

## Rogue States – State Sponsors of Terrorism?

---

By Petra Minnerop

**Suggested Citation:** Petra Minnerop, *Rogue States – State Sponsors of Terrorism?*, 3 German Law Journal (2002), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=188>

**SPECIAL FORUM ISSUE: THE WORLD WE (INTERNATIONAL LAWYERS) ARE IN: LAW AND POLITICS ONE YEAR AFTER 9/11.** [1] Since 1994, the United States of America have been warning of a new threat posed by so-called 'rogue states'. (1) Following 11th September 2001, a number of these so-called rogue states have been targeted as responsible for the attacks or as a result of fears that they are planning further terrorist acts. The classification of certain states by degrading terminology by the United States not only seems to be fully justifiable *vis-à-vis* the realisation of an emerging danger; furthermore, it could be seen as movement within the international community towards the identification of states which threaten international security. Thus, it is important to look behind the terms: which states fall into the category of rogue states and what consequences could follow for public international law from such classification? [2] This paper proposes to trace the origins of the terms that are used to describe some states, separating them from the rest of the international community, i. e. the term *rogue state* (I.), the meaning of the U.S. State Department list of "states supporting international terrorism" (II.) and whether such stigmatisation of states has or could have legal implications (III). I. [3] The term rogue state is indicative of a new security strategy in the United States. Following the end of the Cold War, U.S. foreign policy was no longer concerned with the containment of another superpower through "Mutual Assured Destruction", but with the emerging threats posed by the proliferation of weapons of mass destruction in developing countries. (2) [4] The new security strategy was mainly developed and presented under the authority of *Clinton's* former security Adviser *Anthony Lake*. His concept was focused on the containment of certain outlaw nations or backlash states and was intended to isolate those States which he identified as opposing U.S. interests and as threatening national and international security interests, particularly Iran and Iraq. (3) [5] In 1994, former- U.S. President *Clinton* used the term rogue state for the first time, in reference to the growing threat posed by rogue states such as Iran and Libya in an address to future European Leaders in Brussels. (4) The term came to be used frequently in presidential speeches and was used to define Cuba, Sudan, Syria, Libya and North Korea. (5) [6] In June 2000, the then- U.S. Foreign Minister, *Madeleine Albright*, announced that the United States would abolish the term. Positive developments in those states meant that they were now to be classified as *states of concern*. However, the U.S. Administration neither lowered the threshold for inclusion in the category of dangerous States, nor changed the overall concept of treating certain states as outlaws. (6) [7] However, the countries concerned appeared to appreciate this development and acknowledged the change in terms as a step towards a normalisation of diplomatic relations with the United State. (7) Yet, following the election of *George W. Bush* to office, the term state of concern was again replaced by the wording "rogue state", and since his Address to the Union, Iran, Iraq and North Korea have been labelled as constituting an "axis of evil". (8) [8] While the term rogue state was cited in the media of many countries, only a few States have used it officially, such as the United Kingdom (9) and Ukraine. (10) Moreover, France, (11) Russia (12) and China (13) have all criticised the use of such terminology, largely for the part such terms are seen to play in justifying the proposed U.S. National Missile Defence Program. (14) II. [9] Aside from its meaning in U.S. Foreign Policy, the term rogue state also has a function in domestic politics. It identifies enemy States for the public, satisfies the need for unification within the country and emphasises national identity. However, in the context of foreign policy, only the designation of States as states sponsor of terrorism might secure support on the international level for U.S. foreign policy objectives: those States labelled as rogue states in political speeches are those defined as 'states supporting international terrorism' under U.S. law. In other words, the United States' governmental authorities reserve the wording rogue state for those States that are on the State Department's "list of states supporting international terrorism". [10] This list was established in 1979, according to the Export Administration Act. (15) Under the authority of the Secretary of State, the list of designated States is drawn up annually and published in the Code of Federal Regulations, as well as in the Patterns of Global Terrorism. The U.S. State Department's criteria for inclusion in this list are either the active, immediate support of acts of international terrorism or the indirect support of terrorist organizations. (16) States within the latter category are called „safe haven" for terrorists by the State Department. Currently, North Korea (since 1988), Iran (1984), Iraq (1990), Libya (1979), Sudan (1993), Cuba (1982) and Syria (1979) are on the list. (17) [11] For the United States, the classification of countries as promoting international terrorism is only the first step in the campaign against international terrorism. Additional measures aim to prevent the States on the list from supporting terrorist organizations. Under current U.S. practice, distinct economic sanctions have been enacted, taking the States on the terrorism list particularly into account. Further sanctions, apart from extensive export and import restrictions, include the prohibition of all financial transactions and the prevention of support from foreign countries. The states on the list do not enjoy State Immunity in civil litigation. Furthermore, the nationals of those States are confronted with extensive security controls when entering the U.S. The most relevant legal instruments are: The Trading with the Enemy Act of 1917 (18) and the International Emergency Economic Powers Act of 1977, which replaced in part the Trading with the Enemy Act, and which created the provision of a declaration of a situation of „national emergency" as the precondition for the enactment of further sanctions. (19) Furthermore, there are also, in particular the Cuban Liberty and Democratic Solidarity Act, (20) the Iran-Libya Sanctions Act, (21) the Anti-Terrorism Act and Arms Export Amendments Act of 1989 (22) and the Chemical and Biological Weapons Control and Warfare Elimination Act of

