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COORDINATORE Prof. Simoni Alessandro

THE PRINCIPLE OF NON-RECOGNITION IN INTERNATIONAL LAW

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Dottoranda
Dott.ssa Vitale Agnese

Tutore
Prof.ssa Frulli Micaela

Coordinatore
Prof. Simoni Alessandro

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Abbreviations/Acronyms

AALCO	Asian-African Legal Consultative Organization
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
CEDAW	Committee on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of Racial Discrimination
CJUE	Court of Justice of the European Union
ECHR	European Court of Human Rights
EU	European Union
GA	General Assembly
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTs	International Criminal Tribunals
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IOs	International Organizations
NATO	North Atlantic Treaty Organization
NLMs	National Liberation Movements
NPT	Treaty of Non-proliferation of Nuclear Weapons

OAS	Organization of American States
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SC	Security Council
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNMIK	United Nations Interim Administration in Kosovo
US	United States
USSR	Union of Soviet Socialist Republics
WHO	World Health Organization
WWI	First World War
WWII	Second World War

CHAPTER I

Introduction, Scope and Theoretical Framework

1. Introduction

The principle of non-recognition has a long history. It was used in its primitive form by ancient civilizations, then by powerful nations and by the Church during the Middle Ages. In the XIX century, it began to attract the attention of scholars and statemen as a defined doctrine by which severe breaches of international law, in particular seizures of territory or other special advantages acquired through the use of force, were barred from legality and recognition. During the era of the League of Nations the doctrine took a definitive boost when the US administration and the organs of the Organization, qualified it as a sanction (and/or an obligation) according to the Pact of Paris and Art. 10 of the Covenant. After World War II (WWII) and the advent of a new international order, non-recognition gradually became a principle of law. H. Lauterpacht was probably the first scholar to use the expression of 'principle of non-recognition' and he described it as the 'minimum of resistance which an insufficiently organized but law-abiding community offers to illegality; it is a continuous challenge to a legal wrong'.[1] Even if the principle showed its multifaceted role from the beginning, it is particularly from 1945 onwards that it is applicable not solely as a sanction or an obligation towards situations of fact contrary to fundamental rules, but also in the area of law-making, acting especially as a bar to consent, and in the area of ascertainment of wrongdoings, acting especially as an objective parameter of legality.

After the great interest aroused in scholars during the inter-war years and the immediate aftermath of WWII, the doctrine or principle of non-recognition fell out of the spotlight for some decades. The debate about non-recognition as an enforcement tool has been reinvigorated only after 2001, the year of adoption of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Still, many questions remain open. This is made evident also by the fact

[1] H. Lauterpacht, *Recognition in International Law* [Cambridge University Press, London, 1947] 431.

that there are very few monographs about the sanction of non-recognition. Furthermore, no scholar, as far as we know, has never tackled the issue of non-recognition as a principle of law which unfolds its effects in all the functions of the international legal order.

Surely, a turning point for the principle of non-recognition is represented by the progressive establishment of higher norms in international law. The principle of non-recognition and the notion of higher norms[2] arose simultaneously in the international legal order. States began to act collectively, inspired by a solidarity 'sentiment' – by which breaches of the law were perceived as breaches towards all the members of the community of nations and hence not to be recognized – in 1919, in the context of the first collective security system ever created, the League of Nations. Later on, in 1951 Chen acknowledged this close connection when he affirmed that an illegal act deemed to be an offence against the entire community, thus breaching a 'peremptory rule' or a 'higher rule', was void and 'non-recognition would be the *natural attitude* of the law-abiding members' of the international community.[3] Still today, the principle of non-recognition, triggered by the existence of a conflict involving a 'higher' norm, constitutes one of the most relevant legality checking instrument used by the international community.

It seems to the present author that the full expression of the principle is fulfilled when the international community is at its most critical crossroads. As of today, it is probably one of those moments in history. In the last decades, we observe a tendency of States to recur to legitimacy justifications or simply extra-legal arguments, to use force in contravention to the UN Charter structure of prohibition/exceptions, which carries the risk of completely undo the post-WWII international order. There is also a disregard for multilateralism, as an expression of the triumphant return of 'sovereignty' at the centre of the international arena, and the consent of States as the sole and ultimate arbiter of law. In this scenario, it must be recalled some cases that have attracted and are attracting international attention, such as the continued occupation of Palestinian territories by Israel (including the controversial status of Jerusalem), as well as the huge number of withdrawals from human rights treaties (such as the American Charter on Human Rights (ACHR)) and statutes of international organizations (such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Criminal Court (ICC), just

[2] The notion of 'higher norms' or 'higher law' is intended to be a comprehensive one, including rules that in different contexts are defined as *jus cogens*, *erga omnes* obligations and (in the past) crimes of States.

[3] T. Chen, *The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States* [Stevens & Sons Limited, London, 1951] 428 (emphasis added).

to name a few).[4] They all concern directly or indirectly a disregard of higher norms of the international legal order towards which the principle of non-recognition plays its role of gatekeeper. Recent practice thus shows that an analysis aimed at deeply understanding the scope and nature of the principle of non-recognition can be useful and can offer guidance for all international actors and professionals.

The present author is conscious that '[a]ny writer who attempts to examine the mysteries of State practice on recognition with the intention to provide a coherent explanation of the behaviour and expectations of States within a framework of legal principle and theory exposes itself to certain ridicule and vituperation'.[5] However, it is necessary to at least try to systematize this subject of international law that needs a coherent and comprehensive examination.

2. The theoretical framework(s)

To start the analysis, it is necessary to define what is 'recognition' in the international legal order. The classical definition takes into account the point of view of the recognizing State, and it is usually referred to the traditional objects of recognition, that is States and governments. Among the classic objects must be included also the recognition of a people fighting for independence and territorial changes. Thus, recognition is framed as the unilateral act by which a State expresses its willingness to enter into relations with a certain entity or body.

However, the concept of recognition has a much broader scope than that. As a matter of fact, the terms 'recognition', 'recognize' are frequently used in international resolutions[6] and treaties[7], as well as in States' declarations[8] and in international

[4] See *infra*, Chapter IV, par. 2.3.

[5] J. Dugard, *Recognition and the United Nations* [Grotius Publication Limited, Cambridge, 1987] 5.

[6] It may happen that a given document could be described as recognizing something, such as resolutions by the UN General Assembly or Security Council. The term 'recognition' was used, for instance, in the UN General Assembly resolution of 18 April 1946. In Para. 3 it declared as follows: [the UN GA] '*Recognizes* that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters 11, 12 and 13 of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League'.

[7] Consider, for instance, the Vienna Convention on the Law of Treaties, 1969. Here, the concept of 'recognition' is frequently used. It is referred to two times in the Preamble and it appears in Artt. 38, 44, 53; United Nations, *Treaty Series*, vol. 1155, 331.

[8] The inter-State context is the one which most scholars refer to when talking about recognition, usually done by unilateral declaration by which a State recognizes a certain status or situation affecting another State. It can however be cited by organs of international organizations or international courts and tribunals. In the *Island of Palmas* case, for instance, the arbitrator noted that in 1648 Spain had not recognized Portugal as a sovereign state (*The island of Palmas case, United States of America v. The Netherlands*, 2 RIAA, 844–845). In the advisory opinion concerning railway traffic between Lithuania and Poland, a resolution of the Council of the League of Nations of 10 December 1927 is cited. The Council of the League of Nations took note, *inter alia*, of '(…) the solemn declarations of the Polish representative that the Polish Republic fully *recognizes* and respects the political independence and territorial integrity of the Lithuanian Republic' (PCIJ Publications, Series A/B, No 42, 115).

jurisprudence.[9] Thus, there is a great variety of subjects as well as objects of recognition in international law.[10] Of course, one must distinguish, and it is not an easy task, when the term means only 'cognisance'[11] or it is even used as a every-day word, and when instead it is saying something about the law.

Some authors have indeed tried to describe 'recognition' in a broad sense. D. Anzilotti for example, without making an attempt to compile an exhaustive list of objects of recognition, refers to 'recognition of a state of affairs, claims and so on'.[12] F. Pfluger writes about the recognition of legal relationships, legal situations and legal qualifications.[13] A. Pellet writes on recognition in relation to 'facts and acts of another state' and indicates, that 'the most important forms of recognition are recognition of a state or of a government'.[14] The special rapporteur in his fourth report on unilateral acts of States lists the following objects of recognition: a *de facto* situation, legal claim, and power or competence.[15]

According to us, when recognition is effectuated unilaterally by a State, it most of the time consists of an act asserting that a certain object is legitimate (as a consequence, an indication that according to the author of recognition the object *should* be incorporated in the law). In this case, the definition offered by Antonio Cassese is best suited: 'recognition of a situation or conduct is a unilateral transaction (or in case of tacit or implicit recognition, conduct) aimed at considering as legitimate that situation or conduct'.[16] This reference to legitimacy was already made by Anzilotti and resumed by other authors like Suy.[17]

When recognition instead is employed by other actors, such as courts, tribunals, international organizations, or States collectively, it usually signals that the object at hand is *already part* of the law or at least that it is taken into consideration by the

[9] In many cases international courts use the term 'recognition' in the meaning of respecting somebody's rights or 'treating something in a given way'. For example, in the case of the SS "Wimbledon" the court used the term recognition with respect to Germany recognizing the right of a ship to pass through the Kiel Canal (PCIJ Publications, Series A, No 1, 31). In this context 'recognition' meant treatment of a ship in accordance with an international agreement. Perhaps, however, the most frequent context is the recognition of something by the court itself. Both the ICJ and the PCIJ phrased numerous judgments that way, although it should be noted that the parties also did not hesitate to ask the court to 'recognize' various facts and rights.

[10] See D. Anzilotti, *Cours de droit international* [traduction française par G. Gidel, Recueil Sirey, Paris, 1929] 347: '[..] in international relations recognition has fundamental importance because of its very numerous applications'.

[11] D. P. O'Connell, *International Law* [vol. 1, Stevens & Sons Limited, London, 1965] 181 ff.

[12] Dionisio Anzilotti, Cours de droit international, traduction française par G. Gidel, Paris, 1929, p. 347.

[13] F. Pfluger cited in P. Saganek, *Unilateral Legal Acts of States in Public International Law* [Koninklijke Brill, Leiden, 2016] 469.

[14] A. Pellet, *Droit international Public* [PUF, Paris, 1981] 27.

[15] Report of the International Law Commission on the work of its fifty-third session, 23 April - 1 June and 2 July - 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10, UN Doc A/56/10, 20, par. 91.

[16] A. Cassese, *International Law* [Oxford University Press, Oxford, 2005] 184.

[17] See respectively, D. Anzilotti (n 9) 347; E. Suy, *Les actes juridiques unilatéraux en droit international public* [Librairie Générale de Droit et de Jurisprudence, Paris, 1962] 191.

law.[18] As pointed out by some authors, indeed, recognition may signify that a certain fact is considered as relevant from the legal point of view[19] or should be treated in the perspective of international law.[20]

Such general appraisal of the concept of recognition in international law is relevant for our analysis for it shows that the principle of non-recognition is not a *deus ex machina*. In other words, the applicability of the principle of non-recognition across the board of the international order, has a foundation in the original potentialities of the concept of recognition itself.

Nevertheless, what is necessary to underline is that, unlike recognition, the doctrine or principle of non-recognition is always (or at least should be) attached to legality and not to legitimacy. Thus, if international law has not reached the point by which it can indicate what are secure legal requirements of recognition[21], it has at least established what cannot be incorporated as law in the system and ought not to be recognized. The unique position of the principle of non-recognition in international law as compared to recognition, is justified by this asymmetrical development of the two. Indeed, while it is more appropriate to differentiate the application of the principle of non-recognition according to the three main functions of the system: law-making, ascertainment and application of the law; the theory of recognition is still found usefully categorized according to its traditional objects, namely states, governments and belligerents.

As just said, most authors writing monographs on recognition restricted their analysis to the classic objects of recognition. On the other hand, the branch of law dealing with unilateral acts of States has considered recognition only in the light of whether it can be a legal transaction or not. As a consequence, every theoretical framework proposed by scholars results inevitably to be partial and/or sectorial. This emerges particularly when one moves to study the doctrine or principle of non-

[18] Consider, indeed, that recognition is mentioned also as a means of ascertaining of the existence of a custom; Art. 53 of the Vienna Convention on the Law of Treaties reads: 'For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted *and recognized by the international community of States as a whole as a norm* from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

[19] W. Levi, *Contemporary International Law. A Concise Introduction* [Boulder, San Francisco, Oxford, 1991] 199.

[20] See P. Saganek, *Unilateral Legal Acts of States* (n 13) 465.

[21] Thus, recognition has always remained connected with politics, see E. Suy (n 17) 189: '[D]espite a huge number of works on recognition, the latter remains a great secret (*la grande inconnu*) of international law (…) [T]he true nature of recognition was deviated from (*faussée*) by the authors of works devoted to the main aspects of the application of recognition. Such authors rather try to build a system based on political considerations than to discover the true nature of an act of recognition'. See also J.-P. Jacqué, *Eléments pour la théorie de l'acte juridique en droit international public* [Librairie générale de droit et de jurisprudence, Paris, 1972] p. 337. This means also that recognition is not governed by legal rules, see P. Cobbett, *Cases on international law* [Grey, F. T. ed., Peace, London, 1931] 43.

recognition in international law. The principle of non-recognition has been often detached from the Law of Recognition, since authors treated it only as a sanction. On the other hand, the principle of non-recognition has been only treated in passing by authors dealing with unilateral legal acts of States, thus their analysis says very little about it.

Notwithstanding these remarks, and despite the fact that the principle of non-recognition has developed partly as a separate instrument of international law, it is necessary, before offering our perspective of study, to analyse the two different theoretical frameworks in order to fully grasp the linkages the principle has with them.

2.1. The Law of Recognition

Few scholars have rendered explicit the link between what was then called 'the doctrine of non-recognition' and the wider branch of the Law of recognition. They have generally failed to provide an explanation about where to properly situate the doctrine in international law because they saw it only as a sanction.[22] Lauterpacht and Chen, who wrote the two leading monographs about recognition, respectively in 1947 and 1951, instead did tackle the doctrine of non-recognition as part of their theory of recognition in international law – although founding themselves on the opposite side of the great divide, ie the constitutive versus the declaratory debate. Since then, non-recognition has turned to be a wider principle of international law, but it maintains its source of origin exactly in the international Law of recognition, making use of its legal categories and concepts.

A. Non-recognition between declaratory and constitutive theories

The international law of recognition has been crossed by a fundamental cleavage between adherents to two different schools of thought, the declaratory and the constitutive theories of recognition. The principal tenet of the latter school, as set forth by Oppenheim, is that only and exclusively through recognition a State becomes an international person and a subject of international law. International law, indeed, does not say that a State is not in existence as long as it is not recognized, but it takes

[22] See F. A. Middlebush, 'Non-recognition as a Sanction of International Law' [April 27-29, 1933] 27 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 43; J. W. Garner, 'Non-Recognition of Illegal Territorial Annexations and claims to Sovereignty' [October 1936]30(4) *The American Journal of International Law* 686; Editors, 'Non-recognition: A Reconsideration' [Autumn 1954] 22(1) *The University of Chicago Law Review* 268.

no notice of it before its recognition.[23] More generally, the constutivists maintain that because international law is a primitive legal system without a central institution which is competent to determine whether the criteria for statehood are met, the existing States have to fulfil this function by way of the act of recognition.[24]

On the contrary, the declaratory school, supported in its traditional form by authors like Vattel, Moore, Brierly and Chen, is based on the idea that a State's existence as an international legal person is independent of its recognition by existing States. Thus, when an entity satisfies the traditional criteria for statehood, that is as soon as it exists as a fact, this entity is a State in the sense of international law. Recognition is merely a formal acknowledgment of an already existing fact; it only expresses the intention of the recognizing State that it is willing to enter into relations with the recognized State.

Both schools have attracted criticisms from the other side. The constutivists are accused to tracee back to Hegel who reduced legal positivism to State voluntarism. In this way, the positivist theory would require that not only the content of the law, but also the subjects thereof, are to be subjected to the consent of States.[25] As regards the declaratory school, it has been underlined by Kelsen how from a legal point of view it is incomprehensible that a State may exist *outside* international law.[26]

Lauterpacht suggested a third way, that is a qualified constitutive theory of recognition. He proposed an obligation for States to recognize a political community that fulfils the requirement of statehood. Thus, he advocated of a recognition practice premised on legal principle and not on political whim.

The declaratory school has been predominant for the last several decades and as a matter of fact, it is best suited for describing what is the present state of international law.

Curiously, the two schools of thought did not conflict with respect to certain issues: for example 1) the fact that the formation of a State is a matter of fact and not of law, and it is independent from the legality of its creation; and 2) that recognition where the material conditions for statehood are absent, is unlawful.

The doctrine of non-recognition can be said to complement the theory of recognition in international law by dismantling in part the first assumption. In other words, while the doctrine of non-recognition does not question the fact that statehood

[23] L. Oppenheim, *International Law: a Treatise* (Lauterpacht H. ed.) [vol. 1, Longmans, Green and Co., London, 1937] 121.

[24] D. Raič, *Statehood and the Law of Self-Determination* [Kluwer Law International, The Hague, 2002] 28 ff.

[25] T. Chen (n 3) 17-29.

[26] Cf. H. Kelsen, 'Recognition in International Law: Theoretical Observations' in [1941] 35 *The American Journal of International Law*;

is a 'pre-juridical' fact of the international order, that is something that the international order takes for given, the doctrine intervenes when the process of formation conflicts with some imperative rules of the international order (for considerations on international subjectivity see *infra*, Chapter VI, par. 10).

As regards the second proposition, non-recognition can be viewed as an expansion of it, in the sense that the doctrine 'extends [the] conception of premature recognition by insisting that, with respect to a claim resting upon [illegality], recognition is always premature until such claim has been confirmed by a procedure of general consultation manifesting the will of the community of nations as a whole'.[27] Thus, not only recognition when the traditional elements of statehood are not met is unlawful (because premature), but also recognition when the formation of States is contrary to peremptory norms of international law is unlawful.

The doctrine of non-recognition cannot be considered however an expansion of the second proposition in the sense proposed by some scholars, like Crawford, who seek to demonstrate the existence of additional requirements of statehood dictated by international law[28] (other than the traditional requisites enunciated in the Montevideo Convention of 1933). It emerges indeed that non-recognition does not take international subjectivity nor the determination of governmental capacity *per se* as its target. In a nutshell, non-recognition is not tied with missing legalistic elements, rather it is triggered by the *violation* of higher norms.[29]

That said, it remains unanswered whether the doctrine of non-recognition, barring the validity of illegal situations, has a constitutive effect. Even if its primary focus is not international subjectivity, indeed, non-recognition has also a clear effect on it.

The answer to this question depends on other concepts which will be tackled later in this work, in particular the effect to be attached to an act of non-recognition: nullity, non-existence, or lack of efficacy. With regard to situations involving the formation of States and governments, UN organs have resorted interchangeably to expressions like 'null and void', 'non-existent', 'illegal and invalid'. Of course, if it is assumed that a State is non-existent, the effect of non-recognition would be constitutive of its

[27] Q. Wright, 'The Legal Foundation of the Stimson Doctrine' in [December 1935] 8(4) *Pacific Affairs* 444-45.

[28] J. Crawford, *The creation of States in International Law* [2nd edition, Clarendon Press, Oxford, 2006] 97 ff.

[29] J. Dugard (n 5) 127 ff. In the Kosovo Advisory Opinion, for example, the ICJ stated that the secession of Kosovo was not *a priori* contrary to international law, the matter of subjectivity left to the area of facts and not of law. However, whenever a secession is carried out with an unlawful use of force by a third State against the territorial integrity and political independence of another State, we have a violation of a peremptory norm of international law and the territorial change can not be recognized (as it has been the case for the declarations of independence of Southern Rhodesia, Cyprus and Republika Srpska; see ICJ, *Accordance with international law of the unilateral Declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, para. 81. For a detailed and comprehensive analysis of the Advisory Opinion, see A. Tancredi, 'Il parere della Corte internazionale di giustizia sulla dichiarazione d'indipendenza del Kosovo' in [2010] 4 *Rivista di Diritto Internazionale* 994.

international legal personality, on the contrary if the State is labelled as illegal and invalid, it is more appropriate to see non-recognition as declaratory.

As it will be explained, the sanction of non-recognition has a 'status-denying' effect rather than a 'nullifying' effect (which is instead the effect it has in the sphere of law-making). As a consequence, the doctrine of non-recognition applied to traditional subjects such as States and governments can be said to have a sort of declaratory effect; the doctrine coming to terms with the factual existence of the territorial situations. However, it seems reductive to label the doctrine of non-recognition as merely 'declarative'; to appreciate the full effects of the doctrine of non-recognition with respect to international subjectivity we have to deepen our analysis outside the Law of Recognition (see *infra*, Chapters VI-VII).

B. (Non-)recognition as a faculty and (non-)recognition as an act governed by international law

From the preceding section, it emerges that the doctrine of non-recognition developed both as a limitation and as extension to the traditional theory of recognition. The major difference between recognition and non-recognition is represented by the fact that the former remains, at the present stage of international law, a discretionary faculty of States, while non-recognition has developed as an act governed by international law, mostly mandatory in character and collectively enforced.

However, it should be remarked that also non-recognition can be a discretionary faculty of States acting for geo-political or economic interests. In these cases, it is more appropriate to use the term 'refusal of recognition', as according to us it better underlines the unilateral and policy-oriented character of such denial of recognition. What distinguishes a unilateral refusal of recognition and the doctrine (later principle) of non-recognition is that only the latter is premised on a conflict involving a higher norm of the international order. Still, there can be occasions where it is difficult to identify a clear demarcation line between non-recognition as a faculty and non-recognition as an act governed by international law. Such difficulty, as in many others branches of international law, draws on the fact that non-recognition still needs the cooperation of States to preserve the authority of the law, lacking sometimes an institutionalized collective response. Of course, when there is an authoritative pronouncement on non-recognition by the organs of an international organization,

such as the United Nations, it is easier to see this 'collective guarantee' and thus non-recognition as an act governed by international law.[30]

Moreover, to further complicate the picture, it must be said that in history recognition has served the same purpose of the doctrine of non-recognition, assuring certain parameters of 'justice' in international relations. As it will be shown in Chapter II, before the explicit establishment of the legal doctrine of non-recognition in the 1930s, recognition – in derogation to its traditional limitation of premature recognition – permitted the constitution of non-European non-Christian States and their entry into the Law of Nations.[31] It can also be observed that recently recognition itself, from a simple faculty of States is acquiring, just as non-recognition, the characterization of an act governed by international law. This change in the understanding of recognition could lead to a gradual formation of a legal obligation of recognition, the exact counterpart of the legal obligation of non-recognition.[32] It is remarkable that the affirmation of a positive obligation to recognize as a means to enforcing fundamental values[33] – even if far from establishing itself – would bring to unity all the Law of Recognition, overcoming many present inconsistencies.

C. Non-recognition and premature recognition

The term 'premature recognition' refers to an unlawful recognition of an entity, traditionally a State, which does not possess the traditional requirements of statehood, that is certain conditions of permanency and political cohesion. Furthermore, since most of communities claim recognition following upon secession from the parent State, the recognition granted before the parent State has consented to it, amounts to premature recognition.

In the period up to 1930s, an epoch in which nation States were very few and were all European and monarchical, the theory of recognition broke away from premature recognition to allow the formation and the entry into the law of nations of non-European, non-Christian States. The recognition by France of the independence of the United States in 1778 was indeed considered a breach of international law by the other European powers. Similarly, Spain protested against the recognition by the UK and the US of the independence of the newly-formed Latin-American Republic in the

[30] See *infra*, Chapter VI, par. 6.2 and 6.3.

