The Classification of States and the Creation of Status within the International Community

Petra Minnerop

A. von Bogdandy and R. Wolfrum (eds.),
Max Planck Yearbook of United Nations Law, Volume 7, 2003, 79-182.

I. The Classification of "rogue states" by the United States*

Throughout the second half of the twentieth century the United States of America (henceforward: the United States) developed a number of multifarious terms for states to which it ascribed a high threat potential as regards the United States and international security. President Reagan referred to these countries as "terrorist states" or "renegade regimes."[1] In the aftermath of the Iraq-crisis of 1990/1991 the United States Department of State (henceforward: DoS) coined the formulations "Iraqs of the future" and "other Iraqs" for states possessing a similar threat potential.[2] In addition to this, the United States has been warning of the increasing danger posed by "rogue states", "i.e. their striving for weapons of mass destruction (henceforward: WMD) and their support of international terrorism since the mid-nineties".

The (perceived) support of international terrorism has been a principal reason for the United States Government to denote countries as "rogue states" in its statements. Besides this factor, the designation of a country as a "state sponsor of terrorism" by the DoS serves as a cornerstone for such a lexical stigmatization. The DoS has been engaged in this procedure since 1979, when it commenced publishing an annual list of countries the United States thought of as "states supporting international terrorism". At the time of writing the list included Cuba (since 1982), Iran (since 1984), Iraq (since 1990), Libya (since 1979), North

---

* For a more detailed description of United States practice concerning the use of pejorative classifications and the reaction of other states, see P. Minnerop, *Die Stigmatisierung von Staaten. Eine völkerrechtliche Bewertung unter dem Prinzip der souveränen Gleichheit der Staaten* (Dissertation, University of Göttingen, forthcoming).

1 Address by President Reagan before the American Bar Association, Washington D.C., 8 July 1985, Current Policy No. 721 (United States Department of State).

2 Cheney, Statement before the House Armed Services Committee, Washington, D.C., 19 March 1991, 7 et seq.

Korea (since 1988), Sudan (since 1993) and Syria (since 1979).[3] Since the establishment of this list only one country (South Yemen, following the reunification with the North in 1990) has been deleted from it.[4] Hence, the content of this list has remained virtually unaltered after the addition of Sudan in 1993.[5] The DoS, however, engages in annual evaluations as to whether listed countries can be deleted or new ones should be added.[6]

Government statements leave little room for doubt as regards the clear distinction made between "the community of democracies" and "rogue states" as a grouping of countries.[7] This dichotomy has been expanded by Secretary of State, Albright during her incumbency. By adding "emerging democracies" and "international good citizens" Secretary Albright devised a classification which subsumed all countries of the world into the four categories of "[i]nternational good citizens,

---

3 Iran: 15 C.F.R. 742.8 and 746.7, 66 Fed.R. 36683, 12 July 2001; Syria: 15 C.F.R. § 742.9, 66 Fed.R. 36682, 12 July 2001; Sudan: 15 C.F.R. 742.10, 66 Fed.R. 36682, 12 July 2001; North Korea: 15 C.F. R. 742.19, 66 Fed.R. 36682, 12 July 2001; Cuba: 15 C.F.R. 7462, 66 Fed.R. 36682, 12 July 2001; Iraq: 15 C.F.R. 746.3, 66 Fed.R. 36682, 12 July 2001; Libya: 15 C.F.R. 746.4, 61 Fed.R. 64284, 4 December 1996, 62 Fed.R. 25469, 9 May 1997, 63 Fed.R. 42229, 7 August 1998, 64 Fed.R. 49383, 13 September 1999, 67 Fed.R. 51033, 6 August.2002, cf. also 31 C.F.R. 596.310, 1 July 2001.

4 E. Day, *Economic Sanctions imposed by the United States against specific Countries: 1979 through 1992*, Congressional Research Service Report to Congress, Order No. 92-631 Fed.R., 1 October 1992.

5 According to press releases the DoS has been investigating the track records of North Korea and Sudan, in order to determine if they could be excluded from the list. But no concrete steps of this kind have been taken so far. See Washington Post, 1 May 2001.

6 Cf. Patterns of Global Terrorism, Overview of State-Sponsored Terrorism, 2000, <http://www.state.gov./s/ct/rls>, accessed on 9 September 2002: "State Sponsorship has decreased over the past several decades. As it decreases, it becomes increasingly important for all countries to adopt a 'zero tolerance' for terrorist activity within their borders [...]. The United States continued actively re-searching and gathering intelligence on other states that will be considered for designation as state sponsors".

7 Press briefing with Spokesperson Rubin, 25 April 2000 on the adoption of a Resolution by the UN Commission on Human Rights which in his words: "[...] also confirms that democracy is not a regional value vested in any particular social, cultural, or religious tradition, but rather a universal value rooted in the rich and diverse nature of the community of democracies".

emerging democracies, "rogue states" and countries where a state hardly exists, such as Somalia and Sierra Leone".[8] This process of differentiation introduced a hierarchical order between groups of states at the same time. This becomes visible through Secretary Albright's explanation that:

> "[t]he largest group are those that understand that it is important to have some kind of rules of the game within the international system; that understand the value of working together. That is the largest group. We may not agree with the governments in all those groups — in that group. But generally, there is an agreement about the importance of abiding by international systems. The second group was basically the countries transitioning to democracy that wanted very much to be a part of the first group but did not yet have all the institutional structures to do that. The third group of countries was the "rogue states", who not only did not want to be a part of the first group, but deliberately were doing everything they could to undermine it. The fourth group was the so-called failed states that for some reason or another were basically eating their own seed grain".[9]

The existence of "rogue states" — and their repeatedly underscored threat potential — also served as a rationale for the United States Government to follow up on its announcement and cancel the ABM-Treaty with Russia on 13 December 2001. The official wording of the announcement cited "extraordinary circumstances,"[10] a phrase which implied that immediately after 11 September 2001 "rogue states" became the prime target of counter-terrorism strategies.[11] One more exhibit in

---

8 G. Wright, Washington Post, 19 June 2000.

9 Secretary of State, Albright, International Economic Leadership: Keeping America on the Right Track for the 21st Century, 18 September 1997, 9.

10 ABM Treaty Fact Sheet, Statement by the Press Secretary, Announcement of Withdrawal from the ABM Treaty on 13 December 2001, *Archiv der Gegenwart* 71 (2001), 45360.

11 Press briefing by Spokesperson Fleischer, 26 November 2001, <http://www.whitehouse.gov./news/releases>, "Because there are many nations that hold weapons of mass destruction. The President was referring to those nations that are listed on the State Department's list as nations that sponsor terrorism, that would use them, which I think is something that should be self-evident to everybody in the room. What, if the American President would not speak sternly about any nation that is listed as a nation that sponsors terrorism from using weapons of mass destruction? Does anybody think that any nation that is a terrorist sponsor that would use

support of this claim was President Bush's State of the Union Address on 29 January 2002, when "terror states" was a repeatedly used denotation, and three "rogue states" were eventually merged into an "axis of evil". President Bush then delineated the wide notion of counter-terrorism, which would include state sponsors, as:

> "[i]f we stop now — leaving terror camps intact and terror states unchecked — our sense of security would be false and temporary".[12]

This is due to the fact that such countries pose a threat, which the President summed up in the following manner:

> "Our second goal is to prevent regimes that sponsor terror from threatening America or our friends and allies with weapons of mass destruction. Some of these regimes have been pretty quiet since September 11th. [...] States like these constitute an *axis of evil*, arming to threaten the peace of the world".

The different interpretations of the reference "rogue states" was to be defined explicitly and in detail on 17 September 2002, upon the publicizing of the United States Government's new National Security Strategy. The fifth section of this document lists the common features of "rogue states",[13] whereas preceding and subsequent items set forth a recalibration of the legal system to counter the particular threat "rogue states" pose — in addition to justifying pre-emptive measures of defence against these countries' synergizing of WMD and support for international terrorism.

---

weapons of mass destruction would not be held accountable? Of course they will be. That's an existing American policy, always has been, and under President Bush it always will be".

12 The President's State of the Union Address, 29 January 2002, <http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html>.

13 According to it "rogue states" display the following features. They:
"– brutalize their own people and squander their national resources for the personal gain of the rulers,
– display no regard for international law, threaten their neighbours, and callously violate international treaties to which they are party,
– are determined to acquire weapons of mass destruction along with other advanced military technology, to be used as threats offensively to achieve the aggressive designs of these regimes,
– sponsor terrorism around the globe, and
– reject basic human values and hate the United States and everything for which it stands", National Strategy for Homeland Security, 14.

Hence, the question to what extent the stigmatization of certain states in international law, employed to complement their political isolation, becomes increasingly important. Especially since such classifications are utilized in legal contexts to expand binding provisions in the light of unprecedented danger.

This article will attempt to outline aspects of the answer to this question, by focusing on the impact of a unilaterally introduced stigmatization of states upon an international community, based on the sovereign equality of states as one of its founding principles.

One of the issues linked to this subject-matter consists of the fact that the United States does succeed in creating a dichotomy of "rogue states" and the international community. Reactions of the latter exclude "rogue states" from the "social community" of states. At the same time, it becomes obvious, however, that such an exclusion does encounter limitations at the legal level, in spite of the fact that any legal order is usually derived at the social level through a conversion of values and principles. Thus the exclusion of "rogue states" from the international community becomes an impossibility, if the latter defines itself as a legal community. This article, furthermore, shows that exclusion at the social level will affect the legal order of the community if the consensus on its principles is being challenged, i.e. if the social community returns to a previous stage of development.

The argumentation tasked with procuring an answer to the abovementioned question and its implications consists of three sections. The first centres on structural distinctions between an international society and an international community. It hence deals with the question which principles are recognized by states as community-forging principles? It also delves into the extent to which stigmatization undermines these principles. The second section indicates that the derogation of states represents a form of hegemony, which is rooted in the legal traditions of the domestic law of another state. These are then elevated to a rationale at the level of international law. The final section feeds on the thought that hegemony has the tendency to petrify power disparities, while focusing on the effects of stigmatizing designations of sovereign states, as well as the use of such formulations as an instrument of hegemony within an international community.

II. Exclusion, Inclusion and the Emergence of Community

1. Society and Community: Different Conceptions of World Order

Every legal order is based on a social order, i.e. on the values and interests of those acting within the legal order.[14] Within this framework the legal and social orders are exercising influence over each other at the same time. On the one hand common values and interests are conducive to codification and they determine the application of laws; on the other hand, laws provide patterns for action and they determine the procedure for reaching a consensus on common values and interests within the social order.[15]

The conduct of states towards each other is likewise dependent on the scope of their common values consensus and on which interests they choose to pursue jointly. One prominent historical example for this is the multitude of Christian states, which were dedicated to a standardized norm application within the value community of the *res publica christiana,* while societies outside this community were not recognized as subjects in an international legal order. Simultaneously to this, the legal provisions regulating relations between civilized states were not applicable to countries outside the community of civilized states. Hence the civilizational criterion not only embodied a "logic of exclusion-inclusion,"[16] it also symbolized a value consensus conducive to the demarcation of boundaries between social orders. This division consequently defined the purview of the law of civilized states. Beyond the borders of a community incorporated through a civilizing process, which fathered a value consensus, the application of the laws designed for it was impossible.

Thus the convergence on common material values determines the social quintessence, which in turn provides a foundation for the development of a legal order. The scope of this value canon is decisive for the possible establishment of states as a community. One indicator for such a process, however, lies in the exclusion of countries which do not share

---

14 N. Luhman, *Das Recht der Gesellschaft*, 1993, 550; W. Friedman, *The Changing Structure of International Law*, 1964, 3.

15 N. Luhman, *Die Politik der Gesellschaft*, 2000, 372 et seq.

16 M. Koskenniemi, The *Gentle Civiliser of Nations*, 1989, 127.

the common values. The notions "international community" and "international society" still embody the basic explanatory models for functional prerequisites, which have to be met by an assembly of states in order to incorporate an international order. Both of them have been based on the dichotomy of the sociologist *Ferdinand Tönnies* between community and society.[17] According to *Tönnies*, the notion of community is characterized by a certain genuine homogeneity of its members and their interests.[18] The key feature of distinction with respect to the term society, nevertheless, lies in the fact that a community is marked by an intrinsic common denominator, whereas an society is at best capable of producing an overlapping of pragmatic preferences.[19] Hence there is no genuine common ground in an association — there merely is a multitude of individual interests, which do not have an impact on each other.[20] As a consequence of this, the co-existence of states generates the functional prerequisites for an international society.[21] The interior state boundaries are very prominent within such associations, and the exclusion-inclusion function is initially executed by national social i.e. constitutional orders.[22] Pressures for an optimum structure and performance gain ground throughout the pursuit of national interests. All this, however, does not preclude several states from defining themselves as a super-ordinate unit through value convergence.[23] This yields a particular form of community in an international society, as the development of legal provisions may take a different turn. But at the same time, this particular kind of organizational form will produce possibilities for the exclusion of states.

In contrast to this, an international community is characterized by common values as its foundation. It is not merely dominated by national interests, but acts on the common interests of all states — even if these can only be determined through confrontational bargaining, i.e. through the balancing of all national interests. What is decisive is the fact that each consensus reached on material values alters the social substratum, which underlies the legal order. This raises the question if —

---

17 F. Tönnies, *Gemeinschaft und Gesellschaft*, 1935, 1st edition 1887, 14; M. Weber, *Wirtschaft und Gesellschaft*, 1980, 20 et seq. (234 et seq).

18 Tönnies, see above, 14.

19 Tönnies, see note 17, 45.

20 Tönnies, see note 17, 40 et seq.

21 Friedman, see note 14, 60 et seq.

22 U. Di Fabio, *Der Verfassungsstaat in der Weltgesellschaft*, 2001, 18.

23 Friedman, see note 14, 62.

upon crossing a certain threshold of integration and concordant social order development — it is still possible to subsume this legal order under the reference "international society".[24] It would seem plausible to presume, after all, that the consensus-forging process creates a value conversion which intensifies social cohesion up to a level of development corresponding exclusively to the "international community" model.

This, however, would mean that (still) feasible processes, which are idiosyncratic traits of the international society, would no longer be applicable without threatening to undermine the value consensus of a community. Such instances would occur at least upon applying international-association processes to the detriment of a material value of the international community that has been recognized as a basic principle by the units of the latter.

Apart from the agreement on the purview of legal provisions, the stigmatization of states has always been linked to a division of social orders throughout each epoch of history. This exclusive function of a community, which defined itself as a community based on values, reached a particular degree of prominence in the Medieval Age, when the Christian system of international law defined itself as an "in-group" with respect to non-Christian states. Such a notion of Christianity-based community subsequently permeated the civilization criterion. This process of clustering common traits, in order to define the composition of the civilized world, created the prerequisites for excluding certain states which were consequently awarded the epithet "non-civilized".

This exclusion of other countries had to be preceded by a certain amount of integration, as only a convergence on value systems attributes the necessary weight to common denominators, thus elevating them to criteria of exclusion.[25] It is therefore hardly surprising that each instance of stigmatization revolves around the defining feature of each "in-group" — regardless of the type of existing legal order.

---

24 A similar view is upheld by A.L. Paulus, *Die internationale Gemeinschaft im Völkerrecht*, 2001, 426 et seq., who arrives at the conclusion that state-community structures have emerged in some areas of legislation, while state-association structures still persist in others.

25 M. Koskenniemi, *From Apology to Utopia — the Structure of Legal Argument*, 1989, 466 et seq.; B. Simma, *From Bilateralism to Community Interest in International Law*, *RdC* 250 (1994), 217 et seq. (248 et seq.).

The categorization of social orders entails a stigmatization of states similar to their designation as "rogue states" or "state sponsors of terrorism," along the same operative principles. Countries branded with such references (ascribed traits) cannot belong to the community of (all remaining) states. The latter cannot, after all, include countries threatening its existence.

This assertion is based on the fact that the co-operation within the war against international terrorism has become a principal component of the international community's ideological core. Against this backdrop, the offence of countries classified as "state sponsors of terrorism" by the United States cannot be seen as anything but fatal, since these states are accused of contributing substantially to the furthering of terrorism. Such a threat analysis justifies the exclusive function of the above-mentioned classification in the eyes of the existing international community. In addition to this, states on the terrorism-sponsor list are also segregated on the grounds of other values shared by the international community, since:

> "[e]mpowered by the reality that a world of democracy, is a world in which terrorism *cannot* thrive, the United States war to eradicate the cancer of terrorism, quickly became a part of a larger struggle for democratic principles, universal freedoms and the demands of human dignity".[26]

The United States' differentiation between "rogue states" on the one hand and the "community of democracies" on the other entails the following assertions.[27] First, the United States upholds the view that there is such a thing as an international community, and second — there are states which are not part of the latter. "Rogue states" have yet to undergo a transformation, they have to meet the accession criteria, before being admitted. This process of conversion is complicated by their lack of progress so far, summed up in charges of curtailing rights of political

---

26 "A Review of the State Department's Human Rights reports from the victims' Perspective", Hearing before the Foreign Relations Committee, Ser. No. 107—73, 6 March 2002, 6, or also in the National Strategy for Homeland Security, 17 September 2002, 14; Wolfowitz, Speech delivered at the XXXVIII Munich Security Policy Conference, February 2002, <http://www.securityconference.de/>, "It is not an accident that every state that sponsors terrorism also terrorizes its own people".

27 National Strategy for Homeland Security, of 17 September 2002, 14, Secretary of State, Albright, see note 9, 9.

participation and massive human rights violations, in order to underpin totalitarian leadership mechanisms.[28]

On the basis of all this, it can be said that (regardless of the legal consequences entailed by the process of stigmatization) the designation of countries as "rogue states" and "state sponsors of terrorism" accomplishes the explicit dichotomization of social orders in one step. Such processes of exclusion are nevertheless subject to legal constraints, which are binding for the international community, should it consider itself a legal community as well.

2. The International Society as a Legal Community

The notion of "international community" is marked by a "jet set" status: it leaves room for a wealth of different interpretations and travels across academic disciplines. The exclusion of certain states from *the* international community can only have legal consequences if "rogue states" were part of this community under normal circumstances. Hence it can be said that the exclusion of "rogue states" from the international community aims at a change of their status under (international) law, i.e. it is dominated by the intention of according them the status of pariah-states.

The references "international community," *communauté internationale*, and *internationale Staatengemeinschaft* are used synonymously for states capable of acting together, and willing to do so in situations of crisis. In political speeches the formulation is frequently employed in connection with the United Nations, as in Joschka Fischer's speech given for the Council of Foreign Relations, when he advocated the:

> "[...] strengthening of multilateralism, the capacities for action of the UN and the codification of the international community"[29]

as desirable aims. This could imply that the United Nations constitute the "international community". In contrast to this usage there are instances which question such an absolute overlap. During the air campaign against Yugoslavia in Kosovo political leaders spoke of a military intervention by the "international community" — in spite of the fact that a mandate (according to Chapter VII of the UN Charter) had not

---

28 National Strategy for Homeland Security, 17 September 2002, 14.

29 Speech given by the German Minister of Foreign Affairs Fischer before the Council of Foreign Relations in New York, 5 November 1999.

been negotiated within the United Nations Security Council, due to the resistance of Russia, the People's Republic of China and France.

An identification of the states comprising the "international community" could, however, still be possible. This is implied by the inclusion of the reference into positive legal acts, as well as by the thesis on the constitutionalization of the international community, which has emerged within international law literature.[30]

In 1949 the ICJ utilized the formulation "international community" to establish the objective legal personality of the UN.[31] In subsequent years this formulation was at times embellished by the phrase "as a whole" in rulings of the ICJ. In case of the siege and hostage-taking at the US Embassy in Teheran the Court's documents contain the more general reference "international community".[32] But the records of the *Barcelona Traction* case speak of duties *erga omnes* towards the "international community as a whole," which the ICJ had spelled out for all states during this trial.[33]

---

30 J.A. Frowein, "Reactions by not Directly Affected States to Breaches of Public International Law", *RdC* 248 (1994), 344 (350 et seq.); B. Fassbender, "The United Nations Charter as Constitution of the International Community", *Colum. J. Transnat'l L.* 36 (1997/98), 529 et seq.; C. Tomuschat, "Die internationale Gemeinschaft", *AVR* 33 (1995), 1 et seq. For a survey of notions of the international community and their origins in sociology and ethics, Paulus, see note 24.

31 Reparations for Injuries Suffered in the Service of the United Nations, ICJ Reports 1949, 174 et seq. (185). In its Opinion on the Genocide-Convention the ICJ recognizes "the principles underlying the Convention [as] principles which are recognized by civilized nations as binding on States, even without any conventional obligation", Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 1951, 15 et seq. (23).

32 Case Concerning United States Diplomatic and Consular Staff in Teheran, ICJ Reports 1980, 3 et seq. (42 et seq., para. 92).

33 This is supported by the ICJ via one of its 'obiter dicta', Barcelona Traction, Light and Power Company, Limited, ICJ Reports 1970, 3 et seq. (32, para. 32), the ICJ also addresses 'erga omnes' duties without an explicit linkage to the international community in the Case Concerning East Timor (Portugal v. Australia), ICJ Reports 1995, 90 et seq. (102, para.28), and in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 1996, 595 et seq., (616, para. 33).

Such formulations remind us of article 53 of the Vienna Convention on the Law of Treaties (henceforward: VCLT), according to which a legal provision enjoying the status of *ius cogens* represents a norm accepted by the "international community as a whole".[34] Hence, there is a possibility that the reference "international community" encompasses most (but not all) countries, whereas the formulation "the international community as a whole" covers all countries.

The United Nations employs both references. The more elaborate notion of the "international community as a whole" was used by the General Assembly for the first time in 1993. Up to this time only the "international community" had been common in United Nations parlance.[35] The Chairperson of the UN Security Council referred to the "international community as a whole" for the first time in 1994.[36] Two years later this reference emerged for the first time in an appeal to states for cooperation in the fight against terrorism, in shape of a UN Security Council Resolution.[37] Ever since the United Nations regularly resorts

---

34 Vienna Convention on the Law of Treaties, UNTS Vol. 1155 No. 18232.

35 A/RES/48/23 of 24 November 1993: "[s]tresses the importance for the zone of peace and cooperation of the South Atlantic of the results of the United Nations Conference on Environment and Development, particularly the principles of the Rio Declaration on Environment and Development [...] in the conviction that their implementation will strengthen the basis for cooperation within the zone and for the benefit of the international community as a whole"; A/RES/48/139 of 20 December 1994: "Deeply preoccupied by the increasingly heavy burden being imposed, particularly upon developing countries with limited resources of their own and upon the international community as a whole, by these sudden mass exodus and displacements of population", also in A/RES/48/258 of 23 June 1994, A/RES/49/26 of 2 December 1994, A/RES/49/137 of 19 December 1995, A/RES/S-20/4 of 10 June 1998.

36 Doc. S/PRST/1994/40 of 29 July 1994: "the members of the Security Council demand an immediate end to all such terrorist attacks. They stress the need to strengthen international cooperation in order to take full and effective measures to prevent, combat and eliminate all forms of terrorism, which affect the "international community as a whole", also subsequently in Doc. S/PRST/1996/1 of 5 January 1996.

37 S/RES/1044 (1996) of 31 January 1996: "Stressing the imperative need to strengthen international cooperation between States in order to make and adopt practical and effective measures to prevent, combat and eliminate all forms of terrorism that affect the international community as a whole", also see S/RES/1045 (1996) of 8 February 1996; S/RES/1055 (1996) of 8 May 1996; S/RES/1064 (1996) of 11 July 1996.

to the phrase "international community as a whole" if it explicitly encourages all states to take an action, or if it underscores that every country is affected by an issue. In the latter case the relevance of a problem is amplified by appealing to the "communal ties" uniting all states. What is not intended by this usage is the implication that there has been a quantitative increase in states addressed to act.[38]

The ILC of the United Nations also utilizes both references. Following the first deliberation session of the ILC's provisions on state responsibility in 1996, it was agreed that according to article 19 (2) the distinction between state crimes and state delicts was to be rationalized in the following manner:

> "An international wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime".[39]

This dichotomy was subsequently dropped during the adoption of a significantly revised Draft on the 52nd ILC Conference in the summer of 2000. Hence article 40 (1) stipulates massive and substantial violations of international legal obligations without resorting to the "international community".[40] What has been preserved through article 42 (b), however, is the opportunity for one state to appeal to the liability of

---

38 S/RES/1189 (1998) of 13 August 1998: "Also stressing the need to strengthen international cooperation between States in order to adopt practical and effective measures to prevent, combat, and eliminate all forms of terrorism affecting the international community as a whole"; also see S/RES/1087 (1996) of 11 December 1996, S/RES/1075 (1996) of 11 October 1996, S/RES/1064 (1996) of 11 July 1996, A/RES/54/109 of 9 December 1999, A/RES/56/83 of 12 December 2001, Counter-terrorism is therefore always "essential for the maintenance of international peace and security", S/RES/1214 (1998) of 8 December 1998, S/RES/1269 (1999) of 19 October 1999.

39 Article 19 (2) of the draft, ILC Yearbook 1996 II/2, 60; M. Spinedi, "International Crimes of State. The Legislative History", in: H.H. Weiler/ A. Cassese/ M. Spinedi, *International Crimes of States*, 1989, 7 et seq. (10 et seq. and 339 et seq.).

40 ILC Report 2000, J. Crawford, *Third Report on State Responsibility*, Doc. A/CN.4/507 (2000), 29 et seq.; Doc. A/CN.4/507/Add.4 (2000), J. Crawford, *The International Law Commission's Articles on State Responsibility*, 2002, 249 et seq.

another state, should the latter have violated a norm whose upholding is owed to the "international community as a whole".