1991. (23) [12] The Arms Export Control Act of 1990 sets the legal framework for the System of Export Regulations of military goods, particularly to countries which are on the list: "The Prohibition contained in this section applies with respect to a country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism. For purposes of this subsection, such acts shall include all activities that the Secretary determines wilfully aid or abet an individual or groups in acquiring proliferation of nuclear explosive devices to individuals or groups or wilfully aid or abet an individual or groups in acquiring unguarded nuclear material". (24) Finally, the International Financial Institutions Act contains the provision that the voice and vote of the United States in international financial institutions has to be used in order to prevent a State on the terrorism list receiving financial assistance. (25) [13] The terror attacks on the administration building in Oklahoma in April 1995 and the World Trade Centre in February 1993 led to the enactment of the Anti-terrorism and Effective Death Penalty Act of 1996. This Act intensified the criminal liability for US nationals committing or supporting terrorist offences. According to these provisions, any financial transaction with a State on the U.S. State Department list is punishable under domestic law. Beyond that, the Act creates the legal basis for U.S. citizens to bring civil actions for damages against the States concerned before U.S. Federal Courts. According to the law of State Immunity, in principle no State is exposed to the jurisdiction of another State: *par in parem non habet jurisdictionem*. This principle is, on the basis of the theory of restrictive immunity, contained in the Foreign Sovereign Immunities Act (FSIA) of 1976. (26) After the respective amendment of 1996 by the Anti-Terrorism and Effective Death Penalty Act, states on the 'rogue state' list do not enjoy State Immunity in civil actions. (27) Since the amendment of the FSIA, several U.S. citizens, who were victims of terrorist acts allegedly supported by states on the list, have brought claims against these states before U.S. Federal Courts. Iran was sued in 1998 by *Stephen M. Flatow*, who accused Iran of supporting the terrorist organization Islamic Jihad. The organization was held responsible for a bus assassination in which *Flatow's* daughter was killed. The plaintiff was awarded compensatory damages that amounted to triple the sum of Iran's alleged expenditure in support of terrorism. (28) Likewise *Terry Anderson* and *Thomas M. Sutherland*, two US citizens kidnapped in Lebanon, have been successful in their claims for compensatory damages against Iran in the year 2000. (29) III. [14] The attacks in New York and Washington raise the question, in what respect the classification of countries as rogue states or states sponsoring terrorism by the United States has consequences for the reaction of the international community in this concrete situation, that reach beyond the domestic sphere, the mere foreign policy level and the rhetorical relevance within international relations. In reaction to the attacks of 11 September 2001, the United States enacted further legislation to prevent terrorist acts (30) and strengthened the rhetoric against certain states by calling them collectively an axis of evil. In so doing, the United States stressed its determination to continue the fight against international terrorism. Does the continuing unilateral classification of states as states supporting international terrorism, and additionally, their general and repeated characterization as being extremely dangerous by calling them rogue states, change the requirements to prove a State's liability in a concrete situation? [15] Most States do not refer to a distinct concept on the international level that categorizes other States as being more dangerous. Furthermore, State practice does not support the view that the threshold for military intervention is lower because a State has been labelled as being generally dangerous and an "outlaw". [16] The United Nations Security Council made clear in Resolution 1368 of 12 September 2001, that the liability for a terrorist act in respect to the exercise of the right to self-defence against another State continues to depend on the extent and intensity of the State's participation in terrorist acts. (31) Therefore, the crucial characteristic for the legality of comprehensive military self-defence remains, that a State, independent from the classification as rogue state or a state sponsor of terrorism by the United States, must be held responsible for having contributed substantially to war-like terrorist acts. Beyond these preconditions no retaliation with regard to committed terrorist acts can be in accordance with public international law. (32) [17] But looking to the development of customary international law and the response of states to concrete situations, one has to bear in mind that the usage of pejorative terms on the international level has a subversive impact on the decision making process of States: "When the United States speaks, the world listens, so it matters what language the United States uses." (33) Thus, the classification of states can have a substantial influence on the atmosphere within the international community and thus the evaluation of the factual evidence that make interventions legitimate under the U.N. Charter. It is this last aspect, that makes on the one hand the legal impact of the term rogue state difficult to assess and that, on the other hand, increases the danger posed to the system of collective security by the unilateral stigmatisation of States.