[31] Whereas a political conservative conception of non-recognition attempted to negate them international subjectivity, keeping them outside the closed circle of civilized nations who had control on the shaping and application of international law.

[32] Cf. H. Lauterpacht, *Recognition in International Law* (n 1) 26 ff.

[33] E. Milano, 'Recognition (and Non-Recognition) of Non-State Actors' in (W. Czaplinski, W., and A. Kleczkowska eds.), *Unrecognized Subjects in International law* [Scholars Publishing House Ltd., Warsaw, 2019] 17.

1820s. In the end, a theory of recognition based on effectiveness, was predominant over a political selfish conception of non-recognition.

However, at the end of WWI and particularly in the aftermath of WWII, the number of States increased enormously. In 1913, the world community consisted of 48 States; in 1950, there were 75 States of "generally accepted status", of which 60 were UN members. Nowadays, there are over 200 States, most of them members of the United Nations. In this new scenario, the doctrine of recognition has remained formally attached to the effectiveness criterion (of which the declaratory school is an effect) as enunciated in the Montevideo Convention of 1933. However, in recent years especially, with increasing secessionist movements which fall short of being characterized under the umbrella of National Liberation Movements (NLMs) and non-state actors aiming at achieving power within the State (usually forming the phenomenon of 'dual government'[34]) recognition is not seen always as premature and thus an unlawful intervention.[35] The situation of dual government in Venezuela following the presidential election of January 2019 is a case in point.[36] Two weeks after the proclamation of Mr Maduro as the President of the Republic, the President of the Parliamentary Assembly of Venezuela, Juan Guaidó, announced that he would assume the *interim* Presidency, in view of the arrangement of new elections (since for the just held elections there were accusations of fraud). The claim of the self-proclaimed President, based on Articles 233, 333 and 350 of the Venezuelan Constitution, was immediately recognized by the United States (US), as well as by almost all the States of South America and by 19 members of the European Union (EU). Thus, it seems that premature recognition, intended as an unlawful intervention in the domestic affairs of other States, is going through the same changes as the principle of non-intervention more generally.[37] States, indeed, are ever more frequently involved in domestic affairs of other States, such as unconstitutional changes of governments, secessions, and other claims, without or even against the will of the territorial State.

However, such a practice is at present based only on legitimacy, and not on legality, thus posing many problems (see *infra*, Chapter VII). In a certain way, the legitimacy-grounded theories of recognition of the XIX century, seem to reappear on the scene, such the willingness to fulfil international obligations test, the legitimacy of

[34] See *infra*, Chapter VI, par. 6.4 and Chapter VII, par. 3.

[35] According to Lauterpacht, writing in 1947: 'It is generally agreed that premature recognition is more than an unfriendly act; it is an act of intervention and an international delinquency', H. Lauterpacht, *Recognition in International Law* (n 1) 8.

[36] See G. Puma, 'The Principle of Non-Intervention in the Face of the Venezuelan crisis' in [March 31, 2021] *Questions of International Law* 5.

[37] E. Milano (n 33) 14.

origin test and others.[38] In this way, recognition can be likely abused by States that seek to achieve their interests against the law.

It is not by chance that the International Law Association (ILA)'s 2018 Report on Recognition and Non-Recognition, still points out the relevance of the theory of premature recognition, that is recognition when the traditional elements based on effectiveness are not met, both for States and governments.[39]

The risk of a general dismemberment of nation States into a myriad of small entities incapable of survival has been taken up by the principle of non-recognition, which sticking to law plays a more conservative role than recognition. Dealing with cases of secession, indeed, the ICJ has resorted to non-recognition of the violation of higher norms in strong connection with the principle of territorial integrity of States[40] (see *infra*, Chapter VI, par. 5.1.).

D. Non-recognition and implicit recognition

The relationship between recognition and non-recognition has been rendered more obscure by the notion of 'implicit' (also said, 'implied', 'tacit', 'presumed' or 'silent') recognition.[41] Implicit recognition of an illegal situation is unlawful as much as explicit recognition. It follows that to understand when a type of conduct will be interpreted by the law as amounting to recognition is of utmost importance.

Recognition can be implied as regards every act or situation in international law. Mullerson, for instance, affirms that most States of the international community tacitly recognized Russia's taking the seat of the USSR at the UN.[42]

Of course, the major practice concerns tacit recognition of States, governments and territorial changes, that it is a more sensitive area of law and more easily a harbinger of consequences in international relations. In the case of the *Temple of Preah Vihear*, the International Court of Justice (ICJ) referred to a visit made by a Cambodian Prince to Preah Vihear. The lack of reaction by Siam to this visit, for the Court amounted to an implicit recognition of the sovereignty of Cambodia (under the French Protectorate) over the temple.[43] Similarly, in the case concerning the right of

[38] See H. Lauterpacht, *Recognition in International Law* (n 1) 102-114.

[39] ILA, Committee on Recognition/Non-recognition in International Law, Sidney Conference Report, *Fourth (final) report*, 2018, 8-9.

[40] See ICJ, *Accordance with international law of the unilateral Declaration of independence in respect of Kosovo* (n 28).

[41] P. Saganek, 'Forms of Recognition' in (Czaplinski, W., and Kleczkowska, A., eds.), *Unrecognized Subjects in International law* (n 33) 79. It must be said that sometimes the distinction between implicit recognition and acquiescence is a very thin line.

[42] R. Mullerson, 'The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia' [1993] 42(3) *International and Comparative Law Quarterly* 473, 477-478.

[43] ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgement, ICJ Reports 1962, 6, 30-33.

passage over Indian territory, the ICJ ruled as follows: 'Thus Portuguese sovereignty over the villages was recognized by the British in fact and by implication and was subsequently tacitly recognized by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory'.[44]

Since recognition is essentially a matter of intention[45], the question that has to be addressed is whether from the evidences it has emerged an intention to recognize the situation concerned.[46] Scholars have identified the main ways in which in practice a State usually manifests its intention.

Consider, first of all, the formal conclusion of treaties[47], that is the conferral of a treaty-making power to a subject or entity. Lauterpacht takes a negative stance as to that matter, stating that neither signature nor adherence on the part either of the recognizing or the unrecognized State result by themselves in bringing about recognition.[48] This view should be accepted as a general rule, and it is demonstrated by the participation in many multilateral treaties of non-recognizing and non-recognized States[49]. Even the joint participation to a special category of multilateral treaties, that is the ones establishing an international organization, generally does not constitute a form of recognition.[50] Authors like Wright and Dugard have advanced the idea that 'collective recognition' given by the acceptance of membership in an international organization like the UN is a proof of universal recognition of status.[51] As it will be shown also in Chapter V, however, recognition – even when collectively applied – at the present stage of international law is not a means of conferring objectivity to a status, a title or a situation in general. In customary international law, the doctrine of non-recognition is the only means to confer objectivity.

That said, as regard the signing of treaties, a distinction must be made between multilateral and bilateral treaties. Unlike the former, the conclusion of a bilateral treaty really goes in the direction of recognition. In this case, this must be taken as a general rule, even if, as it has been rightly specified by Chen, some agreements for its

[44] ICJ, *Case concerning Right of Passage over Indian Territory*, Judgment, ICJ Reports 1960, 6, 39.

[45] H. Lauterpacht, *Recognition in International Law* (n 1) 371.

[46] D. P. O'Connell (n 11) 167.

[47] A. Ross, *A Textbook of International Law: General Part* [Longmans, Green and Co., London/New York/Toronto, 1947] 120.

[48] H. Lauterpacht, *Recognition in International Law* (n 1) 374

[49] See, for instance, the case of Israel and Palestine which participate in multilateral treaties even if they do not recognize each other.

[50] Contra see V. Lowe, *International Law* [Oxford University Press, Oxford, 2007] 163.

[51] Q. Wright, 'Some considerations about recognition' in [1950] 44(3) *The American Journal of International Law* 548; Dugard (n 5) 50 ff.

informal or temporary character are unsuitable for grant recognition to States or governments.[52]

Another distinction is in order, and it concerns illegal territorial seizures. In this case, a third State or a group of third States who sign a (bilateral or multilateral) treaty with the occupant or the annexing State regarding the illegally occupied/annexed territory give rise to a strong presumption in favour of recognition. In the East Timor case, the ICJ seems to share this position when it agrees with the Australian Foreign Minister's assertion that the recognition of a treaty-making power to Indonesia concerning East Timor amounted to recognition *de jure* of the Indonesian title over the Territory.[53]

Then, there are a number of acts from the field of diplomatic and consular law that could amount to recognition. Chen notes: '[t]hat the exchange of diplomatic representatives constitutes recognition is in principle open to less dispute than any other form of implied recognition. As evidence of the existence of the power recognised, it is irrefutable'.[54] Similarly, Lauterpacht writes that '[t]he formal appointment or reception of diplomatic representatives is properly regarded both as a mode of and as an irrebuttable presumption of recognition'.[55]

As regard consular law instead, scholars seem to agree that the very preservation of consular officers (where *exequatur* is neither asked for nor received) is recognition neither of a new State nor of a new government.[56] They agree also on the fact that an issuance of *exequatur* would amount to recognition to the new entity. There is less certainty as regards the request of *exequatur*.[57] It is useful to quote in full Lauterpacht's approach to the issue: '[T]here is no compelling reason of logic why a request for a consular exequatur should signify general recognition [..] The importance and the character of exequatur and the consul function in general would not seem to make it a proper or natural instrument of recognition. However, in view of the preponderance of opinion that a request for exequatur implies recognition, a government making that request and wishing to avoid any such implication will be acting wisely in entering a caveat calculated to prevent that effect'.[58]

The practical approach of Lauterpacht is indeed useful to see the proper relation between implied recognition and non-recognition. Instead of assuming that the

[52] T. Chen (n 3) 193; see also B.R. Bot, *Nonrecognition and treaty relations* [A.W. Sijthoff/Oceana Publications, Leiden/Dobbs Ferry, 1968] 67.
[53] ICJ, *East Timor (Portugal v. Australia)*, Judgement, ICJ Reports 1995, 98, par. 17.
[54] T. Chen (n 3) 196.
[55] H. Lauterpacht, *Recognition in International Law* (n 1) 381.
[56] P. Saganek, *Unilateral Legal Acts of States* (n 13) 89.
[57] A. Ross (n 47) 120; H. Lauterpacht, *Recognition in International Law* (n 1) 387.
[58] H. Lauterpacht, *Recognition in International Law* (n 1) 387.

doctrine of non-recognition is undermined by the notion of implied recognition, he reversed the causal link. He maintains that a general attitude of non-recognition reduces the operation of the doctrine of implied recognition. According to him, 'this means that particularly exacting evidence of recognition is required in the case of States which have declared themselves to be pursuing a policy of non-recognition or, even more so, as being bound by an obligation of non-recognition. There is room for the view that in such circumstances nothing short of an explicit and unequivocal act of recognition will have the result of recognition'.[59]

There are merits and demerits of such an approach. To start with the latter, it should be noted that not only recognition in contravention to a previously assumed policy of non-recognition or a collective obligation of non-recognition is not admitted, but also a recognition contrary to peremptory rules themselves (since as we will see in the next subsection, non-recognition has evolved as a logical and automatic 'consequence' of conflicts involving higher norms of the international order). This means that States are mandated not to recognize a certain situation which conflicts with a higher norm independently from the existence of an authoritative pronouncement on non-recognition by organs of the UN. In a nutshell, there can be no basis for an 'inverse' presumption which is contrary to recognition. Connected to this, it must also be said that the abandonment of a clear classification by which to decipher whether a State behaviour is seen as recognition by the law, it leads to a risk of abuse by States themselves. In other words, States could hide themselves behind the fact that whatever the nature of the act they put in place with regard to the unrecognized situation, it does not amount to recognition because it is not their intention.

On the positive side, it should be said that the great reliance on intention permits a considerable degree of flexibility in ascertaining whether a certain act is conferring recognition to an illegal situation or not. It is the international community as a whole, indeed, that is competent in determining whether from a particular act the State wanted to recognize a certain situation and in barring it from legality (see *infra*, Chapter VI, par. 9).

Another merit of allowing this flexibility, is underlined by Lauterpacht himself: 'If we fall a prey to the tendency to interpret various kinds of conduct as implied recognition, we may often be led to assume, without good cause, that the principle of non-recognition has been abandoned in a particular case. Conversely, if the doctrine of implied recognition is confined within its proper sphere, States may be in a position, without necessarily becoming disloyal to the general obligation of non-

[59] *Ibid.*, 395-396.

recognition, to adapt their conduct to the requirements of international intercourse and to the protection of their interests and those of their nationals'.[60]

Thus, if the doctrine of non-recognition rules out the theory of implied recognition, it becomes possible to balance the burden (ie the adverse effects) on the non-recognizing States with their objective of having the rule of law maintained. To put it another way, there is a certain equilibrium between the 'outcasting' of the illegal situation and the maintenance of the international legal order. Not by chance, certain rules of international law continue to apply to the illegal situation and connected subjects.

E. Non-recognition, withdrawal of recognition, retroactivity, and prescription

It is a postulate of the Law of recognition that once recognition *de jure*[61] is granted, it cannot be revoked because of the *estoppel* effect of the previously granted act of recognition. The doctrine of non-recognition represents an exception to this postulate. While it holds true with regard to the faculty of non-recognition – that is a State cannot decide not to recognize a situation, withdrawing its previously granted recognition, for a new political calculation – a State can, or it is even compelled to withdraw its recognition, when the situation concerned is conflicting with a fundamental rule of international law. Such withdrawal of recognition is not unlawful, for the doctrine of non-recognition has here a retroactive application. As explained by Langer, in this case 'withdrawal of recognition [..] is bound to have retroactive force. For, what is "null and void" (in French: "nul et non avenu") must be held invalid from its inception; this means that by virtue of the declaration the effects of the previously granted recognition are deleted "nunc pro tunc"'.[62]

However, it must be said that the doctrine of non-recognition is not a suitable tool for addressing past serious violations of the law. It does not make much logical sense not to recognize an illegal situation of the past which has already ceased to exist. It means that the retroactive application of the doctrine is limited to a time span in the past for which it is still considered relevant to make an assessment of non-recognition.

On the other hand, as outlined by Lauterpacht, the doctrine or principle of non-recognition has one objective in preserving the existing legal position and in preventing the operation of prescription.[63] It must be said that such presumption against prescription is mostly valid *pro futuro*, that is once the doctrine of non-

[60] *Ibid.*, 395

[61] For a distinction between *de jure* and *de facto* recognition see *infra*, par. 2.1.G.

[62] R. Langer, *Seizure of territory. The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice* [Princeton University Press, New Jersey, 1947] 114.

[63] H. Lauterpacht, *Recognition in International Law* (n 1) 428.

recognition, as a sign of protest and condemnation, starts applying. It means that for historical illegalities or illegalities towards which an unclear stance by the international community has been taken, prescription is not completely excluded, this for, *inter alia*, the operation of acquiescence. It could happen indeed that some claims originating from illegality, are accepted by the law through prescription. This fact is taken into consideration by the doctrine or principle of non-recognition itself, which is not an 'open-ended' obligation, for it is required to modulate its effects according to the evolving factual conditions on the ground and in international relations.[64] Of course, a balance must be carefully looked for between order and justice, intended as the two poles of attraction of the doctrine, not to favour too much one side at the expenses of the other.

F. Other considerations on the intertemporal problem

The factor 'time' is relevant for the doctrine of non-recognition also from the more general point of view of intertemporal law. The doctrine of intertemporal law consists of two postulates, as originally set out in *Island of Palmas* arbitration by judge Huber[65], the first of which is that acts should be judged in the light of the law contemporary with their creation, and the second of which is that rights acquired in a valid manner according to the law contemporaneous with that creation may be lost if not maintained in accordance with the changes brought about by the development of international law.[66]

While the first element is widely accepted in international jurisprudence and among scholars, the second one has been the object of controversy among experts.[67] However, it has been observed that in practice other principles of interpretation and application of intertemporal law such as prescription and non-retroactivity operate as to make impossible for the second element of the doctrine to work injustices, completely overriding the first element. A call for a delicate balance in the formulation of the doctrine has been made by authors like Lauterpacht and Brownlie.[68]

In the context of our analysis, to find a balance is an even more delicate operation, for it has been said that the doctrine of non-recognition can have a retroactive application and it can prevent prescription.

[64] M. Arcari, 'The UN SC, Unrecognised Subjects and the Obligation of Non-recognition in International Law' in (W. Czaplinski, W., and A. Kleczkowska eds.), *Unrecognized Subjects in International law* (n 33) 239.

[65] *Island of Palmas Case (Netherlands, United States)* in 2 B. Int'l Arb. Awards 831, 845.

[66] See T. O. Elias, 'The Doctrine of Intertemporal Law' (1980) 74 *The American Journal of International Law* 285, 286.

[67] P. Jessup, 'The Palmas Island Arbitration' in [1928] 22 *The American Journal of International Law* 735.

[68] H. Lauterpacht, *The Function of Law in the International Community* [Clarendon Press, Oxford, 1933] 284; I. Brownlie, *Principles of Public International Law* [2 nd ed., Oxford University Press, Oxford, 1973] 132.

This is relevant especially as regards recognition of claims and titles of sovereignty. Scholars have indeed resorted to the notion of intertemporal law – in particular the idea that mere acquisition of rights at the time of their creation is not enough, but that they must be maintained according to the evolution of international law – to say that as it is possible not to recognize a revolutionary government come to power with massive violations of human rights, it is possible as well to withdraw recognition from an already recognized government which commits similar acts.[69]

These authors are brought to this thought also by their adherence to the theory of new criteria of statehood requested by international law, such as the respect of free elections and other civil and political rights. These new rules on States' formation and governmental capacity would have determined already existing States too to adapt to the changed legal regime. However, we think that this view should not be accepted, as already said above, because the principle of non-recognition is triggered by violations of peremptory rules of international law and not by new criteria of statehood or governmental authority, as demonstrated by international practice

Thus, the question is whether an already recognized government, which commits serious violations of human rights at present can be sanctioned by the principle of non-recognition or better by withdrawal of recognition (as an expression of the principle of non-recognition) by the part of the international community. In this way there is no question of intertemporal law, since non-recognition sanctions the actual situation of fact, not being restricted to international subjectivity. While it could be a logical development of the law, from the practice of States it emerges that the withdrawal of recognition of statehood or governmental capacity is not a viable solution at the moment. In other words, States prefer to adopt other measures rather than non-recognition in these cases. As a matter of fact, such application of non-recognition may run the risk to leave no shred of certainty in the conduct of relations among States, every State or government potentially being unrecognized.

G. Non-recognition and *de jure*/*de facto* recognition

The distinction between *de jure* and *de facto* recognition is traditionally considered relevant when dealing with the traditional objects of recognition, that is States and governments.[70] *De facto* recognition is a declaration that the body claiming to be a State or a government actually wields effective authority, without, however, satisfying

[69] Cf. Dugard (n 5) 129 ff; H. Lauterpacht, *Recognition in International Law* (n 1) 107.
[70] See L. Oppenheim (n 22) 134-136.

other conditions of a full *de jure* recognition.[71] The latter is deemed to be full and definitive, and the former of nothing more than a partial and temporary nature.[72] However, as Lauterpacht put it, 'The subject of *de facto* recognition is a somewhat elusive topic of the law of recognition. There is no consensus of opinion as to its precise legal meaning'.[73] For this very reason, Kelsen and Ross underline that the distinction between *de jure* and *de facto* recognition has hardly any legal significance.[74] Dugard chooses not to deal with such a distinction in its monograph on recognition, since for him, 'these confusing concepts have outlived whatever usefulness they may once have served'.[75]

While these last considerations hold true as regard recognition and non-recognition as a faculty of States, the distinction between *de jure* or *de facto* recognition is relevant in our analysis for it has resolved to be a way for the doctrine of non-recognition to deal with the effective existence of facts. There has been indeed a tension between two opposite fronts, those seeking to comprehend in the doctrine of non-recognition the banning of both *de jure* and *de facto* recognition, and those trying to preclude only *de jure* recognition. The distinction would influence at a considerable degree the content to be given to the doctrine of non-recognition (see *infra*, Chapter III, par. 4.7; Chapter VI, par. 8). In the more stringent version, the doctrine of non-recognition would exclude a major range of measures of intercourse between non-recognizing States and the unrecognized body or entity. The other way round, the doctrine would be more flexible, allowing certain measures and transactions between them, without incurring in recognition *de jure* (on implicit recognition, see *supra*, par. D). According to Lauterpacht, for instance, States' practice in the inter-war years showed that there was nothing in the doctrine of non-recognition which precluded some measures of intercourse, since ignoring altogether the existence of the power which actually exercises control and avoiding anything which may bring into contact with the effective authority, would signify an unduly high price for the non-recognizing States.[76] The debate has survived until the discussion preceding the 1970 Declaration on Friendly Relations, where the formula 'not to recognize *as legal*' has been finally used (see *infra*, Chap. VI, par. 8). This terminology seems to confirm the position of those who seek to separate *de jure* from

[71] E. F. Kobey, 'International Law - Recognition and Non-Recognition of Foreign Governments' in [1951] 34(4) *Marquette Law Review* 282.

[72] P. Saganek, *Forms of Recognition* (n 41) 105.

[73] H. 3

, *Recognition in International Law* (n 1) 329.

[74] A. Ross (n 47) 120; H. Kelsen, *Recognition in International Law* (n 26) 605, 613.

[75] J. Dugard (n 5) 6.

[76] H. Lauterpacht, *Recognition in International Law* (n 1) 431-32.

de facto recognition; however, it gives relevance to the legality test, that is States should be really cautious in putting in place acts which can result in any kind of recognition of the legality of the unlawful situation. As a matter of fact, since the doctrine has progressively become a 'corollary' of higher norms of international law, the liberal approach of Lauterpacht has proved not to endure over time. As a matter of fact, at present the doctrine of non-recognition is dimmed or better relativized by the increasing consideration given to the protection of the population living in the unrecognized entity or under an unrecognized authority (Namibia exception doctrine) – rather than by the disadvantages suffered by non-recognizing States.

2.2. (Non-)Recognition as a unilateral legal act of State

Authors predominantly dealings with the Law of recognition make their analysis on a sectorial basis (concentrating mostly on the recognition of States, governments and belligerency) and rely abundantly on State practice. What come out is a very detailed picture of the state of affairs in these sectors of enquiry. On the other hand, scholars dealing with unilateral juridical acts of States are more interested in reconciling the instrument of recognition with the wider theory of international law and in particular with the theory of sources of international law.

Thus, the two branches have treated the same argument adopting different lenses, posing themselves different questions. It is thus interesting to see briefly what the doctrine of unilateral juridical acts of States has to offer in terms of a comprehensive understanding of recognition in international law and then for the doctrine or principle of non-recognition.

The main problem when dealing with unilateral acts of States is that of distinguishing between juridical and political acts, that is between 'law' and 'non-law'.[77] Since the notorious ICJ judgment *Nuclear Tests case*[78], in which the Court acknowledged the binding nature of French unilateral statements, scholars and judges have divided in 'believers' or 'deniers' of the legal character of unilateral acts of States. Neither the ILC in the 2006 Guiding principles has come to a clear method of ascertainment. According to the Special Rapporteur, the criterion for distinguishing between political and legal acts was that of the intention of the author State to create legal effects, an opinion that was accepted by the majority of the members of the Commission. However, neither in the first, nor in the subsequent reports, did the Special Rapporteur elaborate on how the element of intention is to be determined in

[77] E. Kassoti, *The Juridical Nature of Unilateral Acts of States in International Law* [Brill Nijhoff, Leiden/Boston, 2015] 112.