The above-mentioned legal contexts illustrate that the international community is called upon to justify duties of states (or their qualifications), which have to be performed in order to respect and maintain the international community of states. This may not clarify which states comprise the international community, but the rulings of the ICJ indicate that the exclusion of any country from the community has not been intended. This particularly applies when elaborating the responsibilities of states, as is shown by the ICJ's statement in connection to the hostage-taking at the US Embassy in Teheran. The ICJ felt compelled to:

> "[...] recall [...] yet again the extreme importance of the principles of law which it is called upon to apply in the present case, the Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial [...]".[41]

This illustrates that the ICJ held Iran accountable for a violation of international law which applies to all members of the international community. In addition to this, the ICJ did not release Iran from this community as a result of the transgression. The Court appeared to lend particular weight to its charges against Iran based on the fact that — in spite of being a member of the international community — it had violated international law.

All the arguments presented so far indicate that there is no international community in contemporary international law which can be restricted to some states. The notion of the international community consequently encompasses all states.

Analyses of the literature focusing on the constitutionalization of the international community set forth the question whether the countries referred to in the just mentioned legal texts are those comprising this constitutionalized community or whether the latter represents a smaller but closer community of states. *Verdross* defined norms stipulating the laws of the international system (as well as their formulation, implementation and interpretation) as the constitution of the international legal community, as early as 1926.[42] *Jellinek* upheld the view that

---

41 Case Concerning United States Diplomatic and Consular Staff in Teheran, ICJ Reports 1980, 3 et seq. (42 et seq., para. 92).

42 A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, 1926.

the functional load of each state established it as a permanent member of an international community.[43] According to *Tomuschat* article 53 VCLT equates the international community with all states. In his opinion the inclusion of all states into the international community is an unwavering axiom of the current international order.[44] This has led to the acceptance of the notion of "international community" beyond classical international law — it is being ascribed as constitutive function with respect to "communitarian international law," which made the traditional structures of international law (shaped through the sovereignty, autonomy and equality of states) obsolete.[45]

The references "international society" or *Staatengesellschaft* remain in usage when the concept of community is subordinated to an explicitly realistic view of international relations. Depending on the perceived potential for the development of a community, the formulation "international society" is either used as a denotation for the achieved final stage, or as a transitional system leading towards an "international community".[46] At time the latter also encompasses international organizations, or even international interest groups and associations.[47] These instances, however, remain at the periphery of legal writings on the international community. Most texts focus on (and personify) *states* acting within the latter,[48] over individuals affected by such actions (in the sense of a world community).

---

43 G. Jellinek, *Die Lehre von den Staatenverbindungen*, reprinted 1996, 93 et seq. (95): "Therefore no civilised state dares, even if he has transgressed a norm of international law a hundred times, to question the validity of the norm itself".

44 Tomuschat, see note 30, 1, 4 and 7.

45 M. Nettesheim, "Das kommunitäre Völkerrecht", *Juristen Zeitung* 57 (2002), 569 et seq.

46 G. Schwarzenberger as an illustrative example in: *Power Politics*, 1951, 148, 254: "In any international society, inter states relations are almost bound to be conducted initially on a society footing rather than on a community, for each of the independent groups has less in common with any of the others [...]".

47 As described by C. Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", *RdC* 241 (1993), 195 et seq. (228 et seq.); S. Hobe for the response of international law to transnational threats by including private actors, "Die Zukunft des Völkerrechts im Zeitalter der Globalisierung", *AVR* 37 (1999), 254 et seq. (272, 279).

48 Paulus, see note 24, 228 et seq.

With time many experts have also come to consider the UN Charter as the constitution of the international community.[49] In contrast to this, the *New Haven School* views the Charter as the expression of a single constitutive decision. This school defines the drafting of a constitution as a process in which law and all social phenomena and processes influence each other.[50] The ultimate clarification of this issue remains of secondary importance for the question whether the international community is being personified. What is decisive is the fact that 190 states ratified treaties committing them to uphold the provisions of the UN Charter.

Consequently, it can be concluded that there is a community of states. It is characterized by their obligation to adhere to the same treaty, i.e. the same basic provisions contained in the latter. If one were inclined to view the UN Charter as a "special" or "constitution-like" document, the rationale could be constructed as follows: by adopting this international legal treaty to establish the United Nations, the Contracting Parties have acted in the manner of a *pouvoir constituant* and developed a specific legal framework. This would establish them as the principal actors within this community, and the legal specification of the community would have to remain based on the UN Charter. Yet for policy its additional qualification as constitution does not increase its legal impact, as states are bound by the Charter as it is an international treaty.

To summarize within United Nations parlance and legal texts the reference "international community" applies to the Contracting Parties to the UN Charter — those 191 states representing the United Nations. The usage of the formulations "international community" and "international community as a whole" confirms this finding, as variance merely depends on the extent to which the community ties among states is to be stressed. At no time does this usage point towards different quantitative scopes, i.e. the exclusion of some states. What is, moreover, emphasized is the sense of community dominating these lexical shells.[51]

---

49 J.A. Frowein, "Das Problem des grenzüberschreitenden Informationsflusses und des 'domaine réservé'", Reports of the *DGVR* 39 (1999), 427 et seq., Tomuschat, see note 30, 12 et seq., Paulus, see note 24, 293-296.

50 M. Mc Dougal/ W.M. Reisman, *International Law Essays: A Supplement to International Law in Contemporary Perspective*, 1981, 191 et seq. (195).

51 Tönnies based his sociological dichotomy between association and community on the presence and strength of ties: "the theory of association con-

In particular the ICJ's legal texts concerning the hostage-taking of United States diplomatic personnel in Iran stress the inclusion of all states into the latter. This function increases in relevance upon the stipulation of states' responsibilities.

In cases where bodies of the United Nations appeal to the entire international community, it may be that this organization hopes to activate certain countries with the capacity to provide a solution. This does not, however, absolve other states from action, as such "fitted" appeals would violate the basic principles and aims of the UN Charter.

3. The Sovereign Equality of States as a Community Principle

The process of stigmatization is particularly challenging to the existence of an international community, as it possibly not only limits the applicability of a legal principle but also excludes the branded states. In addition to this, it questions the validity of this principle for the international community itself. The designation of countries as "rogue states" or "state sponsors of terrorism" devaluates their standing. At the same time, this process triggers several legal mechanisms within United States domestic law, which significantly alter the legal status of designated states. Apart from numerous provisions imposing economic means of coercion, these legal mechanisms include the annulment of state immunity. According to provisions of the Foreign Sovereign Immunities Act (henceforward: FSIA) in 1996, states listed as sponsors of terrorism are not accorded protection from civil compensation claims in the United States.

In contrast to this, the international community has converged on the principle of the sovereign equality of states. Thus the stigmatization of states, and the substantial alteration of their legal status through domestic laws, may be conducive to the violation of this principle. The

---

structs a circle of human beings who – as in a community – live side by side. These human beings, however, are not tied to each other as humans. Hence is a community people tied to each other in spite of all divisions, whereas in an association they remain divided in spite of all proximity", Tönnies, see note 17, § 19, 39, in: § 7. Tönnies points to the "from status to contract" formula of H.S. Maine, in his *Ancient Law*, 1905, 12 et seq., (170); D. Vagts focuses on the misuse of this terminology during the national socialist era, "International Law in the Third Reich", *AJIL* 84 (1990), 661 et seq. (687).

sovereign equality of states embodies one of the quintessential principles of international law, as:

> "[e]ach nation is a sovereign person, equal to others in moral dignity, and having, whether small or great, weak or powerful, an equal claim to respect for its rights, an equal obligation in the performance of its duties".[52]

It is therefore hardly surprising that the principles of sovereignty and equality are also enshrined in the UN Charter, in the shape of Article 2 (1), which sets out the sovereign equality of its members.[53]

This provision is usually analyzed by extracting its two constitutive principles: sovereignty and equality.[54] Analyses also emphasize that the equality of states is derived from their sovereignty, thus establishing equality as a synonym for sovereignty.[55] The formulations contained in Article 2 (1) of the UN Charter, however, indicate that states ascribe a particular normative relevance to equality. Consequently this principle stands fast as a second "pillar" next to sovereignty, rather than acting as a foil to the latter.[56]

The domain of sovereignty is equal to the extent to which one state may enact rules independently of other states.[57] The ICJ summed up

---

52 Statement delivered by the French Representative Bourgouis to the Second Peace Conference at the Hague in 1907, on the relevance of this Conference for the sovereign-equality-of-states principle see M. Huber, *Die Gleichheit der Staaten*, in: Juristische Festgabe des Auslandes zu J. Kohlers 60. Geburtstag, 1909, 88 et seq. (99 et seq.), and also, PCIJ Ser. A, No. 1 (1923), 25, more precisely on this A. Cassese, *International Law*, 2001, 88.

53 On the meaning of the Charter's principles A. Randelzhofer, "Ziele und Grundsätze der UN", in: R. Wolfrum, *Handbuch Vereinte Nationen*, 1991, 1151 et seq., the difficulties intrinsic to such general principles are analyzed by K. Doehring, *Völkerrecht*, 1999, item 188, et seq., also K. Hailbronner, in: W. Graf Vitzthum, *Völkerrecht*, 2001, Chapter III No. 91 et seq.

54 R.P. Anand, "Sovereign Equality of States in International Law", RdC 197 (1986), 9 et seq. (52), Cassese, see note 52, 88; Vitzthum, in: id., see above, Chapter I No. 45 et seq.

55 G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht*, Band I/1, 1989, 236.

56 R.Y. Jennings/ A. Watts, *Oppenheim's International Law*, 1992, Vol. I, 8 (§ 2); H.J. Morgenthau, *Politics Among Nations*, 1985, 290 et seq.

57 C. De Visscher: "La théorie de la souveraineté relative explique le fait que les Etats individuels sont inclus dans les relations qui nécessairement imposes certaint limitations sur leur volonté d'être autonomes", quoted by J.P. Cot/ A. Pellet, in: id. (eds), *La Charte des Nations Unies*, Art. 2 Para. 1, 87; H. Dreier, "Souveränität", in: Görres Gesellschaft (ed.), *Staatslexikon Vol.*

this self-sufficiency as the "[r]ight of every sovereign State to conduct its affairs without outside interference".[58] The emphasizing of this subjective dimension of empowerment within the principle of sovereignty by the ICJ substantiates that sovereignty is always the output of law created by states.[59]

The participating states at the UN's Founding Conference in San Francisco hence based their decision to establish an organization on the sovereign equality of its members on a particular concept of sovereignty.[60] The debates on the possibility of states to end their United Nations membership revealed that the Contracting Parties attributed greater importance to inter-state cooperation for the securing of world peace, than to the creation of "opting-out" clauses, which would enable a state to renege on its obligations, set out in the UN Charter.[61]

IV, 1988, Note 91, Columns 1203, 1208; D. Held, "Three Models of Sovereignty. Law of States. Law of Peoples", *Legal Theory* 8 (2002), 1 et seq. (17 et seq.).

58 Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, 14 et seq.

59 See also ECJ, Rs. 26/62, van Gend & Loos, Ruling of 5 February 1963, Collection 1963, 1, as regards the rationale for the ruling: "All this indicates that the Community represents a new legal order within international law, whose member-states limit their own sovereign rights, although in a limited fashion", cf. also the rationale of the PCJ in the Wimbledon Case, PCIJ Ser. A, No. 1 (1923), 25: "The Court declined to see, in the conclusion of any treaty by which a state undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty [...] the right of entering into international engagements is an attribute of state sovereignty". Island of Palmas Case, 2 RIAA (1928), 829; the Corfu Channel Case, ICJ Reports 1949, 4 et seq. (25, 27), cf. also the Dissenting Opinion Judge Winiarski, 49, 56 et seq.

60 UNCIO, Vol. I, 9th Plenary Sess. of 25 June 1945, Documents of the San Francisco Conference, 612, 614.

61 This *a priori* determined devaluation of opting-out mechanisms was considered an infringement on the principle of sovereignty by the Soviet Union. It aired the view that: "[...] it is wrong to condemn beforehand the grounds on which any state might find it necessary to exercise its right of withdrawal from the Organization. Such right is an expression of state sovereignty and should not be reviled, in advance, by the International Organization" UNCIO, see above, 619. The eventually adopted Report of Committee I/2 therefore felt obliged to stress that: "The Committee deems the highest duty of the nations which will become Members is to continue their cooperation within the Organization for the preservation of interna-

Hence, it becomes clear that the principle of sovereignty was to bestow upon states a relative capacity to assert positive rights (liberties), as an intrinsic component of statehood, within the framework of the United Nations. The sovereignty of a state is limited by the exercise of its own rights, as well as by those of other sovereign states. This demarcation is strengthened by the prohibition to use violence and to intervene respectively, in order to shield a level of state sovereignty from undesired exogenous actions by other states. Therefore:

> "[t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference, though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of international law".[62]

This means that, on the one hand the sovereignty of states is subject to change, while on the other hand it is protected from change. What remains is a protected core of sovereignty, which may not be diminished through interference by another state.[63]

Consequently, the principle of non-intervention is directly rooted in the provision of Article 2 (1) of the UN Charter. The above-mentioned protection granted to state sovereignty is further enhanced by the prohibition to use violence in inter-state relations, contained in Article 2 (4), and by the prohibition of intervention in Article 2 (7) of the UN Charter. The ban stipulated in Article 2 (4) includes both the threat and the use of violence by United Nations members in international rela-

---

tional peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization", UNCIO, see above, 619, see the decision to adopt this proposal including the dissenting vote of the Soviet Union, 620.

62 Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, 14 et seq. (106 et seq.); Jennings/ Watts, see note 56, 428 (§128).

63 ICJ Reports, see above, 118, 121, 259, and previously the Corfu Channel Case, ICJ Reports 1949, 4 et seq., (34); G. Nolte, *Eingreifen auf Einladung*, 1999, 167; id., "On Art. 2", in: B. Simma (ed.), The *Charter of the United Nations*, 2002, item 7; J.A. Frowein, "Die Intervention im heutigen System der Weltverfassung", in: E. von Jäckel (ed.), *Ist das Prinzip der Nichteinmischung überholt?*, 1996, 9 et seq. (20 et seq.); id., "Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung", in: *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte*, 1983, 241 et seq. (255 et seq.).

tions, in order to affect the territorial integrity or the political independence of another state. Article 2 (7) accords states protection from interference by the United Nations, with regard to issues falling under the domestic jurisdiction of a state.[64] The principle of non-intervention among states can be traced back to customary law.[65] Article 2 (4) of the UN Charter shields state sovereignty from a qualified form of intervention. Beneath the threshold of threatening or employing military coercion any prohibition of unacceptable interference can only be derived from the general principle of non-intervention.[66] In this sense a "maximalistic" concept of sovereignty protection has to be based on the prohibition of inter-state intervention. Only once the use of violence has been threatened, this shield becomes strengthened by the prohibition of violence in conducting international relations.

a. Intervention via Stigmatization?

The stigmatization of states could violate the sovereignty of countries, since the formulations employed aim at the devaluation of the objects they refer to. This, however, would imply that the principle of sovereignty also consists of the right of a state to have its honour respected by other countries. Apart from this, their sovereignty could be infringed upon by the consequences attached to the process of stigmatization — whether this be the intended international isolation of "rogue states" or the legal mechanisms entailing economic sanctions for "state sponsors of terrorism", according to United States domestic laws. Eventually this rhetoric employed at the international level, coupled with tangible consequences set out by domestic law, could even more affect the political independence of the targeted states.

---

64 Nolte, in Simma, see above, 63; B.D. Ro, *Governmental Illegitimacy in International Law*, 1999, 160 et seq.; M. Herdegen, *Völkerrecht*, 2002, § 35 item 1 et seq.

65 Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, 14 et seq. (106); the Corfu Channel Case, ICJ Reports 1949, 4 et seq., (34 et seq.).

66 Jennings/ Watts, see note 56, 428 (§128); A. Verdross/ B. Simma, *Universelles Völkerrecht*, 1984, 301 (§ 492).

aa. A Right to Dignity?

The assertion that derogatory references harm the dignity of natural persons would hardly require a rationale. The same does not apply to pejorative terms aimed at states. In such instances the question whether depreciating references injure the dignity or honour of a state has to be dealt with. An injury of this sort can only be committed if notions like "dignity" and "honour" can be applied to states, i.e. if states can be "insulted". The entitlement to respect and a fair reputation has been inevitably linked to the teachings on the basic rights and duties of states in the earliest stages of international law. According to these teachings, states were accorded a "personality" and the thus derived rights and duties of states acquired a significance in their own right.[67] It is therefore logical that states should be granted the right to have their dignity upheld.[68]

This attribution enjoyed a measure of support in international relations up to the beginnings of the nineteenth century. Hence the premeditated generating of a negative climate, *via* the diffusion of false or detrimental news about a nation in the press, was considered a substantial danger to inter-state peace. British courts provided the following assessment of this threat during a trial concerning the slandering of Russia by the British press:

> "When this paper went to Russia and held this great sovereign as being a tyrant and ridiculous over Europe, it might tend to his calling for satisfaction as for a national affront, if it is passed unreprobated by our government and in our courts of justice".[69]

---

67 L. Oppenheim/ H. Lauterpacht (eds.), *International Law*, 1955, Vol. I, 8th edition, 260 et seq. (§ 112), also Jennings/ Watts, see note 56, 379 (§115); P. Kunig, "Staatenehre im Völkerrecht", *Jura* 20 (1998), 160 et seq. (161).

68 K.J. Partsch, *Von der Würde des Staates*, 1967, 12 et seq.; also H. Lauterpacht, "Revolutionary Activities by Private Persons Against Foreign States", *AJIL* 22 (1928), 105 et seq. (106), for a critical viewpoint see Oppenheim, see note 67, 282 (§ 120).

69 King v. Vint, *State Trials* (edited by T. B. Howell), 27 (1799), 627, 641, the trial had been caused by the following press statement: "The emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency, he has now passed an edict prohibiting the exportation of timber, deals etc.", quoted by E. Dickinson, "The Defamation of Foreign Governments", *AJIL* 22 (1928), 840 et seq. (842).

It was thus concluded that the verbal abuse of states could disrupt peaceful relations between states, since:

> "[a]ny publication which tends to disgrace, revile, and defame persons of considerable situations of power and dignity in foreign countries, may be taken to be, and treated as a libel, and particularly where it has a tendency to interrupt the amity and peace between the two countries".[70]

The potential for inter-state wars as a result of affronting foreign countries was considered real and unwanted. Hence:

> "[e]very publication is intrinsically illegal, which tends to produce any public inconvenience or calamity. Under this division, those rank the first in respect of the magnitude of their results, which tend to interrupt the good understanding which prevails between this country and others, by malicious reflections upon those who are possessed of high rank and influence in foreign states. Since the natural tendency of these is to involve the government in a foreign war, their authors have, in several instances, been punished as offenders at Common Law".[71]

According to these assessments, states came to be considered as targets of slander in the late nineteenth century. This opinion was upheld in most legal analyses well into the twentieth century.[72] Following World War I various proposals emerged to oblige states to punish the slander of foreign states or peoples in the press.[73] Several states were already penalizing the slandering of their own and foreign governments at that

---

70 King v. Peltier, State Trials, see note 69, 28 (1803), 529, 619. This case had been investigated by the following statement: "O! Eternal disgrace of France, – Caesar, on the banks of the Rubicon, has against him in his quarrel, the Senate, Pompey, and Cato, and in the plains Pharsalia, if fortune is unequal, if you must yield to the destinies, Rome in this sad reverse at least remains to avenge you a poignard among the last Romans", quoted by T. Starkie, *Law of Slander and Libel*, 1832 (reprinted 1997), 351 et seq.

71 Starkie, see above, 350.

72 R. J. Alfaro, "The Rights and Duties of States", *RdC* 97 (1959), 91 et seq., 110; Jennings/ Watts, see note 56, 379 (§ 115); G. Gidel, "Droits et Devoin des Nations", *RdC* 10 (1925), 537 et seq., (542); P. Fiore, *International Law Codified and its Legal Sanction*, 1918, article 62.

73 W. Schücking, *Internationale Rechtsgarantien, Ausbau und Sicherung der zwischenstaatlichen Beziehungen*, 1919, 127 et seq.

point of time.[74] Countries such as Denmark, Norway, Austria, and Switzerland considered the affronting of foreign governments a threat to peace and codified legal sanctions for such offences.[75] Initiatives at the international level attempted to introduce punishment not just for journalistic slander targeting the head of a foreign state; they aimed at penalizing the slander of an entire people, as a collective actor. Such requests were founded on the belief that, in the era of democracy, the climate among an entire people was of greater relevance than the mood of a single statesman.[76] In addition to this, the recognition that a national consciousness existed in every country entailed that an entire nation could become the target of verbal abuse. In an opinion for the Inter-Parliamentarian Conference of Stockholm, the impact of negative press coverage of states was summed up as follows:

> "The most efficient instrument to maintain states in permanent combat readiness, and to actually involve them in armed conflict at any point in time, is the regular diffusion of false or derogatory news on the evil intentions of one state against another. In present

---

74 An example in support is offered by Canada's Criminal Code, Revised Statutes of 1927, c. 36, § 135: "Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful justification, publishes any libel tending to degrade, revile or expose to hatred and contempt in the estimation of the people of any foreign state, any prince or person exercising sovereign authority over such state." Article 95 of the Norwegian Criminal Code (1901) sets forth in a similar manner that: "Persons endangering the peaceful relations with another country, by reviling it in public or by inciting to hatred towards Norway and its Government, or by the unsubstantiated attributions of unjust or disgraceful actions to a foreign Government – or by acting as an accomplice to such deeds – shall be punished with a fine or a imprisonment of up to one year". Article 115 of the Austrian Criminal Code (1912) stipulates that: "Every one diffusing false or defamatory news in print, which endanger the relations of the monarchy with a foreign country, shall be sentenced to a time span from nine week to one year in prison, or he shall be fined with 40-50 000 Krona".

75 See e.g. the provisions in article 84 of the Danish and article 95 of the Norwegian Criminal Code (1902). The Norwegian regulation was eventually annulled in 1909, due to significant application difficulties, see also article 115 of the Austrian Criminal Code (1912) and a Swiss Directive of 2 July 1915 (on 'Öffentliche Beschimpfung eines fremden Volkes, eines Souveräns oder einer fremden Regierung').

76 Cf. Starkie, see note 70, 350; F.L. Holt, *Law of Libel*, 1816, 86; Schücking, see note 73, 130.

> times armed conflict may not — in spite of governmental support — be initiated due to the will of one single man, one monarch, one minister or one bank. In order to attain the military force required for (the prospect of) victory, at least one section of the nation has to consider war a necessity, a duty. Should a genuine grievance be lacking with respect to a foreign state, offences are concocted in order to create the required mass psychosis known as war glorification. [...] This occurs quite frequently at the behest, or with the support, of a government lacking a just '*casus belli*'".[77]

With time the concepts of "state dignity" or "state honour" lost their relevance in international law analyses, analogous to the marginalization of the teachings on states' basic rights and duties. The UN Charter, moreover, does not contain any provisions on the dignity of states. This does not imply that the UN never addressed the issue of slander. In 1949 the UN General Assembly adopted a *Convention on the International Transmission of News and the Right of Correction* that *inter alia* focused on the representation of states through false press coverage in another country. This Convention, however, was never released for signature,[78] although it was less concerned with the liability of states for false statements aired by structures on its territory; the Convention rather delved into the duties of states to ascertain the correction of false statements.[79] This treaty intended to provide states with a legal instrument, in cases where the press of other states had diffused false or ambiguous news which could impair the international relations, the national prestige or the dignity of the targeted state. In cases where any Contracting Party to the Convention, which harboured offenders, has neglected to fulfil its duty and oversee the correction of slanderous news, the UN Secretary-General would assume the obligation to oversee the publication of a correct(ed) version.[80] In 1952 the UN General Assembly adopted a part of these provisions as the *Convention on the International Right of Correction.*[81] The introduction to the Convention provides the rationale that false statements about a foreign country can be used to influence inter-state relations. Thus the Convention's

---

77 Lammasch, capita selecta, No. 5, September 1917, 31 et seq.

78 A/RES/277 (III) C of 13 May 1949, the text of the Convention is contained in the Annex.

79 A/RES/277 (III) C of 13 May 1949, article IX , 2 and article X.

80 A/RES/277 (III) C of 13 May 1949, article XI.

81 A/RES/630 (VII) of 16 December 1952. The text of the Convention is contained in the Annex, effective as of 24 August 1962.

aim is "to combat all propaganda which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression".[82] An extremely wide concept of state dignity had been upheld only by socialist states during preparatory discussions, despite implications of restricting the free flow of information that such a maximalistic notion entails.[83]

International law analyses on the subject are able to derive a mutual obligation of states to uphold state dignity without, however, advocating legal consequences for a violation of this duty.[84] Such a debate underlines the critical question in which sense the concept of dignity is applicable to states, if it is applicable to them at all.[85] Few voices are heard in support of a "right" to dignity. Whenever the existence of such a right is presumed, legal provisions are being tasked to not only prevent slander by other states, but to establish the honourable conduct of states.[86]

The debates on dealing with the slandering of an entire state — preceding the establishment of the League of Nations — nevertheless proved the relevance which certain states attached to their representation in public. These debates were not only led by those states focusing on the liability for World War I, which were accordingly most likely to become the targets of slander; the inviolability of states was considered a vital prerequisite for the preservation of peace. The volatility of states, created by unsanctioned pejorative statements, was hence viewed as a potential catalyst for conflict, i.e. a weak link in the framework for maintaining peace.

Similar discussions did not resurge until prior to the founding of the United Nations. In its *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (henceforward: Friendly-Relations Declaration) the UN General Assembly set forth that

---

82 A/RES/630 (VII) of 16 December 1952, Preamble of the Convention.

83 Cf. Frowein, see note 49, 29 and B. Simma, "Grenzüberschreitender Informationsfluß und domaine réservé der Staaten", Reports of the *DGVR* 19 (1979), 39 et seq. (60).

84 Cf. Jennings/Watts, see note 56, 379-381 (§ 115); M.N. Shaw, *International Law*, 1997, 137 et seq.; Verdross/ Simma, see note 66, §§ 455, 1052, Partsch, see note 68, 14.

