, and the latter seeks to block acquisition of means to conduct terrorism. Following 9/11, state cooperation emerged as a new, dominant deterrence strategy instead.

<sup>37</sup> See Saira Bano & Srinu Sitaraman, *The Nuclear Security Regime and Nuclear Terror*, THE DIPLOMAT (May 7, 2016),

#### D. Multilateral Efforts

The post-Cold War fears of Weapons of Mass Destruction (“WMD”) terrorism led the United Nations General Assembly to establish an *ad hoc* committee with the mandate “to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism[.]”<sup>38</sup> The *ad hoc* committee’s work resulted in conclusion of three treaties under the auspices of the U.N. General Assembly: the International Convention on the Suppression of Terrorist Bombings (adopted in 1997 and entered into force in 2001),<sup>39</sup> the International Convention for the Suppression of Financing of Terrorism (adopted in 1999 and entered into force in 2002);<sup>40</sup> and the International Convention on the Suppression of Acts of Nuclear Terrorism (adopted in 2005 and entered into force in 2007).<sup>41</sup> The preamble of the International Convention on the Suppression of Acts of Nuclear Terrorism, specifically states that “acts of nuclear terrorism may result in the gravest consequences and may pose a threat to international peace and security . . . [and] that existing multilateral legal provisions do not adequately address those attacks[.]”<sup>42</sup>

After the September 11, 2001 terrorist attacks on the United States, a series of multilateral state efforts emerged to address the heightened fear of nuclear terrorism including:

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<https://thediplomat.com/2016/05/is-the-nuclear-security-regime-doing-enough-to-stop-nuclear-terror/>.

<sup>38</sup> G.A. Res. 51/210, ¶ 9 (Dec. 17, 1996).

<sup>39</sup> G.A. Res. 52/164, annex (Dec. 15, 1997); International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, 2149 U.N.T.S. 259 (entered into force May 23, 2001).

<sup>40</sup> G.A. Res. 54/109 (Dec. 9, 1999); International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002).

<sup>41</sup> G.A. Res. 59/290 (Apr. 13, 2005); International Convention for the Suppression of Acts of Nuclear Terrorism, Sept. 14, 2005, 2245 U.N.T.S. 89 (entered into force July 7, 2007).

<sup>42</sup> *Id.* pmbl.

- IAEA's Plan of Activities outlined in GOV/2002/10 to prevent nuclear terrorism: In 2002, the Board of Governors of the IAEA approved a three-year Plan of Activities concerning IAEA's nuclear security activities, such as those related to prevent theft of nuclear weapons or other nuclear weapons-related materials and attacks on nuclear facilities. The Agency acknowledged, however, that the primary responsibility for the protection of nuclear weapons and materials lay with states and that the Agency's assistance is circumscribed by scope permitted by each state;<sup>43</sup>
- The G8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction, 2002: The Partnership sought to raise and spend fund on activities to support non-proliferation of nuclear weapons;<sup>44</sup>
- Amendment to the 1980 Convention on the Physical Protection of Nuclear Materials: Among other things, the Convention created expanded duties for states to secure nuclear materials in storage and during transit and to criminalize sabotage against civilian nuclear facilities (2005).<sup>45</sup>

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<sup>43</sup> Int'l Atomic Energy Agency [IAEA], *Nuclear Security—Measures to Protect Against Nuclear Terrorism*, IAEA Doc. GOV/2004/50-GC(48)/6 (Aug. 11, 2004).

<sup>44</sup> *Global Partnership Against the Spread of Weapons and Materials of Mass Destruction ("10 Plus 10 Over 10 Program")*, NTI, <https://www.nti.org/learn/treaties-and-regimes/global-partnership-against-spread-weapons-and-materials-mass-destruction-10-plus-10-over-10-program/> (last visited Dec. 25, 2018).

<sup>45</sup> Int'l Atomic Energy Agency [IAEA], *Nuclear Security—Measures to Protect Against Nuclear Terrorism: Amendment to the Convention on the Physical Protection of Nuclear Material*, IAEA Doc. GOV/INF/2005/10-GC(49)/INF/6 (Sept. 6, 2005); *see also* Int'l Atomic Energy Agency [IAEA], *Amendment to the Convention on the Physical Protection of Nuclear Material*, in IAEA International Law Series No. 2 (2006) (establishing legally-binding measures for the prevention, detection, and punishment of offenses relating to nuclear material). The 2005 amendment sought to strengthen its provisions for protecting nuclear facilities and materials being used, stored, or transported for peaceful domestic purposes. The added article 2A 1(b) of the amendment calls on

In the post-9/11 times, multilateral efforts accelerated particularly rapidly following President Obama's speech in 2009 at Prague, in which the U.S. President declared nuclear terrorism as "the most immediate and extreme threat to global security."<sup>46</sup> The speech called on states to set new standards and cooperate in new partnerships to protect nuclear materials.<sup>47</sup> However, the standards that emerged are general and lack enforceability.<sup>48</sup>

Since President Obama's 2009 Prague speech, there have been four Nuclear Security Summits. The Summits sought to secure nuclear materials, including stockpiles of highly enriched uranium ("HEU") and plutonium, in several countries and to increase border, airports, and ports security through use of sophisticated technology and international cooperative efforts.<sup>49</sup> The various international treaties, organizations, and initiatives that emerged as a result of the Summits, constituting the current international security regime, rely on voluntary engagement of participating countries.<sup>50</sup> These treaties require states to judicially and logistically cooperate with one another to prevent terrorism and to punish terrorists. For instance, the International Convention for the Suppression of Acts of Nuclear Terrorism criminalizes nuclear terrorism under domestic laws of state parties and through promotion of inter-state police and judicial cooperation for investigating and punishing individuals' acts of intentional and unlawful possession and use of nuclear device and radiological materials to threaten or harm other persons.<sup>51</sup>

In the wake of the discovery of the A. Q. Khan's illicit nuclear proliferation network, former U.S. President George Bush's Proliferation Security Initiative ("PSI") is another testimony to lack of confidence in the existing system. The PSI is a U.S.-led

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states to expand the scope of inter-state cooperation on measures to recover stolen or smuggled nuclear material, *inter alia*.

<sup>46</sup> Obama, *supra* note 29.

<sup>47</sup> *Id.*

<sup>48</sup> George Bunn, *Enforcing International Standards: Protecting Nuclear Materials from Terrorists Post-9/11*, 37 ARMS CONTROL TODAY (Jan./Feb. 2007).

<sup>49</sup> Bano & Sitaraman, *supra* note 37.

<sup>50</sup> *Id.*

<sup>51</sup> See International Convention for the Suppression of Acts of Nuclear Terrorism, *supra* note 41, arts. 2, 6, 14.



international effort to interdict WMD-related shipments and stop proliferation-related financing. A coalition of eleven states took matters in their hands—so to speak—in self-defense through the multilateral cooperation initiative of PSI to prevent terrorists from acquiring nuclear weapons or their materials: the PSI prevents sensitive shipments to suspected destinations. The PSI is

a regime . . . designed for a new era, recognizing that proliferation threats today are different than those in the decades when the Nuclear Non-Proliferation Treaty (NPT) was negotiated and supplier regimes such as the Nuclear Suppliers Group (NSG) and the Australia Group were established.<sup>52</sup>

In designing the tool of interdiction to respond to the challenge of nuclear weapons proliferation, the drafters of the Statement of Interdiction Principles claimed to have built the PSI upon existing treaties and regimes and under Security Council's authority to address situations that threaten world peace and security, *i.e.*, under general international law.<sup>53</sup>

Measures devised by multilateral treaties remain of uncertain kinship with international law. The Vienna Convention on the Law of Treaties ("VCLT"), which codified the pre-existing general law on the subject to treaties, states in article 26—entitled *Pacta Sunt Servanda* ("agreements must be kept"): "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>54</sup> As such, treaties do not create obligations on non-parties. Under this view of treaties, scholars favor positivist construction of international law rules, stating that "[s]tate consent

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<sup>52</sup> Andrew C. Winner, *The Proliferation Security Initiative: The New Face of Interdiction*, 28 WASH. Q. 129, 130 (2005).

<sup>53</sup> *Fact Sheet: Statement of Interdiction Principles*, U.S. DEP'T OF STATE, <https://www.state.gov/t/isn/c27726.htm> (last visited Dec. 25, 2018).

<sup>54</sup> Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

is the foundation of international law. The principle that law is binding on a state only by its consent remains an axiom of the political system, an implication of State autonomy.”<sup>55</sup> International law, according to this viewpoint, emerged for states by their consent. This viewpoint leaves non-state actors, lacking competence to consent to formation and implementation of international laws, outside the pale of international law. The treaties mentioned in this section are indirect attempts to hold non-state actors, specifically, possible nuclear terrorists, responsible and culpable under international law.

#### *E. U.N. Security Council Resolutions*

Alongside multilateral treaties, summits, and other related inter-country activities, often sponsored by the United Nations system, the Security Council also passed some resolutions with the objective to prevent nuclear terrorism. In the post-Cold War times, most Security Council resolutions sought to respond to specific situations and to direct action toward specific countries for the purpose of maintaining international peace and security.<sup>56</sup> Two resolutions, Resolution 1373 and Resolution 1540, however, purported to legally bind nations to tasks related to anti-terrorism.

Resolution 1373, passed on 28 September 2001, under Chapter VII of the U.N. Charter, responded to the September 2001 terrorist attacks on the United States, affirming that “such acts, like any act of international terrorism, constitute a threat to international

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<sup>55</sup> Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKLEY J. INT’L L. 137, 141 n.14 (2005) (quoting Louis Henkin, *General Course on Public International Law*, in IV RECUEIL DES COURS 46 (1989)).