[78] ICJ, *Nuclear Tests Case, Australia vs France*, Judgement, ICJ Reports 1974.

practice, ie on how the distinction between legal and political acts of unilateral origin can be practically made.[79] If for the Law of Recognition, recognition is a matter of intention on the part of the recognizing State, here it emerges that also the legal character of the act of recognition is a matter of intention.

Intention of the author-State alone, however, has not been considered enough by scholars studying unilateral legal acts in order to ascertain the legal character of an act. Other approaches have been advanced to classify unilateral legal acts according respectively on their content, on their legal effects, on the basis of the purpose they serve.

Among them the legal effects of such acts are of particular importance. Some authors, for instance, take for granted that recognition is a legal transaction when they attach to it the *estoppel* effect. Others instead connect the declarative/constitutive debate with the divide between law and non-law. Suy and Verhoeven, for example, maintain that the lack of constitutive effect would mean that recognition does not have the character of a transaction of international law.[80]

However, if one exits the traditional objects of the Law of Recognition, ie particularly States and governments, and widen the understanding of 'recognition' (see *supra*, par. 2), it can be observed that the preclusive effect of recognition (*estoppel*) cannot treated automatically as an obligation as such.[81] Furthermore, the effects attributed to recognition by either of the two theories, declarative and constitutive, are not precisely identical with the effects of an unilateral legal act of recognition as such.[82]

In general, the view of Saganek should be accepted, that is to say that one must exclude that recognition is by definition a legal transaction. Determination whether one has to do with recognition which is or which is not a legal transaction can only be effected *a casu ad casum*.[83] He, however, makes some qualifications. First, he admits that there can be types of recognition which by definition *are*, or by definition *are not*, transactions of international law. In other words, recognition of certain objects may

[79] See for example the Report of the ILC on the Work of Its 51st session, UN Doc. A/54/10, in [1999] 2 *Yearkbook of the ILC* 134, par. 540. See also the statements by A. Pellet in Summary Record of the 2525th Meeting, UN Doc. A/CN.4/SR.2525, in [1998] 1 *Yearbook of the ILC*, 46, par. 36.

[80] E. Suy (n 17) 192; J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine* [Paris, Pedone, 1975] 716.

[81] P. Saganek, *Unilateral Legal Acts of States* (n 13) 494; for a more critical opinion, see E. Kassoti (n 77) 89 ff.

[82] '[..] it is difficult to see in 'recognition' as discussed by the constitutive theory an individual act of recognition, while 'recognition' as discussed by the declarative theory may be identified even with an individual or collective acts of recognition. However, the theory concentrates on what recognition is *not*, rather than on what it *is*, while it is the latter element that is really critical for any and all discussions on whether the recognition of a state is a legal transaction or not. To this end the dispute between the theories is of minor importance. It is the attempt to identify the legal effects of that recognition which is of crucial importance here', P. Saganek, *Unilateral Acts of States* (n 13) 499.

[83] *Ibid.*, 493.

always be or may never be such a transaction.[84] Furthermore, in the ambit of recognition of rights[85], he seems to envisage that if one has to do with a right giving no basis for any doubts whatever, there is clearly no right on the part of another state to put the former right into question, hence there is nothing to waive by the means of recognition. In this sense 'only the recognition of a right giving rise to doubts is a legal transaction, while recognition of another right is a political act'.[86] It resembles very closely the opinion of Lauterpacht and Chen that recognition of doubtful or manifestly illegal situations is a quasi-legislative act.[87] This consideration is relevant insofar as the doctrine of non-recognition can invalidate unilateral legal acts whose aim is to create law or influence the development of the law. In these cases, indeed, the unilateral act of recognition is of concern to the whole community, it assumes an *erga omnes* effect; thus the act becomes juridical in nature, and it can be invalidated by the principle of non-recognition (other than sanctioned by the same principle for being contrary to higher norms according to the regime of State responsibility) (on circularity of the principle of non-recognition see *infra*, par. 3.2).

Scholars focusing on unilateral legal acts of States assumes a different perspective and conceive the observance of the doctrine of non-recognition as an additional requirement for the act of recognition to be legally relevant and validly accepted.[88] According to them, the act of recognition is invalid for being contrary to higher rules, and/or because it does not respect the doctrine of non-recognition. This means that these authors tend to see in the doctrine of non-recognition a limitation to the theory of recognition as a unilateral legal act. Apart from this consideration, non-recognition is treated as part of recognition, and it is presumed that every consideration that is made as regards recognition is applicable for non-recognition. However, this can not be taken for granted with regard to the doctrine of non-recognition. Keeping in mind that there is a distinction between the constitutive effect and the legal character of an act of non-recognition[89], one must assume that every act of non-recognition as governed by international law is a unilateral legal act whose legal effect is to bar from legality any situation, right, claim and so on. As already said above, indeed, the doctrine of non-recognition responds to legality, while the faculty of (non-)recognition is most of the time guided by legitimacy, and as a rule it does not constitute a legality checking instrument.

[84] *Ibid.*, 494.

[85] Recognition can be of a legal right or a factual situation (the latter having in turn an impact on obligations incumbent on the author-State or its loss of certain rights).

[86] P. Saganek, *Unilateral Legal Acts of States* (n 13) 491.

[87] H. Lauterpacht, *Recognition in International Law* (n 1) 412; T. Chen (n 3) 411.

[88] E. Kassoti (n 77) 32.

[89] For a contrary position see H. Kelsen, *Recognition in International Law* (n 26) 605.

3. The subject matter of the thesis: the *Principle of Non-Recognition* in international law

This work focuses on the principle of non-recognition, that represents one of the most relevant legality checking instruments that the legal order itself has set with respect to higher norms. As a result, it is proposed here a line of reasoning that exits the boundaries of traditional legal frameworks in which non-recognition has been analysed so far in this chapter, keeping in mind however the important linkages that the principle maintains with them.

The doctrine of non-recognition started developing in the '30s as a limitation to the unlimited discretion of States to recognize at will every situation or conduct. In the interwar years, most scholars find its legal source in the rather general jurisprudential maxim *ex iniuria ius non oritur*. Although it was labelled as a 'doctrine', it was considered almost exclusively as a sanction. It took Lauterpacht in 1947 to show that '[..] being a sanction is not the only, and perhaps not the main, function of the principle of non-recognition'.[90] The passage was twofold: 1) from a doctrine it progressively became a principle, and 2) it developed in a closed relationship with higher norms of the international order.

3.1. The scope of application and the general function of the principle of non-recognition

The aim of this study is to provide a comprehensive perspective on the principle of non-recognition, that substantiates in different customary norms depending on the field where it applies. Indeed, just as *jus cogens* cuts across the boundaries between the law of treaties and the law of international responsibility, the presence and the effects of non-recognition as well are found circularly in the three main functions of creation of the law, ascertainment of a wrongful act and coercive enforcement of the law.

The principle of non-recognition is always triggered by the existence of a conflict involving a 'higher' norm, a conflict which can be normative or 'material'. In this latter case, they are 'traditionally' referred to as breaches of the law. Its general function is preventing the consolidation of legal consequences deriving from acts or situations that are contrary to higher rules and endanger fundamental values of the international community.

[90] H. Lauterpacht, *Recognition in International Law* (n 1) 434.

In the field of law-making, the principle of non-recognition fulfils the function of bar to consent but also of evidence in the verification of the existence of fundamental norms. In the area of enforcement of the law, it fulfils the well-known function of sanction, but sometimes also acts as a precautionary measure. In between, the principle of non-recognition plays a role also in the ascertainment of the conflict involving a higher norm: the connecting link between the other two functions. Albeit establishing a breach of the law can be viewed as a sub-function of the 'enforcement of the law'[91], members of the international community, either in nullifying a treaty or in denying status to a territorial annexation, make an assessment on whether the act in question is legal or illegal and deserves recognition or non-recognition.

3.2. The circularity of the principle of non-recognition in the international legal order

As one can observe there is a sort of 'circularity' in the role of 'higher law' and of the principle of non-recognition. This circularity is due to the fact that higher norms are 'negatively' defined; hence they entail mainly negative duties on States and compliance with them is ensured by the invalidity of acts contrary to them.[92]

As pointed out by Cannizzaro: whereas, '[t]he two legal regimes – ie the rules of conflict established by the Vienna Convention and the additional secondary rules established under the law of state responsibility [relating to *jus cogens*] – are formally distinct', it is however true that in practice, 'the strict separation between these two legal regimes is less clear than it might appear'.[93] The same holds true as regards the principle of non-recognition in the two legal regimes; both regimes 'respond to' a conflict with a norm of jus cogens with non-recognition. However, in the case of a normative conflict, non-recognition acts *ex ante*, as a preventive defence to violations of higher rules; in the case of factual situations, non-recognition acts *ex post*, as a consequence of a breach of higher rules already occurred.

The invalidity of a treaty (through non-recognition) can be invoked by any State before a peremptory rule is materially breached, but it can also happen that a treaty is

[91] H. Kelsen, *Collective Security under International* [United States Government Printing Office, Washington, 1957] 39.

[92] See also A. Orakhelashvili, 'The Classification of International Rules: A Reply to Stefan Talmon' in [2013] 26 *Leiden Journal of International Law* 89, 100: 'In all areas where *jus cogens* applies, it deals with situations arising after the wrongful act. Apart from the 1969 VCLT, the areas of state responsibility, statehood and recognition, waiver and acquiescence, or acts of international organizations are virtually unanimous in recognizing the effects of *jus cogens* in relation to situations produced after the violation of the relevant peremptory norm'. According to us, also in the first case mentioned, it is appropriate to talk about 'normative conflicts'.

[93] E. Cannizzaro, 'A Higher Law for Treaties?' in (E. Cannizzaro ed.), *The Law of Treaties Beyond the Vienna Convention* [Oxford University Press, Oxford, 2011] 426.

concluded in the aftermath of a *jus cogens* breach. In the latter case, it is unclear whether the normative consequence falls within the law of treaties, or it is a special consequence of State responsibility.

Another example may be useful. State A recognizes the illegal occupation of State B by State C: the recognition of the consequences of a *jus cogens* violation can be assessed in two ways. It can be said that recognition of an illegal occupation is an invalid unilateral legal act. Otherwise, such recognition may be considered as a matter of international responsibility, ie recognizing an illegal occupation amounts to an unlawful act, directly flowing from the primary breach of the underlying norm of *jus cogens*, especially in cases where UN organs have authoritatively established the obligation of non-recognition of the illegal situation.

Finally, recognition of an illegal act has a quasi-legislative function because the illegality is incorporated into the legal order and it may prompt a change of law. Conversely, non-recognition of the effects of a material breach of the 'higher law' can also function as a bar to consent to a modification of existing rules.

4. The scope of the research

Legality in international law has not only been affected by historical conundrums deeply rooted in the discipline, namely the difficulty of defining what exactly international law is, if it is law at all, and which degree of normativity it possesses. In the last decades, we observe also a tendency of States to recur to legitimacy justifications or simply extra-legal arguments, to use force in contravention to the UN Charter structure of prohibition/exceptions, which carries the risk of completely undo the post-WWII international order. There is also a disregard for multilateralism, as an expression of the triumphant return of 'sovereignty' at the centre of the international arena, and the consent of States as the sole and ultimate arbiter of law.

In the last analysis, these *phenomena* are not new. They recur in sinusoidal waves throughout history. Thus, it emerges that answering whether a particular 'fact' or 'claim' in international law is legal or illegal with respect to the core rules of the system and whether it has to be recognized (and incorporated in the international legal order) is of extreme importance.

There are mainly two reasons why such is the framework research question that needs to be answered. First, it is for the very same survival of a system of law that it is allowed to change according to 'external' factors, but it can not be destroyed by the unqualified submission of law to facts. Second, it is posing in front of this problem that it can be assured States' abiding to fundamental rules.

In last analysis, thus, the desire to study and investigate the existence and substance of a principle of non-recognition in international law is inherently related

to what Lauterpacht called 'the maintenance of international law' as a valid world-ordering legal system.[94] The object and purpose of the principle of non-recognition being said to be the preservation of the authority, the integrity and the legal character of international law.[95] The distinction between law and non-law, between legality and illegality, whether legitimacy can become or influence legality, what is the role of effectiveness with compared to legality and legitimacy, at what stage of development is the international legal order at, these all are questions for which the reader can search for (some) answers in this work.

5. Methodology

The work has been divided in three parts according to the different methodology adopted. Part I deals with the historical development of the instrument of non-recognition from ancient times to the end of WWII. The legal-historical analysis is carried through a chronological order, taking into considerations events, scholarly works and debates, developments of the law as they actually occurred in history. In the conclusions to both chapters, a 'conceptual' analysis is however provided for, to extrapolate general trends and legal characterizations from the practice and the literature analysed. In part II of the dissertation, which concentrates on the period from 1945 to present, the research does not adopt the historical chronological order as the main *criterion*, but it is structured in a 'problematic' way, each paragraph aimed at answering specific questions. Within each paragraph cases of practice, literature, and international jurisprudence are analysed as they fit relevant to the question at issue. Finally, part III, dealing with the conclusions of the dissertation, is approached through a more marked conceptual perspective, since the main aim is to briefly reconstruct a theory of the principle of non-recognition and to offer some future scenarios of development.

This work must be said to rely on three elements: 1) the collection and analysis of the relevant legal literature and documents, such as conventions and resolutions adopted by international organizations; 2) the analysis of the relevant State practice; and 3) the examination of pertinent jurisprudence, in particular the case-law of the International Court of Justice, that contributed to the development of interpretations concerning the principle of non-recognition and it is of course crucial to evaluate the formation of customary rules.

[94] H. Lauterpacht, *Recognition in international law* (n 1) 435.
[95] D. Raič (n 24) 111.

It has been decided to focus primarily on the international level, that is on the horizontal relations between States in public international law. The domestic aspects of the principle of non-recognition as well as its regional developments are treated only when they result to be relevant for the characterization of the general principle. For instance, the question of immunity is treated only in a very specific perspective, that is whether the principle of non-recognition can be a waiver of it, without embarking on a comparative analysis of different domestic practices. The jurisprudence of regional courts (such as the European Court of Human Rights, ECHR) is not analysed systematically, however it is referred to when dealing with the content of the sanction of non-recognition and in matters of international responsibility.

Another aspect that is not tackled in this work is the private international law implications of the principle of non-recognition. For the sake of coherence and space, we do not investigate what are the effects, for instance, of the Namibia exception doctrine on the recognition/non-recognition of private acts of individuals in non-recognizing States. Furthermore, even if it would be of extreme interest, we do not analyse the parallel that could be made between the protection of the 'public order' in public international law and in private international law and the issue of (non)recognition of domestic acts.

Finally, it must be said that this work aims to offer a new paradigm to study the instrument of non-recognition in international law. The author is aware that there are numerous other aspects that could be analysed in depth; where possible they are however indicated making references to relevant readings on the topic.

As regard the theories of international law, this research sticks to positivism. However, a more liberal approach to positivism is taken, giving weight to *values* of the international community as a whole. Our approach takes inspiration in some respects by the one adopted by Antonio Cassese, as well as before him by Giuseppe Sperduti. The Cassese's general approach to international law has been described as 'presentational positivism', a co-existence of positivist and humanistic concerns. He sought to move the law forward and render it more humane, but broadly within a positivist framework or vocabulary.[96] Its contribution to the study of customary rules has been also important, for he emphasized the relevance of *opinio iuris* over State practice in those areas of international law involving fundamental values, such as humanitarian principles[97], to give expression to what his master Sperduti called the

[96] R. Cryer, 'International Criminal Tribunals and the Sources of International Law. Antonio Cassese's Contribution to the Canon' in [2012] 10 *Journal of International Criminal Justice* 1045, 1048.

[97] *Ibid.*, 1049-1057.

'conscience' of the international community.[98] Furthermore, it is to be remarked that Cassese was fully conversant with interdisciplinarism. He believed in the great contribution that other disciplines could bring for analysing and reforming international law, without however losing the scientific method proper to lawyers.[99] Finally, he was also a scholar who gave relevance to the historical development of international law.[100] Cassese indeed understood that the study of the history of international law can tell many things about how the law is at present, and why. Sometimes history can tell something about how the law will be.

Another approach that is relevant in this research is that called 'communitarian approach' adopted among others by Judge Bruno Simma.[101] This approach indeed underlines the existence of a 'community' and not an international society only. Considering that there is not yet a constitutional and fully-institutionalized international order, this approach investigates all the ways in which community interests and not only individual States' interests are realized through international law. The notion of international community is intrinsically flexible and elastic, as to include States, non-state actors, international organizations, individuals and others, depending on the rules at issue and the context from time to time. Sometimes community interests are pursued through institutionalised mechanisms, other times in the absence of community institutions, but through the States themselves acting as the guardians of general interests. In the field of law-making structures, for instance, the softening of the principle of State consent bears witness to communitarian traits.[102] Finally, the principle of non-recognition can partly fall under what the communitarian approach calls 'decentralized law enforcement' of higher norms.

6. Thesis outline

This preliminary chapter has served the purpose to introduce the subject matter of the thesis, ie the principle of non-recognition in international law. It has been necessary to dwell into the different theoretical frameworks that have tackled the issue of recognition and non-recognition, so that in narrowing our analysis, the linkages with the bigger picture are not missed.

[98] G. Sperduti, *Lezioni di diritto internazionale* [Milano, Giuffrè, 1958] 69-70.

[99] As he himself said in A. Cassese, 'A Soliloquy' in (P. Gaeta and S. Zappalà eds.), *The Human Dimension of International Law. Selected Papers* [Oxford, Oxford University Press, 2008] lix ff.

[100] See recently A. Cassese, *Il diritto internazionale in Italia* [M. Frulli ed., Il Mulino, Bologna, 2021].

[101] B. Simma, 'From Bilateralism to Community Interests in International Law' [1994] 250 *Collected Courses of the Hague Academy of International Law* 217.

[102] C. Tomuschat, 'Obligations Arising for States without or against Their Will' in [1993] 241 *Collected Courses of the Hague Academy of International Law* 195.

In Chapter II, we focus on the historical origins of the instrument of non-recognition from ancient times until the 1930s. In the early stages, the practice of non-recognition was based on political considerations, reflecting at times different concerns, and thus oscillating between legitimacy and effectiveness. The analysis of the early cases where a policy of non-recognition was applied is however useful to identify some lasting characteristics, different regional patterns and to outline the trajectories of development of the doctrine in different fields. Chapter III deals with the period from the creation of the League of Nations until the end of WWII. In this period, the so-called 'doctrine of non-recognition' was conceived by scholars only as a peaceful sanction, thus the analysis in this work is rendered mostly as it was viewed at the time. The wider role of the principle of non-recognition in the inter-war years, such as its contribution in the development of the higher law, is taken up again in the second part of the thesis.

Chapter IV deals with the role of non-recognition in law-making, both as evidence of the existence of the higher law and as a bar to consent. In Chapter V it is tackled the role of the principle of non-recognition with respect to the ascertainment of a conflict involving a higher norm of the international legal order. Here it is argued that the principle is closely linked with the concept of 'objectivity', for it can create a situation of objective conflict that must be assumed as a given by diverse international 'actors'. Chapter VI deals with the principle of non-recognition as a sanction. Notwithstanding it has been the most studied aspect of the principle of non-recognition so far, many questions remain unanswered. It is tackled, *inter alia*, what is the content of the sanction of non-recognition, if it is self-executing or not, if its form differs within and without the system of the United Nations, as well as matters of international responsibility.

Chapter VII contains the general conclusions of this thesis, an attempt to summarize a general theory of the principle of non-recognition in international law. We thus answer what is the nature of the principle at present in light of the customary norms it substantiates in different fields of application. We finally sketch what can be the trends of the future development of the principle of non-recognition.

PART I

HISTORICAL-JURIDICAL RECONSTRUCTION OF NON-RECOGNITION IN INTERNATIONAL LAW. FROM ANCIENT TIMES TO 1945

CHAPTER II

Early Practice of Non-Recognition

In general, the early practice shows that the instrument[1] of non-recognition was used to stop any attempt at changing the international order. It thus had a negative connotation for it was a powerful tool of exclusion from a given set of rudimentary rules (in ancient times) and later from the community of nations itself. In other words, its application did not follow the violation of a rule of the system, the instrument of non-recognition negated international subjectivity *a priori*. It was particularly so during the Spanish Age.

The rise of effectiveness as the main criterion for ascertaining the birth of new entities in international law, particularly thanks to the recently independent United States, caused the principle of non-recognition – so conservatively conceived – to step back. Effectiveness, as a legitimacy parameter of international subjectivity, was thus the counterpart of non-recognition. It might sound strange today because we are used to think to the modern principle of non-recognition as the embodiment of legality. In the second half of the XIX century, again, practice showed that the instrument of non-recognition was used negatively by the major powers to assure for themselves spheres of influence. The only exception was the emergence of a Latin-American movement which tried to ban the use of force to perpetrate territorial seizures *tout court*. Here, non-recognition flowed from a conception of legality, and it was opposed to effectiveness for the first time. However, Latin American attempts failed and an obligation of non-recognition of forcible territorial acquisitions would not enter the international legal order until the 1930s.

Indeed, States did not formalize a collective duty of non-recognition of unlawful situations until the emergence of the Stimson Doctrine in 1932 and the subsequent pronouncements of the League of Nations. In the early stages, the practice of non-recognition was based on political considerations and not on legal ones. However, the analysis of the early cases of non-recognition is relevant in order to identify some lasting characteristics, different regional patterns and to outline the trajectories of development of the doctrine in different fields of application.

[1] For the early practice of non-recognition, the term 'instrument' is best suited to describe the phenomenon, which was not legal or even 'political' as we are used to think today.

1. Ancient times

In a really broad sense, international law always existed. Some authors trace some forms of system of international relations, based inter alia on law, back to the 15th century B.C.[2] Rudimentary rules of international law were applied to govern relations between the various Greek cities. The Roman Empire also contributed to the development of international law through a body of law known as *jus gentium*, the forerunner of modern obligations of foreigners' protection.[3] And since ancient times 'on peut constater que les relations extérieures de l'Etat avec les autres organismes politiques sont différenciées suivant que l'organisme politique en question avait été reconnu comme répondant ou non à des critères déterminés'.[4]

For example, the Hittites acknowledged two categories of "States": the allies, rulers of equal rank, and the enemies, who deserved a lower treatment. Additionally, the Greek city-States did not recognize barbarians (non-Greeks) as legal subjects of equal rank.[5] The Romans also differentiated between formally declared war and non-declared war. In formally declared war, specific rules of conduct were applied to the opponents as *publici hostes.* Otherwise, the war was considered unjust and the opponents were treated as brigands.[6]

In Medieval times, ecclesiastical consecration developed as a right of approbation. Even if it was not constitutive of the legal subjectivity, it remained a fundamental element of occidental royal rule throughout the Middle Ages, especially for those kings and princes whose legitimacy seemed doubtful. And 'as the claims of the Church grew, so a doctrine of *impedimenta* developed, which defined the obstacles to the suitability of a ruler'.[7] Prerequisites and obstacles to papal approbation were first formulated for the Emperor's enthronement in the *Venerabilem* decree issued by Innocent III in 1202. Paragraph 8 of that decree stated that the descent from a *genus persecutorum*, that is a family hostile to the Church, was an obstacle to enthronement.[8]

[2] W. Preiser, 'History of International Law. Ancient Times to 1648' in [2008] *Max Planck Encyclopedia of Public International Law* 1.

[3] D. Carreau, F. Marrella, *Diritto Internazionale* [Giuffré, Milano, 2016] 5.

[4] R. Bierzaneck, 'La non-reconnaissance et le droit international contemporain' contemporain' in [1962] 8 *Annuaire Française du Droit International* 119.