---

(1) President *Clinton* before the 52th session of the United Nations General Assembly, 22 September 1997; President *Clinton* in a speech at the National Defence University, 29 January 1998; President *Clinton* in the Pentagon, 17 February 1998; "Madeleine Albright defined a rogue state as one that had no part in the international system and that tried to sabotage it. The United States had used the term mainly for countries it thought might be working on long-range missiles." *Wright*, Washington Post, 19 June 2000, <<http://www.gn.apc.org/~cndyorks/~yspace/~articles/derougue.htm>>, visited on 23 July 2000; Vice-President *Gore*, U.S. Military Academy, West Point, 27 March 2000; U.S. Secretary of Defence, *William S. Cohen*: "Rogue States cannot hope to blackmail America or her Allies", London Times from 1 March 2000, <<http://www.fas.org/spp/starwars/~programm/news00/~e20000301rogue.htm>>, visited on 23 July 2000; President *Clinton*, "Remarks by the President to the Duma", Moscow, 5 June 2000.

(2) „The End of the Cold War”, in: Jentleson/Peterson (eds.) Encyclopedia of U.S. Foreign Relations, Vol. 3, 1997, pp 298.

(3) *Clinton*, „Remarks to Future Leaders of Europe in Brussels”, 9 January 1994, Public Papers of the Presidents, William J. Clinton, Vol. 1 (1994), p 11.

(4) *Lake*, „From Containment to Enlargement”, Dispatch, (U.S. Department of State) 4, no. 39 (27 September 1993), pp 658-64; *Lake*, *Confronting Backlash States*, Foreign Affairs 73 (1994), pp 45.