85 A.A. D'Amato, "there is no Norm of Intervention or Non-Intervention in International Law", *International Legal Theory* 7 (2001), 1 et seq.

86 F. Berber, *Völkerrecht I*, 1967, 202.

"[e]very State has the duty to respect the personality of other States" without mentioning the concepts of "state honour" or "state dignity".[87] An explicit reference to "state dignity" is, however, contained in the Assembly's Declaration on the inadmissibility of interventions. It is important to stress in this context that this reference is only indirectly linked to states, through the formulation that "[r]ecognition of the inherent dignity [...] of all members of the human family"[88] is to be accorded without discrimination.

Proof for the recognition of the intangible volatility of states is found in the ILC's draft on state responsibility.[89] Thus, in cases of violations the "offending state" is not only being tasked with restitution of the material — but also the "moral" loss.[90] The draft differentiates between three categories of remedies.[91] According to article 37 (1) the re-establishment of the *status-quo ante* (restitution) can be complemented by compensation for inflicted damages, or by the granting of satisfaction — if the former two procedures cannot make amends for the harm caused.[92] Paragraph (2) of article 37 specifies "satisfaction" as a subsidiary form of "reparation", compared to restitution and compensation. It can amount to "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality". Hence, it is possible to "undo" the damage in certain cases, through a course of action procuring satisfaction to the targeted state, as this process contains the element of regret over the injury inflicted. A commentary on the ILC Draft sums this up as follows:

> "Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are fre-

---

87 A/RES/2625 (XXV) of 24 October 1970.

88 A/RES/2131 (XX) of 21 December 1965.

89 The Draft Articles on the Responsibility of States for Internationally Wrongful Acts were adopted by the ILC during its 53rd Sess. the text is available in: Report of the International Law Commission on the Work of its 53rd Sess., GAOR 56th Sess. Suppl. No. 10 Chapter IV.E.1, 43 et seq.

90 Article 31 of the ILC-Draft.

91 Article 34 of the ILC-Draft.

92 Arts 35-37, the formulation "insofar" in article 37 (1) indicates at this third kind of remedy is only applied in cases where other compensation methods do not provide sufficient remedy, cf. also Crawford, see note 40, 231.

quently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned".[93]

Satisfaction therefore embodies a remedy accessible to states if a violation of international law is linked to the affronting of another state, which has caused intangible damage apart from the assessable damage. Such provisions presume that states can be the targets of slander. They also require, however, the existence of an "internationally wrongful act" to entail remedies if the dignity of states is affected. The Draft provisions thus recognize that states can be abused when an "internationally wrongful act" has been committed. At the same time such an action is, however, presupposed for an affront. The provisions do not provide the basis for the conclusion that slandering constitutes an internationally wrongful act. They merely embody the foundation for an exhaustive neutralization of damages, which have been caused by a violation of international law (containing an affront to other states). A general codification and prohibition of injuries to the honour of states cannot be derived from them on a discrete basis.

Endeavours to achieve a remedy to violations of international law in an exhaustive manner (including intangible damages) — and thus ensure the continuation of good international relations — may have guided the ICJ throughout its deliberations in the *LaGrand*-case.[94]

In its findings on this matter the ICJ ascribed a remedial impact to the apology of the United States to Germany.[95] The violation of inter-

---

93 Commentary on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art. 37, 264, the text is available at <http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf>, accessed on 6 May 2003.

94 On the impact of this ICJ ruling see United States-Department of State letter to United States-Court after the LaGrand Decision; Taft, United States-Department of State Legal Adviser, to Keating, Governor of Oklahoma on 11 July 2001, or also S.D. Murphy, "Contemporary Practice of the United States", *AJIL* 96 (2002), 461 et seq. (462).

95 ICJ Judgement of 27 June 2001, para. 125 – LaGrand, *ILM* 40 (2001), 1069 et seq.: "In the present proceedings the United States has apologized to Germany for the breach of Article 36, paragraph 1, and Germany has not requested material reparation for this injury to itself and to the LaGrand brothers. [...] The Court considers in this respect that if the United States, notwithstanding its commitment referred to in paragraph 124 above, should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the indi-

national law did not consist of the verbal abuse of Germany, but the failure of the United States to comply with article 36 (1) of the *Vienna Convention on Consular Relations*. This ruling outlines the possibility that a breach of international law can affront a state. But, as in the case of the ILC Draft, the ICJ rulings emphasize that the affronting of a state presupposes a concrete wrongful act. Once again, it cannot be said that the verbal abuse of a state constitutes a transgression of international law. The fact that an internationally wrongful act can affront a state does not imply that the slandering of a state constitutes an internationally wrongful act.

State practice does not suffice either to draw a line between the permitted criticizing of a foreign government and an inadmissible affront on the grounds of an explicit right or duty to respect the honour of states.[96] The question whether the latter can be injured through derogatory designations seems to be based on the question (if and how) the distinction is to be made between the permitted critique of another state's government and the illegal impacting of its political independence.

Hence the categorization of states is ring-fenced by the distinction between acceptable criticism and the inadmissible exertion of influence over the political independence of a state. But even within these bounds, the debate on state honour may provide indicators for the point at which pejorative formulations transcend the area of allowed critique. This is based on the fact that the slandering of states is registered as one element of a breach of international law.

bb. Political Independence

It is well-known and recognized that several states command the resources to exert political and economic pressure. They are able to do so to an extent where the resulting pressure may equal or surpass the application of military force. It also has to be emphasized that the appli-

---

viduals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties", cf. also K. Oellers-Frahm, "Der Internationale Gerichtshof stärkt die Stellung des Individuums im Völkerrecht und klärt wichtige Fragen der Internationalen Gerichtsbarkeit, *Neue Juristische Wochenschrift* 54 (2001), 3688 et seq. and W. J. Aceves, "LaGrand (Germany v. United States)", *AJIL* 96 (2002), 210 et seq.

96 See also Kunig, note 67, 163.

cation of coercion is "part of the game"[97] in international relations. State sovereignty secures political independence for each state, but it does not provide benchmarks to determine its deterioration or its lack.

Hence, upon attempting to delineate the scope of an inviolable domestic jurisprudence of states, it appears advisable to rely on what can be grasped for now: tendencies emerging out of the evolution of international law. Within such a venture, however, it must be emphasized that the principle of non-intervention remains unquestioned. This means that the latter may and will at times regulate certain tendencies on the grounds of its standing in customary law. This process of delineation must pay heed to the inherent dynamic just outlined. It should not be reduced to enumerating the "don'ts".

aaa. Defamation of States

As a matter of principle, it is admissible to criticize the domestic policies of other states, if this critique is based on facts.[98] The line towards inadmissible conduct is crossed when states can be held liable for radio- or TV-broadcasts inciting a *'coup d'etat'* in another state, or calling for violent actions against another state. Additional legal issues of a different nature are being raised through instances where the domestic laws of a country declare the aiding of regime change in a foreign country a political goal.[99] The ICJ has thus agreed that certain modes of assistance accorded to insurgents in intra-state conflicts may constitute inadmissible interventions.[100]

This is conducive to the ambiguous status of derogatory designations of states (which air exhaustive criticism and contain devaluating connotations) as falling into a domain that neither totally excludes nor includes their embodying an intervention. The most clear-cut cases would be the use of such designations with the explicit intent to bring

---

97 Tomuschat, see note 47, 13, 231.

98 A. Fischer, in: K. Ipsen (ed.), *Völkerrecht*, 1999, § 59 item 60.

99 Iraq Liberation Act of 31 October 1998, Pub.L. 105-338, H.R. 4665, sec. 3: "It should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime", cf. also sec. 7, Assistance for Iraq upon replacement of Saddam-Husseins Regime.

100 Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, 14 et seq. (103, 124); Jennings/ Watts, see note 56, 431 (§ 129).

about a regime change. Apart from this, it has to be borne in mind that contemporaneous international law cannot prohibit specific forms of mutual control and influence; it actually encourages them. Thus, an inadmissible intervention would not be diagnosed in cases where one state employs stigmatizing references to affect the internationally illegal conduct of targeted states. This could be due to the fact that the intrinsic criticism of such designations would not refer to "affairs under domestic jurisprudence" (which are not regulated by international law), or to the view that in such cases derogatory designations are no longer considered inadmissible political pressure. Consequently, an intervention via classifying states would not be covered by a legal prohibition, if its principal mission were to inspire the targeted state to fulfil its existing international obligations, such as abstaining from supporting terrorism.

If such a "right" to the unilateral securing of compliance with international law were to be recognized, however, the "enforcing state" would also have to abide by international law. Any other kind of conduct would justify the inadmissibility of its intervention. Apart from this, if the targeted state would comply with its international obligations, there would be little leeway left for the legal influencing of states via stigmatization. This applies to cases where the UN Security Council is being accorded not only the authority to determine this, but also to implement measures — as long as it does not choose to explicitly outsource this competence to other states. It would also affect cases where states have been legally bound to cooperate, since the question emerges if unilateral action may be undertaken in such areas. At least as a consequence evolved from S/RES/1373 (2001) of 28 September 2001, states are legally bound to co-operate in the fight against international terrorism, pursuant to Chapter VII of the UN Charter. This obligation to cooperate does not justify a unilateral classification of states, because a measure of this sort inevitably relies on unilateral criteria. Another argument against the procedure lies in the fact that the stigmatization of states transcends the counter-terrorism measures approved by the UN Security Council. All this implies that the exerting of influence upon the political independence of states (via stigmatization) does not acquire "legal correctness" by designating coercive measures as instruments of ensuring compliance with international law. It is more likely that the utilization of derogatory references with respect to states will be considered an illegal form of government critique, as they verbalize unilateral and exhaustive pejorative evaluations of another state. Whether the mere process of stigmatization equals the "coercive load" of interna-

tionally prohibited interventions will be addressed upon delineating its legal consequences.[101]

bbb. Exception to Immunity

A comprehensive analysis of the issue of stigmatization has to include the exception to immunity, which is applied to "state sponsors of terrorism", as it extends the jurisdiction of the sending state to the targeted state. The admissibility of this cannot be demarcated without a survey of state practice. Only then can it be fathomed to which extent the implementation of domestic laws infringes upon the sovereign core of the targeted state.

Provisions contained within the United States Foreign Sovereign Immunities Act (henceforward: FSIA), for example, do not adhere to a restrictive notion of immunity — nor is their purview limited to cases subject to United States jurisdiction on grounds of the territoriality principle.[102] It has to be emphasized, however, that a "state sponsor of terrorism's" immunity may only be annulled if certain breaches of international law are being prosecuted, such as "personal injury or death caused by an act of torture, extra-judicial killing, hostage taking or the material support of such acts". In its ruling of 14 February 2002, the ICJ found that various international conventions on the prevention and punishment of capital crimes tasked states with the expansion of their jurisdiction, by committing them to the criminal prosecution and extradition of perpetrators. The ICJ nevertheless added that the mandate to prosecute granted to domestic courts does not obliterate the rules defining and granting immunity. Therefore "[t]he jurisdiction of national courts does not imply absence of immunity while absence of immunity does not imply jurisdiction".[103]

---

101 For further details, see the discussion under II. C.

102 On the recognition of the restrictive immunity-theory by the ICJ, see ICJ Reports 1998, Case Concerning the Differences Relating to Immunity from Legal Process of the Special Rapporteur of the Commission on Human Rights, items 33-35 B, as regards state practice and the recognition of the territoriality principle, see the Report of the Working Group of the ILC on "Immunities of States and their Property", Report of the International Law Commission, 1999, Annex, No. 45-55.

103 Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ Ruling of 14 February 2002.

This does not resolve all dilemmas, as the expansion of the jurisdiction of domestic courts, on grounds of international obligations, is inextricably linked to the question to what extent immunity may bridle national courts upon prosecuting crimes committed by state officials. The above-mentioned possibility to sue a "state sponsor of terrorism" in the United States could be approximated to international law standards, if there were concrete instances of state conduct (state practice) which resort to the annulment of a foreign state's immunity by a domestic court — if the latter had supported grave crimes.[104]

The immunity of former heads of state during criminal prosecution has been an issue for the British House of Lords on two occasions. Both of them revolved around the exception to immunity of Chile's former President *Augusto Pinochet.*[105]

In the case of the first appellative ruling by the House of Lords the rationale centred on the fact that the instances of torture and hostage-taking being considered were not *acta iure imperii.* The ordering of such massive violations of human rights, after all, could not be included in this category of tasks attributed to a head of state. Hence immunity could not be accorded for such actions in the sense of *ratione materiae.*[106]

---

104 On the scope of state immunity during violations of *ius cogens* in armed conflict, cf. article 7 of the Charter of the International Military Tribunal (1945), article 7 (2) of the Statute of the International Criminal Tribunal for the former Yugoslavia (1993), cf. also Prosecutor v. Tadić, *ILR* (1995), 419 et seq.; arts 3 and 6 (2) of the Statute of the International Criminal Tribunal for Rwanda (1994), arts 27, 28 and article 8 of the ICC (1998).

105 On the historical i.e. case-based evolution and the "double criminality" etxradition criterion (which requires a decision on immunity, as extraditions can only be lawful if domestic jurisdiction would apply to a case where British nationals had been injured) cf. M. Byers, "The Law and Politics of the Pinochet Case", *Duke J. Comp. & Int'l. L.* 10 (2000), 415 et seq. (422—437); A. Bianchi, "Immunity versus Human Rights: The Pinochet Case", *EJIL* 10 (1999), 237 et seq. (254 et seq.), on the immunity of former heads of state also article 13 (2) of the Resolution issued by the Institut de Droit International in 2001, in addition, see the legal positions as regards the Case Concerning the Arrest Warrant of 11 of April 2000 (Democratic Republic of the Congo v. Belgium), ICJ Ruling of 14 February 2002.

106 House of Lords, Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte of 25 November 1998, *Weekly Law Reports* 2 (1998), 1456, 1500, Lord Nichols of Birkenhead: "And it hardly

In its second ruling the House of Lords[107] annulled the immunity only for instances of torture falling under the purview of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (henceforward: Anti-Torture Convention), which has been directly applicable to British law since 29 September 1988.[108] The Anti-Torture Convention's article 1 (1) stipulates that its purview concentrates on instances of torture committed as *acta iure imperii.* In contrast to the first case, the judges could not apply the rationale that the latter did not include massive violations of human rights. On the contrary, the majority of judges was convinced that immunity did not cover those crimes, which had been branded crimes against humanity and violations of *ius cogens* within the enactment of the Anti-Torture Convention, thus entailing universal jurisdiction.[109] This was conducive to the conclusion that British law would have accorded jurisdiction to British courts, if acts of torture had been committed against British citizens. As a consequence of this finding, the extradition of perpetrators is lawful, provided the "double criminality" requirement is met. This

---

needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state", and 1501: "Acts of torture and hostage-taking, outlawed as they are by international law, cannot be attributed to the state to the exclusion of personal liability", also cf. Lord Steyn, 1506 and 1507. The vote consisted three votes in favour and two against.

107 The plaintiffs had been striving towards such a decision, as the first appellative chamber had not been constituted according to legal requirements, cf. House of Lords, Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte, *Weekly Law Reports* 3 (1999), 827, 828.

108 House of Lords, Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte of 24 March 1999, see above, 847 et seq., Lord Wilkinson: "Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. [...] In my judgement all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention". The verdict in this matter was reached by a majority of five to one votes.

109 Byers, see note 105; on the immunity of incumbent heads of state cf. Clinon v. Jones, 520 S.Ct. (1997), 681 et seq.; United States of America v. Noriega, 746 ET Seq. Supp. (1990), 1506 (1519); Filartiga v. Pena-Irala 577 F. Supp. (1984), 860 et seq., on civil-court litigations see Argentine Republic v. Amerada Hess Shipping Corporation, 109 S.Ct. (1989) 683 et seq.; Siderman de Blake v. Republic of Argentina, 965 F.2d (1992) 699 et seq.

ruling is strictly limited to the immunity of former heads of state during criminal prosecution. In March 2001 France's *Court de Cassation* found that international customary law accorded immunity to incumbent heads of state facing trial.[110] Participation in acts of terrorism, moreover, did not constitute transgressions of international law mandating the exception of heads of state from immunity.[111]

The European Court of Human Rights (henceforward: ECHR) was likewise concerned with aspects of immunity in November 2001, on the grounds of the cases filed on behalf of *Fogarty*, *Al-Adsani* and *McElhiney* against the United Kingdom and Ireland respectively.[112] The *Fogarty* case centred on the admissibility of the United Kingdom's evocation of state immunity in a labour rights dispute, against the backdrop of article 6 (1) of the European Convention on Human Rights (henceforward: EConvHR). The *McElhiney* trial raised compensation charges against civil-service structures in Ireland, which had impaired the health of the plaintiff.[113] Both cases were rejected by the ECHR on the grounds that the rights of the plaintiffs were not unduly restricted by the litigation threshold embodied by immunity, as the latter represents a generally recognized principle of international law.[114]

The *Al-Adsani* case concentrated on the immunity in civil claims, triggered by violations of the *ius cogens*. The plaintiff had filed charges due to his having been captured and tortured by Kuwaiti fighters after the withdrawal of Iraqi forces from Kuwait in 1991. His claim for compensation against Kuwait, lodged at a British court, was finally rejected by an appellative court, as it accorded Kuwait immunity in this matter. The plaintiff had justified his suit before the ECHR by stating that the *Pinochet*-ruling lifted state immunity in cases where the Anti-Torture

---

110 Ruling by the Court de Cassation of 13 March 2001, Bulletin des Arrêts de la Court de Cassation, No. 1414, 1.

111 See S. Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation", *EJIL* 12 (2001), 595 et seq. (607).

112 Fogarty v. United Kingdom, Ruling of 21 November 2001 *HRLJ* 23 (2002), 50 et seq.; McElhinney v. Ireland, Ruling of 21 November 2001, *HRLJ* 23 (2002), 57 et seq.; Al-Adsani v. United Kingdom, Ruling of 21 November 2001, No. 35763/97, *HRLJ* 23 (2002), 39 et seq.

113 On the civil character of this claim, cf. W. Peukert, in: J. A. Frowein/ A. Peukert (eds), *Europäische Menschenrechtskonvention*, article 6 (15) and on the claim to compensation see item 22.

114 ECHR, Fogarty, see note 112, item 26 f, 35-37; McElhiney, see note 112, item 25 f, 35-38.

Convention had been violated.[115] The ECHR had to decide if the rejection of *Al-Adsani's* suit by the British judiciary constituted a breach of article 6 (1) of the EConvHR, and if the British Government had not ultimately violated article 3 (in conjunction with arts 1 and 13) of the EConvHR. The ECHR found that the British Government had not breached article 3 (1),[116] as the warranty stipulated in article 6 (1) of the EConvHR was not absolute — but subject to limitation by rules serving a legitimate purpose, and crafted according to the principle of proportionality. The ECHR furthermore clarified that it considered the prohibition of torture as *ius cogens*, but as the case was a civil lawsuit (and not a criminal prosecution trial), it first had to decide if a breach of the *ius cogens* could annihilate a state's legitimacy in this type of litigation. Eventually the judges of the ECHR arrived at a negative conclusion (with nine votes to eight) and opposed the extension of jurisdiction by analogy (via transfer from cases concerning the immunity of former heads of state, in the sense of a functional immunity, to litigations concerning the immunity of states). The rationale of the ECHR emphasized that:

> "[t]he growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State".[117]

The implicit requirement of a territorial link to a breach of international law, contained in this justification, was to be elaborated subsequently. In the *Banković*-case the ECHR stressed that in order for the application of article 1 of the EConvHR to be possible, NATO should have been in "effective control" of the territory where the violation had been committed.[118]

The Draft of an international convention on the jurisdictional immunities of states and their property similarly contains limitations to the annulment of immunity. These Draft Articles on Jurisdictional Im-

---

115 ECHR, Al-Adsani, see note112, item 51.

116 ECHR, Al-Adsani, see note112, item 41.

117 ECHR, Al-Adsani, see note112, item 66.

118 ECHR, Ruling of 19 December 2001, Banković v. Belgium, No. 52207/99, item 80, the verdict of the ECHR differs, however, in Loizidou v. Turkey, No. 15318/89, (1995), item 71, for a critical view on this finding, see A. Laursen, "NATO, the War over Kosovo, and the ICTY Investigation", *Am. U. Int'l L. Rev.* 17 (2002), 765 et seq. (796—800).

munities of States and their Property[119] were presented by an Ad-hoc Committee on Jurisdictional Immunities of States and their Property in February 2002. The Committee had received the mandate to do so by the UN General Assembly back in 2000.[120] According to this Draft, the immunity of a state remains intact as long as no legal exception becomes binding.[121] One such exception to immunity, based on massive human rights violations, is set out in article 12 of the Draft as follows:

> "Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State and if the author of the act or omission was present in that territory at the time of the act of omission".[122]

Hence, a territorial link to the violation of international law is necessary to justify the jurisdiction of one state against another. In addition to this, a claim can, at best, aim at financial compensation. Charges cannot be pressed for punitive damages.

In one of its reports on the work of the Ad-hoc Committee, the ILC concludes that so far state practice had established scenarios for the lifting of immunity, due to human rights violations, only in the following cases: the first scenario revolved around violations of the Anti-Torture Convention, as in the *Pinochet* case; and the second scenario represents the exception of immunity of "state sponsors of terrorism" under the FSIA.[123] With regard to the compulsory execution of claims

---

119 The Working Group has been established in December 2000, see A/RES/55/150 of 12 December 2000, A/RES/56/78 of 12 December 2001, item 4. The ad-hoc Committee was convened for a session between 4th and 13th February 2002.

120 Report of the ad-hoc Committee on Jurisdictional Immunities of States and their Property, Doc. A/57/22 of 15 February 2002.

121 Report of the ad-hoc Committee on Jurisdictional Immunities of States and their Property, see above, article 5: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles."

122 See Doc. A/57/22, see note 120, article 12 on personal injuries and damage to property.

123 Report of the ILC (1999) Annex, Report of the Working Group on Immunities of States and their Property, Annex, 1999, No. 122, items 9-12.

using state assets, the ILC found that it had to be proven that "[n]ot only ... the activity or transaction at issue was performed in the sense *iure gestionis*, but also that the property affected was not destined for the fulfilment of sovereign functions".[124]

The report mentions the exception to immunity under the FSIA and in the *Pinochet* case as precedents, but it also underscores the differences: the *Pinochet* case represents a criminal prosecution trial of a former head of state, whereas the provisions of the FSIA on "state sponsors of terrorism" focus on the immunity of states during civil claims.

Hence the report implies that international law had established as vital: a differentiation between state immunity and the derived immunity of a head of state.[125] The annulment of the immunity of a former head of state does not set a precedent for the issue whether a state enjoys immunity as a legal person. Upon relinquishing his incumbency, a former head of state (as in the case of diplomats) only enjoys immunity for his actions (in the sense of *ratione materiae*), or along the lines of *ratione personae.* The basis underlying this idea is the thought that a person who no longer represents the state should no longer be shielded by the state's immunity as a private individual. Therefore immunity merely applies to the *acta iure imperii* during his term in office.

The novelties surrounding the exception of immunity with respect to "state sponsors of terrorism" become even more striking if one compares the contexts of the *Al-Adsani* and the *Pinochet* case. Their processing by the judiciary does not so much imply an inconsistent jurisdiction — apart from the qualification of the *Pinochet* case as a precedent along the lines of the immunity exeption for state sponsors of terrorism of the Unites States Code — as it indicates the divergences of state practice so far, in instances where immunity has been annulled according to the FSIA.

Even if the contentious issue of the *Pinochet* case had not been the immunity of a former head of state, but the immunity of Chile — the ruling would still not have been applicable to the *Al-Adsani* case and its challenge to Kuwait's immunity. In the *Pinochet* case the judges were first forced to determine the legality of the "double criminality" requirement; a criterion which has to be met prior to every extradition

---

124 Report of the ILC, see above.

125 Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), see note 103, para. 53-55; P. Daillier/ A. Pellet, *Droit International Public*, 1999, 446 et seq.

according to British law. For this purpose they had to clarify if British jurisdiction would have been expanded in cases where British nationals were tortured in Chile. Thus the judges were not supposed to decide whether a violation of the prohibition of torture was basically conducive to the general forfeiture of immunity. The actual dilemma was if the annulment of immunity applied to cases where British nationals had been harmed. It was found that the extradition of *Pinochet* would be lawful only under these circumstances. This aspect of the case could have been transferred to the *Al-Adsani* trial only if the plaintiff were a British national. Then the territorial-link requirement for an extension of jurisdiction would have been surpassed by the principle of passive legal personality. This, however, would not have been the case with the distinction between the immunity of heads of state and of states, or the different kinds of litigation embodied by both cases. The *Pinochet* case referred to a completely different subject-matter, when compared to the *Al-Adsani* case. Therefore, it remains debatable if there is a similar case to the instances where the immunity of "state sponsors of terrorism" has been annulled. The *Pinochet* case did not revolve around state immunity — it merely tried to assess if an extradition was lawful, based on the hypothetical assumption that one's own nationals had been injured. In contrast to this, the *Al-Adsani* case centred on a civil lawsuit against a state, where neither the plaintiff nor the violation of the law established a link to the state as a forum.

The exception of immunity in case of "state sponsors of terrorism" is conducted under circumstances which were not the object of deliberation in the *Pinochet* case, and which the ECHR did not acknowledge as rationale to state immunity under international law as it currently stands. The exception of immunity for "state sponsors of terrorism" therefore has to be considered the only case where states forfeit their immunity during civil claims, and not another precedent besides the *Pinochet* case.

b. The Meaning of Sovereign Equality

Based on the teachings on the basic rights of states, their equality was considered a "classical basic right" towards the end of the nineteenth century. The notion that this equality represented a subjective empowerment, however, could not gain the upper hand throughout the

twentieth century.[126] What did succeed is the enshrining of the equality of states as a principle in several international conventions.[127] The UN General Assembly confirmed this principle through the Friendly-Relations Declaration, by claiming that:

> "[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature".[128]

In contrast to this, it has to be stressed that general international law has always been aware of an asymmetric distribution of rights and duties among states. Numerous international agreements, such as the Non-Proliferation Treaty, entail a differing level of empowerment and liability among countries.[129] The United Nations itself has accorded the five permanent members of the Security Council special influence on the consensus-forging and decision-making processes within this body, as well as within the United Nations in general. The same applies to spe-

---

126 Cf. Jennings/ Watts, see note 56, 331 (§104): "Until the last two decades of the 19 century there was general agreement that membership of the international community necessarily bestowed so-called fundamental rights on states", Note 1: "these were chiefly enumerated as the rights of existence, of self-preservation, of equality, of independences, of territorial supremacy, of holding and acquiring territory, of intercourse, and of good name and reputation"; T.J. Lawrence, *The Principles of International Law*, 1925, 106 et seq.; cf. P.H. Kooijmans, *The Doctrine of Legal Equality of States*, 1964, 53 et seq.