[5] W. Preiser (n 2) 2-3.

[6] R. Bierzaneck (n 4) 119.

[7] W. G. Grewe, *The Epochs of International Law* [Walter de Gruyter, Berlin-New York, 2000] 75.

[8] 'The princes should recognize as they do (and have in our presence) that the right and authority of examining the person elected king and of promoting him to the imperial office pertains to us, since we anoint, consecrate and crown him. It is regularly and generally observed that the person who places his hands upon a candidate may examine him. There if the princes would elect a sacrilegious, excommunicated, tyrannical, fatuous, and heretical, even a pagan,

The predominant position of the Church however did not exclude the coexisting importance of mutual recognition between temporal powers which dealt with each other on a basis of equal rights and reciprocity. Cases of non-recognition were common among temporal authorities as well as between them and the ecclesiastical power but the significance of such acts can only be partially compared to the modern doctrine and practice of recognition as they were 'always related to the individual person of a certain ruler, or, in the case of municipal authorities, to a specific group of municipal leaders'.[9]

2. Non-recognition in the Spanish Age (1494-1648): a pre-political concept

The international order of modern times based on independent States developed since the end of the XIII century, but the initial system of the medieval times underwent considerable changes during the XVI century with the emergence of the Spanish Habsburg Empire. It not only brought Eastern Europe in closer contact with the West but expanded the reach of international law through the colonization of the Indians.[10]

Despite its claims to universality, however, the early law of nations had its origins in the European State-system[11] and European powers – especially Spain – had no intention to guarantee equality of treatment to their colonies. In other words, while European powers moved the first step towards the enlargement of the scope of application of international law, they did not concede equal rights to the colonized.[12] It can be argued that the non-recognition of the colonized as subjects had a pre-political connotation. In other words, even if it served European particularism, it had not yet assumed a political value like it is meant today. Non-recognition resulted from a conception of the world and of the law of nations still primitive, geographically attached to Europe and ideologically linked with Christianity.[13]

person not in discord but unanimously, ought we anoint, consecrate and crown a man of this sort? Of course not', Venerabilem Decree 1202 available on Medieval Legal History website directed by Ken Pennington, Emeritus Professor of Ecclesiastical and Legal History <http://legalhistorysources.com/ChurchHistory220/Lecture%20Four/InnocentIIIChurchState.html> accessed 26 May 2019.

[9] W. G. Grewe (n 7) 82.

[10] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* [Cambridge University Press, New York, 2004] 17. Indeed, this encounter raised an unprecedented problem of universal law.

[11] J. Crawford, *The creation of States in International Law* [2nd ed., Clarendon Press, Oxford, 2006] 7.

[12] Not by chance at the end of the nineteenth century, when the Berlin Congress was sanctioning the final stages of colonial expansion, international law became finally global.

[13] In the Spanish Age, and precisely until the Reformation, only Spain and then Portugal, sustained by Papal approval, could exercise the right of colonial conquests. As a consequence, territories occupied by infidels should not

Not by chance, indeed, even when Europe was the theatre of a long and bloody confrontation between Catholic and Protestant States, culminated in the Thirty Years' War (1618-1648), an attempt was made to limit the community of international law to Catholic States only.[14] In the age of Spanish predominance in Europe, all cases which involved the recognition of new States, such as the secession of the Netherlands from the Holy Roman Empire, the emancipation of the Helvetic Confederation from the Empire, as well as the rebellion of Portugal against Spanish rule, concerned the closed circle of Christendom.[15]

In summary, until 1648 Spain was able to exercise its influence on the formation of the legal subjectivity of new entities, limiting the law of nations' sphere of action both geographically and ideologically. In other words, Spain did not recognize the extension of the 'international legal community to non-Christian, non-European States'[16] denying them legal subjectivity.

3. From 1648 to the end of the XVIII century: the first application of a collective *policy* of non-recognition. The theory of monarchial illegitimacy *vs* the principle of effectiveness

In 1648 the Treaty of Westphalia formalized and consolidated international law as a system of rules which governed the relations among sovereign States.

The modern State was a political sovereign entity with a permanent administration exerting its jurisdiction over a well-defined territory and population. The international society became dominated by a small number of European States (Germany, United Kingdom, Austria, France and Russia) which constituted a sort of "de facto international government". These states were all monarchies or despotic States and were States relatively homogenous from a social, economic and political perspective. In this regard, it is not surprising that in 1776, when the American Declaration of Independence was issued, the Czarist government in Russia did not recognize the

be recognized; they were considered *terrae nullius*; see G. Scelle, *Prècis du Droit de Gens. Principes et Systématique* [Part I, Libraire du Recueil Sirey, Paris, 1932] 150 : 'Dans les temps modernes, les « titres » des gouvernements colonisateurs ont d'abord été placés dans la découverte et l'évangélisation. Ce but leur était assigné par le droit objectif de la chrétienté. Les territoires occupés par les infidèles étaient considérés comme des territoires sans maitres. Du XIV au Xvi siècle, les gouvernements de l'Espagne et du Portugal firent reconnaitre par des bulles papales leurs acquisitions coloniales'.

[14] R. Bierzaneck (n 4) 120.

[15] W. G. Grewe (n 7) 183. However, none of these cases found a complete legal solution until the French Epoch (1648-1815), when specific treaties of recognition were drafted between Spain and these new States. 'This was often regarded as a confirmation of the view, that only the former sovereign was able to grant independence to the seceding territory'.

[16] *Ibid.*, 186.

new-established system of government "by the people" because it represented a menace to the *status quo* of continental Europe.[17] However, a policy of collective non-recognition emerged after 1789 when the French Revolution put pressure on the monarchy as a system of government for the very first time in the heart of Europe.

As remarked by James Crawford, the problem of recognition began to attract more detailed consideration about the middle of the eighteen century in the context of recognition of monarchs, especially elective monarchs: that is, in the context of recognition of governments.[18] More precisely, Lauterpacht found that 'one of the earliest monographs concerning recognition arose out of a case of denial of recognition to an elected monarch'.[19] Hence, non-recognition might have preceded recognition, at least as far as diplomatic literature is concerned.[20]

Curiously, the English Revolution which caused the fall of Charles I and of the Stuart dynasty as well as the transformation of England into a republic in 1649 did not affect order in Europe. Despite its royalist convictions about legitimacy, Spain was the first to recognize the new republic. France soon followed. This shift is probably due to the fact that there were already some intellectual and political moves, particularly in France, towards the principle of effectiveness, also called *raison d'état*, that acquired major significance at a later stage, at the end of the XVIII century. The French monarchy was also the first European country to recognize the political independence of the United States.[21]

However, most European scholars still supported the idea of premature recognition in case of lack of the parent state's renunciation of sovereignty. Such ideas were substantiated by the practice of conservative states. The restored British monarchy answered to the French recognition of the US with a declaration of war to the recognizing power. The European monarchs as well, constituting themselves in the Holy Alliance, assumed a concerted policy of non-recognition of the results of revolution in France: this practice is known as the "theory of monarchial illegitimacy". Although such an 'obligation' was included in treaty clauses and formal declarations

[17] K. A. Doukas, 'The Non-Recognition Law of the United States' in [May 1937] 35(7) *Michigan Law Review* 1076.

[18] J. Crawford (n 11) 12.

[19] H. Lauterpacht, *Recognition in international law* [Cambridge University Press, London, 1949] 414.

[20] H. Ambros, *Nonrecognition: its development in international law and application by the United States with particular reference to the Baltic States* [Ph.D dissertation, New York University, 1965], available from ProQuest Dissertations and Theses database (n 6605714).

[21] 'It was in this spirit that the Bourbon monarchy, one decade before its own loss of power in the French Revolution, evaluated the results of the American Revolution, the elimination of the sovereign rights of the British Crown in the thirteen colonies', see W. G. Grewe (n 7) 343-48.

by those Powers[22], it did not become a rule of international customary law. In this regard the position of the United States was decisive: they indeed discarded the idea that a government's title to recognition was due to the legitimacy of its origin, but rather to its effective existence.[23]

In 1793, while declining to sign a treaty of mutual understanding with France to defend the "empire of liberty", the United States firmly asserted the right of every nation to work out its destiny in its own way.[24] The United States indeed did not distinguish *de facto* from *de iure* titles to sovereignty, assuming as a parameter of legitimacy of power a mere principle of effectiveness.[25] The principle of effectiveness would however consolidate only in the first half of the XIX century.

4. The first half of XIX century: the Monroe Doctrine as a watershed between the triumph of effectiveness and the rise of US 'imperialism'. The ghost of the Holy Alliance?

The application of the theory of monarchial illegitimacy by the European States was not limited to the French Revolution. It was persistently applied in the first half of the XIX century to revolutions in non-European colonies of monarchial powers,

[22] The Declaration of Pillnitz of 1971 signed by Leopold II of Austria and Frederick William II of Prussia, which contained an implicit non-recognition of the revolutionary government in France, available on *Liberty, Equality, Fraternity* website at <http://chnm.gmu.edu/revolution/d/421.> accessed 09 September 2019; the Proclamation of the Duke of Brunswick, 1792 available on Hanover Historical Texts Project website at <https://history.hanover.edu/texts/bruns.html> accessed 09 September 2019; the treaty of the Holy Alliance, 1815 available on the Napoleon Series website at <https://www.napoleon-series.org/research/government/diplomatic/c_alliance.html> accessed 09 September 2019; 'States which have undergone a change of Government, due to revolution, the results of which threatens other states, ipso facto cease to be members of the European Alliance, and remain excluded from it until their situation gives guarantees for legal order and stability. If, owing to such alterations, immediate danger threatens other States, the Powers bind themselves, by peaceful means, or if need be by arms, to bring back the guilty state into the bosom of the Great Alliance', the Troppau Protocol, 1820 in W. A. Phillips, *The Confederation of Europe; a study of the European Alliance, 1813-1823, as an experiment in the international organization of peace* [Longmans, Green and co., London/New York, 1920] 208-09.

[23] 'In a word, the United States maintained that the true test of a government's title to recognition is not the theoretical legitimacy of its origin, but the mere fact of its existence as the apparent exponent of the popular will. This principle, though it necessarily found little support in Europe in 1793, has proved to be of the highest practical value; for not only has it continued to guide the course of the United States, but it has also become the generally accepted rule of international conduct', J. B. Moore, *A hundred years of American diplomacy* [Saratoga Springs, August 30, 1900] 6.

[24] American State Papers, Foreign Relations (Vol. I) 708, <https://memory.loc.gov/cgi-bin/ampage> accessed 05 September 2019.

[25] See F. Wharton, *A Digest of International Law* [vol. 1, Government Printing Office, Washington, 1886]; R. Bierzaneck (n 4) 120. 'During the early nineteenth century the United States became the foremost champion of de facto theory of recognition. In developing recognition policy in this period the foreign policy decision makers stressed the acceptance of the government de facto and assumed that the acquiescence of the people signified the will of the people', L. T. Galloway (Legal adviser to the Department of State), *Recognizing foreign governments: the practice of the United States* [American Enterprise Institute for Public Policy Research, Washington, 1979] 15.

especially to Spanish colonies in Latin-America claiming independence between 1808 and 1829.[26] In these cases, the distinction between non-recognition of new governments and of new states was blurred. However, the treaty obligation of non-recognition of new States and/or governments arising out of revolutions was not yet the consequence of a violation of a rule of international law, as it seems to be in the later doctrine of non-recognition but was based on political considerations. Non-recognition was a form of pressure to maintain the *status quo ante*, that is the monarchial system of government.

This second surge of cases of non-recognition was not sufficient to create a rule of international customary law. Again, the obligation was applicable only to States who agreed among themselves by means of treaties and declarations. In any case, States that were out of this picture were bound by the international customary rule which at that time forbade the recognition of a new entity before that of the parent State.

However, the US contravened once again the rules of international law by recognizing the Spanish American governments.[27] Moreover President Monroe found support for its policy in George Canning – British Secretary of State for Foreign Affairs who had succeeded Lord Castlereagh – who was not inclined to stand on the side of continental powers too.[28]

Eventually, the principles enounced by Monroe and Canning took precedence over the theory of the Holy Alliance.[29] For that reason, '[a] l'exception d'une courte période – celle de la domination de la Sainte Alliance en Europe – les Etats et les gouvernements nouveaux n'avaient pas trop de difficultés pour obtenir la reconnaissance de la part des autres Etats : tels furent les cas de l'indépendance grecque, belge, serbe, roumaine, bulgare, de l'unification de l'Allemagne et de l'Italie'.[30]

[26] D. Raič, *Statehood and the Law of Self-Determination* [Kluwer Law International, The Hague, 2002] 113-14.

[27] An important precedent, as already noted, is the French recognition of the independence of the United States.

[28] 'While the struggle for neutral rights was in progress, the Spanish colonies in America began one after another to declare their independence. In this movement the United States instinctively felt a deep concern; yet the government, adhering to its policy of non-intervention, pursued a neutral course so long as the contest was confined to the original parties. But in time a new situation arose. In the summer of 1823 the Continental powers of Europe, composing the Holy Alliance, having intervened to restore absolute government in Spain, gave notice to Great Britain of a design to call a congress with a view to concert measures for putting an end to the revolutionary governments in Spanish America. At this time Lord Castlereagh, who was favourably disposed to the alliance, had been succeeded in the conduct of the foreign affairs of England by George Canning, who reflected the popular opposition to the policy of the allied powers. The United States, acting upon its principle that independence should be acknowledged when it is established as a fact, had then recognized the Spanish-American governments', J. B. Moore (n 23) 14, 15.

[29] That became the common conception of statehood and governmental power throughout the XIX century. 'Accordingly, how an entity became a State was a matter of no importance to international law, which concentrated on recognition as the agency of admission into "civilized society" [..] How they acquired territory, what rights and duties they had or owed to others as a result of events before they were recognized, these were irrelevant to international law: they were matter "of fact and not of law"', J. Crawford (n 11) 16.

[30] R. Bierzaneck (n 4) 122.

It can be said that while American international law principles started to shake the European established order, the United States themselves were trying to achieve political objectives. J. M. Moore well described the newly emerged power as a nation 'conceived in liberty and dedicated to freedom' but also 'practical in its aims and judicious in its methods'.[31]

US pragmatic diplomacy was reflected in the ambiguous enforcement of the Monroe Doctrine. In his annual message to the Congress on 2 December 1823 president James Monroe enounced the theory of US supremacy over the entire American continent.[32] The Monroe doctrine was a response to the monarchial illegitimacy doctrine pursued by the European powers; in this perspective, it may be interpreted as a statement of non-recognition of any European claim over the Western hemisphere. However, if on the one hand it aimed at protecting Latin America against Europe, on the other it also served US interests. Ideas of expansion and land ownership were behind the door,[33] as the subsequent US armed intervention in Mexico (1846) and the *de facto* control over Cuba (1898), the Falkland Islands (1831-32) and Gran Colombia (1860) would demonstrate.[34]

By way of conclusion, the practice of non-recognition in the first half of the XIX century (but for many aspects until the era of the League of Nations) was a political tool both in the hands of European monarchial powers and in the hands of the United States for the partition of the world in spheres of occupation and influence.[35]

Carl Schmitt in *The Nomos of the Earth* outlines the key transformations that led to the crisis of the European Law of Nations and the emergence of a modern post-European law of nations, in two stages. First, the US proclamation of the Monroe Doctrine set limits to potential European interventions in the Americas. Much later, a series of distinctions emerged between European and American international law and provoked the progressive dissolution of the European law of nations and its replacement by a universalistic understanding of international law. However, he stressed also how the US contributed to accentuate the imperial nature of modern post-European international law. As regard the Monroe Doctrine he said 'for an

[31] 'The United States came into being, as an independent nation, on the eve of great mutations in the world's political and moral order. The principles on which the government was founded were indeed not new; they had been proclaimed by philosophers in other times and in other lands; but they found here a congenial and unpreoccupied soil and an opportunity to grow. The theories of philosophers became in America the practice of statesmen. The rights of man became the rights of men. But the new nation, though conceived in liberty and dedicated to freedom, was practical in its aims and judicious in its methods', J. B. Moore (n 23) 1.

[32] President Monroe's seventh annual message to Congress, December 2, 1823, available on Avalon Project website <http://avalon.law.yale.edu/19th_century/monroe.asp accessed> accessed 27 November 2018.

[33] Mr. Jefferson to Mr. Monroe, Monticello, October 24, 1823, see F. Wharton (n 25) 269.

[34] See W. A. Phillips (n 22) 289-90.

[35] G. W. Rutherford, 'Spheres of Influence: An Aspect of Semi-Suzerainty' [1926] 20 *The American Journal of International Law* 301.

historically significant imperialism, not only military and naval armament is essential, not only economic and financial wealth, but also this capability to determine the content of political and legal concepts. A people is only conquered when it subordinates itself to the foreign vocabulary, the foreign construction of what law, especially international law, is'.[36]

5. From the second half of the XIX century to the '20s: delineation of different trajectories?

At the end of the XIX century the practice of non-recognition began to assume different geographical specificities and scopes of application. As regards the geographical diversity, there was a Latin-American development that, at least starting from the Congress of Panama, went in a different direction compared to that of Europe and the US. Furthermore, there was a differentiation of the doctrine of non-recognition as regards its scope of application: unlawful territorial acquisitions, treaties and governments.

5.1. Non-recognition of territorial acquisitions

A. Congress of Panama: the Monroe Doctrine still a valuable response against the Holy Alliance? Towards 'Latin Americanism'

The Congress of Panama, held in June 1826, gathered together four states – Colombia, Mexico, Central America and Peru – plus the representation of unofficial agents by Great Britain and Holland. Other States were invited, including the United States, but for one reason or another they were not eventually participating to the meeting. The goal of the Congress was that of bringing the new republics of Latin America to develop a unified policy towards Spain – which could reclaim its lost possessions in the Americas.

The expectations of Spanish America about the results of the Congress of Panama are controversial. According to some historians, the United States would not be an essential actor of the congress since the intention of the organizers like Simón Bolívar was to discuss only among Latin-American countries. However, according to some documents delivered by Latin American governments, it emerges clearly that the real objective of the Spanish Americans in inviting the United States was to obtain a clear

[36] J. B. Scarfi, *The Hidden History of International Law In The Americas. Empire and Legal Networks* [Oxford University Press, New York, 2017] XXVI citing *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* [Telos, New York, 2003].

statement on the meaning of the Monroe declaration of December 1823. Indeed, even if it is true that Spanish-American States aimed solely at the protection of the new republics from an attack by Spain or the Holy Alliance and included any nations likely to help in this matter, not confining the invitation to the US alone[37], they thought, on some level, that the Monroe Doctrine could be a useful means against Spain's grievances.

The participation of the United States was a matter of harsh and long debate between the administration of President Adams and Congress. In his annual message on December 6, 1825, John Quincy Adams referred briefly of a congress to be held in Panama stating that 'the Governments of the Republics of Colombia, of Mexico, and of Central America had severally invited the Government of the United States to be represented at the Congress of American nations to be assembled at Panama to deliberate upon objects of peculiar concernment to this hemisphere, and that this invitation had been accepted'.[38] However, both the Houses of the Congress strongly criticized the President's choice to send US delegates at Panama on the following grounds: fear of the violation of the neutrality stance adopted by the US, apprehension that the participation to the congress might lead to the entrance of the United States into a belligerent alliance, doubts regarding the Latin-American interpretation of the Monroe Doctrine, the slavery question and finally the lack of clear indications by Spanish America as regard to the organization and the content of the Conference.[39] Nor the assurances of Adams did appease congressmen. The President indeed specified that 'the United States neither intend nor are expected to take part in any deliberations of a belligerent character; that the motive of their attendance is neither to contract alliances nor to engage in any undertaking or project importing hostility to any other nation'. And more importantly, he labelled the Monroe Doctrine as 'an agreement between all the parties represented at the meeting that each will guard by its own means against the establishment of any future European colony'.[40] Although the administration eventually resulted victorious in the struggle with Congress, the endless debate delayed the appointment of the delegates who in turn decided to

[37] H. R. Guiney, The United States and the Congress of Panama [MA Thesis, University of Boston, 1930] 50, retrieved from Internet Archive website <https://archive.org/details/theunitedstatesc00guin> accessed 3 December 2018.50.

[38] Message Regarding the Congress of American Nations, December 6, 1825, available at Miller Center website, Presidential Speeches <https://millercenter.org/the-presidency/presidential-speeches/december-6-1825-message-regarding-congress-american-nations> accessed 29 November 2018.

[39] H. R. Guiney (n 37) 23.

[40] Message Regarding the Congress of American Nations (n 38). Thus, President Monroe was assuring the Congress that the doctrine which he himself proclaimed in 1823 did not imply US direct involvement in Latin American disputes.

disattend the Conference in Panama also because of the harsh climate there and the fear of the yellow fever.

The result of the Congress was inconclusive because the treaties[41] were not even ratified by Latin American countries, except for Colombia – due mostly to their political instability. In addition, low support was given to Latin America by neutral States, namely the United States and the United Kingdom.[42]

B. Other Latin-American efforts: the first link between non-recognition and the notion of use of force

In the following years, the southern part of the Western Hemisphere continued to face external aggressions, invasions, and territorial annexations. This led to a renewed interest in the dialogue between Latin American countries[43] which met in Lima (1847-1848), in Santiago de Chile (1856) and again in Lima (1864-1865).[44] In the outcome documents of these conferences States agreed not to recognize territorial acquisitions achieved through the use of force.

For instance, Article 2 of the 'Tratado de Confederación entre las Repúblicas de Bolivia, Chile, Ecuador, Nueva Granada y Perú' of February 8, 1848 stated the following:

> Cuando alguna nación extranjera ocupe o intente ocupar cualquiera porción de territorio que se halle dentro de los límites de algunas de las Repúblicas confederadas, o haga uso de la fuerza para sustraer tal territorio del dominio y señorío de dicha República, sea cual fuere el pretexto que se alegue para ello; pues las Repúblicas confederadas se garantizan, mutuamente y de la manera más expresa y solemne, el dominio y señorío que tienen a todo el territorio que se halle comprendido dentro de sus respectivos límites; *y no reconocen, ni*

[41] Carnegie Endowment for International Peace, *The International Conferences of American States 1889-1928* [Oxford University Press, New York, 1931] XXIV, XXIX reporting full text of the *Treaty of Perpetual Union, League, and Confederation between the Republics of Colombia, Central America, Peru, and the United Mexican States*, July 15, 1826.

[42] See F. Wharton (25) par. 57 (The Monroe Doctrine).

[43] 'The Bolivarian ideal for a regional confederation of states persisted in the memory and policies of Latin American statesmen and intellectuals and went through a process of revival after the Mexican–American War (1846-1848) and the U.S. annexation of Texas. Along with the notion of Hispanic-Americanism, the idea of Latin Americanism began to be adopted in this period as a defensive reaction to U.S. ascendancy and expansionism', Juan P. Scarfi, 'In the Name of the Americas: The Pan-American Redefinition of the Monroe Doctrine and the Emerging Language of American International Law in the Western Hemisphere. 1898-1933' in [2016] 40(2) *Diplomatic History* 194.

[44] G. A. De la Reza, *Documentos Sobre El Congreso Anfictiónico de Panamá* [Fundación Biblioteca Ayacucho y Banco Central de Venezuela, 2010] IX.

reconocerán, derecho en ninguna nación extranjera, ni en ninguna tribu indígena, para disputarles aquel dominio y señorío[45]

In these treaties, non-recognition refers to territorial acquisitions made through the use of force and not to a new State or government. For the very first time the policy of non-recognition is tied with the notion of use of force, even if the use of force was not yet outlawed in international law.[46] This link has proved to be a lasting feature in the characterization of the obligation of non-recognition as it still distinguishes the actual rule.