<sup>56</sup> Joyner, *supra* note 25, at 506 (“[I]n each case the Council acted in response to a situation that had arisen in international relations.”); *see, e.g.*, S.C. Res. 1696, ¶ 2 (July 31, 2006) (demanding that Iran cease uranium enrichment activities by a deadline); S.C. Res. 687 (addressing Iraq’s alleged possession and threatened use of chemical and biological weapons); S.C. Res. 678, ¶ 2 (Nov. 29, 1990) (authorizing U.N. member states to use military force to expel Iraqi forces from Kuwait. There had been other Resolutions also with regard to other places, such as the Balkans, Haiti, Somalia, Rwanda, the Democratic Republic of the Congo, Afghanistan, Libya, and Iraq. Those resolutions undertook enforcement action under the existing international law.

peace and security.”<sup>57</sup> The Resolution characterizes the attacks as an “act of international terrorism” and calls on states to work together toward prevention of such acts in the future by denying access to funding and any other form of active or passive support to terrorists in their pursuit of weapons of mass destruction and by developing a system of border controls and early warning, among other measures.

Later, the Security Council Resolution 1540 unanimously passed on April 28, 2004, shortly after the discovery of the A. Q. Khan nuclear materials smuggling network.<sup>58</sup> The Resolution expresses concern that non-state actors “may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery” or engage in “illicit trafficking.”<sup>59</sup> In expressly relating Resolution 1540 to non-state actors, the Security Council, interestingly, refers to those non-state actors that the Security Council Resolution 1373 had recognized, the ones involved in the September 11, 2001, terrorist attacks on the United States.

Resolution 1540 requires extensive commitments from the U.N. member states. The Resolution welcomes multilateral efforts to deal with the problem of proliferation of weapons of mass destruction in the context of non-state actors. It exhorts states to cooperate in dealing with the threat of WMD terrorism emanating from non-state actors, forbidding states to support, directly or indirectly, private actors. It calls on states to “develop and maintain appropriate effective physical protection measures”<sup>60</sup> to protect nuclear materials and facilities; to enact and enforce national laws to prevent the proliferation of WMD to non-state actors; and “[t]o promote the universal adoption and full implementation, and, where necessary, strengthening of multilateral treaties to which they are

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<sup>57</sup> S.C. Res. 1373, pmbl. (Sept. 28, 2001).

<sup>58</sup> S.C. Res. 1540 (Apr. 28, 2004); *see also Nuclear scientist asks forgiveness*, THE GUARDIAN (Feb. 4, 2004, 9:07 AM), [https://www.theguardian.com/world/2004/feb/04/pakistan?INTCMP=ILCNETT\\_XT3487](https://www.theguardian.com/world/2004/feb/04/pakistan?INTCMP=ILCNETT_XT3487).

<sup>59</sup> S.C. Res. 1540, *supra* note 58, pmbl.

<sup>60</sup> *Id.* ¶ 3(b).

parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons.”<sup>61</sup>

Resolution 1540 also mandates legally-binding obligations upon states. While recognizing that member states are already bound by treaties and other legal commitments to prevent proliferation of nuclear and other weapons of mass destruction and to protect critical materials, the Resolution urges states to do more to fully discharge their international legal obligations.<sup>62</sup> It requires states to cooperate with one another, such as by coordinating efforts on border and export controls or by offering assistance to states that lack needed resources, to prevent illicit trafficking of WMD weapons and related sensitive materials. Importantly, the Resolution requires that states criminalize WMD proliferation attempts by non-state actors and create an international network of cooperation and coordination to check infractions. Significantly, the Resolution did not mention or refer to the NPT-based nuclear nonproliferation regime. The omission implies that the Security Council regarded the NPT as irrelevant for the purposes of nuclear non-proliferation by non-state actors.

The United Nations Security Council Resolutions 1373 and 1540, as well as the Proliferation Security Initiative, are examples of such measures that international community took as the world faced a rising threat of nuclear terrorism. Currently, it is clear the world community relies on these and similar other initiatives, as well as multilateral treaties, in seeking safety against nuclear terrorism and to limit its prospect. Quietly bypassing the NPT-based nuclear nonproliferation regime of international laws, these instruments were designed to seek legitimation for international community’s nuclear nonproliferation efforts against non-state actors under the general international law, not under the specific international regime of nuclear nonproliferation. Regardless of the source of legal authority for these attempts, however, it is clear that the efforts of:

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<sup>61</sup> *Id.* ¶ 8(a).

<sup>62</sup> *Id.* ¶ 2.

[t]he diverse collection of specific efforts to address this threat, such as securing the weapons of the former Soviet Union, export controls, the Proliferation Security Initiative and national anti-terrorism legislation, bespeak the ad hoc and sporadic nature of contemporary response to a hard reality not contemplated when the Nuclear Non-Proliferation Treaty was designed.<sup>63</sup>

#### *F. Legality of Resolutions 1373 and 1540*

The articles of the U.N. Charter that mention disarmament shed light on the role of the General Assembly and the Security Council in the international system, an understanding of which is vital to comprehension of the legal controversy regarding passage of Resolution 1540. Article 11(1) of the U.N. Charter gives the General Assembly the authority to “consider,” *i.e.*, deliberate, “the general principles of cooperation in the maintenance of international peace and security” and, possibly, “make recommendations . . . to the Members or to the Security Council or to both.” Thus, under article 11(1), the General Assembly is to receive input of diverse perspectives.<sup>64</sup> Under this understanding of the role of the General Assembly, when General Assembly’s first Resolution passed on January 24, 1946—under the title “Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy”—the General Assembly created the Atomic Energy Commission whose mandated task was to “enquire into all phases of the problem” and to make recommendations to the Security Council.<sup>65</sup>

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<sup>63</sup> Jack I. Garvey, *A New Architecture for The Nonproliferation of Nuclear Weapons*, 12 J. CONFLICT & SEC. L. 339, 344 (2007).

<sup>64</sup> See also Joyner, *supra* note 25, at 493 (noting “[t]he AEC [Atomic Energy Commission] was given a mandate to ‘proceed with utmost despatch and inquire into all phases of the problem’ of the discovery of atomic energy, and to make specific proposals”).

<sup>65</sup> G.A. Res. 1 (I), ¶ 5 (Jan. 24, 1946).

When the Security Council finds that a breach or threat of breach of peace exists, it proceeds to act in limited ways, in accordance with the guidelines that the U.N. Charter provides. Article 26 of the U.N. Charter authorizes the Security Council to formulate plans, with the assistance of the Military Staff Committee, established under the U.N. Charter article 47.<sup>66</sup> The plans, based on General Assembly's recommendations of general principles of cooperation, are for regulation of armaments (states' weapons), so as "to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources."<sup>67</sup> Clearly, the idea of formulation of plans relates to states and not to private actors as the latter were not regarded as within the purview of the International system and had not figured as prominently as now they have. Joyner argues that the U.N. Charter article 26 plans

are to compose a coherent 'system' for the regulation of armaments, which would imply that the plans to be authored by the Council using this power are not to be situation-specific, as in the case of an *ad hoc* response to a discrete event in international affairs. Rather, these plans are to form the basis for a universally applicable,

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<sup>66</sup> U.N. Charter art. 26 ("In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation "of armaments."); *see also* Joyner, *supra* note 25, at 495 (arguing that, while article 26 confers powers to the Security Council, it also makes Security Council's role as complementary to that of the General Assembly in the exercise of General Assembly's deliberative role under article 11(1)). Joyner points out that article 11(1) also envisions such complementarity in General Assembly's deliberative role concerning consideration of "general principles of cooperation" with respect to maintenance of international peace. *Id.* at 494.

<sup>67</sup> U.N. Charter art. 26.

enduring system of 'practical and effective' international arms control."<sup>68</sup>

That is, Security Council's plans for maintenance of international peace and security are to be formed with assistance from the Military Staff Committee, and, once the plans are completed, they are to be submitted to the U.N. Members for approval. Those plans for the execution of which all members of the United Nations have to agree can refer only to a system of universal application, not one for specific situations.

Comparing U.N. Charter articles 11(1) and 26, Joyner notes that

while Article 11(1) is in keeping with a principled notion of universal participation by . . . [all] states in the construction of fundamental principles . . . [to] order relations among states in the area of international arms control, Article 26 is a recognition of the practical exigencies of international politics which demand that the Security Council, despite its unrepresentative character, have a vital role in the construction of plans for an international arms control system. . . . [T]he Security Council under Article 26 only has the power to formulate plans. It must then submit those plans to the member states of the United Nations for their approval and for establishment through multilateral treaty as actual legal principles governing their relationships with

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<sup>68</sup> Joyner, *supra* note 25, at 496.

each other. The Security Council's plans in and of themselves have no binding force on members, and are merely hortatory offerings, although endowed with the gravitas of having been generated through the Charter system for creation of arms control law . . . . Thus under the Charter system member states retain their full sovereignty over decisions to enter into legal relationships in the area of international arms control. This right is not subsumed under the Council's decision-making powers under Article 25 nor under its broad powers to maintain international peace and security under the articles of Chapter VII.<sup>69</sup>

In other words, neither the General Assembly nor the Security Council can create new law for member states of the United Nations. Rather, the role of these two organs of the United Nations is that of "facilitating co-operation and co-ordination between member states in reaching concrete agreements on the regulation of armaments."<sup>70</sup> For the purposes of this Article, the Security Council does not possess the legal capacity to make new rules for member states.<sup>71</sup>

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<sup>69</sup> *Id.* at 496; *see also* U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

<sup>70</sup> Joyner, *supra* note 25, at 497.

