

Conference Report – "From Government to Governance? The Growing Impact of Non-State Actors on the International and European Legal System" - 6th ASIL / NVIR / T.M.C. Asser Institute Joint Conference in The Hague, 3 - 5 July 2003

By Stefan Kirchmer

A. INTRODUCTION

This year's 6th Joint Conference held by the American and Dutch Societies of International Law and organised by the T.M.C. Asser Institute in The Hague focused on the increasing importance of the role of non-state actors in international law and at the same time provided an opportunity for American and European lawyers to address recent differences between the U.S. and Europe, e.g. on the use of force in Iraq. Consequently one of the three major issues of the conference was the response to international terrorism, while other issues included the role of international organizations as well as transnational corporations in international law.

After a Reception and a speech by the Chairman of the Hague Joint Conference, Rein Jan Hoekstra, the conference was opened by ASIL president Anne-Marie Slaughter who called upon the Bush administration to return to the United Nations "not just in name, but also in spirit" and drew the attention of the participants to a first in U.S. Legal History, which went almost unnoticed in Europe: On 26 June 2003 the U.S. Supreme Court ruled in *Lawrence and Garner v. Texas* that a Texas statute outlawing sodomy was unconstitutional, for the first time citing the European Court of Human Rights in a majority opinion.

¹ Introductory remarks by the Dutch Minister of Justice Piet-Hein Donner, and Theo van Boven (NVIR / University of Maastricht) were followed by two keynote addresses. Judge Kooijmans (ICJ) addressed the role of non-state actors from the point of view of a Judge at a court that only allows states to bring claims. Taking up the

¹ U.S. Sup Ct Case No. 02-102, decided 26 June 2003, judgment available online at <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=02-102#opinion1> (last visited 14 July 2003).

recent order in *Congo-Brazzaville v. France*,² Kooijmans elaborated on the possibility of opening up the ICJ to international organizations reminding the listeners of the view held by Dinah Shelton that justice requires that the Court be open for information submitted by NGOs and that Christine Chinkin also has referred to the ICTY's practice of accepting *amicus curiae* briefs as an argument for widening the options for NGOs at the ICJ. For the time being, however, Art. 34 (2) of the ICJ's Statute³ restricts such options and, while the wording of Art. 62 of the ICJ Rules of Court (ICJ ROC)⁴ is less strict, in practice Art. 62 ICJ ROC is applied in a manner that conforms with the application of Art. 34 (2) ICJS, revealing that the Court is not yet ready, in the words of Kooijmans, to open the "floodgate" to *amicus curiae* briefs by NGOs. Also, the Court's workload would be increased substantially by such a change in procedure: if one takes into account that in the Nuclear Weapons Case⁵ a total of 42 states filed briefs under Art. 60 (2) of the ICJ Statute, the number of *amicus curiae* briefs to be expected from NGOs would be substantial in a large number of cases. Furthermore, it is possible that an expanded influence of non-state actors at the ICJ could lead to a retreat of states from the Court. Since this would not apply to cases in which the ICJ is to give an advisory opinion, there might be one door which could be opened for non-state actors at the Court in the future. While Shelton also favors *amicus curiae* briefs in Human Rights related cases, Kooijmans emphasized that the pros and cons of giving a greater role to non-state actors have to be weighed against each other. While an increasing role of NGOs at the Peace Palace could strengthen the relationship between the ICJ and the world's civil society, it has to be taken into account that the state remains the central player on the international level, albeit no longer the only one. Consequently, in Kooijmans' opinion, international dispute settlement procedures in general should open up to non-state actors to adequately reflect the body of law in today's globalized world.

² I.C.J. Case No. 129 – *Republic of Congo v. France*, Order on the Request for the indication of a provisional measure, 17 June 2003, order available online at http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_order_20030617.PDF (last visited 14 July 2003).

³ Statute of the International Court of Justice, 26 June 1945, UNCIO Vol. 15, pp. 355 et seq., Art. 34 (2): "The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative."

⁴ International Court of Justice, Rules of Court (1978) as amended on 5 December 2000, text available online at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt_20001205.html (last visited 21 July 2003). Art. 62: "1. The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose. 2. The Court may, if necessary, arrange for the attendance of a witness or expert to give evidence in the proceedings."

⁵ I.C.J. Case No. 95 – Order – Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1 February 1995, I.C.J. Rep. 1996, 66 (also known as the WHO Advisory Opinion).

José Alvarez, the executive director of the Center for Global Legal Problems at Columbia Law School, started the second keynote address where Kooijmans had ended, focusing on the role of international organizations in lawmaking. International Organizations like the UN create, according to Alvarez, post-positivist or post-modern law, soft law which hardens. The most prominent example hereof certainly is the Universal Declaration of Human Rights.⁶ But not only is international law increasingly made by rather than through international organizations, international organizations also allowed for a better acceptance of NGOs on the international plane. The flip-side of this development is the increasing influence international organizations have on domestic processes, especially in cases in which international organizations have court-like structures, as is the case with the Council of Europe's European Court of Human Rights or the Special Court for Sierra Leone, a hybrid Court blurring the lines between national and international aspects of adjudication. But the lawmaking capabilities of international organizations also pose new questions such as the question for a doctrine of improper delegation of lawmaking capabilities. Other problems in this context which were mentioned by Alvarez were the fact that international organizations tend to reflect existing gender inequalities as well as western values and that some of them might even be prone to being taken over by more powerful members. Alvarez concluded that a certain price may have to be paid for effective lawmaking on an international level.

B. International Organizations – Governmental and Non-Governmental – And Good Governance

I. The role of international organizations in contemporary international law

One of the three key issues of the conference was the already mentioned role of international organizations in international law, on which further light was shed in four panel discussions on the status and role of international governmental organizations and international NGOs in international lawmaking and implementation, including the application of principles of legitimacy, openness, participation, transparency, accountability, effectiveness and democratic control. The first panel, convened by Niels Blokker of the Dutch Ministry of Foreign Affairs and Ramses Wesel (Utrecht University / University of Twente), included Judge Charles N. Brower (Iran-US Claims Tribunal), Rolf Einar Fife (Norwegian Ministry of Foreign Affairs), Pieter-Jan Kuijper (Legal Service of the European Commission) and Nigel White (University of Nottingham) and concerned itself with the role of international organizations as autonomous subjects in the international and European legal system.

⁶ U.N. General Assembly Resolution 217 A (III), 10 December 1948.