All these treaties, from Panama to Lima, were part of an effort by the Latin-American countries to introduce the question of the rights and duties of States, closely connected with the idea of codification of international law. Though American Republics adopted a general declaration of the rights and duties of States only in 1933, they were already paving its way by agreeing from time to time on specific rights and duties, among which the obligation of non-recognition was one of the first to be asserted.[47]

These treaties did not contribute to the creation of a rule of customary international law since they were confined to Latin America. At this stage, one can argue that they initiated a process of constitution of a regional customary rule. Indeed, tough not ratified and thus not binding, both versions ('they do not recognize, nor will they recognize' and 'commit to not recognize') implies an agreement or acknowledgment that forcible territorial acquisitions will (or 'shall') not be recognized and show a sufficient level of clarity and certainty that usually lies with an obligation.

[45] *Ibid.*, 274 reporting full text of *Tratado de Confederación entre las Repúblicas de Bolivia, Chile, Ecuador, Nueva Granada y Perú. Congreso Americano de Lima, 8 de Febrero de 1848.* See also Article 13 of the *Tratado Continental Concluido entre Las Repúblicas de Chile, Ecuador y Perú, 15 de Septiembre de 1856*: 'Cada una de las Partes Contratantes se obliga a no ceder ni enajenar, bajo ninguna forma, a otro Estado o Gobierno, parte alguna de su territorio, ni a permitir que dentro de él se establezca una nacionalidad extraña a la que al presente domina, *y se compromete a no reconocer con ese carácter a la que por cualquiera circunstancia de establezca*' (italics added), *ibid..*, 287.

[46] Actually, the policy of non-recognition predated the establishment of a prohibition on the use of force in international law. As a matter of fact, non-recognition was used as a means by which States wanted to introduce limits to an absolutist conception of sovereignty as including an unwarranted right to war and territorial acquisition. Non-recognition helped the prohibition of threat or use of force to develop and to establish finally in the Charter of the United Nations at the end of WWII.

[47] Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, Memorandum submitted by the Secretary-General, UN Doc A/CN.4/2 of 15 December 1948, 5.

C. The interplay between the right of conquest and the principle of non-recognition in the context of Pan-Americanism

This trend, however, was soon influenced by the US attempt to recover the relationship with Latin America, deteriorated since the missed opportunity of the Panama Congress.[48] The Harrison administration (1889-1893) in particular was marked by an innovative foreign policy and by the will to expand US influence abroad.

Hence, the Latin American dialogue opened up again to the participation of the US. The first International Conference of American States was held in Washington from October 2, 1889 to April 19, 1890 and inaugurated the period called "new Pan-Americanism", or simply "Pan-Americanism" if we consider that the US as well as other conservative countries of Latin America like Brazil did not join the previous project of a unified western continent.

Since the issuing of the "Circular Instruction of the Secretary of State of the United States to American Diplomatic Representatives accredited to the Governments of Mexico, Central and South America, Haiti and San Domingo" of July 13, 1888, it clearly emerges that the intention of the US was once again solely that of assuring for themselves favourable commercial relations with those countries. Secretary of State T. F. Bayard never mentioned issues that were prominent for Latin Americans such as the territorial integrity of their republics; rather he reassured US diplomatic representatives that 'the proposed conference [would] be wholly without power to bind any of the parties thereto'.[49]

The final document adopted at the conference reflected this orientation; it was almost entirely made up of a great variety of commercial, technical, and logistical detailed provisions, ranging from the intercontinental railway to sanitary regulations to navigation and so on. Surprisingly, however, it contained also a separate recommendation on the "right of conquest", which read as follows:

> *Resolved by the International American Conference*, That it earnestly recommends to the Governments therein represented the adoption of the following declarations:

[48] 'The pacific objects of the Congress [..] might perhaps have been attained had the administration of that day received the united support of the country. Unhappily they were lost, the new states were removed from the sympathetic and protecting influence of our example, and their commerce which we might then have secured, passed into other hands, unfriendly to the United States [..] Events subsequent to that date, have tended to place us in a position to retrieve our mistakes [..]', Report to Mr. Fish, Secretary of State, to the President, July 14, 1870, accompanying President's Message on same date, F. Wharton (n 25) 293.

[49] Carnegie Endowment for International Peace (n 41) 5-6 reporting the *Circular Instruction of the Secretary of State of the United States to American Diplomatic Representatives accredited to the Governments of Mexico, Central and South America, Haiti and San Domingo, July 13, 1888.*

> First. That the principle of conquest shall not, during the continuance of the treaty of arbitration, be recognized as admissible under American Public Law.[50]

The subject however had been limited in scope, not only by the fact that most resolutions of the Inter-American conference would not be binding, but also by the discussions inside the conference. The original proposal of the Committee on General Welfare indeed was different as it read:

> [..] the principle of conquest shall never hereafter be recognized under American Public Law.[51]

On April 18, 1890 the report of the Committee was submitted to the Conference for discussion. Immediately the United States took the floor complaining about the dangerous resolution and proposed a different draft:

> *Resolved,* That if any one of the nations signing the treaty of arbitration proposed by the Conference shall wrongfully and in disregard of the provisions of the said treaty prosecute war against another party thereto, such nation shall have no right to seize or hold property by way of conquest from its adversary.[52]

The argument put forward by Mr. Henderson, the US delegate, was that 'the original resolution as it now stands condemns conquest even as indemnity for defense. It prohibits it even though a nation may be acting purely in defense of its own territory'.[53] Furthermore, the US wanted to tie the prohibition of conquest solely to the operation of the treaty of arbitration.

Mr. Cruz from Guatemala answered to Mr. Henderson that the provision was exactly intended to apply also to the 'nation against which an attack is directed and which, as the result of war and as a kind of indemnity, might have to take possession of something belonging to others'.[54] In sum, Latin-American countries did take a step forward with regard to the obligation of non-recognition, stressing the absolute nature

[50] *Ibid.*, 44-45, Reports, Recommendations and Resolutions adopted by the Conference.
[51] International American Conference, *Reports of Committees and Discussions thereon*, Vol. II [Government Printing Office, Washington, 1890] 1123.
[52] *Ibid.*, 1124-25.
[53] *Ibid.*, 1124.
[54] *Ibid.*, 1126.

of the prohibition of territorial acquisitions through the use of force.[55] Mr. Cruz indeed specified that 'if that nation, after on the defensive assumes the aggressive, in that case it no longer exercises the right of defense, but commits an act of aggression and violence, and falls within the provision of the article'.[56]

Mr. Zagarra, delegate of Peru, emphasized the absolute character of the provision as well and pointed out that the ban of armed contests is a principle of international American law.[57] Moreover, Mr. Quintana from Argentina highlighted that the outlawing of conquest reflected a new principle in international law. Since the American administration wanted to advance the law in the matter of arbitration, there was no reason why they could not advance the law in the matter of conquest.[58]

The connection between non-recognition and use of force – to affect territorial acquisitions – that already emerged in the conferences of 1848 and 1856, seems now to be elevated to the rank of a principle and it may be considered as a further expression of *opinio juris* by Latin American countries.[59]

At the conference, States also began to discuss about the consequences of the principle of non-recognition.[60] In this debate States discussed some of the most controversial and still actual issues concerning non-recognition, namely the difference between the concept of nullity and that of illegality[61], the tension existing between the law-creating effect of facts (*ex factis ius oritur*) and the principle of legality (*ex iniuria ius non oritur*)[62], the difference in the application of the obligation by States and tribunals. All these issues will be further analysed in detail in the next chapters. Suffice

[55] This is a controversial issue still nowadays and will be object of analysis in the present study. 'What if the use of force was lawful? What if sovereignty is acquired as a result of an act of individual or collective self-defence under Article 51 of the UN Charter? What if sovereignty is acquired as a result of a collective enforcement measure of the SC?', E. Milano, *Unlawful Territorial Situations In International Law. Reconciling effectiveness, Legality and Legitimacy* [Martinus Nijhoff Publishers, Leiden/Boston, 2006] 107.

[56] International American Conference (n 51) 1125-26.

[57] 'I recalled, in that connection, the *principles of international American law* [..] I also considered those principles as an indispensable corollary of the plan of arbitration, destined to banish forever armed contests among the republics of the new continent. The report now under discussion supplements those principles, the Committee thought it advisable, as it appears, to separate them in a special report [..]' (italics added), *ibid.*, 1128.

[58] 'I will simply take the liberty to say to him [Mr. Henderson] that if the conclusions of the report upon conquest should be rejected because they imply a *new principle in international law*, upon what grounds the United States support the recommendation of a plan of arbitration when they have no precedent in the world for their action, or for the formula they have adopted? If we can innovate or advance in the matter of public law in matter of arbitration, why can not we advance in the matter of conquest?' (italics added), *ibid.*

[59] Indeed, the final provision, tough dealing with the right of conquest, said that the latter 'shall not [..] be recognized as admissible', thus implicitly linking the concept of use of force with non-recognition.

[60] Although such discussion was linked to the second article of the recommendation about territorial cessions, it had inevitable bearing on non-recognition.

[61] J. Crawford (n 11) 158.

[62] H. Lauterpacht (n 19) 421-26.

it to say now that the principle of non-recognition was explored from the beginning by Latin American countries, not only on the surface but in depth.[63]

Notwithstanding the adoption of the report as a whole by a vote of 15 to 1 (United States voted in the negative and Chili abstained), the US delegation continued to pursue its goal of destabilizing Latin American delegates, also by means of appealing to their feeling of fear.[64] It is not clear from the records of the conference what happened next.[65] However, it seems that the US proved successful in their intent. The final version of the recommendation was indeed approved in the formula mentioned above: '[t]hat the principle of conquest shall not, *during the continuance of the treaty of arbitration*, be recognized as admissible under American Public Law' (italics added). Unfortunately, the treaty of arbitration (the only part which ought to be binding) was not ratified.

In subsequent inter-American conferences, up to 1933, the attempt by Latin America to outlaw conquest was put aside in favour of a more detailed formulation of rules concerning the duty to resort to arbitration for resolving international controversies[66], and that was the fate also of the obligation of non-recognition of territorial conquests. Not by chance, the period from 1898 to 1933, has been described both as Pan-American and interventionist, combining cooperation with the so-called "dollar diplomacy" on the part of the United States.[67] As it will be shown, such Pan-American (or better US) imprint on the principle of non-recognition of territorial acquisitions through the use of force proved its lasting influence on the

[63] Mr. Martinez Silvia asked a question to the conference: 'In the first place I desire to know what the word 'void' means here. By "void" I understand something which produces no effect, which is equivalent to the thing not having existed. If a nation, a conqueror of another, in a war, just or unjust, (I do not enter into qualifications), actually occupies a portion of the territory by the right of cession, what matters if that we declare here that is void in disregard of the actual fact? What tribunal do we constitute to declare that nullity, and what force has that judgment or decree?', International American Conference (n 51), 1133-34.

[64] 'Now suppose that after the passage of resolutions of this character an attack shall be made upon citizens of Brazil who have gone into Peru to build a railroad, or to any other territory [..] and that in a revolution their property shall be destroyed [..] How shall Brazil obtain indemnity for its citizens? That thing would be impossible', *Ibid.*

[65] They started to discuss and vote each single article of the report. At some point however, it is said: 'After a somewhat extended acrimonious discussion, Mr. Carnegie secured the floor' stating that 'this confusion, and the differences among the honourable delegates is largely due to incorrect translations and misconstruction of the meaning of some of the words in the text; and in order to give an opportunity to correct the misunderstanding, I move that this Conference take a recess of twenty minutes'. On its return, the privilege of the floor was given to US Secretary of State Mr. Blaine which not by chance was happy to announce that 'any vital difference upon any question connected with the scheme of arbitration, which an hour ago might have been feared, is, as I hope, entirely removed, and the resolutions of the honourable gentlemen have been simply changed from being in perpetuity to running at even dates with the treaty of arbitration; so that they stand and fall together', *ibid.*, 1145-46.

[66] Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States (n 47) 6; see also Carnegie Endowment for International Peace (n 47) 51-443.

[67] See J. B. Scarfi, *The Hidden History of International Law in the Americas* (n 36) 60. This was possible thanks to the multiple redefinitions of the Monroe Doctrine in those years, that allowed the US to 'make flexible and frequent transitions from interventionism to Pan-Americanism'.

doctrine until 1945. The principle of non-recognition, indeed, would become the other side of the coin of the pacific settlement of disputes.

The same Latin-American practice during the XIX century substantially undermined the obligation of non-recognition. Particular reference has been made to the 1864-1870 War of the Triple Alliance between Paraguay and Argentina, Brazil and Uruguay and the War of the Pacific between Chile and Bolivia, and Peru, from 1879 to 1883.[68] Thus, the existence of an *opinio iuris* was not substantiated by a consistent *usus* in the same direction. Thus, not even a regional customary norm in the American continent was formed.

5.2. Non-recognition and treaties

In the meanwhile, the situation in Europe has underwent considerable changes. After the end of the equilibrium created by the Holy Alliance and the Concert of Europe in 1815, Europe's fate was linked to Bismarck's attempt to replace the old system with a new order for peace. However, Bismarck's system of alliances (1871-1890) was much too instable, and did not prevent tensions to emerge among the Great Powers. Rivalries were exasperated by the European race to colonial acquisitions in Africa and Asia as a part of the global expansionist policy of late imperialism.[69] In this context, a policy of non-recognition was developed, but not on a collective basis, instead as a bilateral means to enforce existing treaty obligations between the parties.

In this period, it is possible to outline four different effects of non-recognition on treaties: 1) non-recognition – and thus the nullity – of treaties affecting third parties; 2) non-recognition of the unilateral denunciation/withdrawal of a party from treaties; 3) non-recognition of colonial acquisitions contrary to treaty rights; 4) non-recognition of treaties in conflict with prior treaty rights.

As regard the latter, Lauterpacht also dealt with the issue of the invalidity of titles based on treaties inconsistent with former treaty obligations. He said '[a] treaty which to the knowledge of both contracting parties is contrary to pre-existing treaty obligations binding upon one or both of them is, in general, illegal, invalid and unenforceable.'[70]

[68] A. Pert, 'The Duty of Non-recognition in Contemporary International Law: Issues and Uncertainties' in [2013] 30 *Chinese (Taiwan) Yearbook of International Law and Affairs* 4.

[69] 'The cooperation between the Great Powers, which had been the basis of the European Concert, disintegrated as a result of these developments, and with it the regional European international law. An American historian of international law has accurately stated that Bismarck was the last statesman "who seems to have been conscious of the old public law of Europe, and with his retirement the last possibility of a restitution of the old system disappeared"', W. G. Grewe (n 7) 438-442.

[70] H. Lauterpacht (n 19) 426.

There are many relevant examples of such a practice at the end of the XIX century: see for example the non-recognition by France of the 1890 Anglo-German treaty because in violation of its rights as contained in the Anglo-French treaty of 1862 regarding the status of Zanzibar. Now we turn to the other three cases.

A. Non-recognition of treaties affecting third parties

The first phenomenon concerns the possibility for a third State to declare null and void a treaty concluded between two or more parties.[71] Chen wondered: '[i]f a treaty between two States should be in violation of a legal right of a third State, is that third State entitled to invalidate the treaty by means of non-recognition? Some writers answer this question categorically in the affirmative'.[72]

All the more it applies when the treaty in question is contrary to peremptory norms of international law, particularly those which have *erga omnes* effect.[73] Very likely, this is what Lauterpacht thought about when he said that one announcement of non-recognition has been of particular importance as it marked the development of the principle: the United States non-recognition of the Sino-Japanese treaty of 1915.[74] According to Lauterpacht, first it 'signif[ied] the determination to refuse recognition not only on account of a violation of the particular rights of the State concerned, but also because of a violation of a general rule of international law as embodied in a treaty

[71] This case can be seen as part of the same phenomenon with the fourth case described in the preceding section, that is the non-recognition of treaties in conflict with prior treaty rights.

[72] T. Chen, *The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States* [Stevens & Sons Limited, London, 1951] 433. The author, however, distinguished between "simple contractual obligations" and "obligations arising from a peremptory rule of law". Only in the second case, the treaty could be invalidated on the part of third States. Therefore, treaties contrary to peremptory norms of international law may trascend the maxims *res inter alios acta* and *pacta tertiis nec nocent nec prosunt*, *ibid.* 436-37.

[73] A. Gianelli, 'Absolute Invalidity of Treaties and Their Non-Recognition by Third States' in (E. Cannizzaro ed.) *The Law of Treaties Beyond the Vienna Convention* [Oxford University Press, Oxford, 2011] 334, 339: 'Because of the absolute character of the invalidity, and of the peremptory primary rule, third states should have an obligation to consider the treaty null. [..] Practice seems to point out the difficulty of ascertaining the conflict with a peremptory norm – a difficulty resolved by a UN organ resolution – more than the uncertainty about the consequences to be drawn by the contrast, once established'.

[74] The policy of non-recognition of the Japanese Twenty-One Demands on China was formulated in the Note that the US Secretary of State Bryan sent to the US ambassador in Japan Guthrie (later labelled as 'Bryan Note'): 'In view of the circumstances of the negotiations which have taken place and which are now pending between the Government of Japan and the Government of China, and of the agreements which have been reached as a result thereof, the Government of the United States has the honor to notify the Imperial Japanese Government that *it cannot recognize any agreement or undertaking* which has been entered into between the Government of Japan and China, *impairing the treaty rights of the United States and its citizens in China*, the political or territorial integrity of the Republic of China, or the international policy relative to China commonly known as *the open door policy*', the Secretary of State to Ambassador Guthrie, 11 May 1915, Foreign Relations, File no. 793.94/351a, available on the Department of State (Office of the Historian) website < https://history.state.gov/historicaldocuments/frus1915/pg_146> accessed 12 September 2019. It can be said that the focus of the Note was the preservation of an open-door policy in China as well as the particular interests of US citizens there.

or in fundamental principles of international law relating to the independence of States'. Secondly, it referred not only to a specific 'title claimed to have been acquired, but, more generally, to possible future situations arising out of a violation of certain treaties and principles'.[75]

However, it has to be noted that the case related to the maintenance of an "open door" regime, a legal institution of imperialistic penetration that appeared everywhere the expansive energy of a single power was not sufficient to secure the exclusion of the jurisdiction of the others.[76] The advocation for the territorial integrity and independence of China was primarily aimed at assuring equality of treatment in commerce and navigation for all nations, but mostly for the two most powerful nations: the US and the UK. The practice of non-recognition was still inspired by political goals of domination and control by the major Powers that regulated the international order of that time.

B. Non-recognition of the unilateral withdrawal/denunciation of treaties

Parallel to the crisis of multilateralism mentioned above, there was also a practice that began at the end of the nineteenth century in which the unilateral withdrawal/denunciation of a treaty – went hand in hand with the non-recognition of the notification made by the withdrawing States (cf. *infra*, Chapter IV, par. 2.3).

In 1870 Russia invoked the doctrine of *rebus sic stantibus* to unilaterally denounce the provisions of the Treaty of Paris of 1856[77] concerning the neutralization of the Black Sea.[78] This episode began to demonstrate some of the dangers inherent in the clause. The response of the other parties to the treaty was the issuing of the London Declaration of 1871[79] - the first document in order of importance to assert a general presumption against the unilateral termination of treaties[80] - with which they declared

[75] H. Lauterpacht (n 19) 415.

[76] W. G. Grewe (n 7) 477-482.

[77] Treaty of Paris, 1856, available at the following website <https://content.ecf.org.il/files/M00934_TreatyOfParis1856English.pdf> visited 07/0472019, artt. 10-14.

[78] The doctrine of the *rebus sic stantibus* was indeed abused by many States before the First World War, in this sense see A. Maresca, *Il diritto dei trattati. La Convenzione codificatrice di Vienna del 23 maggio 1969* [A. Giuffrè Editore, Milano, 1971] 705 ff.

[79] The London Declaration, 17 January 1871 in [1873] 18 *Martens Nouveau Recueil* 278, reproduced in T. Hertslet, *Map of Europe by treaty* [vol. III, Harrison and sons, London, 1901(1890)]. UK, Austria, France, Italy, Russia, Turkey, and Northern Germany (later German Confederation) singed the Declaration. Here it was stated that: '[I]t is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Parties by means of an amicable arrangement'.

[80] A. McNair, *The Law of Treaties* [Clarendon Press, Oxford, 1961] 494. According to Oppenheim '[w]hatever the merits of this declaration, it certainly goes too far in declaring that a State can only free itself from the obligations of a treaty by agreement with the other party, for a State may cancel a treaty if the other party to it violates it', L.

the non-recognition of the treaty denunciation made by Russia[81]. Again, in 1886, Russia unilaterally denounced Art. 59 of the Treaty of Berlin of 1878[82] regarding the 'free port' regime to be applied to the city of Batoum. The British Secretary of State for Foreign Affairs, Lord Rosenbery, in a diplomatic exchange with the British ambassador in St. Petersburg, emphasized that 'Her Majesty's Government *cannot* [..] *consent to recognize* or associate themselves in any shape or form with this proceeding of the Russian Government'.[83]

In 1908, the Austro-Hungarian government notified the signatory powers of the Treaty of Berlin of 1878 of its decision not to consider itself tied any longer - due to changed circumstances - to Art. 25 of the same treaty, with regard to the permanence of its troops in the Sultanate of Novi Bazar and to the title of simple administrator of Bosnia and Herzegovina, in which it resumed its freedom of action.[84] Again, the other parties to the treaty applied a policy of non-recognition.[85]

Still in 1908, Bulgaria declared its independence against the provision of Art. 1 of the Treaty of Berlin by which it was defined as 'an autonomous and tributary Principality under the suzerainty of His Imperial Majesty the Sultan'. The response of the British government once again underlined that '"[..] His Majesty's Government [..] cannot admit the right of any Power to alter an international treaty without the consent of the contracting parties. His Majesty's Government *cannot therefore recognize* what has been done till the views of the other Powers are known, especially of Turkey, who is more concerned than anyone else'[86].

Oppenheim, *International Law a Treatise* [H. Lauterpacht (ed.), 5th ed., Longmans Green and Co., London, 1937] 744, footnote 2. However, other authors like Pitt Cobbett, Alf Ross and Vedross have stressed that 'the provisions of the Protocol [1871] meant to reject unconditional unilateral denunciation and not the concept of unilateral denunciation', that is the rule of unanimous consent of the parties should not be applied 'in so far as the termination of a violated treaty is concerned', B. P. Sinha, *Unilateral Denunciation of Treaty because of Prior Violations of Obligations by Other Party* [Martinus Nijhoff Publishers, The Hague, 1966] 79-80.

[81] See J. P. Bullington, 'International Treaties and the Clause "Rebus Sic Stantibus"' in [December 1927] *University of Pennsylvania Law Review* 156.

[82] Treaty between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey for the Settlement of Affairs in the East: Signed at Berlin, July 13, 1878, available on the following website <https://archive.org/details/jstor-2212670/page/n1> accessed 10/15/2019.

[83] A. McNair, *The Law of Treaties* (n 79) 499, 'Despatch from the Earl of Rosebery to Sir R. Morier of 13 July 1886' (emphasis added).

[84] A. Maresca (n 77) 705-706.

[85] In that occasion, the British government informed Austria-Hungary that the UK '[could not] approve of an open violation of the Treaty of Berlin, *nor recognize* an alteration of it when the other Powers, and especially in this case Turkey, have not been consulted' (emphasis added), see Gooch e Temperley, *British Documents on the Origins of the War, 1898-1914*, Vol. V, 1928, p. 390, reproduced in H. Lauterpacht (n 19) 415. See also A. McNair, 'Stimson Doctrine of Non-Recognition' in [1933] 14(65) *British Yearbook of International Law* 69-70.