<sup>71</sup> The Security Council of the United Nations also enjoys limited enforcement powers under Chapter VII of the U.N. Charter. The Security Council may "determine the existence of any threat to the peace, breach of the peace, or act of aggression," under U.N. Charter art. 39, recommend provisional measures to parties to resolve the dispute, *id.* art. 40, decide non-military measures, in case the provisional measures prove to be ineffective, *id.* art. 41, or decide to take military measures as an exception to article 2(4), *id.* art. 42. Those powers are not at issue in the context of nuclear terrorism. The fact that they are limited might, however, constrain Council's hands in taking effective action on the matter of



The Security Council does not have legislative powers: “[n]either the Charter nor its preparatory materials evidence an intention to establish the Council as a legislative organ.”<sup>72</sup>

The adoption of Resolution 1373 seems to have been a benchmark in international law; with it, the Security Council assumed a legislative role later to reinforce it by the adoption of Resolution 1540.<sup>73</sup> Joyner argued against the jurisdictional legality of both Resolutions 1373 and 1540, pointing out that their passage reflected a shift in Security Council’s role and powers unwarranted under article 25 of the U.N. Charter,<sup>74</sup> making the passage of both

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nuclear terrorism. *See* U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”). Theoretically, article 2(4) also constrains states from using force to quell threat of nuclear terrorism or actual nuclear terrorism by non-state terrorists operating from the territory of another state—unless the latter state’s conduct in exacerbating the threat or terroristic actions of non-state actors is implicated. International law in this area is still evolving. At this time, it is not clearly foreseeable whether the Security Council can be empowered to take military measures against a state from whose territory threat of nuclear weapon by non-state actors unsupported by their state in the issuance of the threat. *See also* Joyner, *supra* note 25, at 504.

<sup>72</sup> Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUR. J. INT’L L. 59, 61 (2005).

<sup>73</sup> *See* Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT’L L. 175, 175 (2005); *see also* VICTOR V. RAMRAJ ET AL., *The Impossibility of Global Anti-Terrorism Law?*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 44 (Victor V. Ramraj et al. eds., 2nd ed. 2012). In the days immediately after the 9/11 attacks on the United States, “the Bush administration went to the UN Security Council and obtained a novel legal instrument, Resolution 1373 . . . In one fell swoop, the Security Council assumed the role of an international legislative body, and assumed the power to monitor domestic legislative compliance.” *Id.* at 44–45. As a practical matter, however, the impacts of Resolution 1373, as Ramraj describes them, have not been altogether insalubrious. The Resolution spurred a number of states to promulgate, implement, and coordinate national anti-terrorism laws. *Id.* at 45–46. As a result, anti-terrorism laws of some states, such as the U.K., have emerged as models for other nations to follow, helping shape nascent legal norms in state practice concerning anti-terrorism. *Id.* at 45. Ramraj suggests that, following passage of the Resolution 1373, the existence of a coherent global anti-terrorism law might be assumed. *Id.* The result, if true, owes nothing to the NPT.

<sup>74</sup> Joyner, *supra* note 25, at 515.

Resolutions *ultra vires* acts on Security Council's part.<sup>75</sup> Curiously, the President of the Security Council was conscious of the fact that the organization was acting outside the scope of its authority.<sup>76</sup>

Security Council has vast powers under Chapter VII, to protect international peace and security through binding enforcement measures, including some discretionary powers.<sup>77</sup> Yet all powers must rest on some legal source. In 2003, during the process of adoption of Resolution 1483, concerning the status of occupying forces in Iraq, the President of the Security Council stated concerning the delegation of certain powers by the Security Council to the occupying Powers that

under the Charter the powers delegated by the Security Council under this resolution are not open-ended or unqualified. They should be exercised in ways that conform with “the principles of justice and international law” mentioned in Article 1 of the Charter, and especially in conformity with the Geneva Conventions and the Hague.<sup>78</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> Press Conference by Security Council President, PRESS BRIEFING (2004), <https://www.un.org/news/briefings/docs/2004/pleugerpc.DOC.htm> (last visited Dec. 15, 2018) (expressing concern on the possibility of terrorism involving weapons of mass destruction and the inability of international law to prevent it); see also Alyona Zhuk, *Experts praise Poroshenko's call for restrictions on UN Security Council veto powers*, KYIV POST (Oct. 7, 2015, 5:24 PM), <https://www.kyivpost.com/article/content/kyiv-post-plus/experts-praise-poroshenkos-call-for-restrictions-on-un-security-council-veto-powers-399497.html> (arguing that the Big Power veto power in the Security Council has defeated many potential Security Council actions).

<sup>77</sup> Eric Rosand, *The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?* 28 FORDHAM INT'L L.J. 542, 553–54 (2004).

<sup>78</sup> Transcript of Speeches Regarding the Situation Between Iraq and Kuwait, 4761st Meeting of the Security Council, at 11–12 (Mar. 22, 2003), <http://undocs.org/en/S/PV.4761>.

This pronouncement leaves little doubt that the Security Council's authority under Chapters VI and VII is circumscribed by the general principles given in the Charter of the U.N. and by the codification of these principles in such international instruments as the Geneva Convention. A corollary of this fact is that any deviation from these principles and laws amounts to commission of *ultra vires* acts of the kind that the Security Council is blamed for in its passage of Resolutions 1373 and 1540, as noted above.

Security Council's resort to such acts was a desperate attempt to address the non-universality problem of the U.N. nuclear non-proliferation system.<sup>79</sup> While the existing international system does not universally bind all states, operating on voluntary subscription by states, the Security Council sought to impose on states affirmative duties to which they had not agreed.<sup>80</sup> Powers of international institutions, including those of the Security Council, however, are circumscribed by limits to which member states agree since consent of states, enshrined in constituent instruments, such as the Charter of the United Nations, is the basis of international law and the constitutionality of international institutions.<sup>81</sup> Both Resolutions 1373 and 1540 illegally cross those limits. These attempts to address the issue of threat of nuclear weapons are, therefore, legally unsound.

### III. INTERNATIONAL LAW'S REACH TO NUCLEAR TERRORISTS

#### A. *Individual Responsibility in International Law*

Traditionally, under the classical, realist theory of international relations, states are considered to be the primary actors in the international system, and international law's primary purpose

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<sup>79</sup> Joyner, *supra* note 25, at 508.

<sup>80</sup> Talmon, *supra* note 73, at 175; *see also* Rosand, *supra* note 77, at 548–49 (supporting Security Council's efforts to act as a global legislator through passage of Resolutions 1373 and 1540 as pragmatic measures for dealing with the new threat of global terrorism).

<sup>81</sup> THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 218–20 (1995).

is deemed to be regulation of relationship between states.<sup>82</sup> In agreement with this idea, scholars have noted that “[s]tates made international law and were accountable to each other in meeting international legal obligations.”<sup>83</sup> The law of state responsibility, which is at the center of international law, “provides that every internationally wrongful act entails the responsibility of the state . . . . Beyond this very general pronouncement, however, the law of state responsibility appears unsettled and has generated considerable theoretical debates and practical difficulties.”<sup>84</sup>

Traditionally, individuals have remained invisible in international law, screened from responsibility for commission of acts, a situation that has eroded perception of international law’s competence in meeting challenges of non-state actors’ undesirable acts.<sup>85</sup> With input from legal scholars and practitioners, however, international law has progressed; it has been evolving, slowly, to make room for individual responsibility. In 1950, Lauterpacht argued that “there is cogency in the view that unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one.”<sup>86</sup> With reference to non-state actors’ responsibility under international law, in 1956, International Law Commission’s report on state responsibility under international law maintained that it was “necessary to change and adapt traditional law so that it will reflect the profound transformation which has occurred in international law . . . [and] to bring the ‘principles governing State responsibility’ into line with international law at its present stage of development.”<sup>87</sup>

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<sup>82</sup> Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 507 (1995).

<sup>83</sup> Edith Brown Weiss, *Invoking State Responsibility in the Twenty-first Century*, 96 AM. J. INT’L L. 798, 798 (2002).

<sup>84</sup> RENE PROVOST, STATE RESPONSIBILITY IN INTERNATIONAL LAW 1 (2002).

<sup>85</sup> André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT’L & COMP. L. Q. 615, 617–18 (2003).

<sup>86</sup> HERSH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 40 (1950).

<sup>87</sup> *Documents of the eighth session including the report of the Commission to the General Assembly* [1956] 2 Y.B. INT’L L. COMM’n annex, 173, 176, ¶ 10, U.N. Doc. A/CN.4/96.

That early concern about holding individuals responsible under international law for wrongful acts continued to echo in the international law scholarship in subsequent decades:

The subjects of international law are states but only in the sense that the present conceptual structure of international law attaches legal rights and duties to the category "state." . . . The subjects of international law, in the sense of those for whose benefit the law assigns all rights and duties, are the people of the world. The wrongful act of a state is the wrongful act of one set of human beings in relation to another set of human beings. . . . The moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally both from the duties the law imposes and from the responsibility it entails.<sup>88</sup>

In line with these concerns and realizations, "[t]he legal nature of international law is perennially in question."<sup>89</sup>

Today, international law and the concept of responsibility in it have changed to reflect state actors' growing role. International law has now, under specific international agreements or under customary international law, extended to individuals and other non-state entities the right to invoke state responsibility, the responsibility owed to them by their own state or by other states.<sup>90</sup> Following this development,

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<sup>88</sup> Philip Allott, *State Responsibility and Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 14 (1988).

<sup>89</sup> PROVOST, *supra* note 84, at Introduction.

<sup>90</sup> Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 798–99 (2002).

[a] large number of criminal law treaties, prosecutions of individuals in national and international courts and the establishment of the International Criminal Court have taken individuals away from behind the shield of the state. International law leaves it no longer to the national legal order to determine which individuals are subjected to obligations and responsibilities and confronts individuals now directly with legal consequences of their acts.<sup>91</sup>

Nollkaemper further wrote “[a]s of yet, the individualisation of responsibility takes the form of international criminal responsibility. However, there is no principled reason why it could not also manifest itself in international civil responsibility.”<sup>92</sup> This thought reflects scholarly acceptance, if not purposeful guidance, of the steadily emerging change with respect to the concept of responsibility under international law.