127 Cf. article 4 of the Montevideo Convention on the Rights and Duties of States (1933), *AJIL* 28 (1934), Suppl. 75, cf. also the former article III.1 of the Statute of the Organization of African Unity, *ILM* 2 (1963), 766, or article 6 of the Charter of the Organization of American States.

128 A/RES/2625 (XXV) of 24 October 1970, the general principle quoted above serves as a foundation for the following rights, derived in the Resolution: "(a) States are juridically equal, (b) Each State enjoys the rights inherent in full sovereignty, (c) Each State has the duty to respect the personality of other States, (d) The territorial integrity and political independence of the State are inviolable, (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems, (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States".

129 Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226 et seq. (263 et seq., para. 98-104).

cial voting arrangements within the IMF.[130] Many other examples could be listed in support of the assertion that there is a disparity between the *de iure* guarantee of state equality and the *de facto* inequality among them. Even the interpretation of this principle (set out in Article 2 (1) of the UN Charter) in expert analyses reflects the chasm between a codified ideal and its realistic/concrete application. Some international law experts distinguish between a factual and a legal plane, accordingly. Inequality may, in the views of one faction, be considered a social phenomenon which has an insignificant impact on the legal level, as it does not affect the equal treatment of states through the law.[131] Another faction has pushed the purview of the principle of equality out of the legal domain, since equality among states cannot be realized,[132] or because the existing inequalities represent exceptions supported by a consensus among states, and thus an indicator of the principle being rooted in customary law.[133]

With regard to the question what kind of standards may be derived out of Article 2 (1) of the UN Charter, none of these options offers an explicit answer. Hence, it may be realistic to conclude that states are *de iure* equal, i.e. subject to relations of coordination without enjoying completely equal rights, but such a statement will not shed light on the question whether this condition complies with the normative contents

---

130 B. Kingsbury, "Sovereignty and Inequality", *EJIL* 9 (1998), 599 et seq. (610).

131 Cf. P. Fiore, *Nouveau droit international Public*, 1918 Vol. I, § 428, 374: "Il nous semble que pour être complètement exact, on devrait dire que chaque Etat devrait avoir le droit d'être l'égal des autres, indépendamment de son importance et de sa force. Il y a loin entre ce désir vertueux exprimé avec raison par les publicistes et la réalité". Doehring adds the standpoint that equality was always pretence, and never a factual condition, see note 53, para. 189.

132 J.L. Brierly, *The Law of Nations*, 1963, 132 et seq.

133 Cf. Cassese, see note 52, 90 et seq.: "Consequently, possible legal hindrances or disabilities may be the result of factual circumstances [...]. Alternatively, legal constraints, if any, are only valid if accepted, in full freedom, by the State concerned [...]"; Jennings/ Watts, see note 56, 376-379 (§114); P. Cullet, "Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations", *EJIL* 10 (1999), 549 et seq. (553 et seq.); G. Schwarzenberger, "Equality and Discrimination in International Economic Law (I)", *Yearbook of World Affairs* 25 (1971), 163 et seq.

of Article 2 (1) — or whether, on the contrary, it represents a restraint of the equality principle in practice.[134]

Should one opt for the second standpoint and attribute the interpretation of the equality principle to the factual asymmetries among countries, then the bounds between the possible interpretations of the principle as a normative postulate and the constraints on actual state equality will be obscured.[135] Therefore this approach provides a stark illustration of the fundamental dilemma concerning the principle of state equality: is the rule of the UN Charter based on a deductive imposition, as a result of general ideas linked to states' equality — or is it to be derived from concrete state practice?

Vattel entertained the view that the equality of states could not be enforced through a legislator, as at the domestic level. Therefore, state equality was to be founded on the practice of states alone.[136] The inconsistent *de facto* conduct of states subsequently strengthened many authors in their belief that equality among states was neither feasible nor just (due to the differing requirements of each state). This view prevailed up to the beginning of the twentieth century.[137]

Current international law is marked by having enshrined the principle of equality of states in the UN Charter. Consequently, the key distinctions to be made do not stem from the relativization of the normative content by practical conduct, but rather from the fact that states have included this principle in the UN Charter. The important issue therefore revolves around the states' concept of the principle as a legal rule. Which function do they ascribe to the inclusion of the principle of state equality into the UN Charter? Only after answering this question can attention be shifted to the purview of the principle, i.e. the manner in which the latter emerged out of state practice. The concrete conduct of states as such will determine to what extent the principle can be implemented. Both aspects combined will result in a principle of state

---

134 Cf. Verdross/ Simma, see note 66, 275 (§ 475), and K. Hailbronner, in: W. Graf Vitzthum (ed.), *Völkerrecht*, Chapter III, items 91 et seq.

135 E. Dickinson, "The Equality of States in International Law", 1920, 122, therefore Goebel opts for another approach, which bases his theory of equality on the philosophical ideals of equality and a state community, ibid., 3 et seq., (79 et seq.).

136 E. Vattel, *Le Droit Des Gens ou Principes De La Loi Naturelle*, 1758 (reprinted 1959), Vol. II, Chapter III, § 40.

137 J. Lorimer, The *Institutes of the Law of Nations*, Vol. I, 1883, 170 et seq.; S. Amos, *A Systematic View of the Science of Jurisprudence*, 1872, 235.

equality, which can aid the development of international law through its regulatory function, on the one hand, and which can limit the utilization of defamatory designations of states on the other.

aa. The Equality of States as an Ideal

The principle of state equality, enshrined in Article 2 (1) of the UN Charter, emphasizes the egalitarian status of states within the international legal order. This warranty is coupled with the recognition of states as subjects of international law.[138] The Friendly-Relations Declaration of the UN General Assembly states that all countries possess the same rights and duties as equal members of the community of states — regardless of the factual differences among them ("[T]hey have equal rights and duties and are equal members of the international community, notwithstanding differences [...]").[139] This interpretation is mainly considered an "additional Charter" and an expression of customary law. As such it provides important insights into the scope of the principle, although it fails to explicitly outline the resulting duties affecting the states' implementation of the principle. Should the latter e.g. encompass both equality before the law and equality of capacity rights?

A historical analysis of the debates surrounding the formulation of this principle during the San Francisco Conference reveals that several states insisted on a lexical "shell" allowing a maximalistic interpretation of equality. Some proposals went as far as outlining the eradication of factual and political inequality.[140] The position forwarded to comple-

---

138 Kingsbury, see note 130, 599, 603, Jennings/ Watts, see note 66, 339 et seq. (§115), in the first edition (1905) Oppenheim defined equality as follows: "In entering the Family of Nations a State comes as an equal to equals, it demands a certain consideration to be paid to its dignity, the retention of its independence, of its territorial and its personal supremacy [...] derived from their International Personality", Hailbronner, see note 134, Chapter III, item 91.

139 A/RES/2625 (XXV) of 24 October 1970.

140 Ecuador's proposal states that the juridical equality of sovereign states should be seen: "[...] as an expression of their identical law which governs their reciprocal relations and as a means for correcting and repairing any practical or political inequality which may occur between them", Text of Proposals for the Establishment of a General International Organization, UNCIO, Documents of the San Francisco Conference, Vol. III, 420, 421. The Turkish Government used the principle of sovereign equality to derive the proposal that the General Assembly should function as the supreme

ment the *Dumbarton Oaks Proposals* was somewhat more restrictive, as it envisaged an organization with "juridically equal" members, which would enjoy certain rights equally. These rights were accorded to them as "inherent in their full sovereignty".[141] Proposals set out by the Governments of the United States, the United Kingdom, the Soviet Union and China at the earliest stage of discussions upheld the view (verbalized in the aims of Article 1 of the UN Charter) that the organization was to further friendly relations amongst states based on the principles "of equal rights and [the] self-determination of peoples".[142] Article 2 thus codified the principle of "sovereign equality of all its members".[143] The Netherlands maintained that there is a legal principle of "sovereign equality of peace-loving states," in spite of the existence of factual differences among countries, which had to be borne in mind.[144]

Following the deliberations on the complementary proposals to the Draft compiled at Dumbarton Oaks, the Rapporteur of Commission I summed up the states' positions as follows:

> "(1) Members are juridically equal, (2) all enjoy the rights inherent under sovereignty; and (3) they all should act in accordance with their duties under the Charter".[145]

The Subcommittee in charge of this subject-matter proposed to replace the formulation "juridically equal" with "sovereign equality". The interpretation of the latter was to be guided by the postulates:

> "(1) that states are juridically equal;
>
> (2) that they enjoy the rights inherent in their full sovereignty;

---

decision-maker as regards preserving the peace. UNCIO, see above, 480, 481, and Vol. IX, 274. Venezuela agreed with this position, Vol. IX, 274, Cuba added its own Draft Declaration of Duties and Rights of Nations, in which equality is defined as follows: "All states are equal before the law, and each one has the same rights as any other which is a member of the International Community", UNCIO, Vol. III, 493, 497.

141 New Uruguayan Proposals on the Dumbarton Oaks Proposals, UNCIO, Vol. III, 34, 35.

142 Amendments proposed by the Governments of the United States, the United Kingdom, the Soviet Union, and China, 5 May 1945, UNCIO, Vol. III, 622.

143 Ibid. 623. This proposal substituted the preceding formulation, which contained the reference to "peace-loving states."

144 UNCIO, Vol. I, 230, 249.

145 Report of Committee 1 to Commission I, Documents of the San Francisco Conference, Vol. VI, 310 et seq.

(3) that the personality of the state is respected, as well as its territorial integrity and political independence;

(4) that the state should, under international order, comply faithfully with its international duties and obligations".[146]

Committee I/1, tasked with outlining the basic principles of the Charter, eventually adopted a revised version, which contained the phrase "sovereign equality of all its members" in addition to the abovementioned axioms, thus accommodating the views of Subcommittee I/1/A.[147]

Commission I subsequently adopted the same version,[148] after clarifying that the formulation "sovereign equality" was to be interpreted along the lines set out by Committee I/1. The Government of Peru had triggered this clarification by stating that, in its view, the Draft lacked outlines on the "personality of states". Such consultations, and the resolution of relevant issues, were conducive to the General Assembly's adoption of the draft-proposal containing the reference "sovereign equality" of 25 June 1945.[149]

The codification of this principle within the UN Charter thus bears testimony to the will of states to enshrine equality before the law as a legal postulate. In addition to this, the signatories were also concerned with guaranteeing equal rights to states on grounds of their sovereignty. Hence, equality before the law was complemented by the equality of capacity of rights, which emanates entitlements directly attributable to the sovereignty of states.

In 1947 the issue of state equality, in particular the equality of capacity of rights, surged to the top of the agenda when the ILC produced a Draft on the Rights and Duties of States. Article 5 of this Declaration on the Rights and Duties of States stipulates the equality of all states before the law and with regard to the rights they enjoy — as supported by the statement that "[e]very State has the right to equality in

---

146 Report of the Rapporteur of Subcommittee I/1/A to Committee I/1 of Commission I , 1 June 1945, UNCIO, Vol. VI, 717, also cf. the discussion of Commission I, 15 June 1945, UNCIO, Vol. VI, 65, 70.

147 UNCIO, Appendix to Rapporteur's Report, Committee I/1 on 9 June 1945, Vol. VI, 402, 404.

148 Report of the Rapporteur of Commission I, 21 June 1945, UNCIO, Vol. VI, 229 et seq.

149 UNCIO, Vol. I, 612, 631.

law with every other State".[150] In the opinion of Commission I, this formulation was to equal the notion of "sovereign equality" along the lines of the interpretation provided at the United Nations Conference of San Francisco.[151] Had such an extensive concept as the "equality in law" been adopted, it would still have contained a limitation in the form of a reference to the Committee's interpretation.[152]

It, furthermore, has to be stressed that neither the Commission's interpretation nor the different governmental positions of the San Francisco Conference indicate that all states are to enjoy the same rights in every aspect. The formulations of the Draft Declaration Resolution on states' rights and duties was not to alter this situation.

It therefore becomes clear that states are equal before the law and that they do enjoy the same capacity of rights, if those are rooted within their sovereignty, or if they are vital to the preservation of their sovereignty. Thus the principle of state equality contains only these (decisive) postulates.

Despite these qualifications, the principle of state equality in the UN Charter meets the requirements publicized in texts prior to its codification. In those analyses the principle of (state) equality before the law is considered a fundamental element of a legal order, which is derived from the postulate on the rule of law. This quintessential component is also said to ensure equal legal protection.[153]

As far as the equal capacity to rights is concerned, analyses emphasize that their origin from material concepts of justice and their aiming at an exhaustive equality of opportunities for states both embody the idealistic dimension of the equality postulate:

"Equality of capacity of rights is commonly regarded as a desideratum, as an ideal towards which the law should seek to develop, as-

---

150 Draft Declaration on the Rights and Duties of States; A/RES/178 (II) of 21 November 1947. The provision corresponds to article 6 of the Panamanian Draft.

151 Report of Committee 1 to Commission I, UNCIO, Vol. VI, 457.

152 *ILCYB* 1 (1949), 288: "this text was derived from Article 6 of the Panamanian draft. It expresses, in the view of the majority of the Commission, the meaning of the phrase 'sovereign equality' employed in Article 2 (1) of the Charter of the United Nations as interpreted at the San Francisco Conference, 1945".

153 Dickinson, see note 135, 3: "International Persons are equal before the law when they are equally protected in the enjoyment of their rights and equally compelled to fulfil their obligations".

suming that there is a certain homogeneity of characteristics among the persons included in the number of its subjects".[154]

This provided a basis for the contentious request that all states would have to be granted identical rights.[155] Such a request is to be distinguished from the demand that identical conduct entails identical evaluation and legal consequences (*Rechtsfolgenidentität*), which can also be traced back to the equality of opportunities. The thus derived equality in law refers to equal opportunities to generate and implement laws, i.e. equal bargaining power, which are ultimately to obliterate status asymmetries.[156]

bb. Safeguarding the Legal Capacities of States

Instances of discrimination generally imply that substantively equal issues (items, subjects) are being treated differently. Hence, every dissimilar treatment of sovereign states would have to be considered a violation of Article 2 (1) of the UN Charter, as the latter elevates all states to an equal footing. The ideal of egalitarianism underlying this provision is not being implemented in practice, however, neither at the intra-state nor the inter-state level.

State practice reveals that not only asymmetrical treaties are being signed, but the "law-and-order" mission advanced by particularly influential states is being "accepted," i.e. not effectively disputed.[157] In

---

154 Dickinson, see note 135, 4 et seq.

155 G. Jellinek, *System der subjektiven öffentlichen Rechte*, 1919, 319, or see J. L. Brierly, *The Outlook for International Law*, 1945 (reprinted 1977), 30, 65 et seq.; also the Declaration on the Rights and Duties of States adopted by the American Institute of International Law 1916, article III: "Every nation is in law and before the law the equal of every other national belonging to the society of nations", *AJIL* 10 (1916), 125, Dickinson, see note 135, 4 et seq.

156 Dickinson, see note 135, 4: "the equality of states in this sense means, not that all have the same rights, but that all are equally capable of acquiring rights, entering into transactions, and performing acts. When used in this significance, equality may be said to constitute the negation of status", J. Goebel, *The Equality of States*, 2 et seq.; Kooijmans, see note 126, 50 et seq.; also cf. R. W. Cox, "Labor and Hegemony", *International Organization* 31 (1977), 385 et seq. (423).

157 Cf. Dahm/ Delbrück/ Wolfrum, see note 55, 238, for a critical view on the NATO-intervention in Kosovo in 1999 without a UN-mandate, but on behalf of the "international community" see N. Krisch, "More Equal than

contrast to this, it must be borne in mind that the above-mentioned positions of governments confirm that the concept of sovereign equality is not exclusively constituted by multifarious necessities and interests, exhibited by states throughout concrete interactions. They tend to view the principle as a manifestation of their (political) will, of their endeavour to materialize the ideal of equality via legal rules.

The principle of sovereign equality does not, however, entail the obligation to actively engage in the eradication of inequality. Apart from this, the UN Charter also gives no suggestion of the view that the principle of sovereign equality secures absolutely identical rights to each state.

In this context it must be mentioned that the dichotomy between equality before the law and equality in law is less clear than would appear at first sight. There is, after all, the possibility that inequality in law (lessened capacity of states to generate law or shape this process) is conducive to inequality before the law. Such possibilities become reality when factual disparities become enshrined in laws, i.e. when states with low political influence being excluded from the process of law-making, whereas they are subsequently confronted with new legal rules which they were not able to shape.

This vicious cycle can be controlled through the principle of state equality, as the Dissenting Opinion of ICJ judge *Weeramantry* illustrates. According to him:

> "[d]e facto inequalities always exist and will continue to exist so long as the world community is made up of sovereign States, which are necessarily unequal in size, strength, wealth and influence. But a great conceptual leap is involved in translating de facto inequality into inequality de jure. It is precisely such a leap that is made by those arguing, for example, that when the Protocols of the Geneva Convention did not pronounce on the prohibition of the use of nuclear weapons, there was an implicit recognition of the legality of their use by the nuclear powers".[158]

Derogatory designations of states could represent a breach of Article 2 (1) of the UN Charter, whenever they transfer factual inequalities into

---

the Rest? Hierarchy, Equality and US Predominance in International Law", in: M. Byers/ G. Nolte (eds), *United States Hegemony and the Foundations of International Law*, 2003, quoted from the pre-publication version, 9 et seq.

158 Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226 et seq., Dissenting Opinion Judge Weeramantry, 429, 527.

the legal domain. The attribution of negative features to states could eventually be conducive to their suffering a loss of trust and credibility.[159] This would embody the direct transmission of political power asymmetries to the legal plane, since a decrease of political power will invariably lessen its weight, and therefore its legal capacity. This loss would be suffered in the area of sovereignty-based rights, which are contained in the postulate of equality in law and whose decrease could endanger a state's equality before the law. Hence, the principle of the sovereign equality of states can develop an optimum of regulatory capacity if the opportunity of sovereign states to generate international laws is kept as equal as possible for all, in spite of power disparities among them. The convergence of states on the purview of this principle underlines that equality is to be secured to states with regard to their sovereignty-based rights. The principle consequently guarantees participatory rights to all states in the process of legislation and the process of claiming/implementing their rights, while prohibiting the "legal oligarchy" of a few powerful states.

c. Discussion

The legal consequences of United States provisions on international economic exchanges and state immunity affect the core of sovereignty: the political independence of states and the principle of state immunity. According to the latter in particular, it is still inadmissible (apart from a few exceptions) for states to extend their jurisdiction over other states.

Against this backdrop it also has to be considered whether the coercive impact of economic sanctions has not already transgressed the bounds of legality in some cases.

Clear boundaries emerge on the grounds of the sovereignty postulate, as regards the extra-territorial jurisdiction of states included in the list of terrorist states. The requirements for the exception to immunity during investigations likewise transgress the rules established by state practice so far. This transgression consists, largely, in the fact that the inclusion of states into the list alone annuls the immunity of these

---

[159] On the meaning of trust in international relations, see, ICJ Reports 1974, 252 et seq. (268 para. 46): "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential".

countries, thus violating the *prima facie* rule stipulating that states *per se* enjoy immunity. This is complemented by the loss of immunity as regards future litigations, a damage which cannot establish a credible link between claims which might be lodged against this country and the reasons prompting the DoS to enter this state into its list. A third dimension of complexity is added through the realization that most litigations (made possible by the lifting of immunity) revolve around *acta iure imperii* of the states listed as sponsors of terrorism. State practice so far has not supplied any support to the hypothesis that such acts lose their protection if they embody grave breaches of international law, i.e. just on the basis of the gravity of the violation. In addition to this, the immunity of a state cannot be annulled for civil claims, even in cases of violations of *ius cogens,* since a recognized rule to this purpose has not been established so far. Hence the exceptions to immunity do not adhere to a restrictive concept of immunity. It also has to be noted that the annulment of a state's immunity in the United States is not limited to cases where United States nationals suffered injury — it is merely important that the plaintiff be a United States citizen. As far as the substantive scope of exceptions is concerned, it is not restricted to acts of torture (as stipulated by the UN Anti-Torture Convention), but also includes extra judicial killings, the sabotaging of aircraft, hostage-taking and assistance rendered in the execution of these crimes.

The extension of jurisdiction over other states cannot, moreover, be justified via arts 4 and 5 of the Anti-Torture Convention, as these provisions apply to the criminal prosecution of perpetrators, but not to the instigation of civil claims. All this indicates that there are no instances of state practice in support of a universal jurisdiction in cases of torture — regardless of the types of immunity, the types of litigation or the existence of a link to one's own nationals being affected — outside the provisions of the FSIA.[160] Such a discrimination of states reaches its limits the moment it strives to annul the sovereignty-based rights of a state, since these cannot be curtailed without the consent of the targeted country. The exception of immunity with regard to designated "state sponsors of terrorism" entails the different treatment of these states. Such an unequal treatment, however, is only admissible within the range of binding international law, unless a state has agreed to a more intrusive action. Provisions justifying the annulment of immunity sub-

---

160 On the existence of an implicit forfeiture of immunity, in case of a violation of *ius cogens* see the Dissenting Opinion of Judge Wald in Princz v. Federal Republic of Germany, 26 F. 3d (1994), 1166, 1182.

stantially surpass binding rules of extra-territorial jurisdiction. As such, even the consent of states cannot establish their legality. This means that the extra-territorial jurisdiction over "state sponsors of terrorism" transcends the bounds set by the internationally binding principle of the sovereign equality of states.

Such a transgression loses little of its weight when another element of coercion is introduced, in the shape of courts according punitive damages. This form of legal consequence is not so much aiming to compensate plaintiffs for inflicted damages, as aiming to penalize the states targeted. Thus, punitive damages are reduced to plain punishment, in spite of the inadmissibility of imposing pecuniary compensation on a state (according to binding regulations), as compulsory execution remains a legal option. Both the latter and the prerequisite annihilation of immunity can be considered instruments of coercion. This is supported by the fact that provisions within the FSIA permit the seizing of assets appropriated for *acta iure imperii* — thus enlarging the scope of rules of this law contravening current state practice.

It is hard to deny that the overall impact of such measures affects the political independence of the states targeted, in spite of there being a few cases where coercive effects would be considered negligible.

All the considerations outlined so far indicate that the gravity of coercive intrusions lies in the consequences attached to the designation of countries as "state sponsors of terrorism" according to United States domestic laws. A slightly different conclusion can be reached if the amplification of coercion contained in defamatory references is analyzed. Should the element of coercion exert unmitigated pressure on targeted states, then their verbal devaluation (and not resulting legal consequences) will be labelled as "dictatorial interference". Hence, attention would have to be paid to the coercive potential of such denotations as "rogue states", "axis of evil" or "state sponsors of terrorism".

Governmental statements in particular abound in pejorative designations of states (e.g. "rogue states" or "axis of evil"), whose derogatory impact is quite explicit. Documents enacting concrete legal provisions, however, tend to resort to the less devaluating "state sponsors of terrorism". The coercive impact in such instances is not adequately mirrored by this lexical reference, as the legal consequences could be initiated under the cover of non-derogatory formulations. Any reference would merely be required to ensure the identification of the states in question. Hence, if the primary goal consisted of applying coercion, the sending state would not have to resort to pejorative references at all: the mere identification of states and their subsequent subjection to sanc-

tions, according to domestic laws, would suffice. The devaluation of targeted states, intrinsic to depreciating designations, should not play a decisive role in cases where coercion is mainly achieved by the legal consequences attached to a state's classification.

If the principal aim were simply to exert considerable pressure upon targeted states, the legal consequences would accomplish this task in their own right, without creating the means to amplify this by employing devaluating formulations. The inclusion of the latter in government statements, however, still cannot be considered dictatorial interference, as long as they are not utilized intentionally to foster regime change. Any other finding would have to be based on a discrete right to state dignity. Since the threshold delimiting inadmissible interference is set at a relatively high level, moreover, the usage of pejorative designations cannot constitute intervention, in spite of considerable economic pressure being applied.

This subject-matter should not be confused with the issue whether the continuous stimatization of states has an impact on the political status — and subsequently the legal equality — of states. Political inequality can affect the legal level, as the political standing of states will influence the process of drafting laws. In addition to this, the principle of the sovereign equality of states is incompatible with the premeditated creation of state inequality via stigmatization, generated in the political realm, due to its limiting impact on the capacities of states to generate and implement laws. This is to be ascribed to the direct influence on the sovereign rights of states of such formulations. The results of all these asymmetries in political standing not only includes the lessened impact of states during international law-making, but also the pronounced influence of a few powerful states throughout this process.[161]

III. Hegemonic Law in the International Community?

The following sections are not concerned with the designation of states as hegemonies, or with the assessment of power (a)symmetries. They merely concentrate on the question whether the utilization of derogatory designations at the international level indicates hegemonic relations, as the normative consequences of this process are not only felt by

---

161 Cf. Kingsbury, see note 130, 599, 611.

the targeted states, but also by the international community as a legal order.

1. Concepts of Hegemony

Initially the notion of hegemony described a particular political constellation during the era of the Greek *polis*. It denoted the supremacy of one city-state with respect to other counterparts, incorporated into an alliance of independent units.[162] Hegemony was accorded to states which, in addition, to their power supremacy, enjoyed considerable trust and respect, on the basis of their advantages and achievements. Such states were entrusted with the management of common affairs.