[86] A. McNair, *The Law of Treaties* (n 79) 501, Telegram sent by Sir Edward Grey to the British Agent and Consul-General at Sofia.

As it can be seen, the policy of non-recognition was mainly applied to the Treaty of Berlin (1878) and in the case of Russia to the Treaty of Paris (1856). Both treaties, without a express withdrawal clause, had as the pivot of their action a certain idea of international security, which was based on the stabilization of the territorial *status quo* in the first case[87] and in the neutralization of the Black Sea in the second.[88]

C. Non-recognition of colonial acquisitions by European powers

The non-recognition of treaties by third parties was aimed at negating to a colonial power certain sovereign rights over a (according to them) backward territory, by invalidating the new treaty entered into by the colonial power with other States, one of which could also be that having formal sovereignty over the territory in question (see the US non-recognition of Sino-Japanese treaty above). There were, however, cases in which an acquisition of territory by a colonial power resulted in violation of prior treaty pledges but there was not a new treaty which could be the object of non-recognition. Here, the object of non-recognition was directly the seizure of territory in question. One example is the French non-recognition of the British occupation of Egypt because in violation of the Anglo-French Treaty of 1904.[89]

A significant example is also given by the British refusal to recognize the annexation of Congo by Belgium in 1908 because in violation of the 1884 Berlin Conference.[90] Lauterpacht cites this case alongside the US non-recognition of the Sino-Japanese treaty as having transformed the law of (non) recognition towards the protection of fundamental principles of international law, in the case at hand the independence of Congo State and some humanitarian principles. However, as above, while not denying these aspects, we convene that the predominant sentiment in adopting a policy of non-recognition by the UK was that of preserving commercial interests in the country.[91]

[87] The Treaty of Berlin of 1878, in fact, revising the Treaty of Peace of Santo Stefano, with which Russia had succeeded in considerably increasing its domination in the Balkans, ensured peace in Europe in the last years of the fourteenth century and the first two decades of the twentieth.

[88] At the Paris congress of February 1856, the territorial integrity of the Ottoman Empire and the autonomy of Serbia, Moldavia and Wallachia were reaffirmed (the latter will unite in 1859 giving life to the State of Romania), the prohibition of access in the Black Sea waters for warships of any nationality and the freedom of international navigation along the Danube was also established.

[89] H. Lauterpacht (n 19) 415; T. Chen (n 71) 411-12.

[90] Cabinet Minutes, 28 October 1908, CAB/41/31/69.

[91] The British policy of non-recognition towards the annexation of the Congo by Belgium was mainly shaped by Arthur Hardinge, a scholarly diplomat who was really influential in the Foreign Office. In December 1907 Hardinge wrote: 'Before recognizing as a signatory of the Berlin Act the validity of the transfer we must ask for explicit and positive guarantees [..]'. Thus, British formal commitment not to recognize the annexation was not absolute but conditional upon the fulfilment of three specific requests by Belgium: 1) the relief of natives from taxation; 2) the

One further aspect needs consideration. The 1884 Berlin Conference, by which the major European powers negotiated and formalized claims to territory to Africa[92], introduced a form of non-recognition in the provisions of the adopted document. An element that instead did not appear in the 1878 treaty of Berlin which was instead aimed at settling affairs in the East. Art. 34 of the General Act of the Berlin Conference[93] by prescribing a requirement of notification of the acquisition of new territory by the signatories established the principle that conquest not always gives rise to a source of title in international law, since at least general recognition or prescription was necessary to convert occupation into good title in international law. Notification was indeed intended to be an instrument by which other powers could challenge a certain occupation of territory, thus not recognizing that seizure as effective.

5.3. Non-recognition of revolutionary governments

A. The doctrine of Constitutional Legitimacy (or Tobar Doctrine or Wilsonian Constitutionalism). The ultimate US turn

The persistence of a political connotation of the principle of non-recognition is proven also by the adoption on the part of the US of a new policy as regards the recognition of governments.[94] The US, as an emerging economic power, started to demand that financial and other international obligations be met before granting recognition to a new government.[95] The new attitude was perfectly embodied by President Woodrow

grant of land to natives, and more importantly 3) the possibility of traders whatever their nationality would be, to open companies and to establish direct trade relations with the natives. See Wm. R. Luis, *Ends of British Imperialism: The Scramble for Empire, Suez and Decolonization* [I.B. TAURIS, New York, 2006] 177-78. These are evidences that British non-recognition policy was moved by political-economic interests rather than humanitarian and legal reasons. The three requests were not satisfied, especially the first two. In December 1908, John Daniels, corresponding Secretary of the Congo Reform Association, thus wondered: 'Will the powers, but particularly the United States and Great Britain, be satisfied then with the taking over of the Congo by Belgium on the present terms? [..] it must be believed that these two Powers at least will refuse to recognize the terms of the annexation proposed by Belgium', see J. Daniels, 'The Congo Question and the "Belgian Solution"' in [December 1908] 188(637) *The North American Review* 902. However, this did not happen.

[92] For a brief overview see E. Heath, 'Berlin Conference of 1884–1885' in (H. L. Gates, Jr. and K. A. Appiah eds.) *Encyclopedia of Africa* [Oxford University Press, Oxford, 2010] available on Oxford Reference website at <https://www.oxfordreference.com/view/10.1093/acref/9780195337709.001.0001/acref-9780195337709-e-0467> accessed 05/22/2020.

[93] General Act of the Berlin Conference on West Africa, 26 February 1885, available online at Prof. Brian Loveman's website at <https://loveman.sdsu.edu/docs/1885GeneralActBerlinConference.pdf> accessed 21 May 2019.

[94] D. Raič (n 26) 114-15.

[95] 'The gradual change in favour of demanding that financial and other international obligations be met (or at least the government promise that it would meet them in the future) before recognition was granted reflected the gradual emergence of the United States as a global economic power. The policy was altered to meet these new interests.

Wilson who firmly endorsed the 1907 doctrine of "constitutional legitimacy" (also called "Tobar doctrine" or "Wilsonian Constitutionalism").

The doctrine was based on the assumption that any government which came into power in violation of the State's constitution, as a result of a *coup d'état* or a revolution, was illegitimate and should not be recognized. The emphasis was placed on the assent of the people but also on the readiness and ability to discharge international obligations.[96] The policy adopted by the United States for more than a century, in which the factual existence of a government was sufficient for its recognition, was thus replaced by a more legitimist stance, the same that they had previously opposed in relation to the Holy Alliance.[97]

The doctrine of constitutional legitimacy was first enunciated by Charles Tobar, while Minister for Foreign Affairs of Ecuador, in a note of March 15, 1907. The main points of the note acquired legal standing during the Central American Peace Conference, participated by Costa Rica, Guatemala, Honduras, Nicaragua, Salvador, and the United States, and held in Washington in December 1907.[98] In article I of the Additional Convention to the General Treaty of Peace and Amity it was stated that:

> [t]he Governments of the High Contracting Parties shall not recognize any other Government which may come into power in any of the five Republics as a consequence of a *coup d'état,* or of a revolution against the recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country.[99]

Such a doctrine was further elaborated in the subsequent Conference on Central American Affairs held in 1922-1923 and included in Article II of the General Treaty of Peace and Amity, adopted on February 7, 1923. This treaty went further by

The traditionally unstable governments in Latin America could no longer be viewed so tolerantly'. Despite Woodrow Wilson's pro-democratic label, he 'implemented a policy that was largely indistinguishable from Dollar Diplomacy, adding only the high-minded rhetoric of democracy', see G. Weeks, 'Almost Jeffersonian: U.S. Recognition Policy toward Latin America' in [September 2001] 31(3) *Presidential Studies Quarterly* 494, 95.

[96] K. A. Doukas (n 17) 1074.

[97] The outbreak of the rebellion in the Confederated States during the Civil War (1861-1865) and their *de facto* control over a large portion of American territory was influential on the US previous viewpoint on the recognition of governments. 'It is a matter of regret, for those who cherish American traditions, that the United States should have elected in these recent years to experiment with the vicious notion of capitalist legitimacy. It is a disconcerting paradox, indeed, that the ghost of the Holy Alliance should have been permitted to walk unchallenged in the country which contributed so much, but little more than a century ago, to thwart the Alliance's unholy ambitions', see E. Dickinson, 'The Recognition of Russia' in [December 1931] 30(2) *Michigan Law Review* 196.

[98] K. A. Doukas (n 17) 1075.

[99] Additional Convention to the General Treaty of Peace and Amity, signed at Washington, 17 September 1907, reproduced in [January-April 1908] 2(1/2) *AJIL* 229-230, available on Jstor website <https://www.jstor.org/stable/2212514?refreqid=excelsior%3A92e21fb160584bdb6cfe5a6efb264607&seq=2#metadata_info_tab_contents> accessed 27 December 2018.

imposing an obligation not to recognize a head of government 'expressly and unquestionably disqualified by the Constitution of his country'[100] to fulfil that function.

The United States enforced it when considering recognition of new governments in Mexico, the Dominican Republic, Costa Rica, Ecuador, Haiti, Cuba, Portugal and the Soviet Union.[101] Before the doctrine was denounced by the same signatories and strongly criticized by the Mexican foreign affairs minister Estrada and the US secretary of State Stimson in the '30s, it had already been challenged before various tribunals.

B. The Doctrine of Constitutional Legitimacy to the proof of international Courts and mixed Tribunals

At the international level the problem was to ascertain whether the *de facto* government was able to engage the will of the State as a *de jure* government and whether the subsequent restored legitimate government might eventually respond of the obligations contracted by the *de facto* government. The response of international and mixed tribunals was clear. They asserted that a *de facto* government could validly conclude treaties in the name of the State and that, for the principle of continuity of States, the obligations were binding on all subsequent governments.

In the most famous arbitration between Great Britain and Costa Rica of 1923[102], the sole arbitrator William H. Taft declared that the Tinoco government was the actual sovereign government in Costa Rica regardless the recognition or non-recognition of this status by Great Britain or other powers, and that the acts of this government were binding upon the subsequent governments of the country.[103] The

[100] General Treaty of Peace and Amity, reproduced in [April 1923] 17(2) *AJIL* 17-122, available on Jstor website <https://www.jstor.org/stable/2212795?seq=3#metadata_info_tab_contents> accessed 27 December 2018.

[101] G. H. Fox and B. R. Roth, *Democratic Governance and International Law, [*Cambridge University Press, UK, 2000].

[102] *Aguilar-Amory and Royal Bank of Canada claims* (Great Britain v. Costa Rica), 18 October 1923, available on UN website <http://legal.un.org/riaa/cases/vol_I/369-399.pdf> accessed 28 December 2018.

[103] 'The merits of the policy of the United States in this non-recognition it is not for the arbitrator to discuss, for the reason that in his consideration of this case, he is necessarily controlled by principles of international law, and however justified as a national policy non-recognition on such a ground may be, it certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law. The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its de facto sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a de facto government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the

same concept was also expressed in the United States-Venezuelan Claims Commission of 1889 and Franco-Chilean Arbitral Tribunal of 1901.[104]

However, as remarked by Lauterpacht, though existing treaties remain in force, their actual implementation presupposes the normal intercourse between the States in question. For this reason, they often remained inoperative, occasionally being expressly denounced by the State refusing recognition.[105]

C. The reaction of domestic courts and the "Namibia exception" precedent

The jurisprudence of domestic courts developed along the same lines. Generally unrecognized governments were often denied jurisdictional immunities, access to foreign courts and to dispose of their property abroad. Their agents were treated like ordinary individuals, and their legislative and juridical acts were deprived of legal effect. Finally, they were prevented from obtaining loans and other economic facilities from abroad and their right to declare war and to conclude peace had been questioned.[106]

The Supreme Court of the United States faced this kind of questions since the times of the Civil War in cases concerning the acts of the Confederate Government.[107] In *Texas v. White* (1868), the complaint filed by Texas claimed that the defendants (George W. White, John Chiles, John Hardenberg, the firm of Birch, Murray & Company and other) should return US bonds that had been conceded to them during the last months of the Civil War by the revolutionary government. The Supreme Court addressed a series of questions about Texas' statehood.[108] It is interesting that the

European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the de facto character of Tinoco's government, according to the standard set by international law', Mr. Taft speech reproduced in L. H. Woolsey, 'The Non-Recognition of the Chamorro Government in Nicaragua' in [July 1926] 20(3) *The American Journal of International Law* 548, 49.

[104] The United States-Venezuelan Claims Commission of 1889 declared in the *Day case* that 'it may also be said with great confidence that a government *de facto*, when once invested with the powers which are necessary to give it that character, can bind the state to the same extent and with the same legal effect as what is styled a government *de jure*', see Ibid 547-48. The Franco-Chilean Arbitral Tribunal of 1901, as well, in the case of *Dreyfuss Freres Cie*, when considering the binding character of the acts of the Dictator Pierola of Peru, stated that 'the capacity of a government to represent the state in its international relations does not depend in any degree upon the legitimacy of its origin, so that foreign states no longer refuse recognition of a government *de facto*, and that the usurper who holds power with the consent express or tacit of the nation, acts and concludes validly in the name of the state treaties that the restored legitimate government is obliged to respect', text of the arbitral award available on The National Archive website at <https://discovery.nationalarchives.gov.uk/details/r/C7060861> accessed 11/04/2019.

[105] 'As treaties regulate most of the current relations to States, the refusal to recognize a government amounts to a considerable extent to exclusion from the benefits of international intercourse', H. Lauterpacht (n 19) 142.

[106] *Ibid.*, 142-44.

[107] L. H. Woolsey (n 103) 547.

[108] 'And yet it is an historical fact that the government of Texas, then in full control of the State, was its only actual government, and certainly if Texas had been a separate State, and not one of the United States, the new

Court found a distinction between acts concerning private rights of citizens – which must be retained valid – and those unfriendly acts pertaining to the public law sphere – that should be regarded as null and void. That judgement by the US Supreme Court can be considered a forefather of the so-called *Namibia exception* that emerged in the XX century.[109]

Since 1924, the US adopted the doctrine of "justice and public policy" as an exception to the accepted rule, to cover also acts of unrecognized foreign governments.[110] In fact, a great number of cases crowded US courts after the 1919 Wilson declaration of non-recognition of the Soviet regime. In *Solokoff v. National City Bank* judge Mr. Justice Cardozo stated: '[j]uridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War'.[111] According to Dugard, however, the isolation of unrecognized entities from the modern world is not disturbed by the fact that sometimes municipal courts may resort to ingenious strategies to give effect to the laws of unrecognized entities for the purpose of setting individual cases.[112]

6. Concluding remarks

In this chapter we saw that the principle of non-recognition has very remote origins, since it can be traced back to the XV century B.C. The Hittites, the Greek city-states and the Roman empire, all used the principle of non-recognition to distinguish

government, having displaced the regular authority and having established itself in the customary seats of power and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts during the period of its existence as such would be effectual, and, in almost all respects, valid. And to some extent this is true of the actual government of Texas, though unlawful and revolutionary as to the United States. It is not necessary to attempt any exact definitions within which the acts of such a State government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government must be regarded in general as valid when proceeding from an actual, though unlawful, government, and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void', *Texas v. White,* 74 U.S. 700 (1868), available on Justia US Supreme Court website <https://supreme.justia.com/cases/federal/us/74/700/> accessed 28 December 2018.

[109] See *infra*, Chapter VI, par. 7.4.

[110] H. Lauterpacht (n 19) 124 ff.

[111] *Sokoloff v. National City Bank*, 164 N.E. 745 (NY 1928) 165, available on the website <https://casetext.com/case/sokoloff-v-national-city-bank> accessed 31 December 2018.

[112] J. Dugard, *Recognition and the United Nations* [Grotius Publication Limited, Cambridge, 1987] 124.

between friendly and enemy entities and thus to guide their conduct towards neighbors. Spanish predominance shaped the principle of non-recognition in a slightly different fashion compared to the past: it was Spain alone that could decide upon questions of international legal subjectivity. Such discretion by Spain was supposedly based on the criterion of Christianity. As a matter of fact, both inside and outside Europe, in that period recognition of new States/governments concerned only the closed circle of Christendom. We supposed however that the instrument of non-recognition in the Spanish Age had a pre-political connotation since it resulted from a conception of the world and of the law of nations still primitive, geographically attached to Europe and ideologically linked with Christianity.

It can be maintained that Spain inherited such attitude from the Middle Ages when the Church and the Empire had monopolized the public sphere of power and of recognition.

In 1648 the Peace of Westphalia inaugurated the beginning of traditional international law based on independent sovereign States. Practically, however, the international society became dominated by a small group of European monarchial States. It was with the independence of the United States, proclaimed in 1776, that the European monarchial powers began to feel threatened. If they could do little to stop the rise of the United States, they applied for the very first time a collective policy of non-recognition to the results of the French revolution in 1789.

France was probably the first country to move steps towards the affirmation of the principle of effectiveness, domestically called *raison d'état*. The French monarchy indeed recognized the political independence of the United States about one decade earlier its own loss of power during the Revolution. In Europe, however, the predominant idea among scholars as well as statemen was still one of monarchial illegitimacy and premature recognition in case of lack of parent State's renunciation of sovereignty. Not by chance, the restored British monarchy responded to the French recognition of the US with a declaration of war to the recognizing power. As soon as the revolution broke out, the other monarchial States, constituting themselves in the Holy Alliance, applied a concerted policy of non-recognition to the results of the French Revolution, this practice become known as "theory of monarchial illegitimacy".

The European theory was successfully contrasted by the stance of the United States which asserted the right of every nation to work out its own destiny. According to the US, the sole parameter of legitimacy should be the mere principle of effectiveness. The rise of the principle of effectiveness in international law was thus linked with notions like 'empire of liberty' and 'self-determination' of nations.

The predominance of the principle of effectiveness over the theory of monarchial illegitimacy established itself in the first half of the XIX century. With the joint efforts

of the US President Monroe and the British Secretary of State Canning, Spanish colonies in Latin America – claiming independence between 1808 and 1829 – were granted recognition despite European revendication. Such course of action reverberated in Europe too, since new States and governments – like Greece, Belgium and Bulgaria – did not encounter obstacles in their international recognition during the century.

In the meanwhile, however, things were quickly changing. In 1823, US President James Monroe, in its annual message to the Congress, enounced the theory – that bears his name ('Monroe Doctrine') – about the US supremacy over the entire American continent. That speech marked a watershed in the US diplomatic history. If, on the one hand, the theory could be seen as a statement of non-recognition of any European claims over the Western hemisphere – thus protecting Latin America from European aggressions – it would also serve US interests of power and influence, as the subsequent armed intervention in Mexico and the *de facto* control over Cuba, the Falkland Islands and Grand Colombia would demonstrate.

This shift in the US attitude could be also seen in their practice of non-recognition of new governments from the end of the XIX century to the first decades of the XX century. President Wilson indeed endorsed the 1907 doctrine of 'constitutional legitimacy' by which any government, came into power in violation of the State's constitution, as a result of a *coup d'état* or a revolution, should not be recognized. Some writers have called this practice as 'capitalist legitimacy' since the US, the emerging global economic power, used this doctrine to exert pressure on the south of the continent, i.e. to have Latin-American governments satisfy financial and other commitments (usually to the advantage of the US themselves) before granting them recognition. The policy adopted by the United States for more than a century by which the factual existence of a government was sufficient for its recognition, was replaced by a legitimist stance that to the eyes of many observers, evoked the ghost of the Holy Alliance.

The principle of effectiveness, champion of self-determination of people since the American proclamation of independence, it was now used exactly against those people that through revolutions tried to seek a change in government. The emphasis on the assent of the people as a test of recognition was moulded in a way so as that the US would have negated recognition because of the undemocratic character of those revolutions (cf. *infra*, Chapter VII, par. 3).

In the period that goes from the second half of the XIX century to the '20s there is also another field where non-recognition has been applied, that is in relation to treaties. This practice emerged especially in Europe where Bismarck's efforts to replace the old system of the Holy Alliance with a new order for peace failed. Bismarck's system of alliances, indeed, did not prevent a crisis of multilateralism.

Rivalries among Great Powers were exasperated by the European race to colonial acquisitions in Africa and Asia as a part of the global expansionist policy of late imperialism. In this context, the policy of non-recognition was not of a collective nature, rather it was a bilateral means to ensure the compliance of parties to existing treaty obligations.

It is possible to outline two different applications of non-recognition to the law of treaties: 1) non-recognition – and thus the nullity – of treaties affecting third parties and with a bearing on the independence of States; and 2) non-recognition of the unilateral denunciation/withdrawal from treaties. Examples include respectively the French non-recognition of the British protectorate over Zanzibar because it violated the Treaty of 1862, and Great Powers refusal to recognize the Russian denunciation of the regime in the Black Sea in 1870.

The non-recognition of a treaty by third States – thus the first application cited above – was mainly invoked on the basis of the protection of the political independence and the territorial integrity of a particular State bound by the treaty. The most notable example is the US non-recognition of the Sino-Japanese treaty of 1915 because against the independence of the Republic of China, and – formally speaking – the 'treaty rights of the United States'.[113] Lauterpacht stressed how this case signified for the very first time, the determination to refuse recognition on account of fundamental principles of international law relating to the independence of States. However, we argued that it related mainly to the maintenance of an 'open door' regime, that is the assurance of equality of treatment in commerce and navigation for the great powers.

Either regarding new governments or treaties, the practice of non-recognition was mainly inspired by political goals of domination and control by the major powers that regulated the international order of that time.

Unlike these two fields of application of non-recognition, a third one would prove to be more fruitful, i.e. the non-recognition of territorial acquisitions. The principle according to which force can be employed without limits in international law had been already challenged by jurists like Victoria, who affirmed in the XVI century: 'the extension of empire is not a just cause of war'. Later, scholars held that conquest not always gave rise to a source of title in international law, since at least a subsequent treaty, general recognition or prescription was necessary to convert occupation into a

[113] R. H. Ferrell (ed.), *The American Secretaries of State and Their Diplomacy* [Vol. XI, Cooper Square Publishers, New York, 1963] 154, Bryan Note of 11 May 1915. Secretary of State, William Jennings Bryanhad, filed a diplomatic notice warning Japan of US non-recognition in respect of Japan's so-called 'Twenty-one Demands' on China.

good title in international law.[114] Most likely, the concept that territorial acquisitions, to be recognized as legal, must be gained in a proper manner, found its apical representation in the Berlin Conference of 1884-1885. The requirement of notification of the acquisition of new territory – which is prescribed by Art. 34 of the General Act of the Berlin Conference – was indeed inspired by the belief that States would need recognition of their newly acquired/annexed territories. Dr. Lindley examined this kind of recognition and stated that in the original draft proposed by the German and French governments: 'the object of notification was said to be to enable other powers to recognize the occupation as effective or to establish their objections'.[115]

It is quite interesting to note that efforts to establish an instrument of non-recognition of unlawful acquisitions of territory preceded efforts to ban the use of force *tout court* in international law. Latin-American countries, indeed, attempted to outlaw conquest by the use of force *tout court* since the middle of the XIX century. Those countries, harassed by continuous annexations, occupations and interferences in their internal affairs by foreign powers, held a congress in Panama in 1826. They wanted to build a single Latin-American voice at the international level in order to protect the new republics from an attack by Spain or the Holy Alliance. To this end, they asked the participation of some neutral countries like the US and the UK. However, these States did not support the Latin-American purpose. The Treaty of Perpetual Union, League and Confederation was signed by Colombia, Peru, Central America, and the United Mexican States but it was not ratified – except for Colombia – due mostly to their political instability.