(5) The President's News Conference with European Union Leaders in Madrid, 3 December 1995, Public Papers of the President, Vol. 2 (1995), p 1835, 1836; Remarks on the Australian Parliament in Canberra, 20 November 1996, Public Papers of the President, Vol. 2 (1996), p 2134, 2135; Remarks on the Terrorist Attack in Saudi Arabia, 26 June 1996, Public Papers of the President, Vol. 1 (1996), p 980, 981; President's Radio Address, 25 March 1996, Public Papers of the President, Vol. 1 (1996), p 818; Remarks to the 51st session of the United Nations General Assembly, 24 September 1996, Public Papers of the President, Vol. 2 (1996), p 1450, 1467, 1468.

(6) WAMU 88.5 American University Radio, Washington D.C., Broadcast on 19 June, 10-11 a.m. / Daily Press Briefing, Monday, 19 June 2000, Briefer: Richard Boucher, Spokesman Department 5-10, „States of Concern” versus „Rogue states”; *Cohen*, Secretary of Defence: “[...]protection to the American people against irresponsible nations - be they called ‘rogue states’, ‘formerly known as rogue states’ or ‘states of concern’”, News Press Briefing, 13 July 2000, Beijing, China.

(7) For example, Libya welcomes US dropping “rogue state” classification, Press release from 22 June 2000, <<http://khilafah.com/news>>; visited on 5 October 2000.)

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

(9) *Blair*, „Britain's role in Europe”, 23 November 2001, European Research Institute, Birmingham, <<http://www.um.dk/cgi-bin/dyn3nt/dyn3.exe>>: „The benefits delivered by the European Union and its forerunners have been enormous. The network of interdependent has helped countries across the continent develop stable and prosperous democracies. It makes it much harder that ever before in European history for any other country to become a rogue state.”

(10) „Ukraine keeps a keen eye on the situation around the ABM Treaty. We believe that possible actions of a party to the ABM Treaty in order to decrease the threat of a missile attack from a rogue state should not contradict its treaty obligations. We call upon the United States of America and Russia to find a mutually acceptable solution to this problem, to avoid a negative effect on START I and START II.; Final Record of the 845 plenary meeting, Conference on Disarmament, CD/PV.845, 9.3.2000.

(11) „France doubts rogue state Danger warrants missile shield”, *Lee*, Washington (AFP), 11 May 2000; „France is unsure whether the threat posed by „rogue states” like North Korea and Iran is dire enough to warrant the possibly destabilizing deployment of a controversial US-anti-missile shield” <[wysiwyg://body.59/http://www.spacedaily.com/news/bmdo-00v.html](http://www.spacedaily.com/news/bmdo-00v.html)>, visited on 5 October 2000; also Yves Boyer, *Fondation pour la Recherche Strategique*, Paris: “International Perspectives on National Missiles Defence”, paper presented to the BASIC Forum at the Carnegie Endowment for International Peace, Washington DC, 18 December 2000.

(12) „To take out the outstanding concerns of both of us, we do propose that political effort should be undertaken in order to establish a so called political umbrella for the United States and the Russian Federation against the so-called other rogue states through the system of arrangements and agreements; Booster Phase Interceptors Vs. Ground-Based Interceptors, U.S. Secretary of Defence and Russian Defence Minister Air Opposing views on Missile Defence, <<http://www.fas.org/nuke/control/abm/news/000616-ada-PressConference.htm>>; visited on 29 November 2000.

(13) 50 App. U.S.C.A. 2405 6(j): „A validated license shall be required for the export of goods or technology to a country if the Secretary of State has made the following determinations: “The government of such country has repeatedly provided support for acts of international terrorism. The export of such goods or technology could make a significant contribution to the military potential of such country, including its military logistics capability, or could enhance the ability of such country to support acts of international terrorism. [...]”

(14) “The excuse used by the United States for developing NMD and TMD was to guard against the missile threats

from the so-called „rogue nations“. As a matter of fact, any sensible people can perceive that the so-called "rogue nations" actually do not have the ability to launch missile attacks against the targets on the mainland of the United States, and their military strength can never be compared with that of the United States."; Zhongguo She news agency, Hong Kong, in Chinese, 18 May 2001/BBC monitoring, <[wysiwyg://37/http://globalarchive.ft.c](http://wysiwyg://37/http://globalarchive.ft.c)>; visited on 14 August 2001.