As far as the usage of this notion in modern diplomatic discourse is concerned, it can be traced back to the Congress of Vienna, where the explicit differentiation between great powers and small states acquired prominence.[163] Apart from the thus established political connotation, the concept of hegemony also gained influence as regards the codification of inter-state relations. Hence the *Treaty for Peace and Friendship between the People's Republic of China and Japan* (12 August 1987) contains an anti-hegemony clause.[164] The purview of hegemony is consequently based on the minimum threshold of a negative freedom enshrined in international treaties.

---

162 Cf. O. Kallscheuer, "Hegemonie", in: D. Nohlen (ed.), *Lexikon der Politik*, Vol. I, 1995, 174; P. Noack (ed.), *Grundbegriffe der politikwissenschaftlichen Fachsprache*, 1976, 99 et seq.

163 The British Prime Minister Palmerston described the decision-making process within the "Concert of Europe" in 1848 as follows: "the smaller Sovereigns, Princes, and States, had no representatives in the deciding congress, and no voice in the decisions by which their future destiny was determined. They were all obliged to yield to overruling power, and to submit to decisions which were the result, as the case might be, of justice or of expediency, of generosity or of partiality, of regard to the welfare of nations, or of concessions to personal solicitations", quoted by Dickinson, see note 135, 295.

164 Treaty of Peace and Friendship between the People's Republic of China and Japan of 12 August 1987, article II: "The Contracting Parties declare that neither of them should seek hegemony in the Asia-Pacific region or in any other region and that each is opposed to efforts by any other country or group of countries to establish such hegemony", *ILM* 17 (1978), 1054.

Scientific debates revolve around different forms of hegemony. These provide the foundation for an analysis of prerequisites and maintenance modes of hegemonic forms in the ensuing sections, and for a subsequent attempt to arrive at a definition uniting the advantages of each approach.

a. The Historical Perspective

aa. Differentiating between Leadership and Predominance

The cornerstones for the differentiation between leadership and predominance were laid in the twentieth century, by the Italian intellectual and leading communist activist *Antonio Gramsci* (1891-1973). In his *Letters From Prison (1929-1935) Gramsci* attempted to provide a detailed answer to issues hampering national unification and communist alliances. His notion of ideological hegemony is marked by the connotation of the legitimate leadership, based on a consensus between the ruling and the ruled classes. Only homogeneous cultures and values, the argument runs, can maintain this class structure, not brute force.[165] Thus, hegemony embodies an effective form of predominance, based on the conviction of all that the existing order is satisfactory, or at least the best which can be expected.

In contrast to this ideology-infused variant, *Heinrich Triepel* developed the notion of consensus-based hegemony in his *Hegemony — a Book on Leading States*, by combining sociological, historical and legal methods.[166] By examining leadership relations in polities at the interpersonal, societal and state level, *Triepel* came to the conclusion that leadership is constrained power, marked by the "energy of the will, but not by the mere will to rule".[167] This dichotomy between leadership and predominance characterizes *Triepel's* concept of hegemony at the inter-state level: the relational configuration within hegemony is deter-

---

165 A. Gramsci, *Sozialismus und Kultur*, 1916 and Gefängnishefte, (1929-1935), on Gramsci's impact on an area of critical legal studies, cf. D.E. Litowitz, "Gramsci, Hegemony and the Law", *Brigham Young University Law Review* 2000, 515 et seq.

166 H. Triepel, *Die Hegemonie. Ein Buch von führenden Staaten*, 1943.

167 Triepel, see above, 40, 59 et seq., 128, 131; cf. also U.M. Gassner, *Heinrich Triepel, Leben und Werk*, 1999, 333 et seq.

mined by two complementary aspects.[168] The will of a state to lead has to be complemented by the will to follow in the case of the other states.[169]

Hegemony is not a "one-state show," but a continuous, reciprocal exchange between the hegemonic state and the "disciple states," i.e. it relies on their *voluntary* acceptance of leadership. This embodies the integration function of hegemony, as an instrument for the pursuit of common goals, under the aegis of a hegemony.[170]

These traits enabled *Triepel* to develop his thoughts on the directions and modi of hegemonic politics (i.e. the means employed by a leading state).[171] The latter include the creation of a genuine sense of leadership acceptance, the influencing of domestic laws, the political-administrative system and foreign-policy makers. Apart from this, the hegemonic leader maintains these modes through various channels, ranging from warning and advice (as weak forms of interference) to concrete interventions (as the strongest form).[172]

This concept of *Triepel* has subsequently been utilized by *Wilhelm Grewe* in his *Powerplay in World Politics*. In his opinion, hegemony is a "primordial phenomenon in international relations,"[173] i.e. the ability of a state to exercise decisive influence on ideological currents and international developments over a period of time. The effects of hegemony

---

168 Triepel, see note 166, 41: "[...] Führung ist als diejenige Macht zu bezeichnen, die ein starkes Maß von Energie des Willens, aber nicht den Willen zur Herrschaft enthält. Führung ist [...] gebändigte Macht"; cf. also the argumentation on sovereignty and hegemony on page 141, and later 224.

169 It becomes clear at this point that Triepel recognizes an aspect of hegemony linked to political psychology: "Auch das Volk denkt, will, ist Affekten zugänglich. Nicht nur Menschen, auch Völker und Staaten sind imstande, Sympathien und Antipathien zu hegen, zu lieben und zu hassen, Furcht und Vertrauen, zu hegen, Treue zu üben und Verrat zu begehen, zu wünschen, zu hoffen, zu befehlen und zu gehorchen", cf. Triepel, see note 166, 10. "Es ist daher nicht nur eine der üblichen, durch das Bedürfnis nach plastischer Darstellung hervorgerufenen populären Analogien, sondern es ist wissenschaftlich zulässig und geboten, bei der Behandlung von Willensbeziehungen zwischen verschiedenen Gruppen, insbesondere zwischen verschiedenen Staaten, auch individualpsychologische Begriffe, wie etwa Machtstreben, Nachahmung und dergleichen zu verwenden", 11.

170 Triepel, see note 166, 134 et seq.

171 Triepel, see note 166, 222 et seq.

172 Triepel, see note 166, 224-239.

173 W.G. Grewe, *Spiel der Kräfte in der Weltpolitik*, 1970, 116.

are reflected in advantages in military and economic resources, in political power and in the potential to shape international law — when compared to the "disciple states."[174] Such an extensive influence can only be exerted by a state which has been moulded into a stable national unit.[175] The sequencing of international law in Grewe's *The Epochs of International Law* (1944) adheres to the succession of different hegemonic states.[176]

In addition to this, *Ludwig Dehio* concluded that hegemony and the balance of power embody two extreme types on a continuum, which could accommodate the entire diachronic evolution of the state system, from Charles V to World War II.[177] *Wolfgang Windelband* similarly resorted to a periodization based on power structures in his history of international law.[178]

In contrast to *Triepel*, however, *Grewe* does not analyze hegemony embedded into a variety of equal social relations; he rather extracted similarities between his concept of hegemony and the historical succession of power configurations among states. *Grewe* also distinguishes between hegemony and predominance. According to him, hegemony is marked by the fact that power is not exercised exclusively in a self-interested manner. Only when hegemonic rule is reduced to abuse as self-interested politics can one speak of predominance, whose rejection is justified. Whereas *Triepel* requires voluntary adherence as a prerequisite for hegemony, *Grewe* reverts this assertion into the question when hegemony may be rejected without censure. In *Grewe's* opinion voluntary adherence is not a constitutive trait of hegemony, and its rejection must be based on its genuine assessment in concrete cases, such as when hegemony develops into predominance.[179]

George Schwarzenberger develops a concept of hegemony in his *Power Politics* based on the premises that the state system is organized along aristocratic lines and subordinated to the power positions of

---

174 W.G. Grewe, *Epochen der Völkerrechtsgeschichte*, 1984, 679 et seq. (691).

175 Cf. Grewe, see above, 165, 326 et seq.

176 Grewe, see note 174; and *Epochs of International Law*, translated and complemented by M. Byers, 2000, cf. also B. Fassbender, "Stories of War and Peace on Writing the History in the "Third Reich" and after", *EJIL* 13 (2002), 479 et seq.

177 L. Dehio, *Gleichgewicht oder Hegemonie*, 1997, 28 et seq.

178 W. Windelband, *Die auswärtige Politik der Großmächte in der Neuzeit*, 1922.

179 Grewe, see note 173, 117.

states.[180] A powerful state differs from the remaining sovereign states through political, economic and military resources, as well as through its capacity to utilize these resources in order to preserve its power.[181]

As a result, *Schwarzenberger* categorizes states (on the grounds of their power) into world powers (states possessing a supremacy of power), middle powers and small states. A world power must, furthermore, be marked by several traits upon its ascension, such as: a large enough territory, a certain population density, military capabilities and economic strength.[182] These and other features (advantages) will have to be preserved in all policy areas. This striving for universal i.e. absolute power by one single state, with the aspiration to replace the international community, is justified by the need for security.[183]

A fundamentally different approach for defining hegemony is enshrined in the international law principle of "large areas" (*Grossraumprinzip*) by *Carl Schmitt*. He does not delve into the social or historical manifestations of power disparities, but rather demands "territorial i.e. spatial order" for world powers. This notion has been developed in *The International Law's Large-Area Order and the Prohibition of Intervention for Extraneous Forces*,[184] but a complete outline becomes visible only with the publication of *The 'Nomos' of the Earth in the International Law of the 'Ius Publicum Europaeum'*.[185] In the opinion of *Schmitt* the dichotomy between leadership and predominance is not of primary importance, in contrast to the assertion that the exercise of hegemony is centred on a certain space, the latter being an expression of "natural boundaries". This equips *Schmitt's* concept with a direction, which is fundamentally different to that of *Triepel's* or *Grewe's* concepts.[186] The linkage of hegemony to space is contrasted with the prin-

---

180 G. Schwarzenberger, *Power Politics*, first edition 1942, second edition 1951, 113 et seq., 127.

181 Schwarzenberger, see above, 121.

182 Schwarzenberger, see note 180, 118 et seq.

183 Schwarzenberger, see note 180, 188.

184 C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte*, 1939.

185 C. Schmitt, *Der Nomos der Erde*, 1988, on Schmitt's being influenced by Bilfinger and Triepel cf. M. Schmoeckel, *Die Großraumtheorie*, 1994, 117-120.

186 Fassbender points out the overlapping terminology, used by Grewe as borrowings from Schmitt, see note 176, 479, 503.

ciple of "de-territorialization".[187] Both principles pronounced by *Schmitt* originate from his view of large areas, as a concrete order along biologically deterministic lines (summed up in the term *völkisch*, which equates the nation with a superior group of human species) in international law, thus revealing the influence of national socialism upon the author.[188]

The adherence of *Schmitt* to thinking in terms of concrete orders, which dates back to the institutional jurisprudence of the Weimar Republic era and feeds on the abstract, general terms introduced by *Larenz*, is conducive to *Schmitt's* designating his principle as a concrete order. In his opinion, large areas are more than just inflated small territories. The qualitative difference between both concepts lies in the transcending of a void notion of state territory towards a focus on the *Reich* ('empire'). It is the latter, and not states, which are the principal subjects of international law according to *Schmitt*. In this context the *Reich* will affect state territory, without the total convergence of both notions being obligatory.[189]

According to *Schmitt*, the first successful model of a large-area order had been established by the Monroe-Doctrine, since it is based on the "independence of all American states, on the absence of colonization and on the non-intervention of non-United States forces in this area". This "quasi-legal" (or at least "semi-legal") character of the Monroe-

---

187 Schmitt, see note 185, 12.

188 See M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Band 3, 1999, 389-392. Thus, it can be questioned, whether Schmitt's understanding of hegemony can be useful in this context. On the one side, one cannot exclude, that a concept can bring the discussion forward, as long as it contains general thoughts apart from being "völkisch". On the other side, it has to be taken into account, that Schmitt based his "völkerrechtliche Großraumordnung" mainly on the idea of "völkische" legal institutes. Thus, this concept of "Großraumordnung" can easily be seen as an derivation of his thinking, which had to be interpreted in the light of the "völkisch" thoughts. Notwithstanding, this concept was based on an universal approach, insofar as he did not mean to restrict its use for one nation. Thus, the fact that this concept was open easily for nationalsocialism interpretation and therefore particularly dangerous, does not necessarily mean that the concept as such cannot be abstracted from its concrete adaptation. Only insofar as abstaction is possible, his concept serves as a further example of hegemonic thinking and its dangerous implications for a community of states in general.

189 Schmitt, see note 184, 67 et seq.

Doctrine, as well as the *Lebensraum* (living space) it created, were to provide a foundation for general legal criteria, and subsequently a rationale for the creation of other spaces like it.[190] Such an interpretation of the Monroe-Doctrine provides actors with a mandate to create an order through law (*Rechtsgestaltung*), as well as underlining its influence.[191]

bb. Legitimized Hegemony?

Triepel also raises the question whether it is possible for factual hegemonies to be legitimized or restrained by legal provisions, i.e. if there are regulations in general international law which acknowledge or contravene hegemony. These would adhere to the principles of the balance of power and the legal equality among states.

The first principle revolves around the prohibition for world powers to attain a supremacy in power resources. The second principle relies on the claim to legal equality in spite of power asymmetries. If, as *Triepel* outlined, hegemony requires voluntary acceptance, then the principle of state equality will limit the leadership of one single state. The power of a state, fortified by the acceptance of "disciple states," must not increase to the extent where the "totality of the remaining states will not be able to oppose the hegemonic state and its followers".[192] In the end *Triepel* comes to the conclusion that there are no provisions in general international law which would obstruct the establishment of a genuine hegemony.[193] The principle of balance of power among states, however, may ameliorate the hegemony of a single state.[194]

Within the framework of *Schwarzenberger's* thoughts there is almost no room to consider legal impediments to hegemony, since he considered international law a system mainly defined — and determined — by power.[195] *Schwarzenberger* is therefore searching for ethi-

---

190 Cf. also Schmoeckel, see note 185, 64-67.

191 On the decisionist aspect of Schmitt see Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, second edition 1993, 21-24.

192 Triepel, see note 166, 212 et seq.

193 Triepel, see note 166, 217 et seq.

194 Triepel, see note 166, 213.

195 Schwarzenberger, see note 180, 206, and 224: "International law is so subservient to power politics and it flourishes best where it does not interfere with the international struggle for power", "The State or States which, owing to the aggressive formulation of the objectives of their foreign poli-

cal criteria, which would provide a basis for the assessment and the justification of hegemony, despite the fact that he doubts that lofty ethical criteria carry sufficient weight to regulate international society. State practice implies that inter-state ethics will only be upheld if they can be utilized to further state interests.[196] Ethical rationales will mainly be employed when political justifications are conducive to a possible decline of reputation.[197] In such cases states would have to comply with the standards they have set, at least in order to keep up appearances. Otherwise, they might be forced into compliance by public opinion.[198] Upon considering all aspects, however, the relevance of ethical principles in international law could neither be described as mono-causal nor as decisive, but they still do succeed in committing states to respecting (if not implementing) them — and they do have an impact on the expansion and development of (international) law.[199]

b. The Current Debate

Modern analyses are shedding light on various aspects of hegemony. The following sections will single out three aspects, in order to complement the established historical approaches: the first is concerned with the legitimacy of hegemony; the second with its contribution to the maintenance of stability in the international system and the third with the prerequisites for the development of hegemony-based international law.

aa. The Legitimacy of the Benign Hegemon

The function of morality, which had been touched upon by *Schwarzenberger* in his work, comprises the focus of *Lea Brilmayer's American Hegemony — Political Morality in a One Superpower World* (1994). By

---

cies or to the distrust of their intentions on the part of other States, tend to enforce the law of the lowest level in international society usually belong to the international oligarchy or are on the point of gate-crashing into this select circle ",148 et seq.

196 Schwarzenberger, see note 180, 225.

197 Schwarzenberger, see note 180, 227: "The ideological use of international morality reaches its highest pitch when public opinion has to be prepared for war or to be sustained in a prolonged struggle".

198 Schwarzenberger, see note 180, 227.

199 Schwarzenberger, see note 180, 230.

resorting to the United States as an example, she provides a moral justification for the predominance of one state.[200] In her opinion hegemony denotes the relations among one dominant and several subordinated states — regardless of the fact that there may be states outside this network.[201] Thus, hegemony is not necessarily global, but rather a relative concentration of power "in the hands" of one state.[202] It becomes clear that *Brilmayer* considers power disparities among states an axiom, while state equality is reduced to legal fiction.[203] She centers her analysis on the structural comparability of governance and the exercise of hegemonic power, and not on the impact of a hegemon upon (legal) structures of the international system.[204] Her argumentation commences with a critique of realistic principles, only to develop into a liberal theory of international hegemony, revolving around legitimacy criteria for the predominance of a state.[205]

The latter are based on benchmarks which could also apply to the exercise of power *within* a state. This indicates that *Brilmayer* views hegemony as a primitive form of governance.[206] Both the constitution of predominance, and the discrete instances in which hegemonic power is exercised, require a legitimate foundation. Hegemony generated on the grounds of voluntary consensus alone would still lack a continuing

---

200 L. Brilmayer, *American Hegemony, Political Morality in a One Superpower World*, 1994.

201 Brilmayer, see above, 16: "Hegemony below, will refer to the relationship between a dominate state and its subordinates, even if there are states beyond the hegemon's effective reach".

202 Brilmayer, see note 200, 16 et seq.

203 Brilmayer, see note 200, 22: "Governance roles may be created or filled by formally equal participants. In both international and domestic affairs, the political leader plays a dual role, simultaneously a member of society and its head".

204 Brilmayer, see note 200, 20 et seq.

205 Brilmayer, see note 200, 4 et seq.; cf. also L. Brilmayer, "Transforming International Politics: An American Role for the Post Cold War World", *University of Cincinnati Law Review* 64 (1995), 119 et seq. (123).

206 Brilmayer, see note 200, 19: "the hegemon should be evaluated, in other words, as the world political leader that it is, despite its formal differences from domestic governance structure's it has the same sorts of responsibilities to subordinate states that a domestic government with comparable capabilities would have over those within its power".

moral justification, as single (concrete) acts could be illegitimate, i.e. deficient of an ethical rationale.[207]

In this context *Brilmayer* differentiates between three forms of consensus: contemporaneous consent, *ex-ante* consent and hypothetical consent.[208] The third form in particular provides leeway for the actions of states, since the latter remain legitimate as long as a "rational (actor) state" has agreed with the steps taken by the "agent state". Thus, the provision of positively evaluated goods, such as stability, order and security by a hegemon will be accorded legitimacy. This applies even to cases where the process of provision has not been supported by a factual consensus at any point of time, since it can be assumed that a "rational (actor) state" would have given its consent. All this implies that a morally justified "global" hegemon would not only pursue its own interests, but also the well-being of the world. Hegemonic power could, furthermore, be exercised in a rather democratic fashion — e.g. via the influencing of multilateral organizations. One major instance justifying the existence of a "benign hegemon," which is frequently being cited and debated, is the United States intervention in Kosovo in 1999.[209]

Brilmayer, therefore, does not object to the utilization of political, economic and military coercion, as long as the underlying rationale

---

207 See C.A.J. Coady for a critique, which raises the question if these ethical criteria command any power of definition, in: "Evaluating Hegemony", *N. Y. U. J. Int'l L. & Pol.* 27 (1995), 933 et seq. (935).

208 Contemporaneous consent denotes the consensus at the time of execution of a concrete action, whereas the *ex-ante* variant precedes action and underpins general norms of behaviour, which favour the action to be taken. Hypothetical consent is materialized when a rational-actor state would have been obliged to agree to the action, Brilmayer, see note 200, 66 et seq.

209 M.J. Maeson, "Justification for the NATO air campaign in Kosovo", ASIL Proceedings 94 (2000), 301; S.D. Murphy, "The Intervention in Kosovo: A Law-Shaping Incident?", ASIL Proceedings 94 (2000), 302 et seq.; or cf. J. Lobel, "Benign Hegemony?", *Chicago J. Int'l L.* 1 (2000), 19 et seq. (27 et seq.); G. Nolte, "Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten", *ZaöRV* 59 (1999), 941 et seq. (954 et seq.); B. Simma, "NATO, the UN and the Use of Force", *EJIL* 10 (1999), 1 et seq. (14 et seq.), on combatting a clear and present danger through a benign hegemon in the post Cold-War era cf. W. Kristol/ R. Kagan, *The National Interest*, 2000, 57 (58 et seq.).

does not exclusively consist of the interests of the hegemon. The hegemonic state is entitled to sanction the misconduct of other states.[210]

Brilmayer ultimately comes to the conclusion that a group of liberal democracies, led by a hegemon, recognizes the right to intervention based on its ethical motives for action. Hence, as long as there is no "global" hegemon to enforce an international law of subordinated liberal democracies. One has to differentiate between the international law with the group of liberal democracies led by a justified hegemon and the inter-state law as general, emerging within the intercourse of all states. The latter would govern the relations of states outside the hegemon's scope.[211]

bb. Effective Stability

While *Brilmayer* justifies the predominance of a state by the ethical posture of a hegemon (as long as the latter pursues hypothetically agreed aims), other authors find a rationale in necessities imposed by current international relations. The predominance of a state is considered temporarily inevitable, in order to secure stability within the international system. Such a view is most explicitly expressed in the conviction that the current hegemony of the United States provides the proper protection against a breakdown of the entire international order.[212] In order to prevent this, the United States is obliged to react adequately to the threats posed by "rogue states" and the axis of evil. This is all the more desirable as the relative military weakness of European countries contributes to their incorrect assessment of these dangers.[213] Still other viewpoints define hegemony as a result of regional geographic condi-

---

210 Coady, see note 207, 940 et seq.: "If we are told in reply that this form involves the Superpower's exercising a dominant governance role akin to the leadership of a domestic government, but using diplomacy, bribery, sanctions, and violence to achieve what it takes to be good outcomes for people who are not formally its citizens and subjects, then I think we are entitled to ask whether it is really such a good idea, and, if not, whether the attempt to improve on it by, as it were, building upon it, might not be a mistake".

211 For a critical review of the implications of this liberal theory, see J.E. Alvarez, "Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory", *EJIL* 12 (2001) 183 et seq. (185 et seq.).

212 W. Kristol/ R. Kagan, "Toward a Neo-Reaganite Foreign Policy", *Foreign Aff.* 75 (1996), 18 et seq. (23); R. W. Tucker, "Alone with others", *Foreign Aff.* 78 (1999), 15 et seq.

213 R. Kagan, *Paradise and Power*, 2003, 30 et seq.

tions and the spheres of influence generated by them.[214] Hence the argument that power disparities are needed to maintain an international order encompassing all states not only occupied a prominent position in theoretical constructs on political relations during the Cold-War era, but it also constitutes the backbone of a theory on hegemonic stability, whose application includes present times.[215] The theory of hegemonic stability, however, aims above the delineation of the *status quo* among states; it strives towards answering the questions on how the well-being of all states might be best advanced and how the relations between international predominance and international cooperation might be defined most precisely. *Keohane and Nye*, for example, attempt to answer these queries by denoting hegemony as a situation where one state is sufficiently powerful and willing to uphold the essential rules regulating international relations.[216] According to *Nye*, the conduct of a hegemon is characterized by the implementation of its national interests via the international system it leads. The resulting economic prosperity of the hegemon (as one output) could then benefit all the subordinate states as well.[217] Hegemony therefore requires the definition of these national interests by the hegemon, as only concrete aims can be pursued successfully.[218] Within the framework of this theory, the growth of international cooperations is proportionately related to the power advantage of the hegemon, i.e. "[t]he theory of hegemonic stability predicts that the more one such power dominates the world political economy, the more cooperative will interstate relations be".[219] Hence hegemony em-

---

214 P. O'Sullivan, *Geopolitics*, 1986, 5 et seq.; J.M. Picard, "International Law of Fisheries and Small Developing States: a Call for the Recognition of Regional Hegemony", *Tex. Int'l L. J.* 31 (1996), 317 et seq. (339).

215 H. Bull, *The Anarchical Society. A Study of Order in World Politics*, 1977, 205–229.

216 R.O. Keohane/ J. Nye, *Power and Interdependence: World Politics in Transition*, 2001, 44.

217 Keohane/ Nye, see above, 39; cf. also S. Huntington, "The Lonely Superpower", *Foreign Aff.* 78 (1999), 35 et seq. (39): "[T]he most powerful actors had an interest in maintaining the system."

218 D.P. Calleo, "The US Post-Imperial Presidency and Transatlantic Relations", *International Spectator* 1 (2000), 69 et seq. (74): "Henry Kissinger used to complain that he never knew what telephone number to call to discover what was Europe's policy. It would be interesting to know what the telephone number might be nowadays in Washington".

219 R.O. Keohane, *After Hegemony, Cooperation and Discord in the World Political Economy*, 1984, 34.

bodies the solution to the needs of all states; it has a stabilizing impact and contributes to the well-being of all.[220]

Keohane agrees with the starting point of the theory of hegemonic stability, i.e. the necessity of a hegemon to maintain international order.[221] But he doubts that there is a causal connection between hegemony and international cooperation, and he warns against considering economic power the decisive element of hegemony. In his opinion, a negative trade balance does not necessarily challenge the power supremacy of a state.[222] For him hegemony is to be defined as a temporary condition, conducive to the establishment of efficient institutions, which must subsequently evaporate — in order to ensure the participation of all states. From this point, international cooperation no longer depends on the existence of a hegemon, but becomes self-enforcing.[223] These views are supported by *Krasner*, who (as a representative of the regime theory) emphasizes that existing regimes may neutralize power asymmetries and power shifts.[224]

Nye criticizes the theory of hegemonic stability as a construct overly dependent on its definition of hegemony: "If hegemony is redefined as the ability and willingness of a single state to make and enforce rules, furthermore, the claim that hegemony is sufficient for cooperation becomes virtually tautological".[225] Thus *Nye* complements this theory with the core ideas of political economy, in order to identify the driving forces for hegemonic action — and in order to outline given power constellations. Such a step is based on the observation that a state which does not only elevate its own interests to "national interests," but also has empathy for others, faces fewer difficulties in setting international

---

220 J. Nye, *Bound to lead. The changing Nature of American Power*, 1990, 9 et seq.; R. Gilpin, *War and Change in World Politics*, 144, or see Calleo, see note 218, 79: "The combination of excessive power and governmental indiscipline is not good for the US, the West or the world in general. The US needs to be contained – not by a new enemy, but by an old friend".