II. Lawmaking by international organizations

Nigel D. White focused on lawmaking by international intergovernmental organizations, which indicates the existence of a separate will, and thus a legal personality under international law. Some international organizations have a separate existence but lack a separate corporate will and hence they have no own lawmaking capabilities. One example of such an organization would be the G 7, but the impact of such less formal conference-type organizations is not to be underestimated. While legal powers of international organizations have traditionally been transferred upon them by member states, international organizations now also develop such powers within their respective constitutional documents, as has the UN Security Council in Resolution 1373,⁷ thereby blurring the distinction between contractual and constitutional foundations of international organizations and making the UN Charter a truly "living instrument". White concluded that the stronger a constitutional document is, the weaker the separate will of states will have to be, making the UN Charter a constitutional document not for government by or over states but rather for achieving global good governance. Another indicator for the UN Charter's constitutional nature is Art. 108 of the Charter which allows for a change of the charter through a majority rather than an unanimous decision.⁸ Independence therefore will best be located in a constitutional framework, such as is the case with the process of European integration. The law made by international organizations, according to White, does not constitute a new source of international law but rather a legal regime of its own, concluding that the question of legal personality can only be the starting point for further research on the notion of community in international organizations.

III. The special status of the European Union

Kuijper's presentation concerned the foreign relations of the European Union as well as the Union's role as a subject of international law is so far as he asked whether or not the European Union was a "normal" partner in international organizations. The European Union is not a full member of international organizations and often only enjoys observer status, as has been the case recently in the negotiations over an international tobacco treaty. Only days before the conference did the EU gain full membership in the Codex Alimentarius. But is there a treaty mak-

⁷ United Nations Security Council Resolution 1373 (2001), 28 September 2001.

⁸ Charter of the United Nations, 26 June 1945, Yearbook of the United Nations 1969, 953, Art. 108: "Amendments to the present Charter shall come into force for all members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council."

ing capability of the EU as such, rather than of the communities, members and pillars? Current practice seems to answer the question in the negative, since the Council concludes treaties on behalf of the EU. But according to Kuijper the question has to be asked what the value of such a practice can be in light of Art. 24 EU-Treaty⁹ and whether the current practice can be reconciled with Art. 24 EU-Treaty in the first place. The question remains open whether the future EU Constitution can solve this issue by avoiding external exposure of the separation between the EU's pillars and present one international voice, making the EU one legal entity and the internal aspects of European integration a lesser concern to the EU's partners.

IV. The increasing importance of transnational lex mercatoria rules in international arbitration disputes

Judge Charles N. Brower elaborated that the rules applied in international arbitration disputes become less and less national, not only in UNCITRAL and CISG related cases. The Iran-US Claims Tribunal also attempts to avoid the application of the national law of a party to a dispute whenever possible. Therefore, according to Brower, non-national lex mercatoria becomes more and more important. One example mentioned by Brower is the UNIDROIT principles, which he compared to the ALI Restatements. Brower emphasized that while the ALI Restatements are meant to restate the existing law and only occasionally go beyond that task, the UNIDROIT principles codify not just the existing law but the law best adopted for the special requirements of international commercial disputes. Hence the legislative element in the UNIDROIT principles is larger than the one in the ALI's Restatements. Brower concluded that the process of developing transnational commercial law needs private measures as well, even when they find a role under the umbrella

⁹ Treaty establishing the European Union, consolidated version as amended by the Treaty of Nice (O.J. 2001 C 80) and published in the Official Journal (O.J.) of the EC (since the entry into force of the Treaty of Nice on 1 February 2003: "the Official Journal of the European Union"), O.J. 2002 C 325, on 24 December 2002. Art. 24: "1. When it is necessary to conclude an agreement with one or more States or international organizations in implementation of this title, the Council may authorize the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency. 2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions. 3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2). 4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3). 5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally. 6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union."

of international organizations from time to time. These measures should result in more concrete, neutral, pragmatic and fair rules and must lead to flexible principles fit for the future, in turn requiring that the lawmaking process is neither a fixed nor an immutable one, since, in the words of Lord Mustill, the UNIDROIT principles “exist to serve the commercial man”.

V. The role of non-state actors in the making of the International Criminal Court's Rome Statute

Fife concluded the presentations of the panel with a case study on the making of the Rome Statute of the International Criminal Court and the role of non-state actors in this context. According to Fife, non-state actors are not actors but the stage itself, for example the stage of international civil society. While states negotiated the Rome Treaty the input and expertise of non-state actors was crucial to the negotiation process, showing that NGOs can be responsible and efficient representatives of civil society. A problem in this context is the accountability of NGOs, which is not assured as it is with respect to national governments subject to democratic control. To some degree this scrutiny can be achieved by local NGOs and the members “back home,” but the NGOs in Rome accepted as well that some aspects of discussion were only of the concern of states, so that the credibility of the NGOs involved in the negotiations was not harmed. Fife concluded that the Westphalian system still rules international law but that “channels of learning” connect states, international organizations and NGOs.

VI. Legitimacy and accountability of international organizations

ASIL president Anne-Marie Slaughter convened the second panel on international organizations. In it Laurence Boisson de Charzournes (University of Geneva), Daniel Bradlow (American University Washington College), Alfred E. Kellermann (T.M.C. Asser Instituut, The Hague), Charlotte Ku (ASIL) and Bimal N. Patel (OPCW) addressed the question of accountability and control of international organizations leading to principles and procedures of good governance. Furthermore, Deirde Curtin of Utrecht University was able to welcome Stephan Hobe (University of Cologne), Carole Lyons (University of Aberdeen), Math Noortmann (University of Rotterdam), Pieter J. Spiro (Hofstra University Law School) and Siegfried Wiessner (St. Thomas University) in the third panel which continued the discussion by focussing on the legitimacy, recognition, democratic control, transparency and accountability of non-governmental organizations before the fourth panel, chaired by Judge Theodor Meron (ICTY) reviewed the application of the principles of good governance by international organizations in practice. Participants in this panel discussion were John King Gamble (Penn State University), Rick Lawson (Leiden University), Philippe Lortie (Hague Conference on International Private Law),

Christa Meindersma (UNMISSET), Hans Thoolen (Martin Ennals Foundation, Crete) and Ralph Wilde (University College London).

C. Multinational Business and Corporate Governance in Public and Private International Law

I. Introduction

The role of multinational corporations and the development of principles of corporate governance and issues of transnational litigation, including international jurisdiction and treaty cooperation to improve capital flows was the focal point of the second main theme of the conference.