Along the path of this progression in international law, certain individual acts carry individual responsibility alongside state responsibility.<sup>93</sup> The Charter of the International Military Tribunal for Nuremberg recognized individual responsibility early on in the context of trials for war crimes. The Charter of the International Military Tribunal for Nuremberg recognized individual responsibility early on in the context of trials for war crimes. The judges at Nuremberg wrote as they punished Nazi leader for their crimes: “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be

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<sup>91</sup> Nollkaemper, *supra* note 85, at 618.

<sup>92</sup> *Id.* at 618 n.14.

<sup>93</sup> *See generally id.* at 617–18 (arguing that the law of state responsibility has expanded to include individual responsibility side by side state responsibility in its domain).

enforced.”<sup>94</sup> The Nuremberg Trial is claimed to have strengthened the notion that international law can and should punish individuals for certain heinous crimes through exercise of jurisdiction of international courts, and, in doing so, “rejected historically used defenses based on state sovereignty.”<sup>95</sup> The U.N. General Assembly Resolution 95, entitled “Affirmation of the Principles of International Law recognized by the Charter of the Nurnburg [Nuremberg] Tribunal” acknowledged that the principles of the Nuremberg Charter were principles of international law.<sup>96</sup> Thus, early on, international law evinced signs of favor for holding individuals responsible for certain acts.

*B. Prosecution of Individuals under International Human Rights Law and under International Humanitarian Law*

International human rights law, while prominently recognizing individual rights and freedoms, does not overlook individual duties to the community. Concerning human rights, for instance, the Universal Declaration of Human Rights (“UDHR”) foresees “the advent of a world in which human beings shall enjoy . . . freedom from fear” and makes it a state obligation to ensure that human rights and freedoms are protected through domestic justice system.<sup>97</sup> The UDHR mentions individual responsibility indirectly: article 29 of the UDHR states that “[e]veryone has duties to the community. . . .” Article 29(2) of UDHR reads further in part that

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<sup>94</sup> William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT’L L.J. 906, 906 (2002).

<sup>95</sup> ROBERT H. JACKSON CTR., *The Influence of the Nuremberg Trial on International Criminal Law*, <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last visited Dec. 18, 2018). “The Nuremberg trials established that all of humanity would be guarded by an international legal shield and that even a Head of State would be held criminally responsible and punished for aggression and Crimes Against Humanity. The right of humanitarian intervention to put a stop to Crimes Against Humanity – even by a sovereign against his own citizens – gradually emerged from the Nuremberg principles affirmed by the United Nations.” *Id.*

<sup>96</sup> G.A. Res. 95 (I) (Dec. 11, 1946).

<sup>97</sup> G.A. Res. 217 A (III), pmb. (Dec. 10, 1948); *see id.* art. 29, ¶ 1 (“Everyone has duties to the community in which alone the free and full development of his personality is possible.”).

“[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others.”

The Declaration, being an expression of principles, does not bind states or persons.<sup>98</sup> The UDHR are statements of peoples’ commitment to human rights under the United Nations Charter.<sup>99</sup> The norms that the UDHR embodies are, however, incorporated in several international agreements and treaties. Over time,

[m]any of the Universal Declaration's provisions also have become incorporated into customary international law, which is binding on all states. This development has been confirmed by states in intergovernmental and diplomatic settings; in arguments submitted to judicial tribunals, by the actions of

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<sup>98</sup> Eleanor Roosevelt, Address to the United Nations General Assembly on the Adoption of the Universal Declaration of Human Rights (Dec. 9, 1948) (transcript available at <http://www.kentlaw.edu/faculty/bbrown/classes/HumanRightsSP10/CourseDocs/2EleanorRoosevelt.pdf>) (“It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a Declaration of basic principles of human rights and freedoms, . . . to serve as a common standard of achievement for all peoples of all nations. . . . This Universal Declaration of Human Rights may well become the international Magna Carta of all men everywhere.”).

<sup>99</sup> See U.N. Charter art. 55(c) (“[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”); see also Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 289, 352–53 (1995) (“Legally and politically, it is the Universal Declaration of Human Rights which defines the Charter’s human rights provisions. As the primary source of the global consensus on human rights—which was reaffirmed in the 1993 World Conference on Human Rights in Vienna—the Declaration represents the only common ground when many states discuss human rights.”).



intergovernmental organizations; and  
in the writings of legal scholars.<sup>100</sup>

The major international instruments incorporating the UDHR norms/rights are the International Covenant on Civil and Political Rights, 1976,<sup>101</sup> and the International Covenant on Economic, Social, and Cultural Rights, 1976.<sup>102</sup> Other specific human rights international treaties that elaborate upon some UDHR rights include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force in 1987.<sup>103</sup> Notably, following suit and referring to the Charter of the United Nations and the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights affirmed everyone's rights to social, cultural, and economic freedoms and noted that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone."<sup>104</sup>

Many other international human rights instruments that hold solely states responsible, however, do not hold people responsible for committing atrocities. Most still expand the idea of responsibility under international law. The Convention on the Prevention and Punishment of the Crime of Genocide, for instance, affirms that genocide is an international crime for the Contracting

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<sup>100</sup> Hannum, *supra* note 99, at 289.

<sup>101</sup> G.A. Res. 2200A (XXI) (Dec. 16, 1966); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>102</sup> G.A. Res. 2200 (XXI), annex (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>103</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

<sup>104</sup> African Charter on Human and Peoples' Rights pmbl., June 27, 1981, 1520 U.N.T.S. 217 (entered into force on Oct. 21, 1986) (explicitly referring to the Charter of the United Nations and the Universal Declaration of Human Rights, which affirms that everyone has right to enjoy social, cultural, and economic freedoms). The Charter also considered that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone. *Id.*; *see also* arts. 27–29 (concerning individuals' duties).

Parties whether committed in time of war or in time of peace.<sup>105</sup> The Convention, thus, expands the scope of applicability of the law of responsibility from war context to peace situations; it places obligation, however, upon signatory states, not individuals, to prevent genocide. The International Convention on the Elimination of All Forms of Racial Discrimination,<sup>106</sup> similarly, makes persons only indirectly responsible for commission of atrocious acts by holding states primarily responsible for racial discrimination against persons. The contracting parties of the International Convention on the Suppression and Punishment of the Crime of Apartheid, likewise, undertake to uphold the UDHR freedoms and rights by enacting appropriate legislation to punish violators.<sup>107</sup> The

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<sup>105</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. V, Dec. 9, 1948, 78 U.N.T.S. 277 (“The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.”); *see id.* art. III (including genocide as well as attempt, incitement, conspiracy, complicity of genocide).

<sup>106</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195. Paying regard to the Universal Declaration of Human Rights, the Convention binds the contracting state parties to declare in article 4(a) “an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.”; *id.* art. 4(b) (stating that state contracting parties “[s]hall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.”).

<sup>107</sup> The International Convention on the Suppression and Punishment of the Crime of Apartheid art. IV, July 18, 1976, 1015 U.N.T.S. 244 [hereinafter Apartheid Convention] (“The States Parties to the present Convention undertake: (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime; (b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.”).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment similarly, obligates state parties to criminalize individuals' commission of enumerated atrocities.<sup>108</sup> Following the Convention's entry into force, absolute prohibition against torture and other acts of cruel, inhuman, or degrading treatment or punishment has become accepted as a principle of customary international law; that is, the applicability of these prohibitions under the Convention has been broadened to include non-signatory states.<sup>109</sup>

It might be fair to state that the incorporation of the UDHR principles in later international law instruments has not been uniform. The fact that some of its principles have become elevated to the status of customary international law, however, bodes well for greater incorporation of international human rights laws in international legal instruments in the future. Specifically, the expansion of international human rights laws with respect to the concept of responsibility under international law opens up the possibility that, over time, individual perpetrators of heinous crimes, such as those committed with use of nuclear weapons, can be held responsible under revised, evolved, or expanded international laws of nuclear proliferation.

International humanitarian rights laws also offer such a prospect. Traditionally, international humanitarian rights instruments, such as the Geneva Conventions,<sup>110</sup> also place

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<sup>108</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 103, art. IV ("1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.").

<sup>109</sup> *See id.* pmbl. ("Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world . . . .")

<sup>110</sup> *See, e.g.,* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva

responsibility on states to criminalize inhuman and atrocious behavior. For instance, article 146 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, requires that States Parties "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention." As the title of the Convention indicates, the sanctions are to be applied only during times of war, *i.e.*, when there is an international adversarial engagement of armed forces. Yet, in the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") noted that, as early as the beginning of the Spanish Civil War, 1936–39, international law has been increasingly becoming involved in non-international armed conflict, the civil war.<sup>111</sup> The greater involvement of international humanitarian laws in civil wars, as well as international wars, indicates humanitarian laws' greater amenability to bringing both states and individuals within the purview of the law.

Giving an account of evolution in this area of law, the Appeals Chamber of the ICTY pointed out that the International Court of Justice ("ICJ") had recognized in the 1985 *Nicaragua* case that certain minimum humanitarian standards must be upheld during internal armed conflict.<sup>112</sup> The standards primarily bind state parties to international legal instruments incorporating international humanitarian law, obligating states to legislate, investigate, prosecute, and punish violations of people's rights and freedoms against persons.<sup>113</sup> Those requirements have also, arguably, passed into the customary international law.<sup>114</sup>

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Convention IV), Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950);

<sup>111</sup> Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 100 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars.").

<sup>112</sup> *Id.* ¶¶ 101–02.

<sup>113</sup> Schabas, *supra* note 94, at 910.