221 Keohane, see note 219, 31.

222 Keohane, see note 219, 33, also cf. S.D. Krasner, "United States Commercial and Monetary Policy: Unravelling the Paradox of External Strength and International Weakness", in: P.J. Katzenstein (ed.), *Between Power and Plenty: Foreign Economic Policies of Advanced Industrial States*, 1978, 51 (68 et seq.).

223 Keohane, see note 219, 32.

224 S.D. Krasner, "Structural Causes and Consequences of regimes as intervening variables", in: id. (ed.), *International Regimes*, 1983, 355 (357).

225 Keohane, see note 219, 38 et seq.

rules.[226] Thus it appears only logical to develop a concept of hegemony tracing the structure of the hegemon's calculations. *Keohane* consequently resorts to defining hegemony as the will and ability to lead,[227] in order to outline the conditions under which a powerful state invests resources into creating rules and institutions.

cc. Hegemonic International Law

Several authors not only detect traces of hegemony in international law; but also include the ability to influence the creation of international law into their definitions of hegemony. Hence, one cannot speak of a hegemonic constellation within the international system unless a power shift among great powers establishes one country as *primus inter pares.* Such a position will then enable it to achieve its aims in the domains of economy, politics, military might, diplomacy and culture — including the codification of adequate rules in these areas.[228] This is the fashion in which superpowers have shaped international law in the past, prior to the moment when it became binding for them and for less influential states.[229] Thus, hegemony enables the dominant state to affect international law-making, i.e. it embodies the prerequisite for hegemony-based international law. Apart from this, (strengthened) hegemony represents a result of such laws, since they "petrify" the power disparities among states.

It must be borne in mind that international law alone cannot alter the prerequisites for hegemony, although the latter affects a state's orientation with respect to international law and *vice versa*. Only an international order based on human rights could restrain hegemony.[230]

The positions presented so far, share the assumption that international law is influenced by hegemony, without delving into the particularities of this process. Several authors have attempted to outline this procedure, by tracing how hegemonic leadership affects the stage of legal aim formulation and by identifying various channels of influence.

---

226 Keohane, see note 219, 131.

227 Keohane, see note 219, 39.

228 I. Wallerstein, *The Polititics of the World Economy: The States, the Movements, and the Civilizations,* 1984, 38

229 R. Gilpin, *War and Change in World Politics*, 1981, 29 et seq.

230 P.W. Kahn, "American Hegemony and International Law. Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order", *Chicago J. Int'l L.* 1 (2000), 1 et seq. (16 et seq.).

This is essentially conducive to the substantiating of a "hegemonic international law".[231] A very general definition of the main goal of hegemony in international law would thus be the adaptation of the latter to the objectives of the hegemon.[232] This raises the spectres of increasingly obscure international laws, of the increasingly incoherent conduct of both the hegemon and its subordinated states and of the increasing loss of legitimacy as regards international law-making.[233]

The shift of international law to a hegemony-based international law, i.e. the undermining of the principles of state equality and state sovereignty, will generate demands for the annulment of the principle of non-intervention (as regards the domestic affairs of states).[234] This goal can be achieved in three ways: First, states may establish interventionary practices outside the bounds of existing international law.[235] Second, the hegemon may refuse to comply with international treaties or regimes which prune its power, or enable "smaller" states to form coalitions and resist the will of the hegemon.[236] In such instances the latter can abstain from the signing and ratifying of a multilateral treaty, and accept merely those provisions as customary law which serve its interests. Or the hegemon can declare certain treaties to be an expression of the political will, but not a legally binding agreement. In addition to this, it can utilize existing international regimes and organizations to fortify its power,[237] or withdraw from them altogether.[238] The cancellation option also applies to international treaties. Then *other* states may

---

231 D. Vagts, "Hegemonic International Law", *AJIL* 95 (2001), 843 et seq.

232 Vagts, see above, 843.

233 G. Nolte, "The Single Superpower and the Future of International Law", ASIL Proceedings 94 (2000), 65.

234 Vagts, see note 231, 845.

235 Vagts, see note 231, 846: "Indeed, even without the United Nations' blessings we have projected military force into the areas outside Latin America such as Sudan, Afghanistan, Libya, and the former Yugoslavia. A true hegemon would have reverted to the practice of overt interventions and would have demonstrated its unapologetic and implacable will by not cancelling air cover for the Bay of Pibs invasion. Whatever changes that would require international law would have been made".

236 J. Joffe, "Who's afraid of Mr. Big?", National Interest of 1 July 2001, 43 (48); Vagts, see note 231, 843, 846.

237 On the use of this terminology see Vagts, see note 231, 846 et seq.

238 R.W. Cox, "Labor and Hegemony", *International Organization* 31 (1977), 385 et seq. (388).

be excluded from international institutions[239] or treaties by their verbal categorization.[240]

As a third path to inter-state interference hegemons can alter the general purview of a possible customary-law principle via the adequately modified implementation of the latter. Thus, "[a]bstention by a hegemonic power does seem to be enough to keep it from being general".[241]

The chances of non-hegemonic states escaping compliance as well are not helped by such tactics. Powerless states, unlike hegemons, are frequently strong-armed in compliance with treaty provisions, which had previously been accepted and elevated to customary law. In contrast to this, a powerful state can violate the latter and claim that its own conduct constitutes new international law.[242] This decisive amount of influence on international law-making becomes conspicuous in cases where legal developments (hypothetically) hinge upon the reaction of a single state.[243] Additional light was shed on this issue by models based on power asymmetries during the multifarious creation of customary law. Whereas one such model focuses on inter-state cooperation, another recently concentrates on "rogue states". The latter is founded on the assumption that there are fewer civilized states, which are less trustworthy as regards contractual compliance. As such, these "spoilers" create incentives for other states to follow suit.[244]

2. Law Creation through Leadership and the Role of Reaction

Hegemony represents a concept of power politics which — utilized within the community of states — affects interactions and consensus-forging within the latter. Hence stem its legal implications. It is an obvious fact that hegemony influences international law; no dissenting

---

239 Cf. Huntington, see note 217, 38.

240 Cox, see note 238, 412 et seq. The author quotes the United States withdrawal from the ILO as an example.

241 Vagts, see note 231, 847.

242 Vagts, see note 231, 847.

243 T.J. Farer, "Beyond the Charter Frame: Unilateralism or Condominium", *AJIL* 96 (2002), 359 et seq. (360), "The normative consequences of 9/11 are likely to depend on the what and how of United States action".

244 J.L. Goldsmith/ E.A. Posner, "A theory of Customary International Law", *U. Chi. L. R.* 66 (1999), 1113 et seq. (1136 et seq.).

opinions are to be found in the literature on this issue. Such an influence on international law certainly does not contravene the political quintessence of hegemony. Political influence is exerted to affect the manner in which political will is generated in other states, and ultimately any international legal order based on the will and actions of its "Member States" will also be affected. It is more difficult, however, to ascribe decisive causal weight to such interference within the process of international law-making, as intra-state political will is always a result of several factors. Apart from this, the scope of hegemony is also dependent on the reactions of targeted states.

What is certain, nevertheless, is the fact that hegemony rests on the ability of the hegemon to affect the perceptions and visions of other states. This could be interpreted as proof in support of *Triepel's* dominance-free notion of hegemony. States would actually subordinate themselves voluntarily, due to a change of the convictions they entertained prior to this time, without coercion. Such a process requires the hegemon to abstain from the latter, of course. It outlines requirements which the hegemon must meet in order to ensure compliance. This also applies to the nature and clarity of its goals, and to the means employed to achieve these. The means will almost certainly include the shaping of international law-making, within an order embodying an "international society". If the order, however, corresponds to an "international community," this kind of coercion-free hegemony will become problematic in cases where a consensus-based principle may fall prey to the agenda-setting privilege of a hegemonic state.

Another aspect of importance is the non-static, dynamic nature of hegemony, as the latter is a relational phenomenon (generated via interactions among states). This contributes to the difficulty of drawing a clear distinction between instruments creating and instruments maintaining hegemony. It also becomes less easy to determine when hegemony commences.

The least complicated categorization of instruments of hegemony focuses on their efficiency, i.e. their ability to affect the will of other states (when employed to this purpose). On these grounds *Triepel* has included a considerable number of instruments in his "starter-kit" for hegemons: from government statements and advice directed at other states (i.e. legally non-binding declarations, which nevertheless have an impact on international law as verbal assertions of hegemonic leadership),[245] via actions within international organizations, the (withholding

[245] See above, III. 1. a. aa.

of) signature of international agreements, the shaping of customary international law, to the self-serving interpretation of international law proper.[246]

This range of instruments not only illustrates the manifold manifestations of hegemony — it also underlines its varying levels of intensity.

It, furthermore, becomes clear that the ethical justification of hegemony is not a monolithic argumentation at all. Certain types of "advice" or "recommendations" offered by the hegemon may be justified, whereas more concrete and coercive interventions may not only be unethical, but downright illegal. The requirement for an ethical rationale, however, may be relativized if hegemony is understood (in the sense of *Keohane's* definition) as a temporary state of affairs, established in order to secure stability.

However, it has to be emphasized that such a concentration on devising justifications for hegemony neglects the question whether hegemonic leadership alters the ethical principles of the dominant state. Does power supremacy undermine the morality which subsequently determines action? Any apology of hegemony runs the risk of ignoring that its effects on an inter-state community may well exceed the immediate aims of the hegemon. This is due to the tendency of hegemony to affect the legal level and perpetuate the monopoly of the hegemon over international law-making. Such a development contravenes the principle of the sovereign equality of states, which does not represent a mere legal fiction, but an evolutionary goal of any international order whose aspirations include cooperation as well as stability. This may not inoculate such a system against change in the sense of power shifts, but it specifies hegemony as a power-based relation of leadership in which the hegemon is attempting to affect international law by increasing his own competencies, while avoiding the alienation of the "disciple-states".

3. The Stigmatization of States as a Concept of Leadership

a. Defining the Community Interests

The designations "rogue state" and "state sponsor of terrorism" are always used in the context of national security. They are employed to label states posing the most acute threats since the end of the Cold War.

---

246 Cf. Morgenthau, see note 56, 258.

With regard to the United States they have always revolved around states' support of international terrorism, the proliferation of WMD and their carriers (long-range or inter-continental ballistic missiles). In its annual reports on the *Global Patterns of Terrorism* the United States DoS has accordingly stressed the importance of counter-strategies and measures, which the United States and the international community should implement against these "rogue states" and "state sponsors of terrorism".

The utilization of these derogatory formulations also made it clear that the United States Government attributed negative traits to the designated states. The establishment of a dichotomy between the latter and the international community emphasized the exclusion of branded countries from the "family" of states.

The linkage of the "rogue state" label to the status of a "public enemy" of the United States became even more explicit through the publication of the new National Security Strategy in September 2002, when even pre-emptive military measures were no longer ruled out. This paved the way for the attainment of a goal, which was implicitly formulated in the mid-nineties of the preceding century.

Apart from all this, the (non-)utilization of these designations may shed light on the conduct of other states that has to be expected in their interaction with the state utilizing stimatization. Thus, the use of designations supports to predict other states reactions. The United States withdrawal from the ABM-Treaty can serve as an illustrative example in support of this hypothesis, as Washington justified its action with the threats posed by "rogue states" and the extraordinary circumstances they helped to create. Russia accepted, this rationale, in spite of the fact that opinions on the actual threat posed by "rogue states" diverge with respect to United States assessments. A withdrawal from the Treaty would have been possible without resorting to this designation, but the United States was fully aware of the fact that any other country employing the same terminology would not contest this kind of rationale; it would rather "accept" the threat assessment. It was, furthermore, possible for the United States to prevent an excessive deterioration of its political reputation in the counterpart-state (Russia) and the Member States of the international community in general.

The security-linkage of the defamatory labels embodies the manifestation of a clearly-defined goal: the identification of states demanding a different security strategy from all other countries, as the former do not strive towards the establishment and maintenance of world peace and international security. This implicit threat attribution, however, is

not only based on the "functional deviation" of designated states, but on the intentional exclusion of such states from the community of democratic countries.

This premeditated isolation is founded on the fact that each social order can only remain unchallenged if it advances the internalization of agreed upon values. Hence "civilized" states will consider the achievement of a certain "level of civilization" a decisive accession criterion.

It remains questionable, nevertheless, if there can be certain states within the international community which would be vested with the unilateral power to enforce the fulfillment of the accession criteria (i.e. values). The potential for contestation is amplified by the fact that the internalization of values has to rest on a procedure securing the respect for the values themselves; their being respected, i.e. the essence of a value will actually demand "compatible" procedures. Thus a democracy brought about by coercion would hardly live up to the ideal notion.

b. Stigmatization as a Legal Argument

The legal acts of the United States contain the reference "state sponsors of terrorism", but not the designation "rogue states". The latter is still being employed within international relations, in support of legal argumentation. This is also illustrated by the United States withdrawal from the ABM-Treaty and the new National Security Strategy.

The United States Government announced the cancellation of the ABM-Treaty on 13 December 2001.[247] Pursuant to article XI, the withdrawal was to become effective after six months,[248] but only if one of the Contracting Parties could prove that "extraordinary events related to the subject matter of this treaty have jeopardized its supreme inter-

---

[247] ABM-Treaty Fact Sheet, Statement by the Press Secretary, Announcement of Withdrawal from the ABM Treaty, 13 December 2001.

[248] Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of 26 May 1972, UNTS Vol. 944 No. 13446, "Art. XV: (1) This Treaty shall be of unlimited duration. (2) Each Party shall, in exercising its national Sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this treaty have jeopardized its supreme interest. It shall give notice of its decision to the other Party [during the] six month prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events notifying Party regards as having jeopardized its supreme interests".

ests". The United States argued, among other things, that "rogue states" had brought about a fundamental change, as regards its national-security interests. The statement announcing the withdrawal literally said that:

> "[t]he circumstances affecting United States national security have changed fundamentally since the signing of the ABM-Treaty in 1972. The attacks against the United States homeland on September 11 vividly demonstrate that the threats we face today are far different from those of the Cold War. [...]
>
> Today, our security environment is profoundly different.
>
> Today, the United States and Russia face new threats to their security. Principal among these threats are weapons of mass destruction and their delivery means yielded by terrorists and *"rogue states"*."[249]

Consequently a new threat assessment (centring on "rogue states") required different counter-strategies, and these could no longer be subordinated to provisions drafted in 1972.[250] Prior to this, the United States had attempted to effect a mutual withdrawal from the Treaty. This had been accompanied by warnings that Russia had better not stall United States missile tests (waiting in the pipeline) by dragging on negotiations on the withdrawal.[251] In the early stages of this process Russia had threatened to equip its ballistic missiles with multiple warheads in case of a unilateral United States withdrawal.[252] Russia justified this threat by declaring it would no longer feel obliged to honour the (never ratified) START-II Treaty, which prohibited the equipment of re-entry vehicles with multiple warheads.[253]

---

249 ABM Fact Sheet, Announcement of Withdrawal from ABM Treaty, 13 December 2001, see also Response to Russian Statement of United States ABM Treaty Withdrawal, Statement by the Press Secretary, 13 December 2001, <http://www.whitehouse.gov/news>.

250 Wolfowitz/ Kadish, Testimony Before the House Armed Services Committee on Ballistic Missile Defense, 19 July 2001, <http://www.defenselink.mil>, accessed on 14 August 2001; cf. also *International Herald Tribune* of 4 May 2001, "China Warns "Weak" Bush over Shield Plan;" Myers/ Glanz, "Pentagon set to accelerate Development of limited Missile Defense, ibid., 4; and "rogue states" of America, Why Bush Needs the Bad Guys", *The Guardian* of 12 March 2001.

251 *Keesing's Records of World Events* 47 (2001), 44429.

252 *Archiv der Gegenwart* 71 (2001), 44825.

253 On the debate also cf. the articles, "Strategisches Denken", Frankfurter Allgemeine Zeitung, 16 June 2001, 11, which warns of an excessive militari-

This snapshot of the negotiations indicates that the formulation "rogue states" was used as an argument to annul the validity of the ABM-Treaty.

Apart from this, the designation is often used in attempts to convince other states of the severe threat posed by "rogue states" and nuclear WMD, and the need for effective and timely counter-measures, as:

> "We must be prepared to stop "rogue states" and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends; [...] We must deter and defend against the threat before it is unleashed; [...] given the goals of "rogue states" and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. [...] We cannot let our enemies first. [...] But deterrence is less likely to work against leaders of "rogue states" more willing to take risks, [...] The overlap between states that sponsor terror and those that pursue WMD compels us to action. [...]".[254]

The scope of this new threat and the resulting urgency for action ultimately require the consideration of pre-emptive action, as the following excerpt reveals:

> "To for[e]stall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively. [...] The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather".[255]

These pre-emptive options require, of course, adequate measures and structures to increase security and readiness. Otherwise the ultimate goal of any such option (the elimination of threats to the United States and its allies) may not be achieved. It, furthermore, must to be stressed that each step of this sequence has to conform to the requirement that:

> "[t]he reasons for our actions will be clear, the force measured, and the cause just".[256]

---

zation of Bush's foreign policy. On the negotiations between Bush, Powell, Rumsfeld and the European Union, see "Schutzschild oder Mühlstein?", Frankfurter Allgemeine Zeitung, 11 June 2001, 16.

254 National Strategy for Homeland Security, 14 et seq.

255 Ibid., 15.

256 Ibid., 16.

Apart from this, several members of the House of Representatives had sponsored the *Joint Transatlantic Security and NATO Enhancement Resolution of 2002*, which emphasized the relevance of NATO for the fight against the threat posed by "rogue states". Article 12 (2) of the Resolution, which had been lodged with the United States Congress on 27 June 2000, stipulates that:

> "NATO must act to address new post-Cold War risks emerging from outside the treaty which are in the interests of preserving peace and security in the Euro-Atlantic area, including risks from *"rogue states"* and non-state actors possessing nuclear, biological, or chemical weapons and their means of delivery [...]".[257]

A few months prior to this, President Bush had welded North Korea, Iran and Iraq into an "axis of evil" during his State-of-the-Union Address on 29 January 2002,[258] while stressing that the war against terrorism would not be limited to these states. The United States Government actually underscored that the United States would do more than "deal" with those protecting, supporting and harbouring terrorists — it would engage in continuous, pro-active warfare against international terrorism. This means that all states had to consider their positions on this "battlefield," following 11 September 2001. Hence:

> "America is determined to prevent the next wave of terror. States that sponsor terror and pursue WMD must stop. States that renounce terror and abandon WMD can become part of our effort. But those that do not can expect to become our targets".[259]

It becomes increasingly clear that pejorative designations are part of an argumentation, which strives to convince foreign governments of the danger emanated by the labeled states. The new National Security Strategy (September 2002) only amplifies this finding, as "rogue states" and their inherent threat potential, i.e. aspirations to acquire (or the possession of) WMD, and the support of international terrorism, have

---

257 107 Congress, 2nd Session, H.R.E 468 of 27 June 2002, lodged by House Representatives Gallegly, Bereuterm, Lanots and Cox.

258 The President's State of the Union Address of 29 January 2002, <http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html>.

259 Cf. also, International Herald Tribune, 8 May 2002, "Cuba Makes Germs for Use in War, United States Says", or The Guardian Unlimited, 7 May 2002, "War on Terror May Extend to Cuba".

to be countered prior to its crossing the line from potential to concrete capacities being utilized.[260]

It cannot be confirmed with certainty that the adoption of these designations by other states indicates their sharing the United States' convictions. An argument in favour of this supposition could be that a state adopting this terminology (e.g. Russia upon the cancellation of the ABM-Treaty) is also convinced of the threats posed by "rogue states". Such a view, however, comes too close to the standpoint of the United States. One of the many purposes attached to such a transfer is more likely a threat perception equal to that of the United States or, if this is not attainable, other states should tolerate United States security measures, either due to the logically consistent and transparent premises on which they rest, or because there may not be any credible alternatives dealing with a threat which cannot be discarded entirely.

All in all, it can be said that the United States is resorting to the usage of "rogue states" in order to convince other states of the correctness of their identification of dangerous countries. This is, after all, the rationale for a special United States security strategy being employed with regard to such threats. Apart from this, the denotation "rogue states" is also utilized to create a legal framework for the United States National Security Strategy, or to alter the existing legal framework affecting the United States (such as the cancellation of the ABM-Treaty). The formulation is used to emphasize that there are countries which are fundamentally different, and hence entitled to a different kind of treatment. Thus, at the legal level, the formulation is being employed as a rationale for the fact that United States reactions to this kind of danger may not be restrained by certain legal provisions.

c. The International Response to the Classification of "rogue states"

Relations among states can only be considered an expression of leadership if the reactions of non-hegemonic states signal acceptance of this leadership. Reactions to a designation like a "rogue state" already indicate that the level of acceptance varies. Hence many of the states, which have appropriated this formulation may stress the fact that it is not their own invention. A country which does so implicitly is the United Kingdom, since the British Government stopped short of adopting the "axis

---

[260] The National Security Strategy of the United States of America, September 2002, 14-16.

of evil" in addition to "rogue state" — opting for "major states of concern" instead.

Other countries which use "rogue state" mainly for states listed as sponsors of terrorism by the United States include Israel, the Ukraine, Botswana and Sierra Leone. It has to be emphasized, nevertheless, that Israeli usage stands out for placing the modifier *rogue* under quotation marks. This does not entail that Israel opposes the isolation of designated states, which the United States Government intends to achieve by wielding this "weapon." Then, there are states like Afghanistan, Egypt, Ethiopia, India and Pakistan, which use the formulation "rogue states" for other countries than those listed by the United States Government. This does not denote a complete decontextualization, however, India, for example, has been demanding that Pakistan be included in the DoS-list.

Still other states, like France, Russia and China mark the designation "rogue state" as part of the United States security strategy, and not a product of domestically generated parlance. These states also frequently voice disagreement with the United States strategy towards "rogue states". Germany highlights its different lexical approach in a similar context, by not adopting the designation — while recognizing that it exists as a label for countries occupying a particular position in United States security policy. Berlin abstains from voicing explicit criticism of this practice.

These "routines" of all states were only shaken up in case of the introduction of the "axis of evil" — as can be demonstrated by the reaction of France.

If one remains at the lexical level, it can be said that pejorative designations for states do not muster enough support to substantiate a leadership relation. Such a (superficial) analysis would obliterate the distinction between linguistic denotations as a manifestation of hegemony and their validity as notions of international customary law. The latter semantic aspect, should it be embraced, would require the usage of the designations in conformity to that of the United States Government. Such a prerequisite, however, would obscure the fact that the hegemon is attempting to influence the will of other states prior to the formalized development of international law. This implies that the benchmarks for measuring the acceptance of hegemony have to be lowered to the level where acceptance is present, i.e. where non-hegemonic states do not criticize the usage of stigmatizing denotations. This may include cases where states adopt the latter, while underscoring their foreign origin (i.e. their embeddedness in the United States security strategy) and as-

cribing different or less (legal) weight to them. Another dimension complementing this issue lies in the fact that the usage of status-designations (as part of a hegemon's national security policy) does not necessarily demand universal application in order to be effective. It suffices that such formulations are recognized at the international level, upon discussing the threat potential of certain states. The benchmark will eventually be met if countries not only adopt a terminology to signal a lack of criticism, but rather if they use it in spite of divergent opinions on the acuteness of a threat and the quality of countermeasures to be taken. Against this kind of backdrop the usage of status-designations acquires particular prominence, up to a point where it influences the officials of even those states which do not share the assessment implied by the designations.[261]

A different insight into the (non-)existence of a hegemonic configuration is obtained when several states explicitly criticize the use of a derogatory denotation, as has been the case with the "axis of evil" (in contrast to "rogue states" and "state sponsors of terrorism"): no other state adopted the formulation. According to a merely pragmatic/lexical analysis, the conclusion would be that leadership acceptance has been withheld in this case. The usage of "rogue states" and "state sponsor of terrorism" contravene the finding above; their adoption by other states (even while qualifying them as part of the United States security strategy) may be conducive to positioning designated states in the spotlight of the security policies of the adopting countries, even via renouncing the United States threat assessment. This illustrates that pejorative formulations invariably influence the creation of the political will of other countries rather than the sending state.

The reference "axis of evil" has done so, too, in a direction divergent from the aims of the hegemonic state. Hence it cannot be considered a manifestation of hegemony, since the latter requires the acceptance by non-hegemonic states.

---

261 This mechanism is described in a different context by M. Lazarus-Black/A. Hirsch, "Performance and Paradox: Exploring Law's Rule in Hegemony and Resistance", in: id. (eds), *Contested States*, 1994, 1 (10): "Although some people seek inclusion in legal processes for specific ends, others 'get included' in the law quite implicitly through the legalities that hegemonically organize their lives. In both cases, people regularly appropriate the terms, constructs, and procedures of law in formulating opposition. For example, colonial subjects protested their subordination through domestic documents which incorporated, often inaccurately, the language of colonial law".

IV. The Creation of Second-Rate Legal Status in International Law?

The United States utilized its influence to stigmatize states to which it ascribed a considerable threat potential, and to influence the behaviour of third countries towards this group. These measures represent a manifestation of hegemony, since the unilateral classification of states is to expand the scope and range of actions by providing a legal rationale for it.

