

Impunity for international terrorists? Key legal questions and practical considerations

Dr. Christophe Paulussen LL.M. M.Phil.

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Abstract

This paper discusses several of the key questions related to the subject of impunity of international terrorists, taking both a fundamental and a more practical approach within the context of international law. First, it reflects on a number of core definitional and theoretical questions which have been pushed into the background of day-to-day reality, by the actual fight against terrorism. For instance: what does the concept of impunity entail exactly and which kinds of standards could be used in measuring impunity? Is it clear what falls under the header of international terrorism and can it in fact be argued that international terrorists enjoy impunity? In practical terms, the paper explores a number of questions related to the actual prosecution of terrorism. What are the obstacles that national prosecutors face every day when prosecuting suspects of international terrorism? To what extent does a rule that *prima facie* seems ideal to fight terrorism (*aut dedere aut judicare*: either extradite or prosecute) apply to terrorist offences? And what is the role of international criminal law – and the international criminal tribunals – in fighting terrorism? The paper concludes with a series of recommendations.

About the Author

Dr. Christophe Paulussen LL.M. M.Phil. is a Research Fellow at the International Centre for Counter-Terrorism – The Hague, a senior researcher international humanitarian law/international criminal law at the T.M.C. Asser Instituut, and coordinator of the inter-faculty research platform ‘International Humanitarian and Criminal Law Platform’. After having spent a year in France (Strasbourg and Angers), he studied law at Tilburg University, the Netherlands. After a propedeuse Dutch law (cum laude), a doctoral International and European Law (with distinction) and a research master (cum laude), he started working as a PhD candidate at the Department of European and International Public Law of Tilburg University in 2005. On 24 September 2010, Christophe defended his PhD thesis ‘Male captus bene detentus? Surrendering suspects to the International Criminal Court’. On 9 December 2011, Christophe’s PhD received an honourable mention from the jury of the Max van der Stoep Human Rights Award. After his PhD defence, and before moving to The Hague, Christophe worked as an assistant professor at Tilburg University. His areas of interest include: international humanitarian law, international criminal law, in particular the law of the international criminal(ised) tribunals, and counter-terrorism & human rights.

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Contact

ICCT – The Hague
Koningin Julianaplein 10
P.O. Box 13228
2501 EE, The Hague
The Netherlands

T +31 (0)70 800 9531

E info@icct.nl

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1. Introduction

On Monday evening 9 February 2009, during his first White House press conference, US President Barack Obama addressed the problem of the Taliban and al Qaeda, and their safe havens in the border regions between Afghanistan and Pakistan. He stated:

[T]his past week, I met with families of those who were lost in 9/11 – a reminder of the costs of allowing those safe havens to exist. My bottom line is that we cannot allow al Qaeda to operate. We cannot have those safe havens in that region. And we're going to have to work both smartly and effectively, but with consistency, in order to make sure that those safe havens don't exist. I do not have yet a timetable for how long that's going to take. What I know is, I'm not going to make – I'm not going to allow al Qaeda or bin Laden to operate with impunity, planning attacks on the U.S. homeland.¹

A little more than two years later, Obama explained to the American people and the rest of the world that after 9/11, “[w]e were (...) unified in our resolve to protect our nation and to bring those who committed this vicious attack to justice”² and that he had directed the CIA “to make the killing or capture of bin Laden the top priority of our war against al Qaeda”.³ He then continued saying:

[F]inally, last week, I determined that we had enough intelligence to take action, and authorized an operation to get Osama bin Laden and bring him to justice. Today, at my direction, the United States launched a targeted operation against that compound in Abbottabad, Pakistan. A small team of Americans carried out the operation with extraordinary courage and capability. No Americans were harmed. They took care to avoid civilian casualties. After a firefight, they killed Osama bin Laden and took custody of his body. (...) [O]n nights like this one, we can say to those families who have lost loved ones to al Qaeda's terror: Justice has been done.⁴

The same day, the UN Security Council issued a Presidential Statement, in which it welcomed the news that Bin Laden would never again be able to perpetrate acts of terrorism and in which it reaffirmed “its call on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of terrorist attacks, and its determination that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.”⁵ Additionally, the President of the UN General Assembly commented – via his spokesperson – on the death of Bin Laden and noted that “[t]errorists must know that there will be no impunity for their barbaric and cowardly deeds.”⁶

These quotations, coming from both the US and UN side, demonstrate the topicality of the subject ‘impunity of international terrorists’ and the mention, in the context of the killing of a terrorist, of concepts such as ‘bringing to justice’, ‘doing justice’ and ‘holding accountable’.

¹ ‘Press Conference by the President’, 9 February 2009, available at http://www.whitehouse.gov/the_press_office/PressConferencebythePresident/ (last accessed on 21 December 2011).

² ‘Remarks by the President on Osama Bin Laden’, 2 May 2011, available at: <http://www.whitehouse.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden> (last accessed on 21 December 2011).

³ *Ibid.*

⁴ *Ibid.*

⁵ UNSC, ‘Security Council Presidential Statement, Welcoming End of Osama bin Laden’s Ability to Perpetrate Terrorist Acts, Urges States to Remain Vigilant’, SC/10239, 2 May 2011, available at: <http://www.un.org/News/Press/docs/2011/sc10239.doc.htm> (last accessed on 11 November 2011).

⁶ ‘Death of Osama Bin Laden’ (Statement attributable to the spokesperson for the President of the General Assembly), United Nations, New York, 2 May 2011, available at: <http://www.un.org/en/ga/president/65/news/ps050211.shtml> (last accessed on 12 December 2011).

However, to what extent does the killing of a terrorist have anything to do with ‘bringing someone to justice’ or with fighting impunity? This paper seeks to provide an overview of several key questions related to the subject ‘impunity of international terrorists’, taking both a fundamental and a more practical approach. As to the fundamental approach, this paper aims to return to – and reflect on – a number of core questions that seem to have been pushed to the background by day-to-day reality, by the actual fight against terrorism. For instance: what does the concept of impunity entail *exactly* and which kinds of standards could be used in measuring impunity? Is it clear what falls under the header of international terrorism and can it in fact be argued that international terrorists enjoy impunity?

In addition to examining these often-overlooked fundamental questions, this paper also seeks to take a more practical approach. The aim of this second part of the paper is to chart the main questions and concerns that are felt *in practice*, in the actual fight against terrorism, so that it is clear which steps should be taken to fight terrorism, regardless of the more fundamental question whether or not international terrorists actually enjoy impunity. Here, both practical problems at the national and international level will be examined. For example: what are the obstacles that national prosecutors face every day when prosecuting suspects of international terrorism? To what extent does a rule that *prima facie* seems ideal to fight terrorism (*aut dedere aut judicare*: either extradite or prosecute) apply to terrorist offences? And what is the role of international criminal law – and the international criminal tribunals – in fighting terrorism?

However, before addressing these more practical issues (Section 3), this paper will first look at a few fundamental questions that can be related to the topic ‘impunity of international terrorists’ (Section 2). This paper will end with a conclusion (Section 4) and a list of concrete recommendations (Section 5).

2. Fundamental Questions

2.1. What is impunity *exactly*?

In the ‘Updated Set of principles for the protection and promotion of human rights through action to combat impunity’ (hereinafter: Updated Impunity Principles), submitted to the United Nations Commission on Human Rights on 8 February 2005, one can find what is arguably the “most authoritative definition”⁷ of impunity, namely:

the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.⁸

Hence, according to this definition, impunity basically means not bringing perpetrators to account pursuant to certain investigative proceedings. Although this definition explicitly speaks of “civil, administrative or disciplinary proceedings” as appropriate ways to fight impunity, it nevertheless seems to focus *especially* on

⁷ M.M. Penrose, ‘Impunity – Inertia, Inaction, and Invalidity: A Literature Review’, *Boston University International Law Journal*, Vol. 17 (1999), p. 276, referring to an earlier (but almost identical) version of this definition proffered by Louis Joinet. (In Joinet’s definition, “violations” is preceded by “human rights” and the final words go as follows: “and, if found guilty, convicted, and to reparations being made to their victims.”)

⁸ UN Commission on Human Rights, Sixty-first session, Item 17 of the provisional agenda ‘Promotion and protection of human rights. Impunity. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher. Addendum. Updated Set of principles for the protection and promotion of human rights through action to combat impunity’, E/CN.4/2005/102/Add.1, 8 February 2005 (hereinafter: Updated Impunity Principles), p. 6.

criminal proceedings.⁹ Indeed, Principle 1 of the Updated Impunity Principles (entitled: ‘General obligations of States to take effective action to combat impunity’) stipulates:

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.¹⁰

This ostensible preference for criminal proceedings brings to the fore an interesting question, namely to what extent non-criminal law accountability avenues should be pursued in the fight against terrorism. For instance, can a truth and reconciliation commission that seriously examines acts of suspects of international terrorism, but whose proceedings in the end do not lead to criminal charges, be seen as an effective way to fight impunity or is it, in contrast, a mechanism that rather erodes this concept?

Another question that could be asked in this context is whether the seriousness of the alleged crime, i.e. international terrorism, should constitute a reason to only use a criminal law approach; can it, for example, be said that international terrorism is a serious crime under international law that seemingly demands criminal proceedings?¹¹ (This point will be addressed in greater detail *infra*.)

Irrespective of the question whether the criminal law approach is the best solution to bring terrorist suspects to account, the definition used by the Updated Impunity Principles assumes some sort of investigative proceedings – whether of a criminal, civil, administrative or disciplinary nature – to fight impunity. This would mean that fighting terrorism via methods that do not use such investigative proceedings are not very helpful in the fight against impunity. On the contrary: by entailing that suspects are not held accountable for their alleged deeds, these methods in fact *increase* the impunity problem.

A clear example of this is the situation where terrorist suspects are not brought before a court, but end up, for instance via extraordinary rendition, in secret detention or torture facilities – outside of all legal frameworks. Indeed, in this context, the word “impunity” is very often no longer connected to the initial starting point – the alleged terrorists – but to the alleged kidnappers and torturers of those terrorist suspects. For instance, the 2010 ‘Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering

⁹ Cf. also L.N. Sadat, ‘Redefining Universal Jurisdiction’, *New England Law Review*, Vol. 35, No. 2 (2000-2001), pp. 241-242, n. 3.

¹⁰ Updated Impunity Principles, p. 7.