<sup>114</sup> *Id.*

States' obligations under international humanitarian law, however, extend only with respect to certain identified heinous violations that can be characterized as "international crimes".<sup>115</sup> The International Criminal Court ("ICC") exercises jurisdiction over international crimes.<sup>116</sup> The ICC hears cases of a category of crimes that the ICJ considered under the *Arrest Warrant* case.<sup>117</sup> These enumerated crimes—crimes of genocide, crimes against humanity, and war crimes—do not include terrorism in general or terrorism involving weapons of mass destruction.<sup>118</sup> The passage of the humanitarian laws' requirements into the customary international law, however, opens up the possibility of their broader application.

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<sup>115</sup> *Id.*

<sup>116</sup> Rome Statute of the International Criminal Court, July 17, 1988, 2187 U.N.T.S. 90 [hereinafter Rome Statute] ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"); Schabas, *supra* note 94, at 910 (pointing out that the concept of "international crimes" has not been expatiated upon by the Rome Statute). Rather, it is a customary international law concept that imposes a duty upon states to prosecute international crimes committed both within and outside their territory. *Id.* In other words, the concept of "international crimes" pre-exists International Criminal Court in international custom. The ICC merely reminds states of their jurisdiction of such crimes and of their duty in that regard. *Id.*

<sup>117</sup> *Arrest Warrant* of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 2002 (Feb. 14).

<sup>118</sup> In the *Arrest Warrant* case, the International Court of Justice (ICJ) mentioned "crimes against humanity" and "war crimes" rather than "international crimes." See, e.g., *id.* ¶¶ 13, 58, 64. Similarly, the 1951 Convention Relating to the Status of Refugees recognized two categories of crimes to which the convention applied: (1) a crime against peace, a war crime, or a crime against humanity; and (2) "acts contrary to the purposes and principles of the United Nations." Convention relating to the Status of Refugees art. I(F)(c), July 28, 1951, 189 U.N.T.S. 137; see Schabas, *supra* note 94, at 911 (arguing that, based on these specific distinctions, some international crimes, such as drug trafficking, fail to lend the gravitas that characterize violations of a fundamental human right and are therefore not covered under the Statute). One could also note that the war crime triggers international jurisdiction due to the cost it entails in human suffering, and a crime against humanity, similarly, comprises other acts that are contrary to United Nation's purposes and principles, which also seek to alleviate human suffering and indignity.)

*C. Individual Responsibility under International Law in International and Non-International Armed Conflict*

International law has historically been concerned with international, rather than non-international armed conflict. In the context of wars, international humanitarian law has been traditionally concerned primarily with states' reciprocal commitments on matters such as treatment of non-combatant victims.

The distinction between international crimes and non-international crimes became gradually blurred with time. For instance, in the 1930s' Spanish Civil War, the internal nature of the conflict lessened the role of international law, and, yet, the jurisdiction of international law were applied in the case of internal conflict against the insurgent non-state actors.<sup>119</sup> The international humanitarian law following Spanish Civil War developed, like the international human rights law, to protect individual rights against states.<sup>120</sup> In the same vein, article 3 of the 1949 Geneva Conventions, the common article to all four Geneva Conventions, entitled "Conflicts not of an International Character," recognizes that certain rules of the laws of war apply to conflicts that are internal. Article 3 of the Geneva Conventions defines a conflict not of international character as the one between a state's armed forces and dissident armed forces or other organized armed groups, not including riots and isolated and sporadic acts of violence.<sup>121</sup>

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<sup>119</sup> See *Tadić*, Case No. IT-94-1, ¶ 100. The Spanish Civil War had elements of both an internal and an international armed conflict. "Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied." *Id.*

<sup>120</sup> Schabas, *supra* note 94, at 914–15.

<sup>121</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978). Protocol II elaborates in article 1(1) on armed conflicts not of international character as the ones "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations." The Additional Protocol II excludes from this definition in article

An act of nuclear terrorism is likely to be characterized as an armed conflict. If non-state actors threaten to use or use nuclear arms, the conflict is likely to be characterized as non-international armed conflict simply because the conflict is not between states, regardless of whether nuclear terrorism is internal or transnational. International law of armed conflict has been gradually expanding to encompass acts that are neither strictly international nor perpetrated by states.<sup>122</sup> An important question for the purposes of this Article is whether non-state actors committing extreme violence using nuclear weapons can be punished under international law when their act relates to a non-international armed conflict.

It is pertinent to note that, in the case of nuclear terrorism, as in the case of almost any crime, the primary avenue for prosecution is to be courts of the state in which such terrorism is committed. Regarding some crimes,

[t]he right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them . . . . On principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the nation itself. But all too often national courts are not yet capable of handing down impartial justice or are physically unable to function.<sup>123</sup>

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1(2) "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." *See also* Schabas, *supra* note 94, at 914–15.

<sup>122</sup> Schabas, *supra* note 94, at 914.

<sup>123</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, *Question of the impunity of perpetrators of human rights violations (civil and political)*, E/CN.4/Sub.2/1997/20, ¶¶ 27–28, (June 26, 1997).

Schabas points out that an act by a non-state actor defined as an international crime entails that states prosecute offenses that might be committed outside their territory, and if a state that obtains custody of the person is unable to do so, it should hand over the accused to another state that is more willing and able to do so under the principle expressed as *aut dedere aut judicare*, translated as “extradite or prosecute.”<sup>124</sup> It is unclear whether this principle is part of customary international law.<sup>125</sup> The same is the case of the principle of universal jurisdiction.<sup>126</sup> Implicitly, this principle is coextensive with that of *aut dedere aut judicare*, but is less used in treaties.<sup>127</sup> For either principle, the status of the principle as a norm of customary international law is debated only in the context of offenses that can be defined as international crimes.<sup>128</sup>

The Rome Statute of the International Criminal Court (“Rome Statute” or “Statute”) offers greater conceptual clarity as to the expanding reach of international law over perpetrators of crimes in international and non-international armed conflicts.<sup>129</sup> The

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<sup>124</sup> Schabas, *supra* note 94, at 912–13.

<sup>125</sup> See Schabas, *supra* note 94, at 913 (“This obligation is set out in article 5(2) of the Convention against Torture and in the ‘grave breaches’ provisions of the Geneva Conventions. However, [it is omitted from] the Genocide Convention or the Apartheid Convention.”). This makes it unclear whether a customary norm to prosecute or extradite exists. *Id.* at 917.

<sup>126</sup> INT’L JUSTICE RES. CTR., *Universal Jurisdiction*, <http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> (last visited Dec. 18, 2018) (stating that under universal jurisdiction, a national court can exercise its jurisdiction to prosecute individuals for serious crimes, such as crimes against humanity, war crimes, genocide, and torture, on the grounds that such crimes are committed against the international community or international order). National courts generally invoke universal jurisdiction in the absence of other, traditional bases of criminal jurisdiction, such as nationality of the state whose court is seeking to exercise universal jurisdiction, when the crime was not committed within the territory of the state, or when national interests are not harmed. *Id.*

<sup>127</sup> Schabas, *supra* note 94, at 913 (pointing out that this concept was purposefully omitted from some treaties, such as Genocide Convention, because states wished to avoid giving other states pretext for intervention in domestic matters, particularly for political reasons).

<sup>128</sup> *Id.*

<sup>129</sup> Rome Statute, *supra* note 116; see also Schabas, *supra* note 94, at 914–15.



Statute defines armed conflict not of international character in a manner similar to the Geneva Convention. Article 8 of the Rome Statute, entitled “War Crimes” confers jurisdiction to ICC on both international armed conflict—article 8(2)(b)—and armed conflicts not of international character—article (8)(2)(c). The latter is defined as a “serious violation of article 3 common to the four Geneva Conventions.” Article 8(2)(d) excludes from International Criminal Court’s jurisdiction over armed conflicts not of an international character “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” Article 8(2)(b) lists in general terms violations that fall within ICC’s jurisdiction over armed conflicts not of an international character. More pertinent, for the purpose of this Article, however, are the “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character” listed under article 8(2)(e). Article 8(2)(e)(i) gives ICC jurisdiction over acts of “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.” Article 8(2)(e) is not applicable to “riots, isolated and sporadic acts of violence or other acts of a similar nature”; under article 8(2)(f) it applies “when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.” That is, the armed conflict has to rise above loosely joined bandits and rioting groups of non-state actors to non-state actor groups with certain organizational capacity before the conflicts fall within the jurisdiction of the ICC.

While legal specifics regarding culpability of non-state actors might differ under the Geneva Convention and the Rome Statute, in principle the two international law instruments recognize culpability under international law of organized groups of non-state actors violating norms of international conflict in the context of non-international conflict, indicating consonance on this matter between international humanitarian laws and international criminal laws.

Beyond recognition of culpability of non-state actors under international law, the next question arises whether non-state actors can be punished in international courts for international crimes committed during armed conflict not of international character.

*D. Punishment of Non-State Actors under International Law*

That individuals can be held responsible, *i.e.*, punished, for certain violations of international law was central to the Nuremburg Principles.<sup>130</sup> In 1946, the United Nations General Assembly affirmed “the principles of international law recognized by the Charter of the Nurnberg [Nuremburg] Tribunal and the judgment of the Tribunal.”<sup>131</sup> The concept, however, was limited then to the context of war.<sup>132</sup>

The Geneva Conventions too recognized individual responsibility in the same sense under the principle of prosecute or extradite for serious crimes through a “grave breach” doctrine.<sup>133</sup> They considered, however, only those crimes that were committed in the context of international armed conflicts, and, although non-international violations could be criminal under the common article 3, those violations did not constitute international crimes and could not, therefore, be punished under international law.<sup>134</sup>

In 1995, however, the Appeals Chamber of the ICTY ruled, in *Prosecutor v. Tadić*, contrary to the previously accepted opinion of legal and judicial scholars, on the question of jurisdiction of the international tribunal over individuals.<sup>135</sup> The Appeals Chamber wrote that the nature of certain offenses are such that “do not affect the interests of one State alone but shock the conscience of

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<sup>130</sup> See *Formulation of the Principles of International Law Recognized in the Charter of the Niirnberg Tribunal and in the Judgment of the Tribunal* [1956] Y.B. Int’l L. Comm’n 28–58, U.N. Doc. A/CN.4/SER.A/1950.