Within current debates on security the evolution of a second-rate legal status can be traced on the grounds of the new National Security Strategy of the United States and its attempts to create new categories of threats endangering a state. The National Security Strategy, for instance, justifies the application of military coercion to "rogue states" (as they pose an acute threat) even outside binding legal rules. This implies that the "rogue states" cannot claim the full protection of their sovereignty through the prohibition to employ violence in inter-state relations. Consequently, the legal status of targeted states would change into a new category, which isolates them from all other states, thus challenging the principle of sovereign equality. The war against Iraq in 2003, however, illustrates that so far the international community has not accepted a reduction for justification for military intervention as contained in the National Security Strategy.

The listing of countries as "state sponsors of terrorism" also begs the question of how much of an impact this unilateral identification and punishment process can have on international efforts to combat terrorism.

1. Pre-emptive Self-Defence against "rogue states"

a. The New National Security Strategy

President Bush has repeatedly stressed the acute threat posed by "rogue states", his State-of-the-Union Address of February 2002 being a particularly explicit example of this.

This danger is to be countered by the new National Security Strategy (September 2002) and its broadened and deepened focus on "rogue states". The Strategy seems to consolidate a "paradigm shift," which

had been sporadically implied in previous government statements.[262] This policy shift will not stop short of preventive military measures:

> "For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. [...] We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. [...] The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack".[263]

This contravenes Article 2 (4) of the UN Charter, which prohibits states to threaten or employ violence in inter-state relations, with the aim to affect the territorial integrity and political independence of another state or to violate any other goal of the United Nations. In addition to this, the ICJ has explicitly outlined the purview of this provision in its rulings in the Nicaragua Case.[264] According to the Court, Article 2 (4) embodies the benchmark for the admissibility of inter-state military violence.[265] The UN Charter recognizes two exceptions to the prohibi-

---

262 M. Weller, "The Changing Environment for Forcible Responses to Non-traditional Threats", ASIL Proceedings 92 (1998), 177 et seq. (184 et seq.), on changes in United States foreign policy after 11 September 2001 also W.R. Mead, *Special Providence, American Foreign Policy and how it changed the World*, 2002, 56 et seq., 79 (306 et seq.); Nye, see note 220, who proposes a "strategy based on Global Public Goods," which would rest on the following six issues, 147: "(1.) Maintain the balance of power in important regions, (2.) Promote an open international economy, (3.) preserve international commons, (4.) Maintain international rules and institutions, (5.) Assist economic development, (6.) Act as convenor of coalitions and mediator of disputes", see also his interview for the Frankfurter Allgemeine Zeitung, 23 April 2003, 5: "Notwendig ist eine Diskussion über das Völkerrecht", zum Verhältnis zwischen Unilateralismus und Multilateralismus.

263 See note 260, section V, 15.

264 Case Concerning Military and Paramilitary Activities in and against Nicaragua ICJ Reports 1986, 14 et seq. (100 et seq. paras 190-192); or ILCYB 1966-II, 247, for a reference to the ILC Comment on article 50 of the Draft on treaty law.

265 Case Concerning Military and Paramilitary Activities in and against Nicaragua, see above, 102, para. 193: "The general rule prohibiting force allows for certain exceptions", also cf. Jennings/ Watts, see note 66, 8, (§ 2).

tion: one being the right to self-defence (Article 51) and the other the use of violence authorized by the UN Security Council (Chapter VII).

The United States National Security Strategy outlines a pre-emptive right to self-defence against "rogue states", while failing to delineate whether counter-measures against "rogue states" could be based on a resolution by the UN Security Council, just as it fails to delve into military interventions founded on a violation of resolutions, or the activation of a mandate contained in past resolutions.[266] [267]

The National Security Strategy conveys the impression that it does *not* attempt to push back the boundaries set by existing or future resolutions. The notion of "rogue states" is being employed exclusively to justify self-defence against the threat these states pose. Thus, the designation can only be employed as an instrument of hegemony within existing laws on self-defence.

The validity of the right to self-defence against an armed attack has been enshrined in Article 51 of the UN Charter.[268] Another explicit rule on the prerequisites for self-defence dates back to 1841. The then incumbent United States Secretary of State *Daniel Webster* said in connection with the Caroline Case that: "[i]t will be for the Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[269] The ICJ confirmed the validity of the criteria of "necessity" and "proportionality" — contained in *Webster's* formulation — during its deliberations on the Nicaragua Case in 1986.[270] On the grounds of the definition of aggres-

---

266 The air force operations of 2 August 2001 in Northern Iraq were denoted by President Bush as "fully in accordance with established allied war plans," *Keesing's Records of World Events* 47 (2001), 44320.

267 Cf. the International Herald Tribune, of 11 October 2002, 4 and 8, also cf. the Press Statement on the signing of the "Iraq Resolution" of 16 October 2001, at <http://www.whitehouse.gov/news>, accessed on 17 October 2002.

268 Case Concerning Military and Paramilitary Activities in and against Nicaragua, see note 264.

269 Cf. D. Webster's correspondence on 24 April 1841, printed in: M. Dixon/ R. McCorquodale, *Cases and Materials on International Law*, 2000 (562), also cf. Shaw, see note 84, 787-791.

270 Case Concerning Military and Paramilitary Activities in and against Nicaragua 1986, 14 et seq. (103 para. 194), cf. also Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226 et seq. (245 para. 41). For a detailed account of the standing of the right of self-defence in legal provi-

sion by the UN General Assembly, the ICJ clarified that not every violation of Article 2 (4) of the UN Charter, but only an *armed attack* justified self-defence.[271]

For an assault to qualify as an "armed attack" the assailant does not necessarily have to be a state, despite the fact that such a constellation underlies Article 51 of the UN Charter.[272] Within its ruling on the Nicaragua Case, the ICJ had come to the conclusion that even the deployment of armed bands or groups into another country, which has been conducted "by or on behalf of a state,"[273] may provide a cause for self-defence,[274] according to the Assembly's definition.

Following the adoption of S/RES/1368 (2001) of 12 September 2001, i.e. the "inherent right of self-defence" mentioned in its Preamble, there has been an increase in those who focus on the impact of an attack (the damage and the harm caused) in order to determine if it constitutes an armed attack, or equals its weight.[275] The operative section of Resolution 1368, however, refers to the assaults as "terrorist attacks" — not armed attacks. Hence this Resolution cannot answer the question at

---

sions on peace-keeping and peace-enforcement, see: N. Krisch, *Selbstverteidigung und kollektive Sicherheit*, 2001.

271 Case Concerning Military and Paramilitary Activities in and against Nicaragua, 14 et seq., (103 para. 195).

272 Shaw, see note 84, 789.

273 A/RES/3314 (XXIX) of 14 December 1974, Annex, article 3 lit. (g).

274 Case Concerning Military and Paramilitary Activities in and against Nicaragua, see note 264, "The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces", on the attribution of private acts of violence see the various constellations proposed by C. Kreß, according to the level of state involvement, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater*, 1995, 129 et seq.

275 C. Walter, "Zur völkerrechtlichen Beurteilung der Reaktion der USA auf die Terroranschläge auf New York und Washington", (not yet published) 4, 5. For a different opinion see C. Stahn, "International Law at a Crossroads? The Impact of September 11", *ZaöRV* 62 (2002), 183 et seq. (214), who interprets the Resolutions 1368 (2001) and 1373 (2001) as having clearly subsumed terrorist acts among armed attacks in the sense of Article 51 of the UN Charter.

which point a terrorist attack meets the "benchmarks" implied in Article 51 UN Charter.

The NATO-Council has been more explicit in its actions, as it decided to evoke article 5 of the *Washington Treaty* (1949) on 12 September 2001, should it be proven that the attacks were conducted by out-of-area perpetrators — which was substantiated by 2 October 2001. [276] Five days later the United States commenced Operation *Enduring Freedom*, while evoking Article 51 UN Charter as a rationale.

Although the assailant, therefore, does not has to be a state, the armed attack serving as a *casus belli* must be attributable to the state against which measures of self-defence are initiated. [277]

In order to prevent an escalation of violence, Article 51 of the UN Charter provides protection for both the assailant and the defender. But these mechanisms are based on the assumption that self-defence has been triggered by a concrete armed attack. Article 51 does neither contain a rationale for self-defence when no attack has occurred, nor does it explicitly limit self-defence to cases of ongoing armed attacks. The article also fails to set out a "statute of limitation" after whose expiry self-defence is no longer acceptable.

In contrast to this, the United States National Security Strategy attempts to justify the need for pre-emptive measures against "rogue states", due to their unpredictability. Another reason lies in the assessment that Cold-War-type deterrence will not work in such cases, since governments of "rogue states" are less risk-averse.[278] Hence the criteria on proving an "imminent threat" (in absence of a concrete armed at-

---

[276] Doc. S/946 of 7 October 2002; *Keesing's Records of World Events* 47 (2001), 44391; cf. the resolutions empowering the President to undertake measures against those responsible for the attacks, Pub.L. 107-40, Section 1 and 2 of 18 September 2001, see also D. Abramowitz, "The President, the Congress, and the Use of Force: Legal and Political Considerations in Authorizing Use of Force against International Terrorism," *Harv. Int'l L. J.* 43 (2002), 71 et seq. (74 et seq.).

[277] New benchmarks for the attributability of terrorist acts by private actors have been developed by C. Tietje/ K. Nowrot, "Völkerrechtliche Aspekte militärischer Maßnahmen gegen den internationalen Terrorismus", *Neue Zeitschrift für Wehrrecht* 44 (2002), 1 et seq., these authors modify the essential criterion of effective control, thus, each state action, which is obviously executed in support of terrorism and enables private actors to launch terrorist attacks, entails that the state will be held accountable for, if these attacks should meet the criteria of Article 51.

[278] See note 260, 13, 15.

tack), as stipulated by current international law, can no longer be considered valid. The solution is "[...][to] adapt the concept of imminent threat to the capabilities and objectives of today's adversaries".[279] Another aspect influencing this stance is the assumption that "rogue states" produce and possess WMD, which could be passed on to terrorist organizations.

The rationale supporting the use of pre-emptive measures rests on three pillars: (1) the unpredictability of "rogue states" (making an attack at any time a likely possibility), (2) their continuous support of international terrorism and (3) their aspirations to acquire WMD.[280]

The question if and when a state may resort to pre-emptive defence is a hotly debated issue. Differing weight is attached to different state positions (interests) in military conflicts. On the one hand, the option of self-defence (according to Article 51) is emphasized as regards the attacked state, or the state facing an "imminent threat," as the latter leaves no time for the country to wait until it has been attacked.[281] On the other hand, it is stressed that pre-emptive self-defence is at best an exception to the "right to self-defence" set out by Article 51. The latter, then, is likewise an exception — this time to Article 2 (4) of the UN Charter. Thus, pre-emptive self-defence is not a right of the *same* rank as the right to self-defence; it can merely be accorded under specific conditions.[282] Following the terrorist attacks of 11 September 2001, a

---

279 Ibid., 15.

280 Ibid., 14.

281 For a thorough account on the defence of state interests without an imminent threat, see D.W. Bowett, *Self-Defence in International Law*, 1958, 118 et seq.; also I. Brownlie, *International Law and the Use of Force by States*, 1963, 257 et seq. (275 et seq.); on the state of emergency, see 376, then cf. R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, 1963; T.M. Franck, *Fairness in International Law and Institutions*, 1995, 267; id., "When, if ever, may States deploy Military Force without Prior Security Council Authorization", *Singapore Journal of International and Comparative Law* 4 (2000), 362 et seq. (368 et seq., 373—376).

282 On the proposal to distinguish between interceptive self-defence, upon the imminent threat of an armed attack and anticipatory self-defence, in cases where an armed attack is foreseeable, cf. Y. Dinstein, *War, Aggression and Self-defence*, 2001, 190, on the distinction between pre-emptive self-defence and preventive warfare. See Verdross/ Simma, see note 66, 288 (§ 471); H. Kelsen, *The Law of the United Nations. A critical Analysis of its Fundamental Problems*, 1950, 792; Shaw, see note 84, 790; L. Henkin, *How*

gradually increasing divergence could be observed between United States and European interpretations of Article 51 of the UN Charter. Whereas United States international law experts advocate a conceptual stretching of the right to self-defence,[283] their European counterparts tend to favour a restrictive interpretation of Article 51.[284]

Nations Behave, 1979, 143; Jennings/ Watts, see note 56, 421 (127): "The better view is probably that while anticipatory self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and this is the only way of avoiding that serious threat, [...]."; Doehring, see note 53, item 764, considers a state's right to self-defence subject to restraints only if the United Nations can provide better protection; P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 1997, 314; W.G. Sharp, "The Use of Armed Force Against Terrorism: American Hegemony or Impotence?", *Chicago J. Int'l L.* 1 (2000), 37 et seq. (46 et seq.); also G. Zimmer, *Terrorismus und Völkerrecht, Militärische Zwangsanwendung, Selbstverteidigung und Schutz der internationalen Sicherheit*, 1998, 54 et seq.; and M. Byers, "Terrorism, the Use of Force and International Law after 11 September", *ICLQ* 52 (2002), 401 et seq.

283 For a very extensive account see W.M. Reisman, "In Defense of World Public Order", *AJIL* 95 (2001), 833 et seq.; as well as Franck, see note 281, 368 et seq., see also for an encompassing argument in favour of pre-emptive self-defence in the case of Computer Attacks on Critical National Infrastructure, E.T. Jensen, "Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self Defense", *Stanford J. Int'l L.* 38 (2002), 207 et seq. (229 et seq. to 240); for a restrained position J.I. Charney, "The use of force against terrorism and international law", *AJIL* 95 (2001), 835 et seq.; also T.M. Franck, "Terrorism and the Right of Self-Defense", *AJIL* 95 (2001), 839 et seq.; C. Greenwood, "International Law and the War against Terrorism", *Int'l Aff.* 78 (2002), 301 et seq. (312 et seq.); S. D. Murphy, "Terrorism and the Concept of "Armed Attack"", *Harv. Int'l L. J.* 43 (2002), 41 et seq. (47—50); H.H. Koh, "The Spirit of Laws", *Harv. Int'l L. J.* 43 (2002), 23 et seq. (27 et seq).; also the different opinions in the ASIL-Insights, at <http://www.asil.org/insights.htm> which contains contributions by F.L. Kirgis, R. Wedgwood, J. Cerone, A. Montalvo, J.J. Paust, W. Hall, G.H. Fox, S. Mahmoudi; for a well differentiating account on the functions of the ICC in the war against terrorism, see A.P. Rubin, "Legal Response to Terror: An International Criminal Court?", *Harv. Int'l L. J.* 43 (2002), 65 et seq. (69), also cf. the earlier text by M. Reisman, "International Legal Responses to Terrorism", *Houston Journal of International Law* 22 (1999), 3 et seq.

284 For a detailed account of the legal consequences of 11 September 2001, see C. Tomuschat, "Der 11. September 2001 und seine rechtlichen Konsequen-

The strategy to justify military operations, prior to an armed attack, is not new, however, in 1956 Israel employed this argumentation to provide a rationale for measures taken against Egypt. In an extraordinary UN Security-Council session (convened at the insistence of the United States), Israel accused Egypt of having taken up arms prior to its attacks, thus actually necessitating Israeli measures to prevent more violence.[285] Israel did not explicitly resort to the imminent threat scenario as a justification for self-defence.[286] Australia, Iran, the Soviet Union, the United States and Yugoslavia consequently criticized Israeli measures as a violation of the ceasefire concluded between Israel and Egypt on 24 February 1949. They demanded the withdrawal of Israeli troops and a cessation of armed hostilities.[287] One United States sponsored resolution to this purpose ended up being defeated by France and

---

zen", *EuGRZ* 28 (2002), 535 et seq., and on the issue of self-defence 540; A. Cassese, "Terrorism is also Disrupting some Crucial Categories of International Law", *EJIL* 12 (2001), 993 et seq. (995 et seq.), on the challenge to international law posed by counter-terrorism after 11 September 2001; see, Y. Sandoz, "Lutte contre le terrorisme et droit international: risque et opportunités", *SZIER* 3 (2002), 319 et seq. (335); S. Oeter, "Terrorismus — ein völkerrechtliches Verbrechen? Zur Frage der Unterstellung terroristischer Akte unter die internationale Strafgerichtsbarkeit", *Die Friedenswarte* 76 (2001), 11 et seq. (23 et seq.); T. Bruha/ M. Bortfeld, "Terrorismus und Selbstverteidigung", *Vereinte Nationen* 49 (2001), 161 et seq. (162-166); J. Delbrück, "The Fight Against Global Terrorism: Self-Defence or Collective Security as International Police Action? Some Comments on the International Legal Implications of the 'War against Terrorism'", *GYIL* 44 (2001), 9 et seq. (17 et seq.); C. Walter, see note 275, 4-7; M. Krajewski, "Terroranschläge in den USA und Krieg gegen Afghanistan", *Kritische Justiz* (2001), 363 et seq. (377 et seq.), also see the contributions by A. Pellet at <http://www.ejil.org/forumWTC> bearing the title "No, this is not 'War'"; G. Gaja, "In What Sense was there an "Armed Attack"?", *ZaöRV* 62 (2002), 183 et seq. (216 et seq.); F. Mégrét, "'War'? Legal Semantics and the Move to Violence", *EJIL* 13 (2002), 361 et seq. (392 et seq.), for a more differentiating account see R. Wolfrum, "Irak — eine Krise auch für das System der kollektiven Sicherheit", 2003, at http://www.mpiv-hd.mpg.de/inome/inome.cfm, also E. Denninger, "Anmerkungen zum Terrorismusbekämpfungsgesetz", *Aus Pol. & Zeitgesch.*10 (2002), 22 et seq. (24 et seq.).

285 SCOR 11th Year 1956, 748 Mtg of 30 October 1956.

286 SCOR 11th Year 1956, 748 Mtg of 30 October 1956.

287 SCOR 11th Year, 748 Mtg of 30 October 1956, the United States, 3 (No. 11), the Soviet Union, 5 (No. 29), Australia, 6 (No. 35), Iran, 5 (No. 27), Yugoslavia, 4 (No. 22 et seq.).

the United Kingdom in the UN Security Council.[288] The same fate was shared by an analogous Soviet proposal.[289] Following this deadlock, the Security Council resorted to a procedure which had yielded the Uniting-for-Peace Resolution (A/RES/377 (V) of 3 November 1950) and transferred the matter to the General Assembly.[290] The latter was convened for several emergency special sessions, which led to the adoption of an adequate resolution on 1 November 1956, with 65 votes in favour, 5 votes against and 6 abstentions. The Resolution called upon all parties to sign a truce and to withdraw their troops from foreign territory.[291]

In 1962 the United States attempted to prevent the further armament of Cuba (especially its being equipped with long-range ballistic missiles by the Soviet Union) by using the self-defence motive.[292] This case developed into a situation where violence could have been used to avert a perceived acute threat. This was not threatened or done, however, on the grounds of an explicitly formulated right to pre-emptive self-defence.

Israel would resort to this rationale *expressis verbis* in 1967, after Egypt had blocked the South Israeli port of Eilat and concluded a military cooperation treaty with Jordan.[293] The Security Council eventually condemned the conflict as a threat to regional peace, while appealing to both warring parties to sign and implement a truce, but it did not challenge Israel's argument that it had the right to pre-emptive defence.[294]

As regards the preceding acts of violence prompting Israel's response, there are several analyses indicating that the response does not qualify as pre-emptive self-defence. Should the blockade of Eilat port be considered an act of violence, then Israel's reaction would count as

---

288 Doc. S/3710 of 30 October 1956.

289 SCOR 11th Year, 750 Mtg of 30 October 1956, 5 (No. 23), Text of the Resolution at SCOR 11th Year, 729 Mtg of 26 June 1956.

290 SCOR 11th Year, 752 Mtg of 2 November 1956.

291 GAOR 1st Emergency Special Sess., 562 Plenary Mtg of 1 November 1956, 13, 34, Doc. A/PV.562.

292 See the Proclamation of the President, printed in: *AJIL* 57 (1966), 512 et seq.

293 Shaw, see note 84, 789.

294 On the position of Israel cf. SCOR 22nd Year, 1342 Mtg of 24 May 1967, 7, (Nos. 56-68) and SCOR 22nd Year, 1343 Mtg of 29 May 1967, 15 (No. 179); S/RES/233 (1967) of 6 June 1967, S/RES/234 (1967) of 7 June 1967, S/RES/235 (1967) of 9 June 1967, S/RES/237 (1967) of 14 June 1967, S/RES/240 (1967) of 25 October 1967.

self-defence proper.[295] This does not "justify" Israel's actions; it merely points out the fact that this case may not be adequate to ensure the answer to the question when pre-emptive self-defence would be considered lawful. This may also explain why Israel was not condemned by the United Nations for exercizing its right to self-defence.[296]

Things become even less clear in the case of Iraq's claim to engage in pre-emptive self-defence against Iran in 1980. On the one hand, Iraq had denoted Iran as a threat, after this country had declared the Algeria Treaties (1815/1816) null and void. But on the other hand, Iraq denied having initiated the armed conflict, by stating it was engaging in self-defence.[297]

In contrast to this, Israel fell back on the pre-emptive self-defence against an imminent attack motive,[298] upon destroying Iraq's *Osirak* nuclear reactor on 7 June 1981. The Israeli Government justified the air strikes with (the threatened) increased capability of Iraq to launch attacks against Israeli targets, once the reactor had been activated in the near future. Therefore Israel could not wait for Iraq to develop its nuclear bombs.[299] It had been forced to engage in an "act of self-preservation," according to the "inherent right of self-defence," went the argumentation of representatives of the UN Security Council.[300] The preparing of a nuclear war was, they continued, an armed attack along the lines of Article 51 of the UN Charter.[301] These detailed elaborations did not prevent several countries (e.g. Egypt, India, Indonesia, Japan, Pakistan, Spain) from condemning the military intervention of Israel.[302] They argued that Article 51 was restricted to cases of actual,

---

295 Shaw, see note 84, 789.

296 Shaw, see note 84, 789.

297 SCOR 35th Year, 2250 Mtg of 15 October 1980, or for a similar position 3, (No. 21), 5 (No. 39), SCOR 35th Year, 2251 Mtg of 17 October 1980, 6 (No. 49).

298 SCOR 36th Year, 2280 Mtg of 12 June 1981, 8 et seq. (Nos. 58 f, 68), 10 (Nos. 86-92), a particular spin to the Israeli position has been detected by J.A. Frowein, "Der Terrorismus als Herausforderung für das Völkerrecht", Speech for the Siemens-Foundation on 3 July 2002, (unpublished manuscript), 16.

299 See the Letter of Israel's Permanent Representative of 8 June 1981, Doc. S/14510 of 8 June 1984.

300 UNYB 1981, 277.

301 Doc. S/14576 of 29 June 1981.

302 On the debates in the Security Council cf. SCOR 2288 Mtg, Vote 14 (No. 151), for a condemnation of the violence, see letter dated 9 June 1981 from

and not anticipated, armed attacks.[303] In S/RES/487 (1981) of 19 June 1981 the UN Security Council thus unanimously branded Israel's strike as a violation of the UN Charter and the norms of international conduct.[304] In November 1981 the UN General Assembly also adopted a Resolution (with 109 votes in favour, 2 against and 34 abstentions) emphasizing the grave consequences of Israel's action for the maintenance of international peace, and especially the peaceful use of nuclear energy and the system of non-proliferation of nuclear weapons.[305] The IAEA likewise condemned the air strike and decided to cut its technical assistance to Israel.[306]

These cases indicate that there is basically no consensus among states that pre-emptive self-defence is admissible. The elaborate justifications of each intervening country, or its attempts to prove that its actions had not been conducted pre-emptively, tend to delineate an awareness that self-defence without an actual armed attack represents an exception to the rule. An exception to be made only under additional special circumstances, as far as international law is concerned. The Osirak case furthermore proves that neither the UN's Security Council nor the General Assembly adopted Israel's rationale at the expense of their reluctance to recognize the lawfulness of pre-emptive measures.

A slightly different verdict might be reached, however, in cases where a country has fallen prey to a terrorist attack. Here the right to self-defence might be accorded more liberally. Such a line of reasoning, focusing on preceding acts of (political) violence as a basis for pre-emption, was employed by the United States in 1986. Air strikes against Libya had thus been necessary due to this country's repeated attacks against United States targets and nationals, and the endeavour to prevent any further assaults.[307] The UN Representative justified the strikes as the exercise of the right to self-defence in the Security Council, since:

---

the Permanent Representative of Egypt see Doc. A/36/314-S/14513 of 10 June 1984, by Japan Doc. S/14512 of 9 June 1981, by Pakistan Doc. S/14517 of 11 June 1981, by India Doc. S/14523 of 12 June 1981, by Indonesia Doc. S/14536 of 15 June 1981.

303 UNYB 1981, 277.

304 S/RES/487 (1981) of 19 June1981, item 1.

305 A/RES/36/27 of 13 November 1981, item 8.

306 See telegram dated 12 June 1981 from the Director General of the IAEA to the President of the Security Council, Doc. S/14532 of 15 June 1981.

307 Doc. S/17990 of 14 April 1986.

> "The United States took these measures of self-defense only after other repeated and protracted efforts to deter Libya from its ongoing attacks against the United States in violation of the Charter".[308]

Some African states, the non-aligned countries and the Soviet Union nevertheless condemned the United States air strikes and British support as an aggression against Libya.[309] The United States upheld the view that the threat of an armed attack was particularly acute, as Libya had executed several terrorist attacks.[310] Another element of the United States rationale was that these assaults had repeatedly violated the prohibition to threaten or use violence in international relations, according to Article 2 (4) of the UN Charter. The United States, however, did not equate a single (or all) terrorist attack(s) with an armed attack.[311] The UN Security Council was nevertheless divided on the issue and a resolution condemning the United States military action had been proposed, but it was not adopted due to the resistance of France, the United Kingdom and the United States. This was induced to the General Assembly passing a resolution with 79 votes in favour, 28 votes against and 33 abstentions.[312]

This, once again, illustrates the contentious nature of pre-emptive military interventions. In this particular case, the precarious foundation for anticipatory military measures also rests on the fact that — although Libya had repeatedly employed violence against the United States — these attacks never reached the scope of a full-spectrum military operation. Thus, it remains questionable if such below-the-threshold assaults should be used to evoke the right to self-defence, as outlined in Article 51 of the UN Charter, since these insufficient actions are instrumentalized to construct an imminent threat in absence of a concrete armed attack. Such a substitution will hardly suffice to establish pre-emptive self-defence as a lawful undertaking.