¹¹ Cf. also Principle 19 of the Updated Impunity Principles (‘Duties of States with regard to the administration of justice’), which states: “States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished. (...)” (Updated Impunity Principles, p. 12.) See also UN Commission on Human Rights, Sixty-first session, Item 17 of the provisional agenda ‘Promotion and protection of human rights. Impunity. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher’, E/CN.4/2005/102, 18 February 2005, n. 48: “The premise underlying updated principle 19, which recognizes that criminal prosecution plays a necessary role in combating impunity for serious crimes under international law, has been strongly affirmed in jurisprudence of human rights treaty bodies.” See further the Preamble of the ICC Statute: “**Affirming** that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, **Determined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, **Recalling** that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes [emphasis in original]”. See finally B. Saul, ‘Forgiving Terrorism: Trading Justice for Peace, or Imperiling the Peace?’, in: M. Gani and P. Mathew (eds.), *Fresh Perspectives on the ‘War on Terror’*, ANU E Press Australian National University: Canberra 2008 (hereinafter: Saul 2008), pp. 205-206, mentioning the principle of “preservation of a prosecution option for the most serious international crimes (where possible)”.

Terrorism’ “aim[ed] to highlight and illustrate by examples the wide spread practice of secret detention and related impunity.”¹²

Another obvious example is related to the introduction of this paper. There, the case of Bin Laden was presented and it was wondered to what extent the killing of a terrorist has anything to do with fighting impunity. Without asserting here that the specific operation in Abbottabad was a targeted killing operation, it can be argued in general that killing terrorists when there is a possibility to arrest them and bring them to account is not assisting the fight against impunity. Hence, even though one should not be too surprised if politicians, after such an operation, may say that ‘justice has been done’, it could be argued that if one wants to truly fight impunity, one should bring suspects to account/to justice pursuant to certain (criminal law based)¹³ investigative proceedings.

A final illustration of a method through which suspects of terrorism are not held accountable for their alleged deeds is the conferral of a blanket amnesty. In principle, the conferral of an amnesty by a truth and reconciliation commission that seriously investigates the alleged deeds of the suspects may not be problematic in the context of fighting impunity. After all, as explained earlier, the criminal law approach is not the only accountability avenue (mentioned by the Updated Impunity Principles).¹⁴ In fact, Ben Saul has even argued that

in exceptional cases, amnesties that would confer impunity (where there are no alternative means of accountability) may still be lawful where, for instance, other branches of international law (such as the enforcement powers of the UN Security Council under Chapter VII of the *UN Charter*) provide a basis for suspending human rights to secure international peace and security [original footnote omitted].¹⁵

However, he immediately adds that there is “a trend in practice towards the restriction of amnesties for serious international crimes.”¹⁶ Is this also the case for international terrorism? Can international terrorism be

¹² UNGA, Human Rights Council, Thirteenth session, Agenda item 3, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, ‘Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin’, A/HRC/13/42, 19 February 2010, para. 6, pp. 10-11. See also, for instance, Amnesty International (United States of America), ‘Impunity and Injustice in the ‘War on Terror’. From torture in secret detention to execution after unfair trial?’, 12 February 2008, AI Index: AMR 51/012/2008, available at: <http://www.amnesty.ie/reports/impunity-and-injustice-war-terror-torture-secret-detention-execution-after-unfair-trial> (last accessed on 19 March 2012) and M. Welch, ‘Sovereign impunity in America’s war on terror: examining reconfigured power and the absence of accountability’, *Crime, Law and Social Change*, Vol. 47, No. 3 (2007), pp. 135-150.

¹³ In UNSC Res. 1373 of 28 September 2001, the Security Council appeared to connect the criminal law approach to the concept of “bringing to justice”. See para. 2 (e) of that resolution: “*The Security Council, (...) Acting under Chapter VII of the Charter of the United Nations, (...) Decides also that all States shall: (...) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts [emphasis in original]*”. See also UNSC, ‘Letter dated 5 April 2011 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council’, S/2011/240, 18 April 2011, ‘Report of the Security Council Committee established pursuant to resolution 1373 (2001) on the practitioners’ seminar on “Bringing terrorists to justice”, held at United Nations Headquarters from 1 to 3 December 2010’ (hereinafter: Bringing terrorists to justice seminar), paras. 1-2 and 13 (where the link is made between the concept of “bringing to justice” and prosecution/the criminal law approach). In that respect, the earlier-mentioned UN Security Council Presidential Statement in the context of the Bin Laden killing (see n. 6 and accompanying text) is a little unfortunate.

¹⁴ See also Saul 2008, p. 204.

¹⁵ Saul 2008, p. 192.

¹⁶ *Ibid.* See also Updated Impunity Principles, p. 14 (‘Principle 24. Restrictions and Other Measures Relating to Amnesty’): “Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty

seen as a serious international crime which should lead to the restriction of amnesties? (This question is also reminiscent of the earlier-indicated issue whether international terrorism can be seen as a serious crime under international law and whether that fact seemingly demands criminal proceedings, see footnote 12 and accompanying text.)

These are important questions, as, in the words of Bianchi and Naqvi,

the characterisation of acts of terrorism as *international crimes* entails a different set of considerations and would result in a number of important consequences, not least the possible entitlement of all states to exercise universal jurisdiction¹⁷ over alleged offenders, regardless of any treaty basis, under customary international law [emphasis in original and footnote added].¹⁸

These observations obviously necessitate a more detailed look at the definition of international terrorism/international acts of terror, to which this paper will turn in Subsection 2.3.

2.2. Which kinds of standards could be used to measure impunity?

The previous subsection has shown that many different standards could be used in measuring impunity. For instance, one could look at the number of conferrals of blanket amnesties or at the number of instances where terrorism suspects are not properly brought to justice, for example because they end up in secret detention facilities or because they are killed on the spot, rather than being arrested. Another indicator could be the refusal to implement treaties and UN Security Council resolutions pertaining to the prosecution of terrorism suspects. These examples show the unwillingness of governments to bring terrorist suspects to account in a proper way, for instance because they realise that following the normal route might lead to the release of suspects they deem too dangerous for society¹⁹ (evidently, more detailed research is needed to examine the official and practical considerations fuelling the unwillingness of governments to put terrorists on trial). Interestingly (and very importantly), this may also lead to refusals to cooperate in terrorism cases, for instance when it comes to extraditing suspects or sharing intelligence, from states that wish (or are legally obliged) to follow the rules. (This point will be addressed in more detail in Subsection 3.2.3.) This, in turn, may also lead to more impunity.

However, impunity may also be caused by inability. Governments may be willing, but *unable* to properly hold suspects accountable. Here, one could think of the many problems that prosecutors face when trying suspects of terrorism – very often legally complicated cases where a state may be dependent on the help of other

and other measures of clemency shall be kept within the following bounds: (a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19 [see n. 12] refers or the perpetrators have been prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question”.

¹⁷ Universal jurisdiction is “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.” (Principle 1 (‘Fundamentals of Universal Jurisdiction’), para. 1, ‘The Princeton Principles on Universal Jurisdiction’ (2001), available at: http://lapa.princeton.edu/hosteddocs/unive_jur.pdf (last accessed on 11 November 2011) (hereinafter: Princeton Principles), p. 28.

¹⁸ A. Bianchi and Y. Naqvi, *International Humanitarian Law and Terrorism*, Hart Publishing: Oxford and Portland, Oregon 2011 (hereinafter: Bianchi and Naqvi 2011), p. 208. See also Principle 21 of the Updated Impunity Principles (‘Measures for Strengthening the Effectiveness of International Legal Principles Concerning Universal and International Jurisdiction’): “States should undertake effective measures, including the adoption or amendment of internal legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable principles of customary and treaty law.” (Updated Impunity Principles, p. 13.)

¹⁹ See, for example, Ch. Lee, ‘Judges Reject Interrogation Evidence in Gitmo Cases’, *ProPublica*, 13 August 2010, available at: <http://www.propublica.org/article/judges-reject-interrogation-evidence-in-gitmo-cases> (last accessed on 27 March 2012): “The Obama administration has already said that at least 48 of the remaining 176 prisoners at Guantánamo will be held indefinitely because they’re too dangerous to release but can’t be prosecuted successfully in military or civilian court. They’ve said that coercion-tainted evidence is one obstacle.”

(perhaps not so helpful) states. Even more extreme is the situation where governments do not have effective control over the territory, and thus are incapable of providing a well-functioning legal system that is able to bring (terrorism) suspects to account. This may for instance be the case in failed states, such as Somalia²⁰ (but one could also refer to the safe havens to which Obama alluded to in the introduction of this paper).

In the next subsection, this paper will look at another fundamental question, namely what falls under the concept international terrorism. As explained at the end of Subsection 2.1., a more detailed look at this definition is necessary, for certain qualifications (can terrorism be seen as an international crime?) might have important prosecutorial consequences. In addition, if certain definitional problems are identified, these could have an effect on the ability of states to properly bring suspects to account (one of the standards that could be used in measuring impunity).

2.3. What falls under the concept of international terrorism?

What could be meant by international terrorism/international acts of terror? To start with the adjective 'international'; different approaches could be taken here. One could see international acts of terror as those acts of terror that contain a cross-border/transnational element, for example because the violence is not limited to the territory of one state or because the perpetrators and/or the victims have different nationalities. However, it could perhaps also refer to acts which may be purely domestic, but which are so serious that it becomes an issue of the international community as a whole.²¹ Cassese, who was of the opinion that international terrorism could indeed be seen as a discrete international crime, argued that both elements (which he divided in four criteria) had to be met before one could speak of an international crime.²² Even more unclear and complicated is the question what could be meant by acts of terror – and if and when such acts can amount to an international crime.²³

²⁰ See International Crisis Group, 'Somalia: Countering Terrorism in a Failed State', Africa Report No. 45, Nairobi/Brussels, 23 May 2002, p. 1.

²¹ See also Bianchi and Naqvi 2011, pp. 274-275: "[T]he Security Council has shown an increased tendency to describe even purely domestic terrorism as a threat to international peace and security (...). Such characterisation may arguably be justified in light of some sort of 'effects-doctrine' in view of the modern interdependent world, in which the effects of domestic terrorism may be felt far beyond territorial borders of the directly affected state. In addition, it is possible to contend that the gravity of a particular terrorist acts may render it an act of international concern, even though the victims and perpetrators hail from the same state. Since one of the defining features of an international crime is its violation of fundamental values of the international community, one could argue that an act of terrorism of sufficient gravity is 'a sort of crime *erga omnes*'. (...) Although the lack of a clearly transnational element to a terrorist crime will continue leaving it open to doubt as to whether it reaches the threshold of an international crime, the above considerations suggest that the possibility to characterize such an act of terror as an international crime should not be discounted completely [original footnotes omitted]."