The first of three panels in this field, convened by René van Rooij of Shell and including Willem van Genugten (Tilburg University), Michel Nussbaumer (European Bank for Reconstruction and Development), Lucy Reed (Freshfields Bruckhaus Deringer) and Jaap Winter (De Brauw Blackstone Westbroek) discussed the role of international or external codes of conduct in corporate governance.

II. Corporate responsibility for human rights violations and environmental damage

1. National Courts as an appropriate forum ? - Forum non conveniens revisited

Questions of transnational litigation including international jurisdiction in cases relating to corporate responsibility for human rights violations and environmental damage were addressed by a second panel headed by Georg Berrisch (Covington & Burling), which included Mike Addo (University of Exeter), Pieter H. F. Bekker (White & Case), Andrew Clapham (Graduate Institute of International Studies, Geneva), Malgosia Fitzmaurice (Queen Mary and Westfield College, London), Harold Koh (Yale Law School) and André Nollkaemper (University of Amsterdam). The question before the first panel was whether or not national courts are an appropriate forum for addressing corporate responsibility regarding damage to the environment and human rights violations. Examples for legal grounds allowing national courts taking up such cases are the recently rediscovered Alien Tort Claims Act (ATCA)¹⁰ in the United States as well as the Belgian International Crimes Law which, ironically enough, has drawn severe criticism from the United States and was which the new Belgian government plans to change due to U.S. threats to move the NATO Headquarters away from Brussels. Fitzmaurice presented a study on the case of *Wiwa v. Shell* before the U.S. Court of Appeal for the

¹⁰ 28 U.S.C. § 1530: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

2nd Circuit,¹¹ relating to the execution of Ken Saro-Wiwa and others by the former Nigerian Government and the role Royal Dutch Shell played in supporting the military regime in Nigeria, in which she focussed on the relationship between the ATCA and the doctrine of forum non conveniens and how the Wiwa case¹² could change our view of this doctrine.

The forum non conveniens doctrine was meant to protect the defendant who can challenge the forum chosen by the plaintiff if there is an other appropriate forum and certain other requirements are met. According to the plaintiffs in *Wiwa v. Shell*,¹³ the defendant had facilitated the killings of Saro-Wiwa, Kpuien and other members of the Movement for the Survival of the Ogoni People (MOSOP) by doing business in Nigeria from which the military regime profited as well. Shell holds that the case is to be tried in either the Netherlands or the U.K. but not in the United States and that the ATCA does not apply to corporations. Furthermore, Shell relied on the act of state-doctrine and on the fact that it was the military regime which in fact killed Saro-Wiwa and others. Furthermore Shell argued that the Nigerian law on corporate responsibility should control. No plaintiff in this case was resident in the Southern District of New York where the case was filed pursuant to the ATCA and Shell complained that the District Court did not assess the question of forum non conveniens appropriately. In rare cases, according to Fitzmaurice, the decision whether or not to apply the forum non conveniens doctrine is at the discretion of the court. In such cases, two questions have to be asked: Does an adequate alternative forum exist and if yes, after balancing the private interests of the parties as well as the public interests of the state, which interests, in favor or against a certain forum, prevail. Only if the defendant's interests are overwhelming, a forum change is permissible under this so called Gilbert-test.¹⁴ Among the factors to be taken into consideration are the access to evidence, witnesses and premises as well as all factors making the process time-consuming as well as the administrative burden of the state. In the *Wiwa Case*¹⁵ the fact that the plaintiffs were U.S. residents has to be taken into account as well as the U.S.'s interest in litigating international Human Rights violations under both the ATCA and the Torture Victim Protection Act (TVPA). Furthermore, Human Rights considerations must be part of the balancing, thus creating an innovative element with which to amend the traditional Gilbert-

¹¹ *Wiwa v. Royal Dutch Petroleum Co.* (a.k.a. Shell or Royal Dutch Shell), 226 F.3d 88 (2d Cir. (N.Y.) 2000); Slip Copy 2002 WL 319887 (S.D.N.Y., Feb. 28, 2002).

¹² *ibid.*

¹³ *ibid.*

¹⁴ *Gulf Oil Corp. v. Gilbert*, 330 US 501, 67 S Ct 839 (1947).

¹⁵ *Wiwa v. Royal Dutch Petroleum Co.* (a.k.a. Shell or Royal Dutch Shell), cf. fn. 11.

test. ATCA and the Torture Prevention Act, according to Fitzmaurice, diminish or even nullify the doctrine of forum non conveniens in cases in which Human Rights play a role.

2. *The potential of complicity of multinational corporations relating to state caused human rights violations*

Pieter Bekker, of White & Case, the law firm which is currently representing Citicorp in the Apartheid cases, spoke on the potential complicity of multinational corporations relating to state caused damages. International law de lege lata only recognizes a general rule of corporate responsibility with the exception of oil spills, etc. The problem in this context is the question if and to what extent there can be corporate responsibility for aiding, abetting or conspiring. Two pending cases referred to by Bekker are the Burma-related Unocal Case¹⁶ which is currently before the Court of Appeals for the 9th Circuit in California and the case of Certain Victims of Apartheid v. Citicorp et al.,¹⁷ a class action suit pending in New York. The plaintiffs in Citicorp employ a theory of indirect harm by claiming that the defendants' loans to the Apartheid-government of South Africa funded and stabilized the regime and facilitated crimes against humanity. The ATCA¹⁸ requires that there is an international treaty or an other indicator of international (Human Rights) Law, according to Bekker, who was equating the term "indicator" with the sources of international law as defined in Art. 38 (1) of the ICJ Statute,¹⁹ in order to allow a

¹⁶ *Doe v. Unocal*, (00-56603 / 00-56628 / 00-57195 / 00-57197), currently pending at the U.S. CA 9th Cir., Three-Judge Panel Opinion: 2002 WL 31063976 (9th Cir. Sept. 18, 2002), Order Taking Case En Banc: 2003 WL 359787 (9th Cir. Feb. 14, 2003). For more information on the current status of the case see the Website of the U.S. Court of Appeals for the 9th Circuit at <http://www.ca9.uscourts.gov/ca9/Documents.nsf/news/26604b492ab620e58825685d00537e33?OpenDocument> (last visited 22 July 2003).

¹⁷ On this currently pending case cf. Newman / Zaslowsky, *The Alien Tort Claims Act: How Far Will It Go?*, in: International Litigation and Arbitration Alert, Vol. 2, Issue 2, January 2003, pp. 39 et seq., at pp. 40 et seq.