Due to the low support gained by other powers, Latin-Americans continued their dialogue among themselves. They met in Lima (1847-48), in Santiago de Chile (1856) and again in Lima (1864-65). In the treaties adopted there, a link between non-recognition and the notion of use of force was created for the very first time. We supposed that these treaties initiated a process for the constitution of a regional customary rule; indeed, even if not ratified and thus not binding, they showed a sufficient level of clarity and certainty that usually implies a legal obligation.

However, it emerged that the original input by Latin-American countries to ban *tout court* the use of force by States to affect territorial acquisitions in international law was narrowed down through the coming into play of the United States. The first International Conference of American States, held in Washington from October 2,

[114] Q. Wright, The Stimson Note of January 7, 1932' in [April 1932] *The American Journal of International Law* 345.

[115] A. McNair, *Stimson Doctrine of Non-Recognition* (n 84) 66 citing Dr. Lindley, *Acquisition and Government of Backward Territory*, ch. XXIX, "Notification and the Assent of Other States", 300. See also G. Scelle, *Prècis du Droit de Gens. Principes et Systématique* [Part I, Libraire du Recueil Sirey, Paris, 1932] 161.

1889 to April 19, 1890 is said indeed to have inaugurated the period of Pan-Americanism. The document finally adopted in Washington reflected the exploitative attitude of the US as regards the conference, since it was only made up of a wide range of technical and commercial provisions. There was, to tell the truth, a separate recommendation on the 'right of conquest' strongly advocated by Latin-Americans.

We thus analysed the debates inside the Committee on General Welfare. What came out is that the US delegation succeeded in tiding the instrument of non-recognition of territorial conquests to the operation of a treaty of arbitration. We do not know whether or not intentionally but the treaty of arbitration (the sole part that ought to be binding) was not ratified causing the right of conquest recommendation to remain dead letter and thus the principle of non-recognition too. Latin-American countries had advanced an absolute conception of the obligation of non-recognition of territorial acquisitions through the use of force. They meant the obligation as encompassing also cases in which the acquisition of territory would have resulted from an act of legitimate self-defence. However, US resistance prevented such an outcome.

In the end, while European States were making steps about non-recognition in the context of colonization (see *supra*, par. 5.2.C.), Latin-American States proposed an enhanced version of the obligation of non-recognition of territorial acquisitions. They indeed had been and were still the colonized, not the colonizers. Their efforts to ban the use of force in order to perpetrate an acquisition of territory substantiated in the *opinion iuris* necessary for the formation of a regional customary norm. The formation of that norm was however impaired by the fact that these same States during the last part of the century started armed conflicts among each other. What is important to us, it is not the war *per se* (in so far as it was not yet outlawed in international law) but the acquisitions of territory resulting from those wars.

Anyway, it has to be strongly stressed that the Latin-American movement has been fundamental for the development of the instrument of non-recognition of territorial acquisitions in the 1930s. It was exactly the link between non-recognition and the use of force that has proven to be lasting and it still distinguishes the actual rule. It would take the boost of two important treaties (the Pact of Paris and the Covenant of the League of Nations) to finally affirm the obligation of non-recognition, thus capitalizing the American experience.

CHAPTER III

The Era of the League of Nations and the Stimson Doctrine

The Covenant of the League of Nations, 1919, and the Treaty for the Renunciation of War, 1928 (also 'Pact of Paris' or 'Briand-Kellogg Pact') constituted the first attempt in the field of international relations to establish a relatively universal system of collective security. As a matter of fact, it was only after the two treaties came into force that the problem of collective security began to attract the attention of scholars and politicians and that the term became commonly used in the literature of international law.[1] Under the 'new law' of the Covenant of the League of Nations (1919) and of the Treaty for the Renunciation of War (1928) – through procedures of a legislative character – States acted in the interests of the community of nations and not anymore in their own national interests.[2] Not only States prohibited, to a large extent, recourse to armed force in international relations but they also established an obligation not to recognize as lawful the results of illegal claims to sovereignty.

The idea of a universal international organization for collective security is directed against the policy of alliances in general and the so-called balance of power in particular.[3] Indeed, previous experiments, like the Concert of Europe – created in 1815 with the Congress of Vienna – are diametrically opposed in their intent to the novel idea of the League of Nations.

In the Preamble to the League's Covenant, the High Contracting parties agreed to achieve international peace and security by 'the acceptance of obligations not to resort to war'. Art. 11(1) of the Covenant also stated any war or threat of war would be a matter of concern to the whole League.[4]

[1] H. Kelsen, *Collective Security under International Law* [United States Government Printing Office, Washington, 1957] 39.

[2] Q. Wright, 'The legal foundation of the Stimson Doctrine' in [December 1935] 8(4) *Pacific Affairs* 444-46.

[3] 'It must be noted that a treaty of alliance, in the specific sense of the term, provides for mutual assistance only in case of external aggression, whereas universal collective security organizations are directed only [..] against an illegal use of force within the organization', see H. Kelsen (n 1) 39.

[4] The Covenant of the League of Nations (Including Amendments adopted to December 1924), available on Avalon Project website at <https://avalon.law.yale.edu/> accessed 5 December 2019.

Although the Covenant of the League represented the first treaty trying to limit the freedom of States to resort to war, it was only with the Pact of Paris[5] that such prohibition became unconditional.[6] On the basis of the Covenant, in fact, if the Council of the League failed to agree unanimously on a solution to a dispute, the individual States concerned could eventually resort to war. War was also permissible in disputes declared by a party to be a matter of domestic jurisdiction. On the other hand, notwithstanding the admitted loopholes in Art. 15 of the Covenant, the Pact of Paris was subject to a wider exception of self-defence compared to the Covenant. Furthermore, the League's Covenant with its arrangements for conciliation, discussion and compromise, was probably stronger than the Pact of Paris regarding peaceful settlement of disputes.[7] The general tenor of the Covenant went against an arbitrary use of force by States.[8]

However, the responsibility to adopt economic and military sanctions as provided for in the Covenant ultimately rested with the individual decision of Member States. Thus, the concept of solidarity lying beneath the creation of the League of Nations did not reflect in the drafting of the rules providing for a collective reaction to serious violations of the Covenant.[9] Indeed, as it is well known, economic sanctions were ineffective and military sanctions were never applied. Nonetheless, solidarity was put into practice by Members of the League through a consistent implementation of the

[5] Kellogg-Briand Pact 1928, available on Avalon Project website at the following address < https://avalon.law.yale.edu/20th_century/kbpact.asp> accessed 5 December 2019. Art. I of the Pact of Paris read as follows: 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.' Both the Pact of Paris and the Covenant of the League of Nations contained the term 'war' rather than the wider and non-technical term 'armed force'; though the Kellogg Pact went far to repair this defect by means of the references in the Preamble and in its second article to 'pacific means' and a 'peaceful and orderly process'. This proves that the two instruments did not ban the use of force *tout court* in international law, rather they were limited to the notion of aggressive war (see Arnold D. MacNair, 'Stimson Doctrine of Non-Recognition' [1933] 65 BYIL 68).

[6] E. Milano, *Unlawful Territorial Situations In International Law. Reconciling Effectiveness, Legality and Legitimacy* [Martinus Nijhoff Publishers, Leiden/Boston, 2006] 103.

[7] R. H. Ferrell (ed.), *The American Secretaries of State and Their Diplomacy* [Volume XI, Cooper Square Publishers, New York, 1963] 165. This is true also in relation to the doctrine of non-recognition. It has been noted, indeed, that the Stimson Note would be only a unilateral declaration if not endorsed by the Assembly of the League of Nations with its all set of functionings.

[8] '[..] It would be misleading to give too much emphasis to the subordination of the Covenant restrictions to Article 15, paragraph 7, and the customary law. It is significant that States which resorted to war and other types of force in the lifetime of the League did not attempt to justify their action by reference to a full-blooded right to resort to war inherent in general international law. States either made no legal apology at all, denied the existence of war in the formal sense, or talked in terms of necessity and self-defence. The Covenant in view of its general purpose and its particular provisions created a presumption against the legality of war as a means of self-help; and as time went by various instruments, and legal developments such as the Stimson Doctrine, were to reinforce that presumption'; I. Brownlie, *International Law and the Use of Force by States* [Clarendon Press, Oxford, 1963] 56-57.

[9] According to Art. 16(1), member States should severe immediately all trade or financial relations and prohibit all intercourse between their nationals and the nationals of the covenant-breaking State. Art. 16(2) provided instead military sanctions that were to be recommended to member States by the Council of the League.

doctrine of non-recognition of illegal seizures of territory that, precisely in this period, acquired a strong collective dimension.

In conclusion, the Covenant of the League and the Pact of Paris worked synergistically. The Pact of Paris undoubtedly set the highest terms of reference for a complete ban on aggressive war on a theoretical level and it proved to be fundamental in changing the mindset of world leaders in subsequent decades. In this light, the Pact of Paris has been recently described as the watershed between the old and the new international order in which we are living.[10] On its part, the League of Nations should be revalued too as the first forum where the concrete realization of a new international order was set in motion. Therefore, it seems correct to uncover the seeds of the new order inside the League rather than only detecting the persistent elements of the old one. Many scholars have indeed highlighted the flaws of the League and its blatant failure, since it could not prevent the outbreak of World War II in 1939. However, insufficient attention was given to the fact that the creation and activities of the League did alter pre-existing rules of public international law.[11]

The Pact of Paris and the Covenant of the League opened a breach into the 'might is right' principle and the just war theory and basically set in motion a radical change of perspective in which the use of force would have become the exception rather than the rule. It is only in the light of the joint effect of the two instruments that one can understand the emergence of the obligation of non-recognition, the first solidarity tool in the hands of the New World Order's forerunners.

As we have seen, for a long time the principle of non-recognition was a matter of policy only. A fundamental step towards transforming the policy of non-recognition into an obligation was taken by the US administration through the enunciation of the Stimson Doctrine and then by the Assembly of the League of Nations through important resolutions, in connection with the invasion of Manchuria by Japan in 1931.

Scholars have often engaged in legal/historical conceptualizations of this period assuming that the doctrine of non-recognition of unlawful territorial acquisitions was

[10] 'The Peace Pact quite plainly did not create world peace. Yet it was among the transformative events of human history, one that has, ultimately, made our world far more peaceful. It did not end war between states, but it marked the beginning of the end – and, with it, the replacement of one international order with another [..] Outlawing war only seems ridiculous to us because ours is a world in which was has already been outlawed. It is difficult to imagine war serving any legitimate function other than a defensive one. Today, war is regarded as a departure from civilized politics. But this has not always been so. Before 1928, every state accepted the opposite position. War wasn't a departure from civilized politics; it was civilized politics. Indeed, states could not imagine doing without it', O. A. Hathaway and S. J. Shapiro, *The Internationalists, And Their Plan to Outlaw War* [Allen Lane, Great Britain, 2017] xiii.

[11] K. D. Magliveras, 'The Withdrawal From the League of Nations Revisited' in [1991] 10(1) *Dickinson Journal of International Law* 70-71.

just a 'pathetic paper sword'[12], a convenient substitute for active participation in the maintenance of the law of nations.[13] In the common view of scholars, the Manchurian case was a sporadic episode, and the doctrine of non-recognition was soon to be abandoned in the wake of other conflicts. This chapter is an attempt to challenge this basic assumption.

1. The Far Eastern crisis

The case of the Japanese seizure of Manchuria raises the fundamental question whether it gave life to a legal doctrine of non-recognition. Another point of controversy is whether the doctrine of non-recognition was applied only in respect to the illegality of conquest by Japan or also to the subsequent creation of the State of Manchukuo, with an important bearing on statehood and recognition. Finally, it is questionable whether such a practice was based on conventional law (the Pact of Paris and the Covenant of the League of Nations) and/or customary rules or even general principles of law like the maxim *ex iniuria ius non oritur*. Before answering these questions, we turn first to a brief reconstruction of the events that led to what has been called the Far Eastern Crisis and the US and the League of Nations' reactions.

1.1. Main facts

The northernmost region of China, called Dongbei but known to the West as Manchuria, has been in the Japanese sphere of influence since the end of the XIX century. However, Japan succeeded in securing it only after the victory in the Sino-Japanese War of 1895 and the Russo-Japanese War of 1904 (aimed at excluding another State interested in the control of the region, i.e. Russia). Japan was thus able to patrol the strategically important South Manchurian Railway and the territory around it, although formally the entire area remained under the sovereignty of China. On 18 September 1931 an explosion occurred on the South Manchurian Railway near Mukden. The troops of the Kwantung Army, the principal Japanese armed force in Manchuria responded exchanging fire with some Chinese soldiers. In three days following the "Mukden incident" the southern part of Manchuria was under Japanese military control and the former local regime of Marshal Chang Hsüehliang was overthrown. Since October 1931, Japan started to support the local movements that

[12] G. Schwarzenberger, *Power Politics. A Study of International Society* [Stevens & Sons Limited, London, 1951] 503.

[13] J. C. Ebegbulem, 'The Failure of Collective Security in the Post World Wars I and II International System' in [2011] 2(2) *Transcience* 23.

were fighting to establish a new State in Manchuria. In the meanwhile, the control on the rest of the region was to be secured by 5 January 1932. The newly formed local provincial authorities, under the oversight of the "Self-Government Guiding Board", reunited in Mukden on 16-17 February 1932 published a "Declaration of Independence" on 18 February.[14]

On January 7, 1932, the Secretary of State Henry Stimson issued an identical diplomatic note both to the Japanese and Chinese Ambassadors in Washington in order to inform their respective governments that

> The American Government [..] cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China, or to international policy relative to China, commonly known as Open Door Policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928 [..][15]

China had already appealed the Council of the League of Nations in the wake of Mukden incident on 21 September 1931.[16] According to the Chinese government a situation had arisen that required the Council to act under Article 11 of the Covenant. The Secretary-General could summon a meeting of the Council "so that the peace of nations may be safeguarded".[17] On 10 December 1931 the Council passed a Resolution by which it instituted a Commission of Enquiry (later known as the Lytton Commission) with a mandate to investigate on-the-spot the situation in Manchuria and to report back to the Council.[18] On 29 January 1932 China finally submitted a formal appeal to the Council under Article 10 and 15 of the Covenant 'requiring the Council to take steps to settle any dispute likely to lead to a 'rupture' between two members of the League'.[19]

[14] D. Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law' in [2003] 2 *Chinese Journal of International Law* 107-110.

[15] Q. Wright, 'The Stimson Note of January 7, 1932' [April 1932] 26(2) *The American Journal of International Law* 342.

[16] League of Nations Official Journal, December 1931, 2453.

[17] Covenant of the league of Nations (n 4), art. 11.

[18] League of Nations Official Journal, 1932, 364.

[19] D. Turns (n 14) 122.

On 11 March 1932, the League Special Assembly issued a Resolution asserting the applicability of the Covenant's provisions on non-aggression and the peaceful settlement of international disputes to the situation in the far East. The declaration recalled the Stimson declaration:

> [The Assembly]
> Proclaims the binding nature of the principles and provisions referred to above [i.e. the Pact of Paris and Article 10 of the Covenant] and declares that it is incumbent upon the Members of the League of Nations not to recognize any situation, treaty or agreement, which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris.[20]

The resolution also established the Committee of Nineteen to oversee the implementation of the League resolutions and to facilitate the settlement of the dispute. Lastly, on 24 February 1933 the draft report of the Committee was adopted by a great majority of States in the Assembly. It expressly called upon member States not to recognize either *de jure* or *de facto* the regime established in Manchuria and adopted recommendations as to give effect to the policy of non-recognition.[21]

In other words, the report, adopted under Art. 15(10) of the Covenant, recognized that China and Japan had legitimate grievances against each other in Manchuria prior to September 18, 1931, and both States were blamed for the Manchurian crisis. Ultimately, however, China was exempted from any international responsibility, while Japan was held to be in breach of Art. 10 for not respecting the territorial integrity and political independence of a League Member as well as in breach of Art. 12 for not submitting the dispute to arbitration, judicial settlement or to enquiry by the Council.[22]

1.2. On the collective obligation of non-recognition

A. Stimson and the shift in US Foreign policy

The first point to be clarified is whether the American administration marked a break with the past, establishing a new course in international relations. As mentioned above, the Stimson Note refers both to the Open-Door policy, which at that time was

[20] League of Nations Official Journal, 1932, Special Supplement 101, 87, 88.
[21] D. Turns (n 14) 122.
[22] League of Nations Official Journal, 1933, Special Supplement 112, 73. See also K. D. Magliveras (n 11) 61.

embodied in the 1922 Nine-Power Treaty[23], and to the 1928 Pact of Paris (also called Briand-Kellogg Pact)[24].

The departure - on the part of the United States - from a strict Open-Door policy aimed solely at the protection of their own commercial rights in China towards support for a legal obligation of non-recognition, is corroborated by the fact that the Nine-Power Treaty, the cornerstone of the US policy in the East at that time, was underpinned by the 1928 Pact on the Renunciation of War. The new Secretary of State Stimson, the successor of Kellogg in the State Department, saw the latter treaty as a major source of legal obligation and was ready to strengthen it further.[25] Moreover, Stimson presented President Hoover two alternative drafts of the Note, one resembling the Bryan Note of 1915 (we have referred to above as the note by which the US had not recognized the 1915 Sino-Japanese treaty) and concerning only US commercial interests, another including the wider obligations of the Pact of Paris.[26] It was the latter that 'was approved and has since passed into the history of international law'.[27] This finding led Professor Quincy Wright to affirm that 'no diplomatic note of recent or even more distant years is likely to go down in history as of greater significance in the development of international law than that sent by the United States to China and Japan on January 7, 1932'.[28]

[23] Principles and Policies Concerning China (Nine-Power Treaty), available at <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0375.pdf> accessed 04 January 2019. By Article I of the Nine-Power Treaty, the Contracting Parties agreed '[t]o respect the sovereignty, the independence, and the territorial and administrative integrity of China'. In Article II they agreed: 'Not to enter into any treaty, agreement, arrangement, or understanding, either with one another, or, individually or collectively, with any Power or Powers, which would infringe or impair the principles stated in Article I.'

[24] Kellogg-Briand Pact 1928, available on Avalon Project website at <http://avalon.law.yale.edu/20th_century/kbpact.asp> accessed 04 January 2019. Article I of the Pact stated: 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.'

[25] See D. Turns (n 14) 114. This position is not universally accepted, see for example J. Verhoeven, *La Reconnaissance Internationale dans la Pratique Contemporaine. Le relations Publiques Internationales* [Editions A. Pedone, Paris, 1975] 281: 'La note Stimson du 7 janvier 1932 se contente ainsi de répéter, à propos d'un différend particulier, une politique américaine bien arrêtée qui, par-delà toutes querelles sur la légalité des titres de souveraineté en droit de gens, entend exclusivement préserver l'influence et l'intérêt des puissances occidentales en Extrême-Orient. Avant d'être la révolution normative tant vantée, la doctrine dite Stimson est, dans cette mesure, l'expression d'un 'impérialisme', aujourd'hui décrié'.

[26] This conclusion is not undermined by the fact that in terms of international law, the only instrument Stimson could use as a basis for his approach to the Far Easter crisis was in fact the Briand-Kellogg Pact. Indeed, one of the neighbouring states, whose interests in the Manchurian affair were very much affected – the Soviet Union – was neither a party to the Nine-Power Treaty nor (yet) a member of the League of Nations.

[27] D. Turns (n 14) 114. For a detailed account of the steps inside the White House for the release of the note, see also R. H. Ferrell (n 7) 155-157. It has to be highlighted also that Stimson had criticized and abandoned the "moralistic" recognition policy of Wilson towards new governments in Latin America.

[28] Q. Wright, *The Stimson Note* (n 15) 342.

B. The obligation of non-recognition in the Pact of Paris

Neither the Pact of Paris nor Art. 10 of the Covenant of the League[29] contained an express duty of non-recognition. It can thus be objected that such an interpretation was born out of a unilateral policy of the United States, later endorsed by the organs of the League, but without a legal foundation.[30] However, there are reasons to argue that 'the parties to the League of Nations Covenant and to the Pact of Paris [were] legally bound to observe the doctrine'.[31]

As regards the Pact of Paris, it is relevant that the Budapest Articles of Interpretation of the Pact of September 10, 1934 - although it did not constitute in any way an authentic interpretation of the Pact or even an official interpretation of the instrument – affirmed that the signatory states were not entitled to recognize *de facto* or *de jure* any territorial or other advantages acquired by means of a violation of the Pact.[32] Moreover, because the parties condemned recourse to war and agreed to resolve international disputes by pacific means, recognition of seizure through the use of war or by non-pacific means of the territory of a party to the Pact by another party would rather seem an encouragement to recourse to war.[33] Stimson himself considered non-recognition inherent in the Pact.[34]

C. …and in the Covenant of the League

Attempts to introduce amendments to the League of Nations' Covenant as to incorporate a principle of non-recognition as a bar to title of sovereignty was proposed by Brazil in 1921, by Finland in 1928 and Peru the following year.[35] None of these amendments however was adopted. According to Dugard, although the Covenant did not expressly provide for the non-recognition of territorial gains in violation of Art.

[29] Art. 10 of the Covenant of the League of Nations: 'The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'.

[30] 'Although subsequently referred to as the "Stimson Doctrine", the position adopted by the United States was clearly directed at the particular situation of Manchukuo and there is no evidence to suggest that it was intended to have a wider effect or that it was anything more than a policy, rather than doctrinal, response to that situation. Even Brownlie, a staunch advocate of the duty of non-recognition, acknowledged that the Stimson note did not establish a legal obligation not to recognise forcible acquisitions of territory', A. Pert, 'The "Duty" of Non-Recognition in Contemporary International Law: Issues and Uncertainties' in [2013] *Sydney Law School Research Paper No. 13/96* 5.

[31] Q. Wright, *The legal foundation of the Stimson Doctrine* (n 2) 439.

[32] See H. Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation' in [1934] 20 *Transactions of the Grotius Society, Problems of Peace and War, Papers Read before the Society in the Year 1934*, 178-204.

[33] Q. Wright, *The legal foundation of the Stimson Doctrine* (n 2) 442.

[34] R. H. Ferrell (n 7) 16.

[35] F. A. Middlebush, 'Non-recognition as a Sanction of International Law' in [April 27-29, 1933] 27 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 43.

10, it was generally believed that such an obligation was implicit in the Article itself.[36] This was the prevailing opinion expressed by scholars and statesmen in the era of the League of Nations.

Already in 1926 the Finnish statesman and scholar, Erich, stated that '[e]ven in case the League of Nations should not have succeeded in repelling an aggression or in preventing an occupation – perhaps a total one – of the territory of a Member, the other Members must not recognize that *de facto* change as final and valid *de jure*' as this was 'conflicting with the supreme values whose inviolability Article 10 want[ed] to safeguard'.[37]

It follows that such an interpretation was already inherent in Art. 10, presumably from the original ratification of the Covenant.[38] In fact, if the final goal of Art. 10 was to safeguard the territorial integrity of the members, the act by a State of recognizing a violent seizure of territory would seriously undermine it. The principle of non-recognition was only revived and made explicit by the joint action of the Stimson Note and the League's Assembly Resolutions.[39] In fact, in the Resolution of the Council of the League of February 16, 1932[40], i.e. the communication of the President of the Council to the Japanese representative, the obligation of non-recognition was said to follow from the terms of Article 10.[41]

Assembly Resolution of March 11, 1932 as well as that of February 24, 1933 recognized that the members of the League 'ought' or that 'it is incumbent upon them' to observe the doctrine. It thus appears from the wording of the pronouncements of the Council and the resolutions of the Assembly that non-recognition was considered

[36] J. Dugard, *Recognition and the United Nations* [Grotius Publication Limited, Cambridge, 1987] 28. This was probably the reason why a formal amendment of the Covenant never occurred.