²² See A. Cassese, *International Criminal Law*, Oxford University Press: Oxford 2003, p. 129: "Terrorist acts amount to *international crimes* when, first, they are not limited in their effects to one State solely, but *transcend national boundaries* as far as the persons implicated, the means employed, and the violence involved are concerned; and, secondly, they are carried out with the support, the toleration, or the acquiescence of the State where the terrorist organization is located or of a foreign State. The element of *State promotion* or *State toleration*, or even *State acquiescence* due to inability to eradicate the terrorist organization, seems crucial for elevating the offence to the rank of international crime. This is so because it is at this stage that terrorism stops being a criminal activity against which States can fight by bilateral or multilateral co-operation, to become (and this is the third element) a phenomenon of concern for the *whole international community* and a threat to the peace. (...) It would seem that terrorist acts, if they fulfil the above conditions and in addition, fourthly, are *very serious or large scale*, may be regarded as international crimes [emphasis in original]."

²³ In Subsection 2.1. of this paper, the terms "serious crime under international law" or "serious international crime" were mentioned, but one can wonder whether there is much difference, in terms of legal consequences, between an international crime as such and a serious crime under international law/a serious international crime. Cf. again (see also n. 12) the Preamble of the ICC Statute: "**Affirming** that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, **Determined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, **Recalling** that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes [emphasis in original]."

First, it must be clearly stressed that Cassese's argument relates to the question whether acts of terror can be seen as a *discrete* international crime. This – very controversial – point will be the focus of this subsection. However, before going into that issue, it must be emphasised that acts of terror could also amount to an international crime if they fall under an *already existing* international crime, such as a war crime, a crime against humanity, a genocide or an aggression. Andrea Bianchi and Yasmin Naqvi have clearly shown that under certain circumstances, this is indeed possible for all four existing international crimes and there is no need to repeat their arguments here.²⁴ However, it should be stressed that *if* certain acts indeed fall under the umbrella of already-existing international crimes, it could be argued that prosecution is warranted (and thus that non-criminal accountability avenues should not be pursued),²⁵ that the use of amnesties should be restricted²⁶ and possibly, that states can exercise universal jurisdiction over the alleged offenders.²⁷ In addition, the already-briefly mentioned obligation of *aut dedere aut judicare* (either extradite or prosecute) may become (more) relevant.²⁸ (This point will be addressed in more detail in Subsection 3.2.3.)

Nevertheless, as stated, this paper will look not so much at acts of international terrorism falling under already-existing international crimes, but at the question whether acts of international terrorism *as such* can amount to an international crime, and whether also for these acts, one can assert that prosecution is warranted, that the use of amnesties should be restricted, that universal jurisdiction is possible and that one must follow *aut dedere aut judicare*.

The (non-)existence of a distinct (definition of an) international crime of terrorism, and its consequences for the fight against terrorism, is a topic that has received great (scholarly) attention. It appears that until recently, there seemed to be consensus on the fact that there was no internationally accepted definition of terrorism; in 2002, Fry alleged that there was no clear and internationally recognised definition of terrorism and that this fact thwarted the fight against impunity.²⁹ Saul's important work in 2006 ended with the words: "In the absence of definition, a lingering 'conceptual chaos or zone of passing turbulence in public or political language' privileges those in the hegemonic position to define and interpret 'terrorism' – and to erratically brand it upon their enemies [original footnote omitted]."³⁰ In the same year, the UN General Assembly adopted the Global Counter-Terrorism Strategy, in which the Member States' determination was reaffirmed "to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism, including by resolving the outstanding issues related to the legal definition and scope of the acts covered by the convention, so that it can serve as an effective instrument to counter terrorism".³¹ Furthermore, in the 2007 'Final Report Poelgeest Seminar',³² it was asserted that "a common definition in a comprehensive counter-terrorism

²⁴ See Bianchi and Naqvi 2011, pp. 208-263.

²⁵ See n. 12 and accompanying text.

²⁶ See n. 17 and accompanying text.

²⁷ See n. 18 and accompanying text.

²⁸ See W.A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*. Cambridge: Cambridge University Press 2006, p. 158: "The (...) result of the recognition of an offence as an international crime is that it imposes duties upon States with respect to investigation, prosecution and extradition. This is sometimes expressed with the Latin expression, *aut dedere aut judicare* (literally, extradite or prosecute)." See also Principle 21 of the Updated Impunity Principles ('Measures for Strengthening the Effectiveness of International Legal Principles Concerning Universal and International Jurisdiction'): "States must ensure that they fully implement any legal obligations they have assumed to institute criminal proceedings against persons with respect to whom there is credible evidence of individual responsibility for serious crimes under international law if they do not extradite the suspects or transfer them for prosecution before an international or internationalized tribunal." (Updated Impunity Principles, p. 13.)

²⁹ See J.D. Fry, 'Terrorism as a crime against humanity and genocide: the backdoor to universal jurisdiction', *UCLA Journal of International Law and Foreign Affairs*, Vol. 7, No. 1 (2002), p. 181.

³⁰ B. Saul, *Defining Terrorism in International Law*, Oxford University Press: Oxford 2006, p. 320.

³¹ UNGA Res. 60/288 ('The United Nations Global Counter-Terrorism Strategy') of 20 September 2006.

³² N. Schrijver and L. van den Herik, 'Counter-terrorism strategies, human rights and international law: meeting the challenges, Final Report Poelgeest Seminar', *Netherlands International Law Review*, Vol. 54, No. 2 (2007) (hereinafter: Final Report Poelgeest Seminar), p. 574. The 'Final Report Poelgeest Seminar' is the basis of the 'Leiden Policy Recommendations

convention should still be the goal”,³³ because “given the lack of a generally accepted international definition of terrorism, states are in a position to use their own national definitions and this opens the door to a fragmented approach and abuse.”³⁴ And finally, Bianchi and Naqvi in 2011 also noted the relevance of a general definition of terrorism,³⁵ and concluded that “it may be said that there is currently no solid consensus in international practice as to the existence of the international crime of terrorism in customary international law.”³⁶

Before turning to the controversial decision of the Special Tribunal for Lebanon’s Appeals Chamber of 16 February 2011 that argued the contrary, it is nevertheless good to stress that the ‘Final Report Poelgeest Seminar’ also acknowledged that “basic agreement exists on the core of what constitutes terrorism”:³⁷

In essence, a terrorist act is (1) an attack against civilians, committed with the intent to cause death or serious bodily injury, or (2) taking of civilian hostages, or (3) damage to property (e.g., an attack against a power plant or cyber terrorism), in all cases with the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population or compelling a government or an international organization to undertake or abstain from undertaking a certain act. There is agreement that a terrorist act is never justifiable whatever the purpose for which the act is said to be committed [original footnotes omitted].³⁸

Saul was even more succinct. He argued that the essence of terrorist action is the instrumental killing of innocent civilians for political purposes.³⁹ However, even though the essence of terrorist action can be captured, it is another thing to argue that there is a clear internationally recognised (definition of a) crime of terrorism.

In the context of this discussion, in the context of defining terrorism, the landmark – and controversial – decision of the Appeals Chamber of the Special Tribunal for Lebanon (STL)⁴⁰ cannot be ignored, “the first time that an international tribunal has authoritatively confirmed a general definition of terrorism under international law”.⁴¹ In this unanimous decision, the five Appeals Chamber’s judges headed by (then Presiding Judge and Judge Rapporteur) Cassese opined, in contrast to the view of the Defence Office, the Prosecutor and “many scholars and other legal experts”,⁴² that “a customary rule of international law regarding the international crime⁴³ of

on Counter-terrorism and International Law’ (N. Schrijver and L. van den Herik, ‘Leiden Policy Recommendations on Counter-terrorism and International Law’, 1 April 2010, available at:

<http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf>, (last accessed on 11 November 2011) (hereinafter: Leiden Policy Recommendations).)

³³ Final Report Poelgeest Seminar, p. 574.

³⁴ *Ibid.* A good recent example in that respect is the new anti-terrorism law of Ethiopia, which, according to Human Rights Watch, is being used to suppress journalists, see Human Rights Watch, ‘Ethiopia: Journalists Convicted Under Unfair Law’, 21 December 2011, available at: <http://www.hrw.org/news/2011/12/21/ethiopia-journalists-convicted-under-unfair-law> (last accessed on 21 March 2012).

³⁵ See Bianchi and Naqvi 2011, pp. 272-273: “The world’s experience of catastrophic and ever-evolving means of effecting terrorism lends considerable empirical support to the argument that the sectoral approach to criminalising forms of terrorist behaviour is severely limited. The effect on international relations from certain acts of terrorism also suggests that a unified condemnation of acts internationally agreed upon as terrorist crimes might achieve more for international co-operation than the segmented approach applied thus far. Therefore, in spite of its difficulties, interest remains in achieving a consensus on a generic definition of terrorism [original footnote omitted].”

³⁶ *Ibid.*, p. 285.

³⁷ Final Report Poelgeest Seminar, p. 574.

³⁸ *Ibid.*, pp. 574-575.

³⁹ See Saul 2008, p. 199.

⁴⁰ See STL, Appeals Chamber, ‘Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging’, Case No.: STL-11-01/I, 16 February 2011 (hereinafter: STL decision).

⁴¹ M.P. Scharf, ‘Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation’, *ASIL Insights*, Volume 15, Issue 6, 4 March 2011, available at: <http://www.asil.org/insights110304.cfm> (last accessed on 11 November 2011).

⁴² STL decision, para. 83.

terrorism, at least *in time of peace*,⁴⁴ has indeed emerged [emphasis in original and footnotes added].”⁴⁵ This customary rule required three elements:

(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational⁴⁶ element [original footnote omitted and footnote added].⁴⁷

However, the decision was fiercely attacked in literature, making its jurisprudential value doubtful. For example, Ben Saul argued that the article he wrote in response to the decision

demonstrates that *every category of source relied upon by the Appeals Chamber* – national legislation, judicial decisions, regional and international treaties, and UN resolutions – *was misinterpreted, exaggerated, or erroneously applied*. It also shows that key sources that undermine the Appeals Chamber’s findings on customary law were hastily dismissed, trivialized, or ignored altogether by it. In short, it exposes a fatally incorrect decision based on poor reasoning and a *laissez-faire* attitude towards both criminal liability and custom formation. The conclusion of the article explains some of the broader implications of such a flawed decision, including the damage to human rights and to public confidence in international criminal justice [emphasis in original].⁴⁸

One could argue that these strong rejections of the decision may point to the fact that the decision cannot be used as a useful precedent to counter the apparent current situation that there is still no internationally recognised definition of international terrorism/a distinct international crime of terrorism.⁴⁹ (A statement that could perhaps also find support in the fact that neither the ICC’s Rome Conference in 1998, nor the ICC’s Kampala Review Conference in 2010 has led to the inclusion of a separate crime of terrorism in the ICC Statute.)