<sup>131</sup> G.A. Res. 95 (I), *supra* note 96.

<sup>132</sup> Schabas, *supra* note 94, at 917.

<sup>133</sup> *Grave breaches specified in the 1949 Geneva Conventions and in additional Protocol I of 1977*, ICRC, <https://www.icrc.org/en/doc/resources/documents/misc/57jp2a.htm> (last visited Jan. 22, 2019) (including the following offenses: willful killing, torture or inhumane treatment, willfully causing great suffering, causing serious injury to body or health, and extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly).

<sup>134</sup> Schabas, *supra* note 94, at 917.

<sup>135</sup> *Prosecutor v. Tadić*, Case No. IT-94-I-AR72, Defense Brief to Support the Notice of (Interlocutory) Appeal (Int’l Crim. Trib. for the Former Yugoslavia Aug. 25, 1995).

mankind.”<sup>136</sup> More significantly, and pertinent for the purposes of this Article, the Appeals Chamber also wrote that “[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict . . . [C]ustomary international law may not require a connection between crimes against humanity and any conflict at all.” That is, a “crime against humanity” can arise when there is a conflict and when there is no conflict, internal or international. Therefore, dismissing the challenge to its jurisdiction, the Appeals Chamber concluded that it had “jurisdiction over crimes committed in either internal or international armed conflicts.”<sup>137</sup> In other words, the Appeals Chamber assumed jurisdiction over cases where extreme atrocities were committed in conflicts related to armed domestic and/or international conflict.

The U.N. support for prosecution of serious international crimes committed during either internal or international armed conflicts was emphasized in the case of non-international armed struggle in Sierra Leone. The Peace Agreement created amnesty for the warring persons of the Revolutionary Front of Sierra Leone.<sup>138</sup> However, the United Nations Special Representative of the Secretary-General for Sierra Leone stated that the amnesty provision did not apply to “international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international

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<sup>136</sup>*Id.* ¶ 57. Citing an earlier case, the Appeals Chamber wrote: “Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lèse-humanité* (*reati di lesa umanità*) and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed.” *Id.*

<sup>137</sup> *Id.* ¶ 142.

<sup>138</sup> S.C. Res. 777 (July 7, 1999).

humanitarian law.”<sup>139</sup> Meisenberg<sup>140</sup> found the decision to be unconvincing and controversial due to the fact that the Appeals Chamber invoked universal jurisdiction (*i.e.*, its own rightful jurisdiction over the case) before addressing Sierra Leone’s duty under international law to investigate and prosecute.<sup>141</sup> Meisenberg, however, acknowledged that the decision was an important step in the development of international humanitarian law’s expanse over non-state actors who commit serious crimes in a non-international armed conflict.<sup>142</sup> Evaluating the shift in international law regarding international law’s jurisdictional reach over non-state actors, Schabas wrote,

It is now beyond any doubt that war crimes and crimes against humanity are punishable as crimes of international law when committed in non-international armed conflict. Non-State actors, who may be members of guerrilla movements, armed bands, and even provisional governments, are subject to

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<sup>139</sup> U. N. Secretary-General, *Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, ¶ 7, UN Doc. S/1999/836 (July 30, 1999).

<sup>140</sup> Simon M. Meisenberg, *Legality of Amnesties in International Humanitarian Law. The Lomé Amnesty Decision of the Special Court for Sierra Leone*, 86 REVUE INTERNATIONALE DE LA CROIX-ROUGE [INT’L REV. RED CROSS] 837, 845 (2004) (Fr.).

<sup>141</sup> Meisenberg, *supra* note 139, at 851 (“The Appeals Chamber did not address Sierra Leone’s own duty to investigate and prosecute in international law, but merely based its findings on the principle of universality. Such an approach is unconvincing, owing to the unusual place of the Special Court in international law, and incompatible with the country’s legal obligation to transfer arrested persons to the court, since the court lacks its own enforcement mechanisms. The court should have specifically established treaty obligations for Sierra Leone to prosecute with regard to all crimes before it and to non-international armed conflict in particular, rather than invoke the principle of universal jurisdiction in order to rule that the amnesties granted are no bar to prosecution before an international and foreign court.”).

<sup>142</sup> *Id.* at 843.

prosecution on this basis. Where, for whatever reason, trials are not possible or desirable before the courts of the territory where the crimes have taken place, justice systems of other States may assume their responsibilities and prosecute on the basis of universal jurisdiction. Amnesty or some other measure of impunity applicable in the State where the crime has taken place, is no obstacle or bar to trial elsewhere. These developments in the law—most of them quite recent—mean that perpetrators of serious violations of human rights during non-international armed conflicts, including non-State actors, are far less likely to escape justice than they were in the past.<sup>143</sup>

It is clear that international law reaches non-state actors.

*E. International Law's Reach over Possible Nuclear Terrorists*

Specifically, war crimes and crimes against humanity have come within the grip of international law. Crimes against humanity, a matter of interest for this Article in the context of feared nuclear terrorism, require a finding under the Rome Statute—which created the International Criminal Court—that acts be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” to qualify as crimes against humanity.<sup>144</sup> International law has come a long way, it appears; however, the question arises whether it can reach non-state actors if they commit nuclear terrorism.

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<sup>143</sup> Schabas, *supra* note 94, at 922.

<sup>144</sup> Rome Statute, *supra* note 116, art. 7.

In the wake of the extremely violent events of September 11, 2001, the United Nations High Commissioner denounced the terrorist attacks on the United States as “crimes against humanity.”<sup>145</sup> The classification fitted as the attacks were regarded as being part of a systematic attack against a civilian population with knowledge of the attack.<sup>146</sup>

Even when a terroristic act fits the definition of crimes of humanity, it cannot be prosecuted by the ICC. The Rome Statute excludes terrorism from ICC’s subject matter jurisdiction. At the time of delineating ICC’s jurisdiction, the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (“Final Act”)<sup>147</sup> expressed regret that although terrorist acts constitute “serious crimes of concern to international community,” lacking a generally acceptable definition, terrorism could not be included in jurisdiction of the proposed ICC.<sup>148</sup>

In the past, some states—Algeria, India, Sri Lanka, and Turkey—proposed considering terrorism as a crime against humanity and subjecting it to ICC’s jurisdiction. Those who rejected the proposal adduced four reasons: (1) terrorism could not be precisely defined; (2) inclusion of terrorism to ICC’s jurisdiction would introduce political divisions in the Court; (3) only some acts of terrorism are serious enough to justify jurisdiction of an international tribunal; and (4) national courts are more efficient than international tribunals.<sup>149</sup> Obviously, participants in the debate were not at the time cognizant of the possibility of nuclear terrorism,

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<sup>145</sup> *Terror attacks on US were crimes against humanity*, UN rights official says, UN NEWS (Sept. 25, 2001), <https://news.un.org/en/story/2001/09/15342-terror-attacks-us-were-crimes-against-humanity-un-rights-official-says>; see also Cassese, *supra* note 13, at 993–95.

<sup>146</sup> *Id.*

<sup>147</sup> U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/13 (Vol. I) (June 15–July 17, 1998).

<sup>148</sup> *Id.* annex I, E.

<sup>149</sup> Cassese, *supra* note 13, at 494.

which, by its very nature, is an extreme act of violence.<sup>150</sup> Regardless of lack of this cognizance, excluding all acts of terrorism from ICC's jurisdiction because "some" acts of terrorism are not serious enough appears to be a weak reason. A stronger reason for the proposal's rejection seems to be the objection by some developing countries that feared that peoples' struggle for freedom from foreign domination could come to be characterized as terrorism.<sup>151</sup> Also, the problem of definition of acts of terrorism arises from the concern to identify such distinct acts as serial killing or killings and other destructive acts in a course of drug trafficking, which can have the characteristics of being widespread and systematic.<sup>152</sup> The Final Act, however, affirmed that the matter is not closed: the review mechanism of the Statute of the International Criminal Court allows for a future expansion of the Court's jurisdiction. The Final Act, in fact, recommended that under article 123 of the Rome Statute of the International Criminal Court a Review Conference should consider arriving at an acceptable definition of terrorist crimes and including them within the Court's jurisdiction.<sup>153</sup> By following up on this recommendation, acts of terrorism may be subsumed within "crimes against humanity," whose definition has over time moved away from strict adherence to crimes that are committed, supported, incited, or tolerated by a state to those committed by individuals without any state involvement, as discussed above. The law in this area, however, is still unsettled, and scope remains for bringing terrorism under "crimes against humanity," over which ICC can exercise jurisdiction.

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<sup>150</sup> NUKEMAP BY ALEX WELLERSTEIN, <https://nuclearsecrecy.com/nukemap/> (last visited Dec. 25, 2018) (hosting a simulation that produces dire results with a virtual detonation of terrorist-made crude nuclear weapon of 10 kilo tons—the size North Korea tested in 2013—detonated as airburst over Washington, D.C. would create 54,380 fatalities and 86,080 injuries).

<sup>151</sup> Cassese, *supra* note 13, at 994.

<sup>152</sup> Schabas, *supra* note 94.

<sup>153</sup> Rome Statute, *supra* note 116, art. 123 (noting that the Rome Statute of the ICC provides, under this article, for the review of the Statute seven years after its entry into force).

