Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Band 178, 2004, 505-510.

Summary

Pariah States in International Law?

This dissertation is an attempt to analyse the legal implications of a political doctrine that is based on pejorative terms and used in political as well as in legal contexts. While the main approach of the book follows the inductive method, the starting point is a deductive one. The analysis emanates from the assumption, substantiated in the initial part of the first chapter, that the repeated use of pejorative terms for States has the impact to change not only their political but also their legal status within the present community of States.

The main focus of the empirical part relies on the classification of States with pejorative terms in recent state practice, in order to show a nexus between the stigmatization of States and the legal consequences at the international level. The perspective follows the factual distribution of political power amongst States. Thus, attention is directed toward formulation of the rogue states doctrine by the United States and its ability to introduce classifying terms at the international level that trigger the attention of other States and thereby have the capacity to acquire legal meaning.

However, pejorative terms have not only been used by the United States and not only in our time.

Therefore, the second part of chapter 1 outlines the use of excluding classifications of political communities in ancient times. It starts with a treatment of communities that have been classified as vassals. For example, the contracts between the Hittites and their vassals reveal that the latter had minor influence regarding the subject matter of contracts. Within the Hellenic world and the Roman Empire, the treatment of barbarian tribes illustrates that the stigmatization as a barbarian tribe was accompanied with the status of an outlaw community, particularly with regard to the *ius ad bellum* and the *ius in bello.*

However, one cannot easily draw the conclusion that the stigmatization itself caused this status or an alteration of the status. Moreover, the stigmatization and the outlaw status were parallel aspects of the same

fact, namely that the respective tribes were regarded as being less developed and wild. The same parallel structure of stigmatization in political terms and in the legal sphere can be observed in mediaeval times. Particularly the family of Christian nations excluded non-Christian and non-civilised communities from the application of norms that were applicable within the *res publica christiana*. Consequently, Barbary States (Barbareskenstaaten) in early modern times were denied the status of legal persons in international law. Although the requirement of christianisation has been abandoned as explicit precondition for membership within the famility of nations in the early 19th century, christianity has been regarded as the origin of civilization and, consequently, remained inherent in the criterion of civilization. The degree of civilization of States developed its own logic of inclusion and exclusion. The division of the world according to the standard of civilization in State practice is reflected in the theory of concentric circles of legal norms in legal scholarship. According to this theory, only within the confines of the inner circle of the community of States was the complete range of international law applicable. With the emergence of the idea of a League of Nations and the institutionalisation of the United Nations, the equality of States became guaranteed by treaty law. The conditions of accession to the United Nations and their application in practice led to a decrease of outright exclusions of States due to their insufficient level of civilization.

Taking into account the structural particularities of each period, the general conclusion seems nonetheless possible that the stigmatization of political communities and certain adverse effects regarding their political and legal status are inseparable.

Chapter 2 describes the use of classifying terms in recent State practice. It starts with the practice of the United States in the last decade, using the terms rogue State, State of concern and axis of evil in political speeches, and the term State sponsor of terrorism for legal purposes, but for the same States. In its Global Patterns of Terrorism analysis, the US Department of State assesses whether a State has to be regarded as State sponsor of terrorism and, consequently, placed on the terrorism list of the Department. This list has been decisive for implementing a sanctions regime for the States included. From an international law perspective, the 1996 amendment to the Foreign Sovereign Immunities Act, providing for an exception to immunity for State sponsors of terrorism and introducing a civil cause of action against those states, deserves particular attention. This exception to immunity intereferes with a core principle of sovereignty with respect to the States on the terror-

ism list and goes beyond the accepted exceptions to immunity in current State practice.

As indicated above, the stigmatization of States is not at all a merely American phenomenon. Some States on the terrorism list call the United States a rogue State. While this is a reaction caused by their defamation, other States including European States use the term with reference to the same States as the United States. Particularly the United Kingdom symbolises its approval of the security analysis of the United States through the use of the terms rogue State and State of concern or State of major concern. However, other States, for example Russia and China, use the rogue State classification, taking into account the US security analysis without sharing the result. They rather employ the term as part of the United States' official language and to demonstrate certain differences regarding the presumptions of their security policies.

While the United Nations does not employ pejorative terms, the expression rogue State can be found in NATO documents, referring to the new threat posed by international terrorism in conjuntion with the proliferation of weapons of mass destruction.