⁴³ Note that the STL Appeals Chamber also speaks of terrorism as an international crime here, cf. also *ibid.*, para. 104.

⁴⁴ In its decision, the Appeals Chamber opined that “a broader norm that would outlaw terrorist acts *during times of armed conflict* may also be emerging [emphasis in original]”. (*Ibid.*, para. 107.)

⁴⁵ *Ibid.*, para. 85. Note that (the scholar) Cassese had already argued this before, see, for example, A. Cassese, *International Criminal Law*, Second Edition, Oxford University Press: Oxford 2008, p. 163: “[W]idespread consensus on a generally acceptable definition of terrorism has evolved in the world community, so much so that the contention can be made – based on the arguments I shall set forth below – that indeed a *customary rule* on the objective and subjective elements of the crime of international terrorism in time of peace has evolved [emphasis in original].”

⁴⁶ The STL explained that this last element is not linked with the definition of terrorism (only the two first elements are), but with “its character as *international* rather than *domestic* [emphasis in original].” (STL decision, para. 89.)

⁴⁷ *Ibid.*, para. 85.

⁴⁸ B. Saul, ‘Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism’, *Leiden Journal of International Law*, Vol. 24 (2011), p. 679. One could also refer to other very critical articles, such as: S. Kirsch and A. Oehmichen, ‘Judges gone astray: The fabrication of terrorism as an international crime by the Special Tribunal for Lebanon’, *Durham Law Review Online*, Vol. 1 (available at: http://durhamlawreview.co.uk/files/Kirsh_house_style_1.pdf (last accessed on 11 November 2011)). In this article, the authors conclude: “[T]he Appeals Chamber’s decision of 16 February 2011 turns out to be a deliberate attempt of judicial law-making. In fact it shows an unwarranted assumption of legislative power which has never been given to the Tribunal by any authority. As such it must be strongly rejected.” (*Ibid.*, p. 19.)

⁴⁹ See also *ibid.*, p. 20: “[T]here can be no doubt that because of its serious shortcomings, the Appeals Chamber’s decision of 16 February 2011 itself cannot serve as a precedent for the establishment of terrorism as a discrete crime under customary international law.”

2.4. Do international terrorists enjoy impunity?

Even though Subsection 2.2. had identified a number of standards by which impunity could be measured (and, having addressed Subsection 2.3., one could further add definitional problems leading to an inability to prosecute), it is very hard, if not impossible, to answer a fundamental question as 'Do international terrorists enjoy impunity?'. After all, even if one were to follow, as this paper has done, the definition of impunity as suggested by the Updated Impunity Principles, and even if one were to agree with the idea that one should look at the number of prosecutions versus the number of non-prosecutions to find the 'impunity rate' of international terrorists (which is still unclear given that non-criminal approaches are not excluded from the definition), the lack of clarity with respect to the meaning of (acts perpetrated by) international terrorists makes the focus as to which kinds of (non-)prosecutions must be analysed, extremely blurry. Furthermore, even if all these elements *were* clear, one can wonder whether there is sufficient statistical data/information available which can clearly point out how serious the problem of impunity for international terrorism really is.⁵⁰

3. More Practical Questions

3.1. Introduction

Even if the fundamental question as presented in Subsection 2.4. cannot be answered, even if it cannot be maintained that international terrorists actually enjoy impunity, the fact is that the perpetrators of acts which could qualify as international terrorist acts *are* brought to justice and that impunity *is being* fought. The remainder of this paper will follow the apparent criminal law preference of the Updated Impunity Principles and will highlight several problems when it comes to prosecuting alleged terrorists. Subsection 3.2. will look at arguably the most important level, prosecutions before national courts, and Subsection 3.3. will address a few issues related to prosecutions at the arguably 'residual' level, the level of the international tribunals.⁵¹ It can be asserted that identifying and clarifying the (practical) questions with which the (inter)national level is confronted/the factors that may hinder prosecution will *always* help in the fight against impunity, even if the exact 'impunity rate' is immeasurable.

3.2. Prosecution before national courts

3.2.1. Introduction

Before addressing several problems that can be discerned at the national level, it must be stressed that in general, it seems that national prosecutors are quite able to prosecute terrorism cases. For instance, one of the two main objectives of the 2011 practitioners' seminar 'Bringing terrorists to justice' was

[t]o build upon States' successes in order to show the broader international community that different legal systems, dealing with different kinds of terrorism, have been able to meet the related challenges

⁵⁰ For instance, even the in many aspects very useful Electronic Legal Resources on International Terrorism of the UN Office on Drugs and Crime's Terrorism Prevention Branch (see <https://www.unodc.org/tldb/en/index.html> (last accessed on 11 November 2011)) contains only limited information on (inter)national terrorism cases from 20 states (Australia, Bosnia and Herzegovina, Brazil, Canada, France, Germany, India, Israel, Italy, the Netherlands, New Zealand, Peru, Romania, Russia, South Africa, Spain, Sweden, Switzerland, UK and US) – out of a list of 195 states (see https://www.unodc.org/tldb/browse_countries.html (last accessed on 11 November 2011)).

⁵¹ Cf. also International Law Commission, Sixty-third session, Geneva, 26 April – 3 June and 4 July – 12 August 2011, 'Fourth report on the obligation to extradite or prosecute (*aut dedere aut judicare*) by Zdzislaw Galicki, Special Rapporteur', UNGA, A/CN.4/648, 31 May 2011 (hereinafter: Galicki report), paras. 34-36.

and find solutions allowing them to bring terrorists to justice effectively while respecting the rule of law and human rights.⁵²

Nevertheless, the same seminar brought to light a number of ideas that could enhance the fight against impunity. A number of them, including some conclusions from the already-mentioned Poelgeest seminar and its follow-up, the Leiden Policy Recommendations on Counter-terrorism and International Law (see footnote 33), will now be addressed.

3.2.2. *Practical concerns part I*

First of all, in the introduction of the seminar's report, the Executive Director of the UN Counter-Terrorism Committee Executive Directorate argued that ratification of conventions, adoption of legislation and conclusion of bilateral extradition and mutual legal assistance treaties was important,⁵³ but that "the biggest challenge in countering terrorism was to make those critically important tools work in practice."⁵⁴ In the 'summary of discussions' of the seminar's report, several critical points were stressed, including effective mutual legal assistance,⁵⁵ enhanced harmonisation of evidence law,⁵⁶ the use of joint investigations teams,⁵⁷ "the high level of trust required to establish effective working relations [and] (...) the need for timely exchange of information",⁵⁸ the importance of liaison magistrates and of informal working relationship between liaison magistrates and national judicial authorities⁵⁹ and judicial networks.⁶⁰

3.2.3. *A more detailed look at extradition, the necessity of an internationally recognised definition and aut dedere aut judicare*

A very prominent issue mentioned in the seminar was extradition. It was found that extradition, which may also bring in political elements/obstacles, is often a difficult process⁶¹ and that "effective communication and an understanding of the other State's domestic legal system increased the chance that an extradition request would be positively received by the requested State."⁶² In addition, it was held that "States must expedite, simplify and give priority to extradition and mutual legal assistance requests in terrorism-related cases and make use of international and regional best practices in the field of extradition and mutual legal assistance, with due respect for human rights, fundamental freedoms and international refugee law."⁶³ This crucial point, the relevance of human rights in extradition, was also noted with respect to safeguards against arbitrary detention, hidden or

⁵² Bringing terrorists to justice seminar, para. 4. See also Leiden Policy Recommendations, para. 8, p. 4.

⁵³ In fact, it has been argued that "[t]he central challenge (...) is the lack of adoption, ratification, accession, and most significantly, implementation of the existing instruments and mechanisms. (...) In addition, widespread, consistent, and appropriately defined domestic criminalization of terrorist acts will facilitate effective international cooperation." (Leiden Policy Recommendations, paras. 11-12, p. 5.)

⁵⁴ Bringing terrorists to justice seminar, para. 8.

⁵⁵ See *ibid.*, para. 14. See also Leiden Policy Recommendations, paras. 13-14, pp. 5-6.

⁵⁶ See Bringing terrorists to justice seminar, para. 15. Cf. also Final Report Poelgeest Seminar, p. 581.

⁵⁷ See Bringing terrorists to justice seminar, para. 17. See also Leiden Policy Recommendations, para. 15, p. 6. Cf. also E. Bakker and J. Powderly, 'Joint Investigation Teams. Added Value, Opportunities and Obstacles in the Struggle against Terrorism', Expert Meeting Paper, ICCT – The Hague, 21 February 2011, available at:

<http://www.icct.nl/userfiles/file/ICCT%20JITs%20Expert%20Meeting%20Paper.pdf> (last accessed on 11 November 2011).

⁵⁸ Bringing terrorists to justice seminar, para. 18. See also Final Report Poelgeest Seminar, p. 581 and Leiden Policy Recommendations, paras. 16-17 and 20, pp. 6-7.

⁵⁹ See Bringing terrorists to justice seminar, para. 19.

⁶⁰ See *ibid.*, para. 20. Cf. also Leiden Policy Recommendations, para. 21, pp. 7-8, where it suggested to make greater use of multidisciplinary fusion centres.

⁶¹ See Bringing terrorists to justice seminar, para. 21: "In practice, as several participants noted, extradition processes are often long, complex processes that mix legal and political elements."

⁶² *Ibid.*

⁶³ *Ibid.*, para. 22. See also Leiden Policy Recommendations, paras. 7 and 18-20, pp. 3 and 7.

unacknowledged detention, torture and prosecution on discriminatory grounds,⁶⁴ a point which ties in with the already-mentioned issue that trust between states is of utmost importance – see footnote 59 and accompanying text – and that practices which actively violate that trust or which cannot adequately take away distrust (think of extraordinary rendition⁶⁵ and diplomatic assurances)⁶⁶ can effectively undermine inter-state cooperation in terrorism cases and thus weaken the fight against impunity.⁶⁷ This point was already generally introduced in Subsection 2.2., but an interesting concrete example is that according to a German official quoted in *Der Spiegel*, Germany has recently limited information exchange with US intelligence to “rule out the possibility that German information could be used to plan a drone attack.”⁶⁸ In the future, the enactment of the US ‘National Defense Authorization Act for Fiscal Year 2012’ (NDAA 2012), which Joanne Mariner qualified “a federal statute essentially meant to codify the Guantanamo approach to justice”,⁶⁹ may cause similar problems. The fact that the act’s controversial counter-terrorism provisions, which expand the scope of (indefinite) military detention, are now anchored in legislation arguably supports the view that the war paradigm – not the law enforcement paradigm – is more and more winning ground in the US fight against terrorism. This may lead to governments refusing extradition of terrorism suspects who might face (indefinite) military detention in the US.⁷⁰

In this context, the relevance of an internationally recognised definition needs to be stressed again. One can question to what extent the lack of such a definition actually jeopardises the fight against impunity as prosecutors seem quite able to bring terrorists to justice, even without such a definition.⁷¹ Indeed: do we really *need* a consensus definition as argued by the authorities mentioned earlier?⁷² It must be stressed that the fact that prosecutors are generally able to bring suspects to justice, does not mean that a clear definition is not necessary. Fighting impunity is not about bringing as many suspects to justice as possible; it is about bringing as many suspects to justice as possible in a way that comports with human rights, criminal law procedures and respect for the rule of law in general.⁷³ Of course, a clear definition is necessary to *help* prosecutors in bringing more suspects to justice. One can imagine that a clear customary international law definition which is implemented in national jurisdictions will increase the substantive coverage of terrorist offences, will lead to more convergence/similarity in the different laws, will make potential double criminality requirements less

⁶⁴ Bringing terrorists to justice seminar, para. 23.