¹⁸ Other recent ATCA cases include *inter alia* *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2nd Cir.(N.Y.) Aug 16, 2002) (*Jota v. Texaco* companion case); *Jama v. U.S. I.N.S.*, 22 F.Supp.2d 353 (D.N.J. 1998) – the judgment in this case is available online at http://www.law.berkeley.edu/faculty/ddcaron/Documents/US_Cases/USDCT_1998_Jama_v_INS_D_NJ.rtf (last visited 22 July 2003); *Sarei v. Rio Tinto*, 221 F.Supp.2d 1116 (C.D.Cal. Jul 09, 2002); *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2^d Cir. (N.Y.) 2001) and *Beanal v. Freeport-McMoran Inc.*, 197 F.3d 161 (5th Cir.(La.) Nov 29, 1999).

¹⁹ Statute of the International Court of Justice (cf. fn. 3), Art. 38: "(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial

claim. He continued by raising the critique that U.S. courts do not discuss the sources of international law properly, placing too much emphasis on secondary sources such as UN General Assembly Resolutions and writings by teachers of international law. This is also reflected in the approach U.S. attorneys take: Ed Fagan, a well-known U.S. Class Action attorney who has already represented Holocaust victims and is now representing the plaintiffs in the case against Citicorp, demonstrated this lack of understanding by only citing a small number of UN GA Resolutions to build the - otherwise undisputed - case that Apartheid is a crime against humanity. Bekker, referring to the German Industrialist Cases²⁰ decided in Nuremberg and *Presbyterian Church of Sudan v. Talisman Energy Inc.*²¹ as well as UN GA Res. 55/215 of 21 December 2000, concluded that international law for the time being does not accept corporate responsibility outside specific treaties, for example the rules laid down by the International Labour Organization (ILO).

Bekker's conclusion was criticized by Koh who asked how corporations could be held liable for breaches of competition law but not for involvement in genocide. Koh stated that corporations have rights and therefore also duties under international law but that yet no flood of ATCA cases need to be feared as is currently claimed by the Bush administration, which plans to cut back on the possibilities ATCA offers just as it has criticized Belgium for its International Crimes Law. In its 214 years of existence, the ATCA has led to some twenty cases, in non of which the responding party has been found liable so far. Consequently there is no "flood" of ATCA-cases to be feared. The ATCA, according to Koh, therefore does not need reform, especially not along the lines of the Bush administration proposal, which wants to repeal Human Rights jurisdictions since *Filartiga v. Peña Irala*.²² Furthermore Koh drew attention to the fact that if international corporations cannot be held liable, Al Qaida cannot be either, which led Koh to the conclusion that domestic litigation is not necessarily a bad way to achieve higher Human Rights and environmental protection standards.

3. *Values of Public International Law in the context of corporate responsibility*

decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law. [...]"

²⁰ Nuremberg Military Tribunal, *U.S. v. Krauch et al.* (I.G. Farben Case), *U.S. v. Flick et al.*, *U.S. v. Krupp et al.*; General Tribunal of the Military Government of the French Zone of Occupation in Germany, *France v. Roehling*.

²¹ *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 CV 9882, AGS, SDNY filed Nov. 8, 2001.

²² *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), 30 June 1980, on remand, 577 F.Supp. 860 (E.D.N.Y. 1984), 10 January 1984.

Translating norms of Public International Law into rules of corporate liability was what Nollenkaemper attempted. *De lege lata*, he argued that such responsibility is only accepted for the worst Human Rights violations, but there yet is no general principle of corporate liability for Human Rights violations and environmental damage. But values of Public International Law can be incorporated into national laws holding corporations liable. On this point Nollenkaemper's view reflected a widespread feeling that international law is heading towards a more value- and community-based system of international governance. Like this value-based approach, the ATCA remains an exception as Nollenkaemper reminded the audience, drawing on the fact that even the Dutch Constitution, which arguably is one of the most friendly in the world towards international law, does not allow for Public International Law to be applicable in civil cases and cannot even be used in interpreting Dutch civil law. What is therefore needed is some form of international legislation codifying norms of responsibilities for transnational corporations. Currently some 30 treaties are applicable to transnational corporations, such as the Biodiversity Convention, but a number of questions remain: Can problems be solved by a form of wholesale transfer of Public International Law to corporations? Can there be one set of rules applicable to multinational corporations large and small and are national courts the appropriate forum for what in essence are public policy choices?

4. Corporate liability under Criminal Law

Andrew Clapham addressed the criminal law aspects of corporate responsibility by asking whether or not, and if yes how, corporations can be liable under criminal law. The ICC Statute does not refer to corporations, but during the negotiation phase a draft article to this effect was on the table for some four weeks and no government held this option to be impossible in general. But which test would be appropriate for such cases? Would it be the ATCA test on aiding and abetting, the Unocal test, requiring practical assistance which has an effect on the actual crime or should some form of *mens rea* - test be employed which would focus on the thought that a contribution would be likely to help the abuse of human rights. Yet any such criminal law approach must have its shortcomings since the victims also want to be compensated for the damage done to them, furthermore requiring an element of tort. Yet this approach, according to Clapham, does not exactly fit with the Shell Case. Therefore Clapham suggests that the Universal Declaration of Human Rights should be a minimum standard which is also to be respected by transnational corporations and that the 2009 Convention on the reform of the ICC Statute could lead to an amendment to the statute to this effect. Mike Addo finally drew attention to the fact that Human Rights Law is sometimes not viewed as law proper but rather as non-binding rules of business ethics. Hence, according to

Addo, despite the fact that the law in general is capable of creating results, the process of lawmaking has to become more proactive instead of merely reactive.

III. The use of treaty cooperation for the improvement of capital flows

Christophe Bernasconi of the Hague Conference of Private International Law chaired a panel on using treaty cooperation to improve capital flows. The discussion included Catherina Kessedjian (University Panthéon-Assas, Paris), Diego Devos (Euroclear Banks), Sir Roy Goode (Oxford University) and Joyce Hansen (Federal Reserve Bank of New York).

D. Responding to international terrorism: Perpetual and multidimensional challenges

I. Introduction

The part of this Joint Conference which, given the transatlantic tensions in recent months, arguably would draw the most attention was the issue of responding to international terrorism. Among the issues discussed in this context was the fight against international terrorism at an international and European level and the challenge to the international security, economic and criminal system, including the role of international criminal jurisdictions.

The first panel discussion on the challenge of international terrorism to the international security system and designing responses within the UN Charter and treaty frameworks for regional security was convened by Jan Wouters (University of Leuven) and included Michael Byers (Duke University School of Law), Vera Gowlland-Debbas and Marcelo G. Kohen, both of the Graduate Institute of International Studies in Geneva, as well as Mary Ellen O'Connell (Ohio State University), John Packer of the Office of the OSCE High Commissioner on National Minorities (The Hague) and Ruth Wedgwood (John Hopkins University).