Chapter 3 elaborates first the legal standard by which the classification of a State through pejorative terms has to be assessed in international law. The legal analysis is based on the existence of a State consensus about the principle of Sovereign Equality in the Charter of the United Nations.

While State practice does not support the view that the stigmatization as such could be a violation of the dignity of states, the classification in conjunction with economic sanctions, severe criticism of the States on the terrorism list and the immunity exception applicable to them affects the principle of equality of sovereign States. On the one hand, the level of coercive interference into a State's domestic affairs is generally extremely high in international law. Thus, it is difficult to argue that the stigmatization as such is an intervention in the classical sense. On the other hand, new forms of subversive interventions amongst States have gained ground and are discussed as violations of the pricniple of non-intervention within legal scholars. Recent State practice, however, does not justify giving up the requirement that the interference has a certain coercive character. With regard to this requirement, it is necessary to distinguish between the listing of States as State sponsors of terrorism and the stigmatization as a rogue State. The coercive element rests with the listing of states as the deciscive legal link for further sanctions, while the stigmatisation in political terms is not essential for the coercive character of any interference, whether it be economic sanctions or the

preclusion of State immunity. To establish a sanction regime against State sponsors of terrorism, the development of a respective list of States would have been sufficient. Thus, it is argued that the stigmatization as such is not a violation of the principle of non-intervention.

This result, however, leads to the assumption that apart from generally strengthening the effect of sanctions, the stigmatization of States has another function, dependent on the concrete use of the different terms on the international level.

To analyse this function from an international law perspective, the legal effects of the different terms have to be assessed. Therefore, the second part of this chapter offers a systematisation of the individual terms (rogue State, State sponsor of terrorism, State of concern, axis of evil) on the basis of a differentiation between „political" and „legal" terms in legal theory. Political terms are divided into general terms (allgemeine Begriffe), describing characteristics of States and terms defining the State's political status (Statusbegriffe). The legal effects of such political terms are assessed in chapter 4.

With regard to an international legal order that can be defined as an international society (Staatengesellschaft) or an international community (Staatengemeinschaft) in reliance on its degree of value-based consensus within the social order, it is argued that the present international order has reached the status of an international community.

Consequently, concepts that were applicable within an international society cannot be applied in the international community without challenging the consenus on community principles. It is argued that the use of pejorative terms is an instrument of hegemony. The meaning of hegemony is elaborated with respect to the classical view and the current debate. In contrast to mere dominance, hegemony is defined as the capability of one or more State(s) to use its power to extend its legal options beyond the existing legal order without loosing the following of the other States within a given hegemonic system.

From this point of view, the effect of hegemony is necessarily a legal one, because the political influence of one State, particularly its influence on the will of other States, determines the development of both elements of customary law, i. e. State practice and *opinio iuris*. The political degradation of States through stigmatization affects the thinking of other States concerning the stigmatised States, in particular if stigmatization is used in legal contexts, for example, to justify the withdrawal from the ABM Treaty or to promote the adoption of new criteria for exercising the right of self-defense. Stigmatization and degradation di-

minish the power of the States concerned. In customary international law, power is a reflection of the capability to develop and interpret legal norms. This right to influence the law-making and the law-interpreting process on the international level belongs to the core principles of sovereignty. In particular, the principle of the sovereign equality of States prohibits that political inequalities inherent in *Statusbegriffen* are transformed and perpetuated on the legal level.

Furthermore, the principle of sovereign equality of States within the international community restricts the use of pejorative terms, as it guarantees all sovereign States the power to participate in the law-creating as community members. The law-making power of each State is based upon its status as a (full) member of the international community.

An alteration of the status of certain States within the creation and application of law must be seen in connection with the existence of consensus over the principle of sovereign equality as such. If the international community acknowledged a second-rate status of some states, it would ignore the principle of sovereign equality in general and, thereby, draw into question the qualification of the present international order as an international community.

The further existence of an international community based on sovereign equality depends on two main factors. First, the community has to improve mechanisms to control compliance by all States with its general international legal obligations, including the duty to refrain from supporting international terrorism and to prevent the proliferation of weapons of mass destruction, in order to avoid leaving a single State in a supervisory role. Second, the international community must clearly oppose State classifications with pejorative terms in order to prevent stigmatizations from affecting States' legal status.