⁶⁵ See also Final Report Poelgeest Seminar, p. 581 and Leiden Policy Recommendations, para. 9, p. 4.

⁶⁶ See Bringing terrorists to justice seminar, para. 23. Cf. also B. van Ginkel and F. Rojas, ‘Use of Diplomatic Assurances in Terrorism-related Cases’, Expert Meeting Paper, ICCT – The Hague, March 2011, available at: <http://www.icct.nl/userfiles/file/ICCT%20EM%20Paper%20Diplomatic%20Assurances.pdf> (last accessed on 11 November 2011).

⁶⁷ See also Bringing terrorists to justice seminar, para. 40: “A representative of the Office of the High Commissioner for Human Rights spoke about international human rights issues in the context of prosecution and prevention of terrorism. He highlighted the obligation to uphold human rights in dealing with prevention, protection, investigation and prosecution of terrorism cases, and showed how compliance with human rights created trust in the criminal justice system and supported the broader preventive strategy.”

⁶⁸ H. Stark, ‘Germany Limits Information Exchange with US Intelligence’, *Der Spiegel Online*, 17 May 2011, available at: <http://www.spiegel.de/international/germany/0,1518,762873,00.html> (last accessed 21 March 2012). See also G. Rona, ‘The Costs of U.S. Counterterrorism Policy’, *Human Rights First*, 27 February 2012, available at: <http://www.humanrightsfirst.org/2012/02/27/the-costs-of-us-counter-terrorism-policy/> (last accessed 21 March 2012).

⁶⁹ J. Mariner, ‘The Indefinite Detention of Citizens and Non-Citizens Under the NDAA’, 18 January 2012, available at: <http://verdict.justia.com/2012/01/18/the-indefinite-detention-of-citizens-and-non-citizens-under-the-ndaa> (last accessed 25 March 2012).

⁷⁰ See for more information Ch. Paulussen, ‘The US NDAA 2012 and its controversial counter-terrorism provisions’, 16 March 2012, available at: http://icct.nl/vervolg.php?h_id=6#CP (last accessed 23 March 2012).

⁷¹ See n. 53 and accompanying text.

⁷² See ns. 30-37 and accompanying text.

⁷³ Cf. the title of point IV of the ‘Plan of Action’ (annex) of UNGA Res. 60/288 of 20 September 2006 (the UN Global Counter-Terrorism Strategy): ‘Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism’. See also UNGA Res. 60/158 (‘Protection of human rights and fundamental freedoms while countering terrorism’) of 28 February 2006 (adopted on 16 December 2005).

pertinent and extradition hence easier.⁷⁴ However, a clear definition would also help to *restrict* overzealous prosecutors that may use vague and overly broad national terrorism definitions to, for example, silence political opponents.⁷⁵ Not only because such prosecutions arguably have no place in a state which claims to be founded on the rule of law, but also because of very practical considerations, namely because the intent to conduct such a prosecution may lead to a successful human rights challenge from the side of the suspect and ensuing non-extradition.⁷⁶ Or it could lead to (the above-mentioned) less trust and cooperation in general from the side of other states⁷⁷ and maybe even to *more* terrorist activity.⁷⁸

Before turning to the other, more practical issues that were highlighted by the practitioners' seminar 'Bringing terrorists to justice', another concept related to extradition should be addressed here, namely the obligation of *aut dedere aut judicare* (extradite or prosecute). It was already explained earlier that this obligation, which seems to be founded on the duty to cooperate in the fight against impunity,⁷⁹ could be very useful in the fight against impunity. But to what extent is this obligation applicable to terrorism (not taking into account now that it would be quite relevant to terrorist acts if they fall under already-existing international crimes or if they are seen as an international crime as such – which, as explained earlier, does not seem to be the case)? In this context, the other already-mentioned questions that could more or less be related to this topic – the preference for prosecution (including the appropriateness of amnesties) and the possibility of exercising universal jurisdiction – will also be reviewed.

The 'extradite or prosecute' obligation can be found in numerous (including counter-terrorism) treaties,⁸⁰ but "it is much more complicated and difficult to find and prove the existence of a customary basis for the obligation in question, in regard both to an obligation in general and to specific, limited categories of crimes."⁸¹ According to the Special Rapporteur on this topic, "it is rather difficult in the present situation to prove the existence of a general international customary obligation to extradite or prosecute"⁸² and thus that "one should rather concentrate on identifying those particular categories of crimes which may create such a customary obligation, recognized as binding by the international community of States, though limited as to its scope and substance."⁸³ Although in this discussion, terrorism has been mentioned by states,⁸⁴ it appears that this obligation is limited to the classic international crimes. Belgium, for instance, considered

that all States must cooperate in suppressing certain extremely serious crimes – particularly crimes of international humanitarian law (crimes against humanity, genocide and war crimes) – since such crimes pose a threat, both qualitatively and quantitatively, to the most fundamental values of the international community. This contribution to the suppression effort may take the form of direct prosecution of the

⁷⁴ Cf. EU Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), under (6): "The definition of terrorist offences should be approximated in all Member States".

⁷⁵ Cf. also 'Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (A/HRC/8/13, 2 June 2008), paras. 20-23.

⁷⁶ See Bringing terrorists to justice seminar, para. 21: "Extradition requests are often subject to numerous legal challenges. Alleged perpetrators often challenge extradition proceedings on human rights grounds, alleging risk of mistreatment or the fact that they may not be given a fair trial in the requesting State."

⁷⁷ See also Leiden Policy Recommendations, para. 89, p. 25.

⁷⁸ Cf. Bringing terrorists to justice seminar, para. 40.

⁷⁹ See Report of the International Law Commission, Sixty-second session (3 May – 4 June and 5 July – 6 August 2010), UNGAOR, Sixty-fifth session, Supplement No. 10 (A/65/10), para. 339.

⁸⁰ See, e.g., Galicki report, paras. 44, 46-47 and 50.

⁸¹ *Ibid.*, para. 86.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ See *ibid.*, para. 79.

alleged perpetrators of such crimes or of extradition of those responsible to any State that wishes to prosecute them.⁸⁵

In that respect, so long as terrorism is not seen as an international crime as such (see the above-mentioned discussion on the STL decision),⁸⁶ ‘extradite or prosecute’ is probably only applicable to those specific terrorism-related offences as can be found in the sectoral terrorism treaties that contain this obligation.⁸⁷

In his draft article 4 (‘International custom as a source of the obligation *aut dedere aut iudicare*’), the Special Rapporteur mentioned the classic international crimes,⁸⁸ but also noted that “the list of crimes and offences covered by paragraph 2 [see footnote 89] seems to be still open and subject to further consideration and discussion.”⁸⁹ Hence, even though it appears that there is no ‘extradite or prosecute’ customary international law rule with respect to terrorism, there is still a lack of clarity here – a point that was clearly identified by the states that (rather critically) commented upon the report of the Special Rapporteur.⁹⁰

It seems that a number of general UN instruments which could perhaps be interpreted as connecting the ‘extradite or prosecute’ concept to terrorism have not been followed in practice, thus undermining the fight against impunity (see also Subsection 2.2.). The first is the truly ‘legislative’⁹¹ UN Security Council Resolution 1373 of 28 September 2001. In its paragraphs 2 (c) and (e), the Security Council decided

that all States shall: (...) (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; (...) (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious

⁸⁵ International Law Commission, Sixty-first session, Geneva, 4 May – 5 June and 6 July – 7 August 2009, ‘The obligation to extradite or prosecute (*aut dedere aut iudicare*), Comments and information received from Governments’, UNGA, A/CN.4/612, 26 March 2009, para. 33.

⁸⁶ Cf. also para. 12 (pp. 7-8) of ‘CR 2009/10. Public sitting held on Tuesday 7 April 2009, at 4.30 p.m., at the Peace Palace, President Owada presiding, in the case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)’ (available at <http://www.icij.org/docket/index.php?p1=3&p2=3&k=5e&case=144&code=bs&p3=2> (last accessed on 11 November 2011)), where Prof. Eric David speaks of “the right for Belgium to see States fulfil their obligation to prosecute or extradite the perpetrator of a crime under international law. This right is ultimately nothing more than the transposition into law by the international community of a fundamental moral and social value which has now become a legal requirement not to let some of the very gravest of crimes go unpunished.”

⁸⁷ See also Saul 2008, p. 199: “Certain manifestations of terrorism have (...) been addressed by 13 sectoral anti-terrorism treaties, prohibiting and often criminalising physical acts such as hijacking, hostage-taking, bombings or the misuse of nuclear material. Those transnational criminal law treaties typically establish ‘prosecute or extradite’ regimes for the relevant offences (...)” See finally Bringing terrorists to justice seminar, para. 12: “The international counter-terrorism instruments (...) require States to (...) submit terrorists for prosecution if they are not to be extradited”.

⁸⁸ Draft article 4 reads: “1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law. 2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes]. 3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2.”

⁸⁹ Galicki report, para. 96.

⁹⁰ See Report of the International Law Commission, Sixty-third session (26 April – 3 June and 4 July – 12 August 2011), UNGA, O.R., Sixty-sixth session, Supplement No. 10 (A/66/10), para. 322 (p. 276): “The Special Rapporteur was encouraged to undertake a more detailed study of the State practice and *opinio juris* and offer a firm view on which certain serious crimes of concern to the international community as a whole gave rise to an obligation to extradite or prosecute.” Note that such indistinctness even exists with respect to the traditional international crimes, see *ibid.*, para. 324 (p. 277): “[G]rave breaches were subject to the obligation *aut dedere aut iudicare* but not all war crimes are subject to it”.

⁹¹ See P.C. Szasz, ‘The Security Council Starts Legislating’, *American Journal of International Law*, Vol. 96, No. 4 (2002), pp. 901-905.

criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts (...).