II. Accountability for military anti-terrorism measures

O'Connell's presentation assessed the preemptive use of force by the United States in the third Gulf War as well as the targeted killing, through a CIA-operated armed Predator drone, of suspected Al Qaida terrorists in Yemen on 3 November 2001. Neither were, in her view, compatible with international law and she urged that international lawyers had the special duty to speak out against these violations of international law or risk becoming accomplices. The "Bush-Doctrine," which

shaped the September 2002 U.S. National Security Strategy²³ is not respectful of either the UN Charter or customary international law, both of which only allow for the use of force if authorized by the UN Security Council or if an attack has occurred or is at least already underway.²⁴ Consequently O'Connell sharply criticized Michael Glennon's view that there would no longer be any legal restraint on the use of force due to the fact that there have already been so many breaches of the *ius cogens* norm prohibiting the use of force. O'Connell referred to the ICJ's ruling in *Nicaragua v. United States*²⁵ in which the Court found that a breach of international law, without the *opinio iuris* that the act committed was lawful, remains a breach and cannot serve as a starting point for a new rule of customary international law. The targeted killing of Al Qaida members in Yemen, with the prior consent of the Yemeni Government, which was only protested by Amnesty International and Switzerland, was illegal since there was no state of war in Yemen which would have allowed the U.S., by which Al Qaida terrorists were regarded as combatants, to attack perceived hostile combatants.

Gowlland-Debbas went one step further and asked how states could be held accountable for acts committed in the war against terrorism at a time when we seem to be taking a step back toward a world dominated by nation states. The United Nations, in her words, should not give a blanket permission for all acts committed in the war against terrorism, as seems to have been the case with UN SC Res. 1373, which according to Art. 103 UN Charter supersedes all other treaty obligations of UN members.²⁶ In any event, UN SC Res. 1373 does not provide a sufficient justification for the war in Iraq. Still the effects of the recent Iraq war are not normal since, in a turn back to *realpolitik*, the UN has given the U.S. control over Iraq with UN SC Res. 1483 while simply reminding the U.S. of the obvious: the obligation to respect International Humanitarian Law. The role lawyers have to play, according to Gowlland-Debbas, was not one of mere commentators but lawyers also have certain responsibilities, one of them being to insist on the utopias of international law.

²³ National Security Strategy of the United States of America – September 2002, available online at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited 14 July 2003).

²⁴ O'Connell, *The Myth of Preemptive Self-Defense*, American Society of International Law Presidential Task Force on Terrorism, ASIL Task Force Papers, August 2002, p. 5. Available online at <http://www.asil.org/taskforce/oconnell.pdf> (last visited 21 July 2003).

²⁵ I.C.J. Case No. 2 – Case concerning military and paramilitary activities in Nicaragua, *Nicaragua v. United States*, Judgment, 27 June 1986, I.C.J. Rep. 1986, 14.

²⁶ Charter of the United Nations (cf. fn. 8), Art. 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Kohen examined the role of the notion of self-defense in the war against transnational terrorism, which cannot be attributed to a state actor, and asked whether or not self-defense can be necessary or relevant in this context and whether terrorist acts are acts of war. He differentiated between internal (e.g., ETA, Shining Path, Red Brigades, RAF) style terrorism, and external terrorism, as is the case with Al Qaida. Only the latter can open the door for self-defense and consequently the U.K. added a reservation to its ratification of the First Additional Protocol to the Geneva Conventions, stating that it does not regard terrorism as a form of war to which the protocol would be applicable.²⁷ But, while external terrorism can at times be attributed to states, Kohen suggests that this attribution becomes difficult if a state only provides shelter for a terrorist organization.

Yet I would suggest that this is not necessarily the case since international law does offer a solution - albeit only by analogy - to cases in which states provide shelter to terrorist operations which operate internationally: In *Trail Smelter*²⁸ it has been recognized that states are under an obligation not to cause transboundary environmental damage.²⁹ This fundamental principle of international environmental law³⁰ is also known as the "21/2 - principle", since it has been codified in Principle 21 of the Stockholm Declaration³¹ and Principle 2 of the Rio Declaration.³² Yet, if

²⁷ Reservation of 28 January 1998 on Article 1 para. 4 and Article 96 of the First Additional Protocol to the 1977 Geneva Conventions (extended to apply also with respect to Anguilla; Bermuda; the British Antarctic Territory; the British Indian Ocean Territory; the British Virgin Islands; the Cayman Islands; the Falkland Islands; Montserrat; Pitcairn; Henderson; the Ducie and Oeno Islands; St Helena and Dependencies; South Georgia and the South Sandwich Islands; the Sovereign Base Areas of Akrotiri and Dhekelia as well as the Turks and Caicos Islands on 2 July 2002): "[...] It is the understanding of the United Kingdom that the term "armed conflict" of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation. The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the United Kingdom shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, paragraph 4, applies[...]" - Corrected Letter of 28 January 1998 sent to the Swiss Government by Christopher Hulse, HM Ambassador of the United Kingdom. cf. <http://www.icrc.org/ihl.nsf/db8c9c8d3ba9d16f41256739003e6371/0a9e03f0f2ee757cc1256402003fb6d2?OpenDocument> (last visited 21 July 2003).

²⁸ *Case of the Smelter at Trail (B.C.), United States v. Canada*, 3 RIAA (1941), pp.1905 et seq.

²⁹ *ibid.*, at pp. 1965 et seq.

³⁰ Judge Weeramantry, in: *Nuclear Test Case 1995, New Zealand v. France*, I.C.J. Rep. 1995, 288.

³¹ Stockholm Declaration on the Human Environment, Report of the UN Conference on the Human Environment, 11 ILM (1972) 1416, Principle 21: "States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their

states do have the responsibility to ensure that activities within their jurisdiction do not cause damage to the environment in other states,³³ I'd suggest that it is only consequent to assume that they are a fortiori under an obligation to prevent that individuals or organizations under their jurisdiction commit crimes or even terrorist acts abroad. While many states claim to have jurisdiction over crimes committed by their nationals abroad,³⁴ Afghanistan for example failed to fulfil this preventive obligation and hence has become responsible for the failure to prevent terrorist attacks by Al Qaida, which was operating from Afghanistan with the consent or at least acquiescence of the Afghan Taliban Government.

The case for such a general obligation to fight terrorism has been strengthened by UN Security Council Resolution 1373, leading to the codification and institutionalization of this obligation.