The problem of finding a definition of terrorism that distinguishes terrorism from an ordinary crime and forms of nationalist struggles has lingered over a long period of time. Treaty law has struggled with the issue since 1920s.<sup>154</sup> The League of Nations, the International Law Commission, and the General Assembly have pondered on the issue.<sup>155</sup> The fact that the international community has made multiple and protracted attempts does not provide evidence of emergence of a customary law; yet, treaties carry evidence of generally accepted rules,<sup>156</sup> and, therefore, the attempts delineate outlines and sharpen basic features of what behaviors international community proscribes or criminalizes. In other words, the repeated and recurring attempts to pin down a generic definition of terrorism testifies to the normative importance that the world community places on the matter.<sup>157</sup> Early on, the international community realized that sound definition will hinge upon the underlying motive of the act to distinguish it from an organized transnational crime committed for material benefit or struggles for a peoples' self-determination.<sup>158</sup>

It is conceivable to extract such a definition from the Protocol 1 of the 1977 Amendment to the Geneva Convention. Saul suggests that the Amendment enshrines international humanitarian law, as well as it contains provisions that proscribe behaviors that can be considered "terrorism," thus helping us reach a generic definition of terrorism in a way that can make terrorism punishable under international humanitarian law that the Geneva Conventions

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<sup>154</sup> Ben Saul, *Attempts to Define Terrorism in International Law*, 52 NETH. INT'L L. REV. 57, 58 (2005) (explaining why and giving examples to prove that terrorism is difficult to define in international law.); *see generally id.*

<sup>155</sup> *Id.* at 59–66 (listing various attempts by the League of Nations to arrive at a consensus on the definition of the term "terrorism" during various international conferences); *id.* at 66–68 (detailing similar attempts by the International Law Commission during the drafting of its 1954 Draft Code of Offences against the Peace and Security of Mankind (Part I)); *see generally id.* at 72–83 (detailing multiple attempts by the UN General Assembly to address the threat of terrorism by arriving at a definition, particularly in the context of the establishment of the International Criminal Court).

<sup>156</sup> *Id.* at 58.

<sup>157</sup> *Id.* at 65.

<sup>158</sup> *Id.* at 79–80



represent.<sup>159</sup> Although the Protocol 1 of 1977 primarily relates to armed conflicts, it bans certain behaviors that, when enacted in either international or non-international armed conflicts—that is, when the armed conflict is between states and when the armed conflict involves non-state actors—can be characterized as terroristic, rather than purely military combat behaviors. Articles 51, entitled “Protection of the Civilian Population,” for instance, prohibits attacks on civilian population. Article 51(2), specifically, prohibits “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population” or “indiscriminate attacks.” Article 51(4) prohibits “indiscriminate attacks,” specifying, *inter alia*, that indiscriminate attacks include “[those] that are not directed at a specific military objective,” and in general “are of a nature to strike military objectives and civilians or civilian objects without distinction.” Articles 51 and 54 outlaw indiscriminate attacks on civilian populations and destruction of food, water, and other materials needed for survival. Indiscriminate attacks include directly attacking civilian (non-military) targets, and also attacking civilians by using technology such as biological weapons, nuclear weapons, and land mines. It is, thus, possible to extract a definition of terrorism from the Protocol 1 of the 1977 Amendment to the Geneva Convention.

*F. Jus Cogens, or Peremptory Norm of International Law, against Nuclear Proliferation by Non-State Actors and Nuclear Terrorism*

Article 53 of the VCLT 1969, defines, for the purposes of the Convention, a peremptory norm of general international law (“*jus cogens*”) as “a norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” The Convention, thus, dictates that a norm be considered to be “peremptory,” and, thus, not be derogated from, if the international community “as a whole” accepts and recognizes it. Examples of such norms are the use of force, slavery, genocide, and

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<sup>159</sup> *Id.* at 81–83.

piracy.<sup>160</sup> Legal practitioners and scholars have regarded that definition to be applicable to the international law at large, and not just for the purposes of the 1969 VCLT.<sup>161</sup>

In this connection, with regard to constitutionality of acts of international organizations, Orakhelashvili made an important observation concerning distinction between *jus dispositivum* and *jus cogens*.<sup>162</sup> International organizations can lawfully disregard the former, the ordinary norms of international law, “provided and to the extent that the constituent instrument evidences the intention of member states to enable the organization to act in such manner while exercising its functions.”<sup>163</sup> However, “if a relevant norm is peremptory [*i.e.*, it is recognized as *jus cogens*], then states cannot derogate from it, establishing an organization with the power to act in disregard of *jus cogens*. Therefore, *jus cogens* is an inherent limitation on any organization’s powers.”<sup>164</sup> In other words, when a peremptory norm of international law emerges, international organizations are guided by it rather than their constituent instruments, which are based on states’ consent. That is, international organizations are to follow peremptory norms even if a state has not explicitly consented to it. This argument promises progress for the objective of punishing possible nuclear terrorists by hinting that acts of extreme violence that conflict with international law’s *jus cogens*, or peremptory norms, might be brought within the jurisdiction of the ICC without explicit assignment of ICC’s jurisdiction over terrorism and without a legal definition of those acts as “terrorism.” In the section on individual responsibility above, the discussion made it clear that the ICC has already assumed jurisdiction over individuals in both international and non-international armed conflict where the acts fall under specified

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<sup>160</sup> M. FITZMAURICE & A. QUAST, LAW OF TREATIES: SECTION A: INTRODUCTION TO THE LAW OF TREATIES 17 (2007).

<sup>161</sup> Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?*, 8 EUR. J. INT’L L. 853, 854–55 (2007).

<sup>162</sup> Orakhelashvili, *supra* note 72, at 60.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

categories. While a case can be made by defining terrorism accompanied by extreme violence, such as nuclear terrorism, as a crime against humanity to bring the acts within the jurisdiction of ICC, another avenue of potential success in the objective of punishing nuclear terrorists would be to actively promote prohibition of such acts, punishing them up on the hierarchy of norms to rise to the level of *jus cogens*, as discussed below.

de Wet points out that in the international legal system a hierarchy of norms has emerged, such that the peremptory norms, or *jus cogens*, are primarily related to human rights norms.<sup>165</sup> In fact, the VCLT made it illegal for states to conclude mutual treaties that violate a peremptory law.<sup>166</sup> Currently, the few norms that have become *jus cogens* recognize prohibition of genocide, torture, slavery, and similar other crimes.<sup>167</sup> In those crimes, individuals or states, the perpetrators of actions, become subject to universal jurisdiction.<sup>168</sup>

Interestingly, de Wet observed that certain crimes rose to the status of *jus cogens* because the normative framework of the U.N. Charter system positively elevated certain values above others, through codification, such as by creating provisions that condemn

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<sup>165</sup> Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L. Q. 51, 57 (2006).

<sup>166</sup> Vienna Convention on the Law of Treaties, *supra* note 54, art. 2, ¶ 1 (“For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

<sup>167</sup> de Wet, *supra* note 165, at 59.

<sup>168</sup> M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 63 (1996) (“International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of ‘obedience to superior orders’ (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under ‘states of emergency,’ and universal jurisdiction over perpetrators of such crimes.”).

violations of human rights.<sup>169</sup> At the time of gross violations of human rights, such as crimes against humanity that the Nazi Germany committed or genocides in Rwanda and Bosnia, such condemnation accelerated concretization of prohibitions of acts constituting those crimes—committed by either states or persons—as *jus cogens*, making the acts punishable under universal jurisdiction over criminals. Today, international law must add to *jus cogens* acts of extreme violence that might result from use of nuclear weapons by states or individuals. In fact, deliberation on the underlying legal principle that nudged crimes of genocide, torture, and slavery up to the level of *jus cogens* might reveal that nuclear terrorism and its threat have a close kinship with these crimes by virtue of similar human rights violations inherent in them and humanitarian concerns that they raise. Nuclear terrorism must also be helped rise to the level of *jus cogens* in the same way.

Currently, terrorist attacks are considered serious crimes to be prosecuted in national courts under domestic laws of the prosecuting state.<sup>170</sup> Cassese argues that terrorism, when it is transnational, state-sponsored, or state-condoned, is an international crime and is prohibited by the customary international law.<sup>171</sup> This Article argues that nuclear terrorism, which is an extreme form of terrorism—even when it is not transnational, state-sponsored, or state-condoned—falls under the distinct category of non-international armed conflict. It must be brought under the jurisdiction of the ICC through application of international humanitarian laws and by broadening the category of “crimes against humanity.” Doing so comports with the general principles of international law concerning fairness and justice, as enshrined in the Charter of the United Nations.

*G. Recommendations for Shift in Law in View of Growing Threat of Nuclear Terrorism from Individuals and Groups*

As noted above, ICC’s Final Act did not regard the matters to have been finalized beyond possibility of change. It foresaw

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<sup>169</sup> de Wet, *supra* note 165, at 58.

<sup>170</sup> Cassese, *supra* note 13, at 993.

<sup>171</sup> *Id.* at 994.

expansion of International Criminal Court's jurisdiction in the future—which is now. It recommended that a future Review Conference would forge a definition of terrorist crimes, acceptable to the world community, to include heinous acts of terrorism within the Court's jurisdiction. As pointed out above, a successful follow up on this recommendation will subsume egregious acts of terrorism within "crimes against humanity." Also, as noted above, this category of crimes, covered by the ICC's jurisdiction, already includes crimes committed by individuals without any state involvement, making this recommended shift in international law to be just another small forward step, but one with far-reaching impacts to international peace and security.