According to the UN Security Council's Counter-Terrorism Committee (CTC), this resolution "obliges States to prosecute and try all those responsible for acts of terrorism, wherever they are committed. This measure is designed to ensure that terrorists have no place of refuge, since each State will be competent to try them or extradite them."⁹² The words "obliges States to prosecute" (obligation) seem to contradict the words "each State will be competent to try them or extradite them" (possibility and discretion) but maybe the CTC is of the opinion that the Security Council is obliging all states *in general* not to let their territories become a safe haven for terrorists and to prosecute, but that they can sort out among themselves how this is to be done: either in State A, or, if this is not possible, in State B (after extradition from State A to State B). Another question relates to the exact scope of the Security Council's obligations to "deny safe haven" and bring to justice. It could indeed be argued that these words seem to refer to the criminal law approach of prosecution,⁹³ although due to their vague language, the exact scope of the obligation remains obscure.⁹⁴ This could explain – but this certainly constitutes a topic in need of further research – why the extradite or prosecute concept does not seem to be followed in practice/to constitute a norm in customary international law with respect to terrorism.⁹⁵ Other related UN instruments are UN Security Council Resolutions 1456 of 20 January 2003 and 1566 of 8 October 2004. They clearly connect the words "deny safe haven" and "bring to justice" with the notion of 'extradite or prosecute', but it is also plain that those two resolutions do not contain strict obligations.⁹⁶ The same goes for the final two UN instruments, which stem from the UN General Assembly: the 'Declaration on Measures to Eliminate International Terrorism', approved by the UN General Assembly on 9 December 1994,⁹⁷ and the UN General Assembly's 'Global Counter-Terrorism Strategy', adopted on 8 September 2006.⁹⁸

⁹² Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council resolution 1373 (2001)' (Annex of UN Doc. S/2004/70 of 26 January 2004), p. 6.

⁹³ Cf. n. 14.

⁹⁴ See also S. Betti, 'The Duty to Bring Terrorists to Justice and Discretionary Prosecution', *Journal of International Criminal Justice*, Vol. 4 (2006), p. 1109, who is of the opinion that it refers to the criminal law approach but who wonders whether it means that "alleged terrorists should be made available to the competent national authorities acting in the context of the criminal justice system" (which does not necessarily mean that the trial stage will be reached as the prosecuting authorities can also use their discretion not to prosecute) or whether the suspects should be actually brought before the judges. (Reading these words, one could argue that it is not correct to use the terms criminal law approach and prosecution interchangeably (as was/is done in this paper), although one could also assert that "to prosecute" is the process which starts when the prosecuting authorities get involved in the case, whether, in the end, they want to continue with the prosecution or not.)

⁹⁵ Note that states may sometimes also simply be unable or unwilling to prosecute or extradite (see also Subsection 2.2.). For example, the state in question may not have a functioning legal system (think again of failed states such as Somalia), it may be implicated in the crime itself or it may believe that the suspect will not receive a fair trial in the requesting state (think of the *Lockerbie* case). As to unable states: it is clear that capacity-building by other states or international organisations is thus of the utmost importance to fight impunity. Cf. Final Report Poelgeest Seminar, p. 581.

⁹⁶ UNSC Res. 1456 of 20 January 2003 states: "The Security Council (...) calls for the following steps to be taken: (...) 3. "States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute". UNSC Res. 1566 of 8 October 2004 stipulates: "*The Security Council, (...) 2. Calls upon States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens [emphasis in original]*".

⁹⁷ "The General Assembly, (...) Solemnly declares the following: (...) 5. States must (...) fulfil their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism, in particular: (...) (b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant

Two final points must be addressed here. UN Security Council Resolution 1373 is understood by the CTC as an obligation to prosecute and try, wherever the crimes are committed. But, now that terrorism can probably not be seen as an international crime, to what extent is non-prosecution possible/to what extent are amnesties allowed in the terrorism context? And, to what extent can it be argued that states have universal jurisdiction over terrorism? As for the first point, it appears that no clear answer can be given. Saul, for example, provides arguments for both prosecution and non-prosecution, depending on the circumstances.⁹⁹ Betti, commenting on UN Security Council Resolution 1373 and pointing to the lack of clarity as to its exact legal obligations, is of the opinion that if this resolution is interpreted as obliging states to prosecute and try suspects of terrorism (cf. the interpretation of the CTC), it could impair prosecutorial discretion, which “may (...) be needed as a means for criminal justice systems to articulate a useful and flexible response vis-à-vis other essential ‘public interests’”.¹⁰⁰ If states share such considerations, this may constitute another reason why the potentially strict prosecution (or extradite) obligation stemming from UN Security Council Resolution 1373 is not clearly reflected in/implemented at the national level.

As for the second point, relating to universal jurisdiction, it may be good to continue a quotation from Saul which was already partly mentioned earlier (see footnote 88):

Certain manifestations of terrorism have (...) been addressed by 13 sectoral anti-terrorism treaties, prohibiting and often criminalising physical acts such as hijacking, hostage-taking, bombings or the misuse of nuclear material. Those transnational criminal law treaties typically establish ‘prosecute or extradite’ regimes for the relevant offences, but fall short of creating customary international law crimes attracting universal jurisdiction under general law (with the possible exception of the most well-established sectoral offences of hostage-taking and hijacking, which exist as parallel customary international prohibitions).¹⁰¹

provisions of their national law [emphasis in original]”. (See the Annex of UNGA Res. 49/60 of 17 February 1995 (‘Measures to eliminate international terrorism’).)

⁹⁸ In its annex, the ‘Plan of Action’, it is stipulated under ‘Measures to prevent and combat terrorism’: “We resolve to undertake the following measures to prevent and combat terrorism, in particular by denying terrorists access to the means to carry out their attacks, to their targets and to the desired impact of their attacks: (...) 2. To cooperate fully in the fight against terrorism, in accordance with our obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe havens; 3. To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of national and international law, in particular human rights law, refugee law and international humanitarian law. We will endeavour to conclude and implement to that effect mutual judicial assistance and extradition agreements and to strengthen cooperation between law enforcement agencies”. (See the Annex of UNGA Res. 60/288 of 20 September 2006.) See also the same plan of action under ‘Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism’, para. 4.

⁹⁹ See Saul 2008, pp. 200-201: “In many cases, war crimes or crimes against humanity will be typically more widespread and affect larger sections of the population than terrorism, and so amnesties for terrorism may not be justifiable as necessary to achieve national reconciliation or to restore harmony between rival ethnic or religious groups in the community. Indeed, prosecuting terrorism is often necessary precisely because terrorists attack the institutions of the state and the community that the state protects. (...) On the other hand, amnesties for terrorism may be appropriate where conflict is sectarian and affects significant parts of the population, or in specific cases where life is at imminent risk. (...) International terrorism affecting multiple states may require different analysis than predominantly domestic terrorism (...). Where terrorist acts affect multiple states, waiving prosecution or extradition should ‘only be exercised in agreement between the nation and the states whose citizens and property are the object of the terrorists’ acts’. (...) The more serious the terrorist acts involved, the stronger the justification must be for waiving prosecution or extradition [original footnote omitted].”

¹⁰⁰ S. Betti, ‘The Duty to Bring Terrorists to Justice and Discretionary Prosecution’, *Journal of International Criminal Justice*, Vol. 4 (2006), p. 1112. See *ibid.*, p. 1116 for more details.

¹⁰¹ Saul 2008, p. 199. See also para. 404 (‘Universal jurisdiction to define and punish certain offenses’) of the Third Restatement of the Foreign Relations Law of the United States, which stipulates: “A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism”.

Indeed, now that terrorism can probably not be seen as a distinct international crime, universal jurisdiction, a great tool to fight impunity,¹⁰² generally does not seem to apply. This is also reflected in the above-mentioned (see footnote 18) Princeton Principles on Universal Jurisdiction. Principle 1, paragraph 2 of these principles explains that “[u]niversal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body.”¹⁰³ However, Principle 2, paragraph 1 does not list terrorism as a serious crime under international law.¹⁰⁴ Interestingly, terrorism – and apartheid and drug crimes – “were raised as candidates for inclusion”¹⁰⁵, but apparently did not make the list. Nevertheless, the commentary also states that “[i]t should be carefully noted that the list of serious crimes is explicitly illustrative, not exhaustive. Principle 2(1) leaves open the possibility that, in the future, other crimes may be deemed of such a heinous nature as to warrant the application of universal jurisdiction.”¹⁰⁶ However, that does not seem to be the case – yet. This notwithstanding, if terrorism is seen as an international crime, if states agree on an international definition, this would trigger the possibility of exercising universal jurisdiction. This may constitute yet another reason why an internationally recognised definition should be pursued.¹⁰⁷

3.2.4. Practical concerns part II

To return to the critical and more practical points stressed during the practitioners’ seminar ‘Bringing terrorists to justice’, other issues worth mentioning here were:

- “the pervasiveness of digital media in terrorist investigations, the burden that transcription and translation have on the prosecution and the need for training of law enforcement and judges in this field”;¹⁰⁸
- the need to strengthen capacity-building efforts in the context of forensic facilities and expertise in DNA comparison or video analysis;¹⁰⁹
- the prosecution of *preventive* offences;¹¹⁰
- attention to traditional organised criminal groups (as these are sometimes linked to terrorist groups);¹¹¹
- “a close working relationship between the prosecution and various law enforcement agencies”;¹¹²
- developing informal mechanisms for information exchange;¹¹³

¹⁰² See also UNGA, ‘The scope and application of the principle of universal jurisdiction. Report of the Secretary-General prepared on the basis of comments and observations of Governments’ (UNGA Doc. A/65/181, 29 July 2010) (hereinafter: Universal Jurisdiction report), para. 9.

¹⁰³ Principle 1 (‘Fundamentals of Universal Jurisdiction’), para. 2 of the Princeton Principles, p. 29.

¹⁰⁴ Principle 2 (‘Serious Crimes Under International Law’), para. 1 of the Princeton Principles, p. 29, stipulates: “For purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.”

¹⁰⁵ Commentary on the Princeton Principles, p. 48.

¹⁰⁶ *Ibid.*

¹⁰⁷ See also J.D. Fry, ‘Terrorism as a crime against humanity and genocide: the backdoor to universal jurisdiction’, *UCLA Journal of International Law and Foreign Affairs*, Vol. 7, No. 1 (2002), pp. 181-182: “The lack of consensus on a definition for terrorism is one of the greatest hindrances to the international community’s efforts to combat terrorism, since such consensus is needed to know exactly which types of actions are illegal under international law. (...) [T]his lack of consensus has slowed the development of ways to prevent and punish terrorists. Furthermore, it has kept states from relying on universal jurisdiction when prosecuting terrorists [original footnotes omitted].” (See also n. 30 and accompanying text.)