While armed countermeasures could be an alternative to self-defense in the immediate aftermath of the September 11, 2001 terrorist attacks, this option has been outlawed by the Friendly Relations Declaration³⁵ and subsequent customary international law. Therefore, Kohen suggests a two-step approach which looks good in theory but at the same time might be hard to accomplish in practice: Terrorists first of all are to be brought before courts to prevent further terrorist attacks, self-defense and the use of force only become an option if terrorist attacks from abroad are ongoing.

jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. [...]"

³² Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, 31 ILM (1992) 876, Principle 2 is almost identical to principle 21 of the Stockholm Declaration and reads as follows: " States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

³³ Case of the Smelter at Trail (B.C.), *United States v. Canada*, 3 RIAA (1941), pp.1905 et seq., at pp. 1965 et seq.; Principle 21 Stockholm Declaration; Principle 2 Rio Declaration.

³⁴ So called active personality principle, cf. e.g. § 7 (2) of the German Criminal Code (*Strafgesetzbuch - StGB*) - "[...] (2) For other crimes committed outside Germany, German Criminal Law applies if the act is punishable by Criminal Law according to the laws of the location where it has been committed or if no Criminal Law is applicable at this location and provided that the person having committed the act in question 1.) was a German citizen at that time or has become a German citizen afterwards or 2.) was not a German citizen at the time in question, yet was apprehended in Germany and, despite the Law on Extradition allowing for his or her extradition after the act committed, is not extradited because a request for extradition has not been made or has been denied or because extradition is impossible." (unofficial translation by the author).

³⁵ UN GA Res. 2625 (XXV), 24 October 1970 - Declaration on principles of international law friendly relations and cooperation among states in accordance with the Charter of the United Nations.

This criminal law approach, albeit an attractive alternative to going to war and certainly so if one takes into account Art. 33 (1) UN Charter,³⁶ has its shortcomings in cases the leaders of terrorist organizations are provided shelter and therefore cannot be brought before the courts. Therefore peaceful dispute resolution mechanisms also have to be directed against states which shelter terrorist organisations and e.g. the United States would certainly have had a good case in this respect against Afghanistan for harboring Al Qaida. Only if this option has failed as well, non-peaceful measures can be considered. A law enforcement approach directed against the members of terrorist organizations alone therefore is insufficient and will often be ineffective, while other peaceful options exist which have to be exhausted according to Art. 33 (1) UN Charter, before military action can be taken.

III. Challenges and options in the perpetual war against terrorism

Three strong pressures were identified by Michael Byers in his presentation, which turned out to be one of the highlights of the conference. Among these pressures were the threat posed by international terrorism, weapons of mass destruction and the unilateralist aggressive tendencies of the Bush administration, which shows no allegiance to the existing international legal order. Accordingly Byers elaborated on three options for the U.S. as well as for international lawyers. The U.S. could choose to reform the existing international order which would involve a reform of the UN Charter which is highly unpractical,³⁷ it could attempt to rule through force or it could seek informal changes to international law, for example regarding the use of force or the right of visitation on the high seas. The latter, most practical, solution has an inherent danger since a system, which is stretched too far does not offer any more constraints and would be prone to abuse. Albeit Byers was aware of existing fears that things might get worse if President Bush should be re-elected, he emphasized that international lawyers have three options at their disposal as well: they can cooperate fully with the U.S. in an attempt to buy influence, completely refuse to cooperate on anything or they can follow a more pragmatic approach, what Byers labelled "constructive opposition" and examine the merits of any legal change and support or oppose it accordingly. The highly controversial UN Security Council Resolution 1441 was cited by Byers as a good example of constructive opposition because of its unclear language: Since basically all members of the UN Security Council knew at the time of drafting what was to become Resolution 1441 that the

³⁶ Charter of the United Nations, Art. 33 (1): "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

³⁷ cf. Art. 108 UN Charter (fn. 8).

U.S. would go to war with Iraq and would also not be stopped by the UN, the unclear language was chosen to avoid creating a precedent for preemptive self-defense.

Packer reminded the audience of the fact that in the current war on terrorism, which later was characterized as "perpetual war" by Gowlland-Debbas saw a new form of terrorism different from the terrorism that merely pursued political objectives through violence. This new terrorism used violence to pursue global political agendas that contain nihilist elements and which are irreconcilable with the Westphalian paradigm, targeting civilians instead of states.

IV. Combating global terrorism in the financial and economic sphere

1. UN Anti-terrorism regimes after 11 September 2001

Concerted actions to combat terrorism in the context of the international financial and economic legal system were at the center of the second terrorism-related discussion convened by August Reinisch (University of Vienna). One core element of discussion in this session was the UN Security Council's Resolution 1373, which has most far-reaching consequences and may become a turning point in the history of international law. Axel Marschik (Austrian Mission to the United Nations) elaborated that the UN was thought to have the capabilities to play only a supporting role in combating terrorism but became a driving force due to the UN SC Resolutions adopted in the wake of the 9 / 11 terrorist attacks. One reason for this surprising role was the fact that the so called P5, the five permanent members of the Security Council,³⁸ have an interest in fighting terrorism and wanted to control and influence any measures taken on a global level. Due to the veto right provided by Art. 27 (3) UN Charter,³⁹ the Security Council turned out to be the best forum for this purpose. Marschik presented the measures taken by the UN, addressed the question of their effectiveness and provided an outlook on future measures and necessities.

³⁸ Charter of the United Nations (cf. fn. 8), Art. 23, sentence 2: "[...] The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council.[...]" - At the time being the People's Republic of China holds the seat previously held by the Republic of China (Taiwan) and the Russian Federation holds the formerly Soviet seat.