(15) 31 C.F.R. § 596.201; Schedule: Cuba, Iran. Iraq, Libya, North Korea, Sudan, Syria; Compare *Murphy*, AJIL 95 (2001), 132, 134.

(16) Foreign Policy Report 2001, Chapter 4, Anti-terrorism Controls, <<http://www.bxa.doc.gov/>>, 19 September 2002, p 2.: "The Secretary of State has determined that Libya (1979), Syria (1979), Cuba (1982), Iran (1984), North Korea (1988), Iraq (1990) and Sudan (1993) are countries whose governments have repeatedly provided support for acts of international terrorism. The Acting Secretary of State determined that the United States would control five categories of dual-use items subject to multilateral controls to certain sensitive government end users under Section 6 (j) of the EAA, since the Acting Secretary determined that these items, when exported to military, police or intelligence organizations or to other sensitive end users in a designated terrorist country, could make a significant contribution to that country's military potential or could enhance its ability to support acts of international terrorism. These anti-terrorism controls apply to all designated terrorist countries."

(17) "The seven states on our terrorism list, have a proven history of sponsoring terrorism either directly or by providing training, money, weapons, logistical support, and safe haven to terrorists, these are the criteria we use to designate state sponsors for terrorism. Religion has nothing to do with it."; Fact Sheet, Released by the Bureau of South Asian Affairs, U.S. Department of State, December 2000.

(18) 12 U.S.C.A. § 95a.

(19) 50 U.S.C. § 1701(a): "[...] any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."

(20) 22 U.S.C.A. § 6021 ff; Public Law 104-112, 110 Stat. 785.

(21) 50 U.S.C. § 1701.

(22) Anti-Terrorism Act and Arms Export Amendments Act of 1989, Public Law 101-222.

(23) Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, Public Law 102-182.

(24) 22 U.S.C.A. § 2780 (d).

(25) 22 U.S.C.A. § 262p-4q: „The Secretary of the Treasury shall instruct the United States executive director of each international financial institution to use the voice and vote of the United States to oppose any loan or other use of the fund of the respective institution to or for a country for which the Secretary of State has made a determination under section 2405 (j) of Title 50, Appendix or section 2371 of this title."

(26) The Foreign State Immunities Act of 1976, Public Law 94-583, 90 Stat. 2891, 28 U.S.C. Sec. 1330, 1332(a), 1391(f), 1601-1611.

(27) „A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case – not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support of resources (as defined in section 2339A of title 18) for such an act if such an act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph – if the foreign state was not designated as a state sponsor of terrorism under section 6 (j) of the Export Administration Act of 1979 or section 620A of the Foreign Assistance Act of 1961 at the time the act occurred, unless later so designated as a result of such act; and even if the foreign state is or was so designated, if – the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration;--neither the claimant nor the victim was a national of the United States (as that term is defined in sections 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(28) *Stephen Flatow v. The Islamic Republic of Iran*, United States District Court for the District of Columbia, C.A. No. 97-396 (RCL).

(29) *Terry Anderson et al. v. The Islamic Republic of Iran et al.*; United States District Court for the District of Columbia, C.A. 99-0698 (TPJ).

(30) Uniting and Strengthening America by providing appropriate tools required to intercept and obstruct Terrorism, Public Law 107-56, 26 October 2001.

(31) S/RES/1368, 12 September 2001.

(32) Nicaragua-Case, ICJ Rep. 1986, 14, 106; Tadic-Case, ICTY, 15 July 1999, Judgment in the Appeals Chamber, para 131.

(33) Albright's former Spokesmen *Rubin*, quoted in *Pfaff*, From Rogue state to States of Concern to the End of History, International Herald Tribune 7 January 2000.