¹⁰⁸ See Bringing terrorists to justice seminar, para. 30.

¹⁰⁹ See *ibid.*, para. 35.

¹¹⁰ See *ibid.*, paras. 36-37. See also Final Report Poelgeest Seminar, p. 582.

¹¹¹ See Bringing terrorists to justice seminar, para. 41. See also Final Report Poelgeest Seminar, p. 582.

¹¹² Bringing terrorists to justice seminar, para. 44.

¹¹³ See *ibid.*, para. 44. See also *ibid.*, para. 37: “Some noted that, if intelligence had been properly shared, some attacks could have been avoided (...)” See finally Leiden Policy Recommendations, para. 18, p. 7.

- sharing good practices related to the use of special investigative techniques and intelligence material in court;¹¹⁴
- “the importance of coordination, both at the national level and at the level of the prosecution, including the organization of the prosecuting team”;¹¹⁵
- and finally “the need to develop informal working relations with other agencies through frequent meetings and regular updates.”¹¹⁶

3.3. Prosecution before international courts

The previous subsection has shown that there is quite a number of challenges within and between states and that these challenges may thwart the fight against impunity. For instance, a state might be unable or unwilling to extradite or prosecute a terrorism suspect (see also footnote 96). In such situations, the international level might step in.¹¹⁷ However, what is the exact role of international courts in prosecuting acts of terrorism?

First of all, it must be stressed that the role of international courts in this context is limited. This first and foremost has to do with the more practical issue that international courts can only prosecute a restricted number of suspects. National courts are responsible for the majority of the cases and international courts can only function as a safety-net.¹¹⁸ Secondly, the jurisdiction (*ratione materiae/temporis/loci*) of these international courts is limited as well.¹¹⁹ For instance, there is only one international court that has clear subject-matter jurisdiction over terrorism (STL),¹²⁰ although it is also true that the International Criminal Tribunal for Rwanda (ICTR) has jurisdiction over acts of terrorism as war crimes (even though no such cases have been prosecuted)¹²¹ and that both the International Criminal Tribunal for the former Yugoslavia (ICTY)¹²² and the Special Court for Sierra Leone (SCSL)¹²³ have already prosecuted suspects for acts of terrorism as war crimes.¹²⁴

¹¹⁴ See Bringing terrorists to justice seminar, paras. 45-48. For instance, it was held that “[e]arly engagement and building a relationship with intelligence was critical, and managing the information gathered was critical to the success of a prosecution. A number of participants highlighted the importance of dedicating time, during the investigation, to other criminal activities run by the terrorists’ organizations. This might sometimes prove useful if the difficulties arising from the confidentiality of sources were such that it would be impossible to bring the terrorist charges without disclosing sources or methods.” (*Ibid.*, para. 47.) Cf. also Q. Eijkman and B. van Ginkel, ‘Compatible or Incompatible? Intelligence and Human Rights in Terrorist Trials’, Expert Meeting Paper, ICCT – The Hague, March 2011, available at: <http://www.icct.nl/userfiles/file/ICCT%20EM%20Paper%20Intel%20in%20Court.pdf> (last accessed on 11 November 2011).

¹¹⁵ Bringing terrorists to justice seminar, para. 49.

¹¹⁶ *Ibid.*, para. 52.

¹¹⁷ Cf. also the introduction to the Princeton Principles, p. 24.

¹¹⁸ See also the complementarity principle of the ICC.

¹¹⁹ See also Universal Jurisdiction report, para. 8: “[A]ttention was drawn to the establishment of ad hoc criminal tribunals, of a diverse variety, as well as to the Rome Statute of the International Criminal Court. While support was expressed for such arrangements, noting that the international criminal justice system afforded a range of complementary mechanisms not only to end impunity but also to maintain international peace and security, it was acknowledged by some Governments that such bodies had their own jurisdictional and practical limitations.” See also Galicki report, para. 35.

¹²⁰ See art. 1 of its Statute.

¹²¹ See art. 4 (‘Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II’) under d of the ICTR Statute.

¹²² In whose Statute the word “terror(ism)” will not be found; the judges used art. 3 (‘The International Tribunal shall have the power to prosecute persons violating the laws or customs of war’) here, which stipulates that “[t]he International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, *but not be limited to* [emphasis added]”.

¹²³ See art. 3 (‘Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II’) under d of the SCSL Statute.

¹²⁴ See generally Bianchi and Naqvi 2011, pp. 215-242. Note that Bianchi and Naqvi also remark that “although the ICTY Statute does not specifically identify terrorism as a form of crime against humanity, it is in its practice frequently the case that the use of terrorism may amount to or result in either deportation or persecution.”

In this context, the International Criminal Court (ICC), the only general and permanent international court, has also been discussed as a possible forum.¹²⁵ As briefly touched upon earlier, the Rome Conference in 1998¹²⁶ regretted that it could not agree on a generally acceptable definition of the crime of terrorism (and also, incidentally, of drug crimes), implying that in principle, it was interested in including these crimes in the Statute.¹²⁷ In fact, it recommended “that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court”.¹²⁸ Here, it should again be noted that the fact that all the states participating in the conference could not agree on a definition may be a sign that the international community, at least in 1998, was of the opinion that there was no internationally recognised definition of terrorism.¹²⁹

Eleven years after the Rome Conference, in the context of the preparations for the 2010 Review Conference in Kampala, a new proposal was made to include terrorism as a distinct crime in the ICC Statute.¹³⁰ In the proposal, the problem of impunity for acts of terrorism and the role the ICC could play in fighting this phenomenon was explicitly referred to.¹³¹ Because there was (still) no generally accepted definition of terrorism, suggestions were made to use the same method used in 1998 in the context of the crime of aggression, meaning that the crime was first to be included in the Statute and that states could later agree on its exact definition and on the conditions regarding the exercise of jurisdiction with respect to that crime.¹³² However, the proposal was criticised on several points and, in the end, did not make it to the agenda of the Review Conference in Kampala. A more detailed insight in these critiques is instructive, for it shows why states were not (yet) prepared to vote for an extension of the ICC’s mandate and thus also, how possible objections might be overcome in the future.

The first criticism related to the fact “that it was premature to include the crime of terrorism in the Rome Statute without a definition and, further, that a clear definition agreed to in the United Nations was a precondition to inclusion of terrorism in the Statute.”¹³³ This criticism confirms the earlier-mentioned suggestion that an internationally recognised definition should be pursued. Another critique stated that there was actually “no lack of definition of terrorism, since the 13 counter-terrorism conventions defined a multitude of acts that constituted terrorism”,¹³⁴ but that “there was no agreement on which acts could be *added* [emphasis added].”¹³⁵ Because of this, “it was suggested that the Assembly should not send the wrong signal that there were problems with the 13 sectoral conventions.”¹³⁶ Even though this criticism may seem different than the first one, it can be

¹²⁵ See, for example, R.J. Goldstone and J. Simpson, ‘Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism’, *Harvard Human Rights Journal*, Vol. 16 (2003), pp. 13-26.

¹²⁶ Note that earlier links between the ICC and terrorism can be made as well. For a good overview, see J.D. van der Vyver, ‘Prosecuting terrorism in international tribunals’, *Emory International Law Review*, Vol. 24, Issue 2 (2010), pp. 534-541.

¹²⁷ See Resolution E of Annex 1 (‘Resolutions Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court’) to the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Done at Rome on 17 July 1998, UN Doc. A/CONF.183/10, 17 July 1998.

¹²⁸ *Ibid.*

¹²⁹ See also H. Duffy, *The ‘War on Terror’ and the Framework of International Law*, Cambridge University Press: Cambridge 2005, p. 39.

¹³⁰ See Assembly of States Parties, Eighth session, The Hague, 18 – 26 November 2009, OR (ICC-ASP/8/20), Vol. I, Annex II (*Report of the Working Group on the Review Conference*), paras. 40-51 and Appendix III, pp. 65-66.

¹³¹ See Assembly of States Parties, Eighth session, The Hague, 18 – 26 November 2009, OR (ICC-ASP/8/20), Vol. I, Appendix III, p. 65.

¹³² See *ibid.*

¹³³ Assembly of States Parties, Eighth session, The Hague, 18 – 26 November 2009, OR (ICC-ASP/8/20), Vol. I, Annex II (*Report of the Working Group on the Review Conference*), para. 43, p. 55. See also *ibid.*, para. 44 for comparable criticism (and the remark that the proposal had to be assessed from an international criminal law perspective).

¹³⁴ *Ibid.*, para. 45, p. 55.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

argued that both confirm the same point, namely that a common definition on which all states can agree is needed. A third point of criticism mentioned the risk of politicisation of the matter: “[i]t was (...) suggested that the Assembly should strive for universality of the Court, which could be hindered by entering into negotiations on terrorism.”¹³⁷ This is a concern that is more often heard and which – in view of the fact that terrorism cases are indeed very often politically charged and the fact that the ICC needs the support of (still more) states to enforce its decisions – should be given due attention. In addition, the comment was made that terrorism, under certain circumstances, could already fall under crimes against humanity.¹³⁸ In fact, one could also add the concept of war crimes (and perhaps even genocide and aggression) here.¹³⁹ A fifth critique was less substantive and related to the legal technique by which it was proposed to bring the crime under the umbrella of the ICC, namely in the same way as aggression had been incorporated in the Statute. First of all, it was felt that “the analogy could not easily be drawn as a degree of consensus had already existed on the definition of the crime of aggression (...), while no such generally agreed definition of terrorism as yet existed.”¹⁴⁰ This has to do with the first (and second) point already discussed above. Secondly, it was expressed that this technique was only to be used “in very exceptional circumstances”¹⁴¹ and “should not become the norm”.¹⁴² The sixth and final point made by some delegations was non-substantive in nature and expressed that the proposal simply “merited greater discussion and reflection than was possible in the limited time before the Review Conference.”¹⁴³

As explained earlier, the proposal was indeed never put on the agenda of the Review Conference in Kampala. Nonetheless, and following the just-mentioned sixth point, it was decided that this proposal, and others, had to be considered by the Working Group on Amendments¹⁴⁴ during informal consultations in New York between the ninth (6-10 December 2010) and tenth session (12-21 December 2011) of the Assembly of States Parties.¹⁴⁵ Although the already-discussed decision from the STL Appeals Chamber may convince some

¹³⁷ *Ibid.*, para. 46, p. 55.