³⁹ Charter of the United Nations (cf. fn. 8), Art. 27: "1. Each member of the Security Council shall have one vote. 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

Currently there are two regimes in place aimed at combating international terrorism: UN SC Res. 1373 provides for an abstract regime with a monitoring body in the form of the Counter-Terrorism Committee (CTC) while UN Security Council Resolution 1363⁴⁰ beefed up the earlier UN Security Council Resolution 1267,⁴¹ which had established the initial sanctions regime on Afghanistan back in 1999, after the terrorist attacks of September 11, 2001. Yet both regimes are subject to criticism. In its Resolution 1373 the Security Council has failed not only to provide for a definition of terrorism, thus opening up the regime to potential abuse, but also did not include an end-clause, leaving in place a temporarily unlimited anti-terrorism regime with a substantial risk of abuse. While the regime under UN Security Council Resolution 1267 only targets individuals and not entire peoples by sanctions, UN SC Res. 1267 does not foresee a right to appeal and violates, according to Marschik, the principles of due process. Only earlier this year a de-listing procedure was included in the rules of the Sanctions Committee which serves as a monitoring body for the 1267 regime. Moreover, the 1267 regime is far from being effective since it focuses too much on travel bans and arms embargoes. On the other hand, the 1373 regime provides for the largest intrusion into domestic affairs ever under Art. 41 of the UN Charter.⁴² The regime is, however, widely supported because of its perceived transparency and so far all 191 members of the UN have issued at least one report to the Counter-Terrorism Committee, making UN SC Res. 1373 the most successful tool in the history of international law, even overtaking the widely acclaimed Convention on the Rights of the Child (CRC). Currently the U.S. and the U.K. are pressing for on-site visits to verify the state reports which seems necessary since the enforcement against unwilling states becomes more urgent. It has been remarked as particularly positive by Marschik that the technical work at the CTC was unharmed by the crisis over Iraq in early 2003 and he suggested that both regimes could be fused to one body, similar to UNMOVIC.

⁴⁰ UN SC Res. 1363 (2001) of 20 July 2001, available online at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/473/97/PDF/N0147397.pdf?OpenElement> (last visited 21 July 2003).

⁴¹ UN SC Res. 1267 (1999) of 15 October 1999, available online at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement> (last visited 21 July 2003).

⁴² Charter of the United Nations (cf. fn. 8), Art. 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its discussions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

2. *The free flow of capital as an obstacle to targeted sanctions ?*

Albert Straver (European Commission) spoke on the difficulties connected to targeted sanctions in an environment of a free flow of capital as is the case in the EU. Should the EC or the member states act and on which legal basis? The EC is facing similar due process problems as had already been mentioned by Marschick since, unlike EC regulations, Common Foreign and Security Policy (CFSP) acts cannot be reviewed by the European Court of Justice (E.C.J.). Himamuali Das (U.S. State Department) stated that the freezing of assets is only one tool while international co-operation remains the key to success in the fight against terrorism. The U.S. State Department therefore appreciates the United Nations' role after the September 11, 2001, attacks. Measures taken by the U.S. domestically include Executive Order 13224 to freeze terrorist assets⁴³ - which in turn was based on the International Emergency Economic Powers Act (IEEPA),⁴⁴ the National Emergencies Act,⁴⁵ section 5 of the United Nations Participation Act of 1945, as amended (UNPA),⁴⁶ and section 301 of title 3, United States Code, the USA PATRIOT Act,⁴⁷ the International Emergency Economic Powers Act⁴⁸ and section 219 of the Immigration and Nationality Act,⁴⁹ which is aimed at identifying foreign terrorist organizations

⁴³ Executive Order 13224 of 24 September 2001 Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, available online at <http://usinfo.state.gov/topical/pol/terror/01092408.htm> (last visited 21 July 2003).

⁴⁴ 50 U.S.C. 1701 et seq.

⁴⁵ 50 U.S.C. 1601 et seq.

⁴⁶ 22 U.S.C. 287c.

⁴⁷ Uniting and Strengthening America by Providing Appropriate Tools

Required to Intercept and Obstruct Terrorism (USA Patriot Act) of 24 October 2001, H.R. 3162, text available online at <http://www.fincen.gov/hr3162.pdf> (last visited 21 July 2003).

⁴⁸ 50 U.S.C. 1701 et seq.

⁴⁹ 8 U.S.C., sec. 219 - Designation of Foreign Terrorist Organizations: " (a) Designation - (1) in general - The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that -- (A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in section 212(a)(3)(B)); and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States. (2) Procedure [...] (C) Freezing of Assets - Upon notification under paragraph (2), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court."

(FTOs) and at freezing their accounts. Executive Order 13224⁵⁰ blocks the assets of individuals on the list based on UN SC Res. 1267 and allows both the State Department and the Treasury Department to block assets. These measures, although they have consequences similar to those of legislation in the field of criminal law, are considered to be only administrative measures, making them easier to apply. Yet they can be challenged in court and there is no automatic transfer from the UN 1267-list to the U.S. 13224-list. Any such transfer can only be on a case-by-case basis and must comply with the Administrative Procedure Act (APA).

3. Challenges to international police cooperation

Europol's Deputy Director Willy Bruggeman explained the work of Europol in this context. Europol issues regular threat assessments, together with Interpol, the FBI and the police services of the U.K. One of the problems Europol faces in the context of stopping the financial flows towards terrorist organizations is the fact that not all funding is illegal, thus leading to a collision between human rights and anti-terrorism measures. Furthermore, there is still no universal definition of terrorism, albeit one on an EU level. Other problems in this context relate to the following of cash flows and different data protection systems, e.g. in the EU and the U.S. Finally, the fact that the U.S. still uses capital punishment leads to legal problems relating to extraditions.

4. Trends and challenges regarding the UN anti-terrorism regimes

Marcel Brus (Leiden University) finally asked the question how this reflects a trend towards international governance and a more community oriented form of international law. In the following discussion, Byers addressed the democratic deficit in the lawmaking by the UN in UN SC Res. 1373 while Bekker asked how to reconcile the immunity of heads of states with the freezing of their assets. One solution offered on this problem was Art. 103 of the UN Charter,⁵¹ allowing the UN SC to overrule the customary law immunity of heads of state.

V. International Terrorism and International and European Criminal Law

1. Defining terrorism

The final discussion panel, convened by Harry Post (University of Exeter) was concerned with International Terrorism and International and European criminal law.

⁵⁰ cf. fn. 43.

⁵¹ cf. fn. 26.

Andrea Gioia (University of Modena) elaborated on the problem of finding a common definition for terrorism, since so far there are only topical treaties on this subject, for example relating to civil aviation, hostages or explosives. So far definitions only exist on a regional level, apart from the indirect definition offered in the 1999 UN Convention on the Financing of Terrorism, which defines terrorism as acts "intended to cause death or injury to civilians not taking part in hostilities with the purpose to intimidate or to force a state to act or abstain from action."⁵² This definition is widely accepted but, according to Gioia, needs to be broadened to include not only civilians but all victims as well as damage to property and the environment. The only two generally accepted exceptions are wars of national liberation and state terrorism. A Comprehensive UN Convention on Terrorism suggested by Gioia should not include acts of war, labeling terrorist acts in times of war as what they are, i.e. violations of international humanitarian law, neither should acts committed by armed forces in times of peace be treated as terrorism, which he regards as state terrorism and possibly crimes against humanity.