Following that step, both individual terrorists and groups can be prosecuted by the ICC. The ICC prosecution of terrorist groups can proceed along the path taken by Justice Jackson, the Chief United States Prosecutor of the principal Axis war criminals at the Nuremberg Trials at the International Military Tribunal following World War II. In his report of June 6, 1945, Justice Jackson laid out his plan for prosecuting both organizations and individuals, and that plan can be adapted for holding modern terrorist organization accountable for nuclear terrorism. Justice Jackson wrote:

In examining the accused organizations in the trial, it is our proposal to demonstrate their declared and covert objectives, methods of recruitment, structure, lines of responsibility, and methods of effectuating their programs. In this trial, important representative members will be allowed to defend their organizations as well as themselves. . . . If in the main trial an organization is found to be criminal, the second stage will be to identify and try before regular military tribunals individual members not already personally convicted in the

principal case. Findings in the main trial that an organization is criminal in nature will be conclusive in any subsequent proceedings against individual members. The individual member will thereafter be allowed to plead only personal defenses or extenuating circumstances, such as that he joined under duress, and as to those defenses he should have the burden of proof.<sup>172</sup>

By adapting this formula in the context of possible nuclear terrorism—first finding organizations culpable and then holding individuals working for that organization responsible—the ICC would be able to prosecute both groups and individuals. It might be important to note also that the Justice Jackson prosecution plan was limited only to barbarities committed by organizations and individuals who had committed them as members of organizations. Individuals who had committed barbarities without being part of an organization and in their personal capacities were not part of this plan. He wrote, “Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan.”<sup>173</sup> In the case of nuclear terrorism, the logistical, technical, and financial difficulties, as well as the complexities of large-scale ideological perversions that might prompt someone to undertake destruction and massacre in such grand scale, might preclude lone-wolf nuclear terrorism. Thus, adapting broad outlines of the Justice Jackson prosecution plan to nuclear terrorism can be feasible with minimal modifications.

Another recommendation that this Article makes for addressing possible nuclear terrorism is to elevate purposefully prohibition against such an act to the level of *jus cogens*. At this

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<sup>172</sup> Letter from Robert H. Jackson to President Harry Truman para. 3 (June 6, 1945) (on file with Yale Law School Library).

<sup>173</sup> *Id.* para. 4.

time, the world community is acutely perceiving this threat, as discussed above, and the world opinion is consolidating on the seriousness of damage that can result if the threat realizes. Already, a number of international conventions, treaties, and other multilateral arrangements are in place to deal with the possibility of such a situation. Already, urgency is being felt to prevent nuclear terrorism. Time is opportune to give this emerging norm against possession and use of nuclear weapons by non-state actors and groups a nudge to raise it to the level of a peremptory norm of international law, from which no derogation is possible.

#### IV. CONCLUSION

International law receives its impetus for and direction of evolution from its dual character, as identified by Ku and Diehl: as an operating system, it establishes rules and norms that chart out outlines of potential interactions; as a normative system, it identifies “substantive values and goals” that international actors are to pursue in international relations.<sup>174</sup> Ku and Diehl’s conception of international law as an operating system<sup>175</sup> is handy for the purposes of the suggestions advanced in the last part of this Article, noted above.

Ku and Diehl regard the international legal system as capable of dealing with multiple issues and one that is not only engendered of the values and norms that it promotes but also shapes its counterpart: international law as a normative system.<sup>176</sup> Seen in its entirety, as a totality of operating principles and values, international law, thus, enshrines an internal dynamic that prods it on the path of development so that norms developed in one part of international law make themselves available for operational purposes in other parts of the law. This Article has proposed that the values embodied in international humanitarian laws must inform laws that are meant to protect the world from proliferation and use of nuclear weapons by the emerging new non-state individual and group actors, national or transnational in scope, meaning to harm

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<sup>174</sup> Ku & Diehl, *supra* note 12, at 4.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 5.

human security through nuclear terrorism. This direction of evolution is not too far-fetched to foresee: international law in other areas, such as human rights laws and humanitarian laws, has already brought individuals within its fold.<sup>177</sup>

More pertinent for the purposes of this Article is Ku and Diehl's comment that, in the traditional way, international law undergoes normative shift as customary practices evolve.<sup>178</sup> A normative shift can, however, also be purposefully and actively brought about. Recently, new treaties, including the NPT, have been used to bring about normative shift when such a need arose.<sup>179</sup> The treaty on nuclear non-proliferation was concluded when the power of the atom was discovered and its enormous potential for both peaceful and destructive purposes was understood and need was felt to both promote its peaceful purposes and restrict its use for destructive purposes. Today, the NPT needs a second normative shift. The NPT, as concluded, did not foresee the emergence of catastrophic terrorism in a new world order where the danger of proliferation and use of nuclear weapons will arise from non-state groups and individuals seeking to end the world or inflict extreme violence on adversaries.<sup>180</sup> The NPT can be revised to incorporate the new reality. It can be revised by incorporating principles emerging from other areas of laws or by helping advance the idea of nuclear non-proliferation to the level of *jus cogens* such that the state consent requirement of international law is not a bar against prosecution of nuclear terrorists.

At the risk of belaboring the point, it may be pertinent to apply ideas from Franck's classic book *Fairness in International Law and Institutions* to the subject matter of this Article. Franck noted early in the book that in international law's post-ontological stage in the late twentieth century, when the number and functions of international organizations hiked, the proper inquiry is not

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<sup>177</sup> Ku & Diehl, *supra* note 12, at 6.

<sup>178</sup> *Id.* at 14.

<sup>179</sup> *Id.* at 1.

<sup>180</sup> Paul I. Bernstein et al., *The Future Nuclear Landscape*, 5 NAT'L DEF. U. (Apr. 2007), [https://wmdcenter.ndu.edu/Portals/97/Documents/Publications/Occasional%20Papers/05\\_The%20Future%20Nuclear%20Landscape.pdf](https://wmdcenter.ndu.edu/Portals/97/Documents/Publications/Occasional%20Papers/05_The%20Future%20Nuclear%20Landscape.pdf).



whether international law is law but whether it is fair and effective.<sup>181</sup> Fairness in laws for Franck is composed of legitimacy and distributive justice, the former being a function of mechanisms that guarantee fair procedures and the latter being a function of the value and worth of laws in allocating appropriate burdens and benefits. Legitimacy in rules seeks to preserve order, and distributive justice in rules favors change. Through the tension between order and change, societies seek fairness.<sup>182</sup> Legal systems are judged by their consequences, in which both procedure and substance matter. Franck's fairness thesis develops further as he points out that the tension between legitimacy and justice—or order and change—is impacted by the concept of equity in international law.<sup>183</sup> When equity is employed to create an exception to the rule when a strict application of the rule might result in unfairness or injustice, a certain level of rule indeterminacy results, or rule legitimacy is lowered. On the one hand, a certain level of rule indeterminacy is to be expected in all bodies of law as it helps arrive at agreements and achieve flexibility.<sup>184</sup> On the other hand, rule indeterminacy can help justify non-compliance.<sup>185</sup> A determinate or inflexible rule can also lose legitimacy if its application brings about an unjust result.<sup>186</sup> Calling such rules as “idiot rules”—as opposed to “sophist rules,” highly flexible rules—Franck writes:

[Highly determinate or inflexible rules] sometimes tend to be unsophisticated in their lack of fine-tuning and are then likely to be perceived—at their margins—as

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<sup>181</sup> FRANCK, *supra* note 81, at 6.

<sup>182</sup> *Id.* at 22–24.

<sup>183</sup> *Id.* at 33–34, 49.

<sup>184</sup> *Id.* at 31.

<sup>185</sup> *Id.*

<sup>186</sup> Giving several examples from modern international relations, Franck wrote: “In such cases ‘hard and fast’ rules of apportionment can be applied at the risk of achieving results which lead to moral outrage and law’s *reductio ad absurdum*. In that sense, fairness discourse which aims to temper the imperative of legitimacy with that of justice serves not to undermine but to redeem the law.” *Id.* at 79.

unreasonable and illegitimate in their demands. If a patently absurd or unfair result accrues from the only possible application of the evident meaning of a simple rule in circumstances requiring a more calibrated response, then that rule has suffered *reductio ad absurdum*, a condition which even may undermine its legitimacy in circumstances not at its margins.<sup>187</sup>

In Franck's terms, international laws' inability to punish non-state actors even if they commit nuclear terrorism and devastate life arises out of excessive high level of determinacy, or inflexibility, of the rules. Pertinent to this Article are the laws that hold perpetrators of certain acts, falling under the category of "crimes against humanity," culpable under international law and punishable under the ICC jurisdiction, but are rendered impotent against nuclear terrorists. The patent unfairness of the outcome, or ineffectiveness of the application, of these rules to respond to a new, worrisome situation of the emerging threat of nuclear terrorism, can be mitigated by application of equity in one of the forms defined and explained by Franck. In this situation, equity must take the form of extending ICC's jurisdiction of nuclear terrorism, not merely by characterizing nuclear terrorism as a crime against humanity but by acting, even when such characterization or definition is hard to formulate, under the general international law principles that underlie the prohibition of such acts. Article 1(1) of the U.N. Charter is a conspicuously-relevant international legal provision under whose legal authority international institutions' jurisdiction can be established over possible nuclear terrorists.<sup>188</sup> Further, the

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<sup>187</sup> THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 77 (1990).

<sup>188</sup> U.N. Charter art. 1, ¶ 1 ("To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or

U.N. Charter's emphasis on international peace and security, whose breach triggers the U.N. Security Council into action under Chapter VII of the U.N. Charter, should be brought to bear upon acts or threats of nuclear terrorism. Even further, normative aspect of the concept of nuclear non-proliferation must be explicitly embedded in a large number of key international instruments and multilateral treaties in the hope of advancing the concept the level of *jus cogens* from which derogation might not become possible.

The current international legal regime of nuclear non-proliferation does not apply to non-state actors. The fear has risen that they may acquire and use nuclear weapons to perpetrate nuclear terrorism. The direction of change that this Article suggests will strengthen international law's reach over possible nuclear terrorists. Placing the crime under the ICC jurisdiction and/or prompting the emergence of peremptory norms against nuclear proliferation and incorporating them in the existing regime of nuclear nonproliferation with strengthen the international system against nuclear proliferation and use by terrorists.

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settlement of international disputes or situations which might lead to a breach of the peace.”).