¹³⁸ Cf., for example, Mary Robinson, United Nations High Commissioner for Human Rights, ‘Realising Universal Human Rights’, American University of Beirut, 4 March 2002, available at:

<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/OAD6688601199F9AC1256B7300350F89?opendocument> (last

accessed on 11 November 2011). In this context, one could also refer to the criticism of Amnesty International: “Although the organization understands the view that including a crime of “terrorism” in the Rome Statute would strengthen global efforts to investigate and prosecute these serious crimes, it is concerned that there is the risk that introducing this amendment to recognize a crime that has not yet been defined may have the effect of weakening the efforts to bring to justice perpetrators of terrorist acts that amount to crimes already within the jurisdiction of the Court.” (Amnesty International, ‘International Criminal Court: Concerns at the ninth session of the Assembly of States Parties (6 to 10 December 2010)’, Amnesty International Publications, 17 November 2010, Index: IOR 53/016/2010, available at:

[http://www.amnesty.org/en/library/asset/IO53/016/2010/en/d72fa9a5-c434-42b9-b75d-](http://www.amnesty.org/en/library/asset/IO53/016/2010/en/d72fa9a5-c434-42b9-b75d-627e3032e4bd/ior530162010en.pdf)

[627e3032e4bd/ior530162010en.pdf](http://www.amnesty.org/en/library/asset/IO53/016/2010/en/d72fa9a5-c434-42b9-b75d-627e3032e4bd/ior530162010en.pdf) (last accessed on 11 November 2011), p. 11.) See finally also AMICC, ‘AMICC: Terrorism and the International Criminal Court’, available at: <http://www.amicc.org/docs/terrorism.pdf> (last accessed on 11 November 2011).

¹³⁹ See n. 25 and accompanying text. This would have the advantage that one would not need to show, for instance, ideological motives behind the act, but only that the act was committed intentionally. Nevertheless, prosecuting terrorism under for example crimes against humanity would also have its disadvantages, for instance because acts that do not meet the threshold of crimes against humanity cannot be tried (and this threshold is quite high). Cf. B. van Ginkel, ‘How to Repair the Legitimacy Deficit in the War on Terror: A Special Court for Dealing with International Terrorism?’, in: J. de Zwaan, E. Bakker and S. van der Meer (eds.), *Challenges in a Changing World: Clingendael Views on Global and Regional Issues*, T.M.C. Asser Press: The Hague 2009, p. 159.

¹⁴⁰ Assembly of States Parties, Eighth session, The Hague, 18 – 26 November 2009, OR (ICC-ASP/8/20), Vol. I, Annex II (*Report of the Working Group on the Review Conference*), para. 48, p. 55.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, para. 49, p. 55.

¹⁴³ *Ibid.*, para. 50, p. 55.

¹⁴⁴ Which was established pursuant to para. 4 of Resolution ICC-ASP/8/Res.6, adopted at the Assembly of States Parties’ 8th plenary meeting on 26 November 2009.

¹⁴⁵ See Assembly of States Parties, Ninth session, New York, 6 – 10 December 2010, OR (ICC-ASP/9/20), Vol. I, Annex II (*Report of the Working Group on Amendments*), para. 7: “As suggested by the Coordinator, the goal of these consultations

delegations that a general definition of terrorism is gradually emerging, it seems very unlikely that the ICC's jurisdiction *ratione materiae* will soon explicitly contain acts of terrorism.¹⁴⁶ It is evident that, if the international community in the future *were* to agree on a definition of international terrorism/a distinct international crime of terrorism, this would greatly assist the states involved in the ICC to also adopt that crime within the ICC Statute.¹⁴⁷

4. Conclusion

This paper has provided an overview of some of the key questions – both of a fundamental legal and more practical nature – that can be related to the issue of impunity of international terrorists, a subject whose topicality was again demonstrated in the context of the Bin Laden hunt and killing.

Section 2 examined the exact meaning of impunity, using, arguably, the most authoritative definition of the Updated Impunity Principles. It became clear that many situations can lead to impunity. Examples are blanket amnesties for suspected terrorists, failed states such as Somalia that cannot prosecute suspects of terrorism, insufficient implementation by states of treaties and UN Security Council resolutions that aim to fight impunity, targeted killing operations when there is still the possibility of arresting and prosecuting the suspects, the “wide spread practice” of secret detentions, and the fact that other states might refuse to cooperate with states that do not follow certain (human rights) procedures and norms in their fight against terrorism.

Even though many standards were thus identified by which impunity can be measured, this paper was not able to answer maybe the most fundamental question one can/should ask in a discussion like this, namely whether international terrorists actually enjoy impunity. This was caused by the still-remaining indistinctness regarding the meaning of impunity (which seemed to prefer the criminal law approach in fighting impunity) and, more importantly, the meaning of acts of international terrorism. The controversial decision of the STL Appeals Chamber of 16 February 2011 does not seem to have changed this: it appears that there is still no internationally recognised definition/a distinct international crime of terrorism. Obviously, these definitional problems, which may lead to an inability to prosecute, constitute yet another obstacle in fighting impunity.

However, even though a clear answer to the above-mentioned fundamental question could not be given, even though it appears that it is impossible to accurately determine the actual ‘impunity rate’ of international terrorists, it is a fact that both at the national and international level, terrorism is being fought. Following the apparent criminal law preference of the Updated Impunity Principles’ definition, Section 3 looked at more practical questions prosecutors face when trying suspects of terrorism. The emphasis of the analysis was on the national level, as the relevance of the international level, among others because there is no distinct international crime of terrorism (yet), is limited. Interestingly, it seemed that national prosecutors are generally quite able to

would be to achieve greater clarity on both the substantive views on the amendment proposals and the procedure to be followed in dealing with amendment proposals, so as to inform the deliberations of the Working Group during the tenth session of the Assembly. Accordingly, the Working Group agreed on adding language to the omnibus resolution on Strengthening the International Criminal Court and the Assembly of States Parties, which would call for the drafting of a report, to be considered at the tenth session of the Assembly, on the elaboration of procedural rules or guidelines that would assist the Working Group in dealing with possible future proposals to amend the Rome Statute or the Rules of Procedure and Evidence.”

¹⁴⁶ Note that the ‘Leiden Policy Recommendations on Counter-terrorism and International Law’ used stronger words when it held that it is not only unlikely, but also “undesirable, that the Rome Statute of the International Criminal Court will be amended to include terrorism as a specifically articulated crime”. (Leiden Policy Recommendations, para. 8, p. 4.)

¹⁴⁷ But note that this would not necessarily mean that prosecutions *would* follow in the ICC context. For instance, one can think here of the application of art. 53, para. 1 (c) of the ICC Statute (if the Prosecutor is of the opinion that initiating an investigation would not serve the interests of justice), see Saul 2008, p. 204.

prosecute terrorism cases. Thus, the problem of impunity is perhaps not so strongly felt in (judicial) practice as it is sometimes presented.

Nevertheless, Section 3 also clarified that improvements could still be made. Besides many concrete ideas such as giving more importance to joint investigative teams, it became clear that trust is crucial when it comes to cooperating in international terrorism cases. This is reminiscent of the already-mentioned point that states may refuse to assist other states that do not follow certain rules in bringing suspects to justice. For instance, states might not want to share intelligence with, or might not want to extradite suspects to the US now that it has enacted the NDAA 2012.

Hence, it was argued that fighting impunity is not about bringing as many suspects to justice as possible; it is about bringing as many suspects to justice as possible in a way that comports with human rights, criminal law procedures and respect for the rule of law in general. The run-up to Kampala has shown that it will be very difficult for the international community to arrive at an internationally recognised definition of terrorism/an international crime of terrorism, for instance because there is a risk of politicisation of the matter. However, the above has shown that this goal remains important. Not only because it will *help* prosecutors (more substantive coverage, convergence/similarity in the different laws, fewer problems with double criminality requirements/extradition, greater chance that the in Section 3 explained and crucial legal concepts such as *aut dedere aut judicare* and universal jurisdiction apply), but also because it will *restrict* overzealous prosecutors that may use vague and overly broad national terrorism definitions, for example to silence persons who are too critical of the state.

5. Recommendations

- 1) This study has used the arguably most authoritative definition of impunity, but its apparent criminal law preference makes one wonder to what extent non-criminal law accountability avenues should be pursued in the fight against terrorism. More research on this topic is needed. (p. 3)
- 2) Counter-terrorism methods that do not use any investigative proceedings – proceedings that ensure that suspects are properly brought to account – should not be followed. They do not assist the fight against impunity; they make the problem bigger. Examples are: holding suspects in secret detention (pp. 4 and 13), in indefinite military detention (p. 14) or killing them on the spot when there is still a possibility to arrest and prosecute them (pp. 4-5). The conferral of a blanket amnesty is also problematic, although in exceptional cases, it might still be lawful. (p. 5)
- 3) More research is needed to examine the official and practical considerations of governments not to bring suspects to account in a proper way. (p. 6)
- 4) It is unclear in which situations a non-blanket amnesty would be possible. Much will depend on the circumstances. More research on this topic is needed. (p. 18)
- 5) States should implement treaties and UN Security Council resolutions pertaining to the prosecution of terrorism suspects (pp. 6, 12 and 16). However, a reason for non-implementation may be that the legal obligations are not clear, see, for instance, the exact *aut dedere aut judicare* character of UN Security Council Resolution 1373 (pp. 16-19). This needs to be clarified.
- 6) States should bring suspects of terrorism to account in a proper way (pp. 6, 12-14). States that do not follow this line will not only increase the level of impunity (see the second recommendation), they also

undermine their own integrity as states based on the rule of law (p. 14) and may even cause more terrorist activity (p. 15). Moreover, states that *do* follow the rules in bringing suspects to account may not want to cooperate, or in fact might be legally barred from cooperating with such states, for instance in terms of sharing intelligence or extraditing suspects (pp. 6 and 13-15). This violation of trust (pp. 13 and 15), in turn, will lead to more impunity.

- 7) States should invest more in capacity building so that former ‘unable states’, such as failed states, can try terrorism cases themselves. (pp. 6 and 17.)
- 8) More statistical data/information on (inter)national terrorism cases would be very welcome to more accurately determine and monitor levels of impunity. (p. 11.)
- 9) All the concrete ideas that can improve inter-state cooperation, as expressed by the ‘Bringing terrorists to justice’ seminar (such as more attention to joint investigative teams), should be seriously examined and adopted where appropriate. (pp. 12-20.)
- 10) The international community should continue to strive for an internationally recognised definition of terrorism/an international crime of terrorism. It will not only *help* prosecutors (more substantive coverage, convergence/similarity in the different laws, fewer problems with double criminality requirements/extradition, greater chance that the crucial legal concepts such as *aut dedere aut judicare* and universal jurisdiction apply) (pp. 14, 16 and 19)); it will also *restrict* overzealous prosecutors that may use vague and overly broad national terrorism definitions. (p. 14.)