2. International Criminal Law as an alternative to military action after 11 September 2001: A law enforcement approach to the challenges posed by international terrorism

Leila Sadat (U.S. Commission in International Religious Freedom) emphasized that international criminal law has evolved so much that it could have been used by the United States after the September 11, 2001, attacks to pursue the perpetrators. Instead, the U.S. left the path of multilateralism. The main question in this context is whether or not terrorism is a crime which can be tried on the basis of universal jurisdiction, since the ICC currently does not have jurisdiction over terrorist acts, unless they constitute a crime against humanity. This could be changed in the 2009 Review Conference for the ICC. The fact that UN SC Res. 1373 assumed that there was universal jurisdiction over terrorist acts opened the door for an international tribunal, widening the ICTY/ICTR precedent, making *aut dedere aut judicare* seem to have become a rule of customary international law.

⁵² International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, available online at <http://untreaty.un.org/English/Terrorism/Conv12.pdf> (last visited 21 July 2003), Art. 2 (1), albeit only indirectly, provides the closest thing to a universally accepted definition of terrorism: "1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."

The question who can try terrorists in which forum was addressed from a prosecutor's point of view by William Fenrick (ICTY), while Jordan Paust (University of Houston) asked whether or not international humanitarian law could apply to a non-state actor such as Al Qaida. States, in his words, cannot be at war with Al Qaida as such and Al Qaida cannot be bound by the laws of war outside a concrete armed conflict, as for example in Afghanistan. Yet, for Paust that doesn't mean that the U.S. improperly invoked Art. 51 UN Charter as a justification for going to war in Afghanistan. Christopher C. Joyner (Georgetown University) preferred a law enforcement approach to counter terrorism, as opposed to the military approach chosen by the Bush administration. Since 1960 twelve major instruments have been created to deal with terrorism and the challenge for a proposed future Comprehensive Convention on Terrorism is not so much a lack of law but making the law work. Monica den Boer (EULEC) asked whether the September 11, 2001, attacks offered a window of opportunity for the EU to act against terrorism and even a paradigmatic shift. While she admits that there was a window of opportunity, she denies that there was a paradigmatic shift in the EU's way of dealing with terrorism, since Europe could build on the experience of twenty years of cooperation in anti-terrorism measures. Especially the cooperation in the field of Justice and Home Affairs took a giant step forward and the introduction of the European Arrest Warrant in 2004 would not have been possible without the attacks speeding things up substantially. Moreover, the EU has adopted a framework decision on terrorism as well as on the freezing of terrorist assets. The competencies of Europol's Anti-Terrorism Department were strengthened and Eurojust now plays an important role in the European Anti-Terrorism Context. Finally Tony Bunyan (Statewatch) criticized that the war on terrorism had replaced the ideology of the Cold War and had led to large restrictions on civil rights, especially for foreigners and minorities. His most astonishing claim was that the EU had formed a secret anti-terrorism force which allegedly was not bound by legal restraints and which he compared to Operation Gladio.

E. Concluding Discussion

In a concluding debate entitled "The structure of the international and European Legal System and its values" convened by Dorinda Dallmeyer of the University of Georgia and Ige F. Dekker of Utrecht University, ASIL-president Anne-Marie Slaughter (Princeton), NVIR's acting president Nico J. Schrijver (Free University of Amsterdam), Theo Raaijmakers (University of Tilburg) and Sean Murphy (George Washington University) addressed the question whether the transition for the Westphalian-style state government to international governance will change the fundamental structure of the international legal system, not only in the sense of the kind of participating actors, including now non-state actors, but also in the sense of its fundamental values and principles. Slaughter recalled that we are moving from

national government "to international something" and that we are on the verge of a change of the underlying fundamentals of international law. This change could lead to a world of networks including states as well as non-state actors such as international organizations.

F. Speech by the President of the International Court of Justice, Shi Jiuyong

The Conference ended with a speech by the President of the International Court of Justice, Shi Jiuyong. His remarks on the role of non-state actors in international law can at best be called conservative since he strongly reminded the attendants that all non-state actors, international organizations, NGOs and transnational corporations, are dependent on states, which according to him remain the center of international law. In this respect Judge Shi rejected the view that the rise of non-state actors could have an impact on the role of states in international law. To the contrary, the ICJ's president not only emphasized that the state remains, in his view, the only true subject of international law, but also insisted that the sovereignty of states prohibits that foreign "values" can be imposed upon states and that doing so would amount to imperialism.

Shi's very conservative view contradicts the findings of the conference regarding the increasing importance of non-state actors, and his criticism of the idea of a value-based system of international law appears to be unnecessary, since international law, as a system of law based on the consent of the governed is designed to reflect the core values on which the overwhelming majority of subjects of international law agree on, such as the need to preserve international peace and security and to protect human rights. Creating universal standards for human rights, the protection of the environment or other aspects of a more and more fragmented system of international law and holding states accountable according to these very standards cannot be considered a new form of imperialism, since all actors of international law have the possibility to participate in the creation and shaping of such universal rules. As long as a consent-based legal system, like the international legal system today, is working without interference regarding the decision-making process of its actors,⁵³ Shi's claim would go too far. The limit for this interference is pro-

⁵³ As has been the case e.g. with regard to Yemen: After Yemen had announced it would not support a U.S. bid for a UN Security Council threatening the use of force against Iraq in the context of its occupation of Kuwait in 1990, some US\$ 70 million in U.S. foreign aid which were supposed to go to Yemen were withheld, making it, in the words of one official in the administration of Pres. *Bush sr.*, "the most expensive 'no' in history".

vided by Art. 2 (7) UN Charter.⁵⁴ In general, Western efforts in favor of stricter human rights standards certainly do not reach this limit.

Given the fact that the Kosovo Cases are still pending before the ICJ Shi's remarks, with which he attempted to strengthen the veil of sovereignty under which human rights violations and undemocratic governance are hidden, could lead to suspicion that the Court will give Human Rights considerations a less important role in the future and place a greater emphasis on state sovereignty, a concept which is now more limited than since the beginning of the Westphalian period in international law. While the idea that we are witnessing a fundamental change in international law away from an all-dominant role of states towards a more community- or value-oriented legal system had certainly prevailed among the participants during the three-day long conference, Shi, appeared wary of any such ideas and certainly preferred strong state government over the value-based international governance favored by many of the conference's participants.

The proceedings of the conference will be published in spring 2004 by T.M.C. Asser Press, The Hague.

⁵⁴ Charter of the United Nations, cf. fn. 8, Art. 2 (7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."