---

308 M.N. Leich, "Contemporary Practice of the United States relating to International Law", *AJIL* 80 (1986), 612 et seq. (633).

309 The position of the Soviet Union is contained in Doc. S/17999 of 15 April 1986, of India in Doc. S/17996 of 15 April 1986, cf. the Annex of the Communiqué of the non-aligned states, Ghana in Doc. S/18002 of 16 April 1986, Nicaragua in Doc. S/18004 of 16 April 1986, Burundi in Doc. S/18006 of l6 April 1986.

310 Leich, see note 308, 612, 632 et seq.

311 Leich, see note 308, 633.

312 Also cf. G.F. Intoccia, "American Bombing of Libya: An International Legal Analysis", *Case W. Res. J. Int'l L.* 19 (1987), 177 et seq. (180 and 189).

This very issue has been addressed by the ICJ in its deliberations on the Nicaragua Case. The Ruling stipulates that even repeated violent assaults which do not qualify as a (full-spectrum) armed attack may not be evoked to justify self-defence. It also does not prohibit, however, that the assaulted state undertakes armed counter-measures, after having suffered attacks below-the-threshold of armed attacks. It must be borne in mind against such a backdrop that the ICJ calibrated these findings to suit a concrete situation, where the United States justified its military action against Nicaragua on the grounds of aiding El Salvador within the framework of a collective self-defence (security) system. The ICJ responded to this by hinting that collective defence measures would have been superfluous if El Salvador had undertaken any counter-measures on its own behalf.[313] The ICJ, however, did not specify whether such measures by El Salvador would have been acceptable as self-defence. This implies that a violation of Article 2 (4) of the UN Charter does not by itself justify the evocation of Article 51 by another state, as far as this Court is concerned.

This state of affairs could change if a country argues that it is facing an imminent threat or terrorist attack, and that the materialization of these threats was highly probable due to past severe (terrorist) attacks. Hence, it becomes important to analyze a country's past conduct: if it has suffered a severe (terrorist) attack without launching retaliatory measures in the past, it will be difficult to demand restraint in the face of another attack by the same perpetrator. Other standards will apply to cases where counter-measures have been taken, which ended the aggression. A repeated evocation of this stifled aggression, upon building the case for an imminent threat by the same perpetrator, would violate the principle of proportionality in Article 51. According to this principle, measures of self-defence must be fitted to the ending of a concrete, ongoing attack. This principle is even more important for cases where the connection between past counter-measures and the culpability of the "aggressor" cannot be fully substantiated. Thus the right to pre-emptive self-defence represents an issue which has to be resolved on the basis of concrete situations, rather than past acts of violence.

In this context binding international law does not allow for the construction of an imminent-threat scenario on the grounds of a state's possession of WMD alone. In its Opinion on the Legality of the Threat or Use of Nuclear Weapons the ICJ stated that an imminent threat is

---

313 Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, 14 et seq., (110 para. 210).

given when the danger of threatened violence against a country's territorial integrity or political independence is credible. The intentions of the potential aggressor have to be clearly visible, in order to violate Article 2 (4) of the UN Charter by its existence and/or execution.[314] Such a violation of Article 2 (4) requires that a state in possession of WMD threatens to use them.

In this context it remains contentious, however, if threats which do not represent a clear violation of Article 2 (4) still entitle a country to pre-emptive self-defence against an imminent attack. The ICJ has not addressed this question. It has made it clear, nevertheless, that the possession of WMD alone does not constitute an imminent threat. The latter is given only when a threat to use WMD (and their actual usage) comprise a clear violation of Article 2 (4) of the UN Charter.

Against this backdrop it becomes clear that the endeavours of the United States National Security Strategy to lower the benchmarks for determining an imminent threat (in order to improve counter-measures targeting "rogue states") represents a substantial expansion of the right to self-defence. The latter would be applicable not only to concrete, but anticipated threats, by resorting to a rationale which has not been used in justifications of pre-emptive self-defence so far.

b. The War against Iraq

The United States-led coalition commenced Operation *Iraqi Freedom* on 21 March 2003.[315] By 9 April 2003 troops had reached Iraq's capital and were dismantling Hussein's statue in the vicinity of the "Palestine" Hotel.[316] The military campaign against Iraq constitutes the first case where full-spectrum military operations have been launched against a "rogue state". The United States rationale for this war, however, did not centre on this designation, but on existing argumentation, which had been recognized and tolerated by international law.[317] Thus it appeared

---

314 Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226 et seq. (246 et seq. para. 48).

315 CENTCOM Operation Iraqi Freedom Briefing on 22 April 2003, at http://www.centcom.mil/CENTCOMNews/Transcripts/20030419.htm, accessed on 22 May 2003.

316 J. Habermas, "Was bedeutet der Denkmalsturz?", Frankfurter Allgemeine Zeitung, 17 April 2003, 33.

317 Cf. Powell's speech at the Security Council of 5 February 2003, Doc. S/PV.4701, is in accordance with the draft of the "USA Patriot Act II" of 7

that several argumentations were being pursued by the United States throughout 2002, with the same amount of legitimating weight. Prior to the beginning of the war in 2003, however, official statements of the United States Government focused on Resolution 1441, issued by the UN Security Council on 8 November 2002.[318] This Resolution represented the last in a chain of Security Council Resolutions, such as S/RES/661; 678; 687 and 1284,[319] granting Iraq one last chance to avoid any "serious consequences" by the fulfilment of its international obligations.[320] This argumentation complemented efforts to substantiate a "material breach" of Resolution 687, which establishes a truce between Iraq and Kuwait, and of Resolution 678, which enters the "states cooperating with Kuwait"[321]. The constitution of such a material breach would then reactivate the mandate to undertake military countermeasures, contained in Resolution 687.[322] This rationale, ranging up to Resolution 1441, became predominant compared to efforts justifying a right to pre-emptive self-defence on the grounds of Iraq being a "rogue state", which would have transcended the boundaries of international law. Resolution 1441 in particular became the basis to demand Iraq's

---

January 2003, especially the findings in Sec. 1302, which do address the situation in Iraq.

318 S/RES/1441 (2002) of 8 November 2002.

319 S/RES/661 (1990) of 6 August 1990, S/RES/678 (1990) of 29 November 1990, S/RES/687 (1991) of 3 April 1991, S/RES/1284 (1999) of 17 December 1999.

320 S/RES/1441 (2002) of 8 November 2002, item 13 of the operative section (based on Chapter VII of the UN Charter), also see Powell, see note 317: "Resolution 1441 (2002) was not dealing with an innocent party, but with a regime that the Council had repeatedly convicted over the years. Resolution 1441 (2002) gave Iraq one last chance to come into compliance or to face serious consequences.", see also the statement given by Powell at the Security Council on 14 February 2003, <http://www.un.int/usa/03>, accessed 17 February 2003.

321 S/RES/687 (1991) of 3 April 1991, item 33.

322 Cf. M. Weller, "The Legality of the Threat or Use of Force against Iraq", at <http://www.jha.ac/articles/a031.htm>, accessed on 30 July 2002; R. Wedgwood, "The Enforcement of Security Council Resolution 687: The threat of Force against Iraq's Weapons of Mass Destruction", *AJIL* 92 (1998), 724 et seq.

disarmament, i.e. the destruction of suspected WMD, in order to prevent their use by terrorists.[323]

The ensuing military campaign, therefore, could not evoke a violation of Article 2 (4) of the UN Charter. Its masterminds also abstained from citing their National Security Strategy as a rationale.[324]

Apart from this, the UN Security Council refused to provide an authorization on the grounds of Resolution 1441 in order to ensure Iraq's fulfilment of clearly existing legal obligations[325] via military coercion.[326]

The United States nevertheless "authorized itself" for a unilateral military intervention to this purpose, outside recognized rationales for the use of military force in international law. At no time, however, did the United States try to justify the campaign (i.e. to fill the void of a multilateral mandate) by stressing that Iraq was a "rogue state". This implies that "the doctrine of verbal stigmatization," typical for the United States, did not acquire a new dimension by advocating the use of violence against designated countries. Such a scenario appeared possible after the publication of the National Security Strategy in September 2002. However, this argumentation would neglect the fact that verbal stigmatization entails consequences. Even without employment for the justification of the use of force in the concrete case as it is designed to be effective in the forefront. The repeated usage of stigmatizations is dedicated to diminish the political pressure for the acting state to substantiate the justification of its actions.

---

323 This is consistent with the "National Strategy to Combat Weapons of Mass Destruction", of December 2002, on the obligations of Iraq see Wolfrum, see note 284.

324 Powell speech to the Security Council, see note 320; Negroponte, Doc. S/PV.4726 of 27 March 2003: "The military campaign in Iraq is not a war against the people of Iraq, but rather against a regime that has denied the will of the international community for more an 12 years. [..] Resolution 687 (1991) imposed a series of obligations on Iraq [..] . Resolution 1441 (2002) explicitly found Iraq in continuing material breach".

325 Also cf. the Report by El Bahradei, the Status of Nuclear Inspections in Iraq of 27 January 2003, at <http://www.un.org/News/dh/iraq>, accessed on 28 January 2003, Press Release SC/7644 of 27 January 2003 and the IAEA Report Doc. S/2003/95, Annex, of 27 January 2003.

326 G. Nolte, "Gewalteinsatz muß Regeln unterliegen", Handelsblatt, 24 March 2003; Wolfrum, see note 284, 5.

Nonetheless the war against Iraq does not qualify as an application of the "stigmatization doctrine" as the United States attempted to justify its campaign along the lines of recognized rationales, in order to secure (international) legitimacy. This utilization of existing Security-Council Resolutions, however, went hand in hand with the (repeatedly stated) intent to launch a military campaign without a multilateral mandate. But the debate on whether Resolution 1441 provided enough of a justification to permit the use of military coercion indicates that the United States accords "rogue states" the same standing in this respect as non-designated states. Hence, it becomes obvious that the United States tried to procure as much legitimacy as possible, without abandoning its determination to wage war.

International reactions to this strategy imply that the United States may have paid a high political price for executing its intentions. Most states were critical of the military campaign.[327] Thus the designation of a country as a "rogue state" did not grant legitimacy to a military intervention against it, in their opinions. Their reactions revealed that an acceptable rationale would have to be based on a breach of Article 2 (4) of the UN Charter.

To sum up, it cannot be concluded that "rogue states" enjoy so little protection that the use of military force against them has become an *aliud* in international law.

2. Sanctions Regime against "state sponsors of terrorism"

The United States considers the countries included in its list of terrorist organizations the main focus of stage two in the war against terrorism.[328]

---

327 Cf. the debates at the Security Council of 5 February 2003, Doc. S/PV.4701, and of 29 March 2003, Doc. S/PV.4726 the Letter of the Permanent Representatives of France, Germany and Russia to the Chairman of the Security Council of 24 February 2003, Doc. S/2003/214, the Speech by Minister of Foreign Affairs Fischer at the Security Council of 20 February 2003, at <http://www.auswaertiges.amt.de>, accessed on 21 January 2003; the Letter of the Permanent Representative of Iraq to the United Nations of 31 January 2003, Doc. S/2003/131; the Press Release Doc. SC/7665 of 18 February 2003.

328 Doc. S/946 of 7 October 2001; Greenwood, see note 283, 310.

From a legal standpoint, countries are not forbidden to compile lists of states they consider dangerous, as long as this does not violate international law. The situation becomes less liberal when attempts are launched to establish such a list at the international level. This is the case when the inclusion in a list triggers (economic) sanctions, which affect the sovereign rights of targeted states and third countries. In addition to this, the process of verbal stigmatization attempts to convince other states of the danger posed by designated states. Were this aspiration materialized without obstruction, "rogue states" would be condemned as sponsors of terrorism at the international level as well. This would accord international significance to the unilateral categorization criteria of the United States DoS.

So far there exists no international version of the United States list of terrorist organizations. The United Nations abstains from designating countries as "state sponsors" of international terrorism,[329] as does the Security Council, even in cases where repeated terrorist activities were attributable to states, or states failed to clearly distance themselves from terrorist activities.[330] The Security Council has only practised the identification of actions supporting (international) terrorism, if a state had taken concrete measures of this sort. A condemnation of such action, in contrast, is usually linked to an appeal to the named state to explicitly distance itself from any support of (international) terrorism.[331] Thus the presumption of innocence applies to states until proof is procured of their supporting a concrete terrorist action. Once this has been achieved, however, even the insufficiently clear renouncing of terrorism by a state may be considered a threat to international peace.[332] Unlike the DoS, the UN Security Council does not consider the credibility of a state as a decisive factor to determine a threat to international peace.

---

329 The international agreements on the combating of certain terrorist acts also focus on precisely defined felonies, which have to be prosecuted and penalized by the signatories, see Wolfrum, see note 53, 853 et seq.

330 On Sudan cf. S/RES/1044 (1996) of 31 January 1996, S/RES/1054 (1996) of 26 April 1996, S/RES/1070 (1996) of 16 August 1996, on Afghanistan S/RES/1214 (1998) of 8 December 1998, S/RES/1267 (1999) of 15 October 1999, S/RES/1333 (2000) of 19 December 2000.

331 The first explicit formulation of this is found in S/RES/748 (1992) of 31 March 1992.

332 On the categorization of terrorism as a threat to international peace, cf. J.D. Aston, "Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative Maßnahmen des Sicherheitsrates – Resolution 1373 (2001) im Kontext", *ZaöRV* 62 (2002), 257 et seq. (277 et seq.).

But it should not be forgotten that both the Security Council and the General Assembly have adopted a number of resolutions obliging all states to abstain from supporting international terrorism.[333] A complicating aspect to such a demand is the fact that there is no clear-cut definition of terrorism[334] and of state sponsorship of terrorism so far.[335] The Security Council, however, provides a compilation of several state actions, which constitute support of terrorism and are therefore not to be engaged in states.[336] Upon analyzing these prohibited acts and Security-Council documents on this subject diachronically, several changes emerge over the past ten years.[337] The most recent documents, for example, appear to reveal United Nations support for the United States war against international terrorism.[338]

As regards the different forms of state support to this type of political violence, the UN Security Council distinguishes between direct and

---

333 See V. Röben, "The Role of international Conventions and general International Law in the Fight against International Terrorism", at <http://edoc.mpil.de/conference-on-terrorism/present/roeben.pdf>.

334 Cf. C. Walter, "The Notion of Terrorism in National and International Law", at <http://edoc.mpil.de/conference-on-terrorism/present/walter.pdf>.

335 On attempts of a definition cf. A.C. Brown, "Hard Cases Make Bad Laws: An Analysis of State-Sponsored Terrorism and its Regulation under International Law", *Journal of Armed Conflict Law* 2 (1997), 135 et seq. (136 et seq.).

336 The most recent instance is to be found in S/RES/1373 (2001) of 28 September 2001, item 2, references are also contained in A/RES/49/60 of 9 December 1994, Annex, item 3, A/RES/51/210 of 17 December 1996, A/RES/54/110 of 9 December 2000, also cf. R.A. Friedlander/ T. Marauhn, "Terrorism", in: R. Bernhardt (ed.), *EPIL* IV (2000), 845 et seq. (850 et seq.).

337 The same applies to the assessment of state terrorism as a threat. Initially, formulations would regularly stress at countering terrorism, including the forms of state activities in this domain, were vital to the preservation of international peace and security (S/RES/1054 (1996) of 26 April 1996, S/RES/1189 (1998) of 13 August 1998). More recent resolutions of the Security Council clarify that international terrorism can pose a threat to international peace and security. On 12 September 2001 it publicized the statement that the attacks of "11 September" embodied a threat to international peace and security, as did any other terrorist act. See S/RES/1368 (2001) of 12 September 2001, item 1.

338 Charney, see note 283, 835, 837.

indirect modes, since it considers "state sponsors of terrorism" as countries furthering:

> "[...] acts of international terrorism in all its forms, including those in which States are directly or indirectly involved".[339]

The latter include *'inter alia'* the:

> "organizing, instigating, assisting or participating in terrorist acts in another State or aquiescing in organized activities within its territory directed towards the commission of such acts".[340]

Acts of support furthermore include "activities of assisting, supporting and facilitating terrorist activities and from giving shelter and sanctuaries to terrorist elements".[341] Another formulation prohibits the sheltering and training of terrorists and planning terrorist acts.[342]

By the end of the nineties this list (proscribing the organizing, instigating, assisting or participating in terrorist acts) was complemented by new "don'ts". In 1999, for example, the UN Security Council delegitimized the provisions of a safe haven, by:

> "[d]eploring the fact that the Taliban continues to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations".[343]

In 2000 it added "harbouring" terrorists to the acts of state support,[344] and ultimately the Chair of the Security Council declared the attack of

---

339 S/RES/731 (1992) of 21 January1992, S/RES/748 (1992) of 31 March1992.

340 S/RES/748 (1993) of 31 March 1993, S/RES/ 1189 (1998) of 13 August 1998, S/RES/1371 (2001) of 26 September 2001.

341 S/RES/1044 (1996) of 31 January 1996, S/RES/1064 (1996) of 11 July 1996.

342 S/RES/1333 (2000) of 19 December 2000.

343 S/RES/1267 (1999) of 15 October 1999, as well as S/RES/1333 (2000) of 19 December 2000, a document not mentioning the Taliban is S/RES/1269 (1999) of 19 October1999, which strives to: "deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition".

344 S/RES/1333 (2000) of 19 December 2000: "Not[es] that the Taliban benefits directly from the cultivation of illicit opium by imposing a tax on its production and indirectly benefits from the processing and trafficking of such opium, and recognizing that these substantial resources strengthen the Taliban's capacity to harbour terrorists."

11 September 2001 an "attack on humanity as a whole,"[345] upon convening a session on 12 September 2001. The Resolution adopted on this day states that:

> "The Security Council calls on all States to work together urgently to bring to justice the perpetrators and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable".[346]

The UN Security Council also committed all states to abstain from any form of active or passive support of terrorist acts, on the grounds of Chapter VII of the UN Charter, on 28 September 2001. This included the prohibition to provide shelter to terrorist organizations on their territories. Hence:

> "[a]ll states shall (a) refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons of terrorists; (b) [...] (c) deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe haven; [...]".[347]

In this context the Security Council's employment of terms like "safe haven" and "harbour" implied an internationalization of the notions used mainly by the United States in its war on international terrorism.

But even in S/RES/1373 the UN Security Council did not designate any countries as "state sponsors of terrorism", nor did it single out any countries as particularly dangerous within the multilateral campaign against terrorism. Such a resorting to "loan-words" could be accompanied by the transfer of the definitions on various terrorist activities.[348]

The findings mentioned above indicate that the United States practice of listing "state sponsors of terrorism" is marked by a specific form of identification, evaluation and treatment of such states. These traits are not mirrored by United Nations practice. At the same time, the founding of stage two in the war against international terrorism on the

---

345 Doc. S/PV.4370 of 12 September 2001.

346 S/RES/1368 (2001) of 12 September 2001.

347 S/RES/1373 (2001) of 28 September 2001.

348 Brown, see note 335, 135, 144 et seq. concludes that there is a "Legal Regime Governing States Sponsoring Terrorism" contained in Resolutions and Declarations, which strives to regulate unilateral measures outside the United Nations as well, also cf. Charney, see note 283, 835, 837.

DoS list, represents an attempt to secure international relevance for a domestic political instrument, in order to proclaim it a part of the "canon" of international counter-terrorism. It could also imply that the United States reserves the leadership in this campaign for itself. This would have been corroborated by international law if the UN Security Council had accorded the United States Government a privileged role within the war against terrorism. Resolution 1373, however, establishes the United States as a state with rights and duties equal to all other countries.

The operative section of Resolution 1373 explicitly demands the improvement and intensification of international cooperation in this context. In addition, sight should not be lost of the fact that the Preamble stresses the "inherent right of individual or collective self-defence in accordance with the Charter". The United States could be accorded a special role mainly in cases where international cooperation assumes the form of collective self-defence.

This does not entail, however, that the UN Security Council is attempting to provide the United States with a rationale for dealing with the state sponsors of its list, as "abstractly" dangerous states, by equating international cooperation and collective self-defence. The right to self-defence is, after all, inherent and not dependent on authorization by the Security Council.[349] In addition to this, the provisions outlined in Article 51 of the UN Charter must be met for acts of self-defence. What the Security Council can nevertheless do, is to influence the development of international customary law by recognizing a particular form of exercizing the right to self-defence as lawful.

In spite of all this, it has to be remembered that the provisions of Resolution 1373 were drafted at a time when terrorist acts were not considered armed attacks along the lines of Article 51 of the UN Charter. This does not amount to an absolute prohibition, as the Preamble of Resolution 1373 (and of Resolution 1368) recognizes the right to self-defence. It rather indicates that, under certain conditions, even terrorist acts may constitute a justification for self-defence. The abstract threat posed by terrorism, however, does not legitimate the exercise of this right. Against this backdrop the Chapter VII derived duty to cooperate in the fight against international terrorism, contained in the operative section of Resolution 1373, mirrors the distinction between self-defence and collective defence and security maintained by the UN Security Council. It therefore cannot be concluded that the potential of certain

---

[349] Also cf. Franck, see note 283, 839 et seq.

terrorist acts to entail the right to self-defence (substantively or procedurally) expands this right within the war against international terrorism. The launching of self-defence measures against "rogue states" will continue to depend on concrete constellations and dangers — and not on abstract classifications which do not fulfil the provisions of Article 51.

The inclusion of states in lists, not only as a reaction to single acts and their overall conduct, cannot predetermine their threat potential within the war against international terrorism. At least not as far as binding international law is concerned. This contravenes the rationale behind designations such as "rogue states," since they have been designed to affect the perceptions of other states to this effect. Hence it could be concluded that derogatory denotations embody an instrument of hegemony.

V. Conclusion

For the time being, the process of verbally stigmatizing states occurs at a "political" plane. This does not prevent the alteration of the targeted states' legal status, as the examples of this article have illustrated.

The legal consequences of derogatory formulations are not determined by their usage alone; they also depend on the binding principles of a legal order as possible checks and balances. Should one state be able to elevate its domestic classification to an international standard, these principles would be undermined in their overall purview, not just in one concrete application.

Whether defamatory designations infringe upon the sovereign equality of states will depend on what notion of equality we attribute to this principle. In the earlier cases of verbal stigmatization less emphasis was placed on the discrimination of the countries targeted. The main issue was if international law was applicable to "barbaric" or "uncivilized" states which were not recognized as full subjects in international law at all. Thus the question on their legal equality would not even be considered at the time.

Although there always have been pariah-states in the past, their impact on community principles was insignificant, as they did not belong to the community at any time.

This changes in the case of communities based on the sovereign equality of its Member States: here unilaterally stigmatized states re-

main part of the community. A change in the legal status of these states would, therefore, not just violate the principle of state equality — it would undermine its validity as a principle of the international community. This would, again, not require deliberations on charges of discrimination — it would require debates on the general applicability of international law in case of these states. Against such a backdrop, the international community could revert to a previous stage of development.

The international community as we know it is also vulnerable as regards processes based purely on the existence of spheres of influence. Within this community, and its international law, however, states labelled with pejorative designations (i.e. being branded with negative traits) still enjoy the same sovereignty-based rights as all other countries. The designations examined, such as "rogue states," "state sponsors of terrorism," "states of concern" and "axis of evil," are not recognized elements of international law. They are used to affect the constitution of the political will in other states. Hence, the principle of sovereign equality has not been annulled either within the war against terrorism as regards a group of states (designated as threats) or during applications of violence against single "rogue states". The reactions to the war in Iraq clearly demonstrate that the unilateral stigmatization of a country does not allow for an extraordinary right to use military force. The dangers which such a process of (verbal) abuse entail, however, remain real to the development of international law in our current order, as they threaten the consensus on fundamental principles. As regards the prerequisites for the generation of legal concepts within the current system, the considerable influence of the United States requires a clear reaction by the international community to counter the aspiration to codify a domestic classification at the international level. Otherwise the principle of the sovereign equality of states will no longer be able to act as a check during international law-making. Thus reactions to single cases of stigmatization may prevent the erosion of this fundamental principle of international law.

Any change in the legal status of the designated states contravenes (the maintenance of) state equality, since they would have been denied key elements of statehood, rendering them incompatible with the rest of the system. This in turn could render the application of binding legal rules of the existing international community non-obligatory with regard to these states. Sub optimum standards and exceptions could be wielded at them instead, without ever raising the question of state equality. The latter, after all, would apply only to countries considered

internationally sovereign states. This is the very scenario the UN Charter strives to prevent, by explicitly stipulating the sovereign equality of its signatories in Article 2 (1).

The UN Charter tries to prevent the loss of sovereignty-based, equal rights by stigmatized states. It also attempts to ensure that the latter continue to honour their international obligations. If pariah-states were to be factually excluded from the international community (created by the UN Members), they would suffer the loss of their communal rights, on the one hand. Another loss would be suffered by the international community, on the other hand, as it would no longer command an instrument to effectively deal with any threats emanating from these countries.[350] It has to be borne in mind that a change in the legal status will not only divest stigmatized states of their rights (as equal members of the international community): it will absolve them from fulfilling their duties.

Hence, there is no concept of "international community" that stands for an evolution of international law or even the constitutionalization of the "international community", admitting at the same time the exclusion of "pariah-states" from its ranks. It is less clear, however, what the exact relations between the notion of an "international community" and antonymous designations like "rogue state" are. These appear to require further, in-depth research, in yet another "linguistic construction".

---

350 On the options outside the UN Charter cf. D.J. Scheffer, "Staying the Course with the International Criminal Court", *Cornell Int'l L. Rev.* 35 (2002), 47 et seq. (99).