[37] *Ibid.*, citing Académie de Droit International de la Hague, Collected Courses, Tome 13, 1926. See also League of Nations Official Journal, Special Supplement 64, 1928, 75. Similarly, two years later, Mr Proncope of Finland pronounced these words within the League Assembly: '[w]e may, indeed, we must, infer from [Article 10] that Members of the League cannot recognize as final or admissible a situation resulting from an act of aggression or from any other act incompatible with the provisions of the article itself'.

[38] 'That no obligation specifically requiring non-recognition of conquest was incorporated in *expressis verbis* in the Covenant was probably due to the fact that sterner sanctions than mere non-recognition of the results of conquests were envisaged against states guilty of aggressions. However, as Lauterpacht has observed, *non-recognition of a conquest in violation of the Covenant probably constitutes the minimum of the obligation to respect and preserve the territorial integrity of the other League members*' (emphasis added), cited in H. Briggs, 'Non-recognition of title by conquest and Limitations of the Doctrine' in [May 13-15, 1940] 34 *Proceedings of the American Society of International Law at its Annual Meeting (1921-1969)* 73.

[39] 'This action will go far toward developing into terms of international law the *principles of order and justice which underlies those treaties*, and the Government of the United States has been glad to cooperate earnestly in this effort" (emphasis added), Q. Wright, *The Stimson Note of January 7, 1932* (n 15) 344 citing the Statement of Secretary of State Stimson in reference to Assembly Resolution, March 11, 1932. See also L. Oppenheim, *International Law, a treatise* [ed. H. Lauterpacht, Vol. 1, 5th edition, Longmans, Green and Co., London, 1937] 141: 'So far as members of the League are concerned, the obligation [of non-recognition] implied in that Resolution must be regarded as *declaratory* of the obligations of Article 10 of the Covenant'.

[40] League of Nations Official Journal, 1932, 383.

[41] L. Oppenheim (n 39) 141, note 2-3. See also League of Nations Official Journal 1932, 383.

a legal obligation binding upon the members of the League by virtue of the Covenant.[42]

From a strictly legal point of view, Assembly Resolutions were not binding on member states and had a purely political exhortatory effect.[43] However, the majority of jurists inclined to the view that those Resolutions were legally binding on member States.[44] Moreover, being adopted under Art. 15, they may be regarded as an authentic interpretation of the Covenant.[45] It has been noted, however, that it is not necessary to embark in the controversy as to whether the Assembly resolutions were binding or not, since, as already stated, they were declaratory of existing obligations flowing from the text of the Covenant.[46] Indeed, in the case of the Pact as well as of the Covenant, certain commentators assumed even before the Manchurian crisis that 'in the future all annexations or territorial acquisitions by means of war, or in the presence of armed force, and all seizures or exactions by force, duress of fraud, shall be null and void'.[47]

None of the League's members made individual declarations of their intention to withhold recognition such as the one made by the United States. For this reason, some authors concluded that such an interpretation was not shared by most States and that they were not legally bound by it.[48] The US administration itself did not take for granted the support of other governments[49] and they were especially eager to secure British support for their position.[50] The British Secretary of State, Sir John Simon and the Under-Secretary of State, Anthony Eden, repeatedly showed their reluctance to

[42] H. Lauterpacht, *Recognition in International Law* [Cambridge University Press, London, 1947] 417.

[43] See A. Pert (n 30) 5; J. L. Brierly, 'The meaning and Effect of the Resolution of the League Assembly of March 11, 1932' in [1935] 16 *British Yearbook of International Law* 159; H. A. Smith, 'The Binding Force of the League Resolutions' in [1935] *British Yearbook of International Law* 157.

[44] This doctrinal debate can be found in J. Dugard (n 36) 31.

[45] Q. Wright, *The legal foundation of the Stimson Doctrine* (n 2) 440; see also S. R. Patel, *Recognition in the Law of Nations* [N. M. Tripathi Private LTD, Bombay, 1959] 115. Art. 15(10) of the Covenant of the League of Nations indeed stressed that 'In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that *a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League*, exclusive in each case of the Representatives of the parties to the dispute, *shall have the same force as a report by the Council concurred in by all the members thereof* other than the Representatives of one or more of the parties to the dispute' (emphasis added).

[46] H. Lauterpacht, *Recognition in International Law* (n 42) 417 note 4.

[47] Q. Wright, 'The Meaning of the Pact of Paris' in [January 1933] 27 *The American Journal of International Law* citing S. O. Levinson, *Christian Century*, 1929.

[48] Cf. K. Yokota, 'The Recent Development of the Stimson Doctrine' in [1935] 8(2) *Pacific Affairs* 133-143.

[49] Q. Wright, *The Stimson Note of January 7, 1932* (n 15) 343 citing the letter Stimson sent to United States' Senator Borah: 'If a similar decision should be reached and a similar position taken by the other governments of the world, a caveat will be placed upon such action which, we believe, will effectively bar the legality hereafter of any title or right sought to be obtained by pressure or treaty violation [..]'.

[50] Stimson confidentially communicated his proposal to the Washington ambassadors of Great Britain and France on 5 January 1932, two days before the Note was delivered to its intended recipients.

deal with the issue, making no reference whatsoever to the preservation of China's integrity, the Pact of Paris or non-recognition of the fruits of aggression.[51]

Notwithstanding the lack of express support, the subsequent course of action within the League of Nations, to which almost every member country agreed, is indicative of a general acquiescence of States to the application of the doctrine of non-recognition and it suggests an acceptance of the principle as binding.[52] Moreover, amongst all European powers, the UK had the largest commercial interests in China. One can suppose, then, that this country found it more difficult to assume a unilateral position in its international relations against Japan, that could impair its economic activities in China and the Open-Door policy.[53] UK preferred to leave the issue in the hands of the League of Nations, a collective forum, where it assumed a leading role in tackling the Manchurian Crisis.[54]

Professor H. Briggs assumed as a parameter to study (and to criticize) the legal nature of non-recognition, the distinction between (1) the extent to which states have renounced the acquisition of title by conquest; and (2) the extent to which States have accepted a legal obligation or followed a policy of non-recognition of title acquired by other States through conquest. He concluded that the legality or illegality of the Japanese conquest depended on whether, in creating the *de facto* situation, Japan violated prior treaty pledges renouncing conquests and that 'only if it could successfully be demonstrated that title by conquest is inchoate and incomplete until recognition by other states, would non-recognition be a factor determining legality'.[55]

As regards the first point, it has to be stressed that whereas war was permitted when the imperfect tools of collective security failed, conquest was never considered as legal and thus ought not to be recognized. The Covenant had established an 'absolute' prohibition of conquest, thus neither after a 'legitimate war' (a war resorted to after having extinguished the procedures set out in Artt. 12, 13 and 15) or a war in self-defence, conquest was permitted. A conclusion endorsed also by Art. 15(2) of the

[51] For a detailed discussion of the issue, see D. Turns (n 14) 114-21. See also R. H. Ferrell (n 7) 158-159.

[52] 'None of the members of the League, in so far as I have been able to discover, have made individual declarations of their intention to withhold recognition such as has been made by the United States. Presumably, the action of the Assembly is binding upon them', F. A. Middlebush (n 35) 48.

[53] A. McNair, 'Stimson Doctrine of Non-Recognition' in [1933] 65 *British Yearbook of International Law* 71. As remarked by A. McNair, Great Britain had in the past showed an inclination to acquiesce to the annexations of territory by other States, when some assurances were given, in particular with regard to the protection of their nationals abroad – see for example the Japanese annexation of Corea in 1910. 'The Corean episode is instructive because it shows the kind of safeguards and advantages which other states are likely to seek to obtain as the price of recognition and likely to fail to obtain in the event of non-recognition'.

[54] R. H. Ferrell (n 7) 161.

[55] H. Briggs (n 38) 75.

1924 Geneva Protocol for the Pacific Settlement of Disputes.[56] Thus it was well established that recourse to armed force was an illegal means to accomplish territorial acquisitions according to the Covenant.

As far as the Pact of Paris is concerned, the absoluteness of the prohibition of conquest is more questionable. According to Korman, for example, the Pact of Paris was not seen by the major powers to exclude, in a successful *war of sanction* (a war resorted against a State which had violated the Pact itself and therefore had lost the benefit of it), the acquisition of territory by conquest, provided that the acquisition was a necessary measure of security against future aggressions.[57] The different tenor of the two instruments in outlawing conquest can not be ignored. Also the official replies of the Japanese government show a different line of argumentation as regards the Pact of Paris and the Covenant of the League. Whereas Japan wrote to the President of the Council of the League that it had no intention to attack the territorial integrity or the independence of a member of the League of Nations, in the reply to the US government it stated the famous sentences: '*It might be the subject of an academic doubt* whether in a given case the impropriety of means necessarily and always voids the ends secured; but as Japan has no intention of adopting improper means, that question does not practically arise' (emphasis added).[58]

[56] '[..] in view of Article 10 of the Covenant, neither the territorial integrity nor the political independence of the aggressor State shall in any case be affected as the result of the application of the sanctions mentioned in the present Protocol', League of Nations, *Protocol for the Pacific Settlement of International Disputes*, 2 October 1924, available at: <https://www.refworld.org/docid/40421a204.html>, accessed 07/05/2020.

[57] See S. Korman, *The Right of Conquest. The Acquisition of Territory by Force in International Law and Practice* [Clarendon Press, Oxford, 1996] 180-199.

[58] See Q. Wright, *The Stimson Note of January 7, 1932* (n 15) 343 citing the Note of Japan to the United States, January 16, 1932. Significantly, in the formal reply to the American Government, Japan tried to undermine the principle of non-recognition as far as the Pact of Paris was concerned: '[The Government of Japan] take note of the statement by the Government of the United States that the latter cannot admit the legality of matters which might impair the treaty rights of the United States or its citizens or which might be brought about by means contrary to the [Kellogg-Briand] treaty of 27 August 1928. *It might be the subject of an academic doubt* whether in a given case the impropriety of means necessarily and always voids the ends secured; but as Japan has no intention of adopting improper means, that question does not practically arise' (emphasis added). See also *ibid.*, 343 citing Note of Japan to President of the Council of the League of Nations, February 21, 1932. Equally, the immediate response by Japan as soon as the question of a breach of Art. 10 raised was: 'As Japan does not contemplate any attack on the territorial integrity or the independence of a member of the League of Nations, it is superfluous to say that the bearing of the observation that attacks of such a character made in defiance of Article X of the Covenant cannot be recognized as valid and effective is totally obscure to the Japanese Government'. Finally, the Japanese government stated that these treaties were either inapplicable or, if applicable, at any rate to be interpreted in the light of very changed circumstances (*rebus sic stantibus*): '[I]t may be added that the treaties which relate to China must necessarily be applied with due regard to the state of affairs from time to time prevailing in that country, and that the present unsettled and distracted state of China is not what was in the contemplation of the High Contracting Parties at the time of the Treaty of Washington. It was certainly not satisfactory then; but it did not display that disunion and those antagonisms which it does today. This cannot affect the binding character or the stipulations of treaties; but it may in material respects modify their application, since they must necessarily be applied with reference to the state of facts as they exist', *ibid.*

Maybe due to these inconsistencies between the two instruments, the League preferred also to dispel any doubt about the legality of Japanese military action when it stated that Japan had adopted improper means inasmuch as the armed intervention in Manchuria could not be labelled as legitimate self-defence. The answer was promptly given by the report adopted unanimously by the Assembly of the League in February 1933 (except for the negative vote by Japan). Indeed, when in December the Lytton Commission arrived in the Far East, one of the most important point at issue was whether the act on the part of the Japanese constituted an unwarranted aggression or could be qualified as self-defence, as according to the Japanese version of the facts. The findings of the Commission were that '[t]he military operations of the Japanese troops during this night, which have been described above, cannot be regarded as measures of legitimate self-defence'.[59] Japanese military actions were thus manifestly in violation of international law.

As to the second point, in the preceding chapter we have already underlined that 'text writers have always shrunk from the implications of the proposition that conquest is a source of title to territory, and have usually held that subsequent treaty, general recognition or prescription is necessary to convert occupation into good title in international law'.[60]

Indeed, Art. 10 of the Covenant and Art. 1 of the Pact of Paris could be seen as the culmination of this historical process.[61] It seems thus clear that express or tacit recognition by third states or by the former sovereign was necessary to convert occupation into legal title and that, therefore, general withholding of such recognition

[59] Appeal by the Chinese Government, Report of the Commission of Enquiry, Geneva, October 1st, 1932, Official No: C. 663. M. 320, 71. The Commission, however, specified that it did not 'exclude the hypothesis that the officers on the spot may have thought they were acting in self-defence.' Furthermore, as regards the boycott policy pursued by the government of China, many Japanese merchants interviewed by the Commission insisted that the boycott was an act of aggression against which Japanese military measures were a retaliation. Although the Commission did not confirm that view, it neither sustained the Chinese assertion that the boycott was pursued in a legitimate manner. See also, A. K. Kuhn, 'The Lytton Report on the Manchurian Crisis' in [January 1933] 27(1) *The American Journal of International Law* 99.

[60] Q. Wright, *The Stimson Note of January 7, 1932* (n 15) 345. The following authors shared the same view: H. Lauterpacht, *Private Law Sources and Analogies of International Law, with Special Reference to International Arbitration* [Longmans, Green and Co., London, 1927] 100 and F. A. Middlebush (n 35) 42.

[61] As we have seen little steps had been made during centuries, in relations to colonial acquisitions in Europe and more comprehensively in Latin America, even if those attempts failed to become positive law prior to the '30s (see p.) Generally, however, '[t]he recognition of title by conquest was, prior to the Covenant and of the League of Nations and the General Treaty for the Renunciation of War, the necessary result of the admissibility of the right of war as an instrument both for enforcing the law and for changing existing rights. [..] This position has, it is submitted, undergone change as the result of the Covenant of the League and, in particular, the General treaty for the Renunciation of War. In so far as these instruments prohibit war, they probably render invalid conquest on the part of the State which has resorted to war contrary to its obligations', L. Oppenheim (n 39) 453-54.

would have effectively prevented the legality of such acquisitions.[62] It follows that recourse to armed force to obtain territorial gains was an improper means and ought not to be recognized.[63] This was surely the position taken by the majority of the delegates inside the Assembly plenary sessions when the Manchurian issue was discussed.[64]

In support of the assertion according to which non-recognition was intended as a legal obligation, there is also evidence given by the behaviour of Japan immediately after the adoption of the Report of the Committee of Nineteen.[65] On March 27, Japan gave formal notice to the Secretary-General of its intention to withdraw from the League.[66] This extreme decision of the Japanese government followed its unsuccessful attempt to discredit the legal basis, or even the existence, of the obligation of non-recognition. Japan was actually the only State to publicly protesting the invocation of the doctrine either by the US and by the League.[67]

D. Legal restatements of the collective duty of non-recognition in Latin America

After the Stimson declaration, a wide set of legal restatements of the principle of non-recognition occurred in inter-American relations.[68] Some examples include 1) the

[62] The strong efforts that have been made by Japan to obtain recognition for Manchukuo showed indeed the importance, if not the necessity, of recognition in the life of a new annexed territory. See J. W. Garner, 'Non-Recognition of Illegal Territorial Annexations and claims to Sovereignty' in [October 1936] 30(4) *The American Journal of International Law* 686.

[63] See A. McNair (n 53) 68. Both the Covenant and the Kellogg Pact unhappily use the term "war" instead of the wider and non-technical term "armed force"; though the Kellogg Pact went far to repair this defect by means of the references in its preamble and its second article to "pacific means" and "a peaceful and orderly process". The Stimson Note and Assembly Resolutions however were surely not restricted by such limitations. Arnold D. McNair indeed evaluated what were the "means contrary" to these instruments which caused the doctrine to apply. It supposed that they could the following. From the Covenant: 1) the possession of armaments, without the concurrence of the Council, in excess of the limits set out in Art. 8, 2) external aggression (Art. 10), 3) resort to war until the expiry of the three months after an award or judicial decision or a report by the Council (Art. 12), 4) resort to war against a party to a dispute which complies with the recommendations of a report by the Council (Art. 15.6). From the Pact of Paris: 1) war used as an instrument of national policy, and 2) war or any other 'non-pacific' means used for the solution of an international dispute.

[64] See for example, Official Journal of the League of Nations, Special Supplement 111, 1-79.

[65] We will see that this was also the case for Italy and Germany which, interestingly, with Japan would be the aggressor States which prompted the beginning of the Second World War.

[66] League of Nations Official Journal 1933, 657-658. Japan stated that the League has failed to grasp the realities of the situation in the Far East, and to treat it accordingly. Furthermore, the Japanese government pointed out that the League's opinion in interpreting the Covenant and other treaties was diametrically opposed to its thinking. The Government had thus to realize the existence of an irreconcilable difference of views between Japan and the League on policies of peace, in particular on how to assure a lasting peace in the Far East.

[67] 'La règle de non-reconnaissance fut largement respectée par les membres de la Société des Nations ; seuls le Japon, les puissances de l'axe et leurs satellites reconnurent le nouvel Etat', J. Verhoeven (n 25) 287.

[68] See International American Conference (n 46) 1123-46. The American attitude towards the establishing of a binding principle of non-recognition of unlawful territorial acquisitions was indeed adverse, or at least controversial, prior to 1933. It is well shown by the discussions inside the Committee on General Welfare of the 1890 First International Conference of American States as regard the separate recommendation on the "right of conquest".

1925 statement of the American Institute of International Law[69]; 2) the Declaration issued by American Republics reunited in Washington in 1932, and addressed to Bolivia and Paraguay as regard the Chaco Dispute[70]; 3) the 1933 Montevideo Convention on the Rights and Duties of States[71], whose Art. 11 contained an express obligation of non-recognition[72]; and 4) the 1933 Saavedra Lamas Pact, signed at Rio de Janeiro, where the parties agreed not to recognise the validity of such territorial acquisitions.[73]

Later, in 1935, the principle of non-recognition was proclaimed in academic declarations concerning fundamental principles of international law by the International Juridical Association and the Académie Diplomatique Internationale.[74] The International Law Association followed in 1936 : '[n]e seront reconnus ni les acquisitions territoriales ni les avantages spéciaux obtenus par la force, que celle-ci consiste soit dans l'usage des armes, soit dans des représentations diplomatiques comminatoires, soit dans tout autre moyen de coercition effective'.[75]

1.3. The legal basis: customary or conventional?

According to some authors, the legal basis of the duty of non-recognition before 1945 could be only found in treaty law and/or resolutions by the League of Nations[76], while

[69] Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, Memorandum submitted by the Secretary-General, UN Doc A/CN.4/2 of 15 December 1948, 114 citing American Institute of International Law.

[70] 'The American nations [..] declares that they will not recognize any territorial arrangement of this controversy which has not been obtained by peaceful means nor the validity of territorial acquisitions which may be obtained through occupation or conquest by force of arms', in [1934] Special Supplement *The American Journal of International Law* 168.

[71] That was the final point of the effort by Latin-American countries to introduce the question of the rights and duties of States (see paragraph 2), which in turn was closely connected with the work for the codification of international law. See Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States (n 69) 5.

[72] Art. 11: '[t]he contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure', see Montevideo Convention on the Rights and Duties of States, Montevideo, December 26, 1933 available at UiO Faculty of Law website at <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml> accessed 07 September 2019.

[73] Anti-war Treaty of Non-aggression and Conciliation, Rio de Janeiro, October 10, 1933 available at Avalon Project website at <https://avalon.law.yale.edu/20th_century/intam01.asp> accessed 07 September 2019. Art. 2 declared that '[..] as between the High Contracting Parties, territorial conquests must not be settled by violence and that they will not recognize any territorial arrangement which is not obtained by pacific means nor the validity of occupation or acquisitions of territories hat may be brought about by force of arms'.

[74] J. Verhoeven (n 25) 285.

[75] Projet Définitif de Déclaration Sur les Données Fondamentales et les Grands Principes du Droit International Moderne in [1936] 39 *International Law Association Report of Conferences* 335.

[76] S. Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?', in (C. Tomuschat and J.-M. Thouvenin eds.) *The Fundamental Rules of the International Legal Order Jus Cogens and Obligations Erga Omnes* [Martinus Nijhoff, Publishers, Leiden/Boston, 2005] 101.

others sustain that it can be traced to a norm of customary international law or even in a general principle of law such as the maxim *ex iniuria ius non oritur*.[77] The latter maxim was famously described by Lauterpacht in the following terms: "[a]n illegality cannot, as rule, become a source of legal right to the wrongdoer. [..] To admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences, may become *suo vigore* a source of legal right for the wrongdoer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character'.[78]

As remarked by Lagerwall, the principle *ex iniuria ius non oritur* is not a formal legal source for the doctrine of non-recognition in international law, rather it serves as an explanation of the duty's *raison d'être*.[79] The rationale of the obligation of non-recognition does not say anything on its legal foundation. Thus, it remains to see whether the obligation of non-recognition was based on customary or conventional law. The answer is partly given by our preceding analysis.

As shown above, the obligation of non-recognition, though clarified by the Stimson Note and the Assembly's resolutions, was considered inherent in two conventional instruments, namely the Pact of Paris and the Covenant of the League of Nations.

The obligation, as incorporated into the Pact of Paris as well as in the Covenant was the result of the historical process that found its precedents particularly in Latin America. The armed conflicts broken out in the region at the end of the XIX century – and the resulting massive territorial changes – however had prevented the formation of an American regional customary norm. As a consequence, we must deduce the treaty nature of the obligation of non-recognition in the '30s.

As regards the Latin-American documents that were adopted until 1936 – cited in the previous section –, they raise some doubts about the customary nature of the rules therein.[80] Among these documents, only the 1933 Montevideo Convention on the Rights and Duties of States and the 1933 Saavedra Lamas Pact, being treaties, were of direct binding force, the others were binding only if, and to the extent that, they reflected customary international law. Most of them suffered from the same fragilities of their predecessors; they were still closely linked to the operation of a

[77] H. Lauterpacht, Recognition in International Law (n 42) 425; See, also, T. Chen, *The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States* [Stevens & Sons Limited, London, 1951] 428-29 and S. R. Patel (n 45) 112-113.

[78] See A. Lagerwall, *Le principe ex iniuria jus non oritur en droit international* [Bruylant, Bruxelles, 2016] 141-59.

[79] A. Lagerwall, 'The non-recognition of Jerusalem as Israel's capital: A condition for international law to remain relevant?' in [2018] Zoom-in 50 *Questions of International Law* 39. Therefore, we will talk about this maxim in relation to the function of non-recognition in international law.

[80] H. Lauterpacht, *Recognition in International Law* (n 42) 419.

system of pacific settlement of disputes. Such a reference to the pacific settlement of disputes was not included, however, in the Montevideo Convention, which was the only instrument containing an express duty of non-recognition. Probably it was exactly on this ground that Brazil and Peru made Art. 11 subject to a reservation, which enacted as follows: '[..] they accept the doctrine in principle [..] but they do not consider it codifiable because there are some countries which have not yet signed the Anti-War Pact of Rio de Janeiro of which this doctrine is a part and therefore it does not yet constitute positive international law suitable for codification'.[81] The Saavedra Lamas Pact was thus the only treaty to clearly state the obligation of non-recognition. According to some authors, only one treaty provision, binding on sixteen States, represented a scant support in favour of the formation of a custom.[82] We think that this view should be accepted. Surely, however, those documents laid down a clear duty of non-recognition, thus reinforcing the conventional obligation already established by the Pact of Paris and the Covenant of the League.

As regards the treaty origin of the collective obligation of non-recognition, attention may be called also to President Roosevelt's statement to the press on January 17, 1933, in which he said: 'I am, however, wholly willing to make it clear that American foreign policies must uphold the *sanctity of international treaties*' (italics added).[83] On the part of the US administration there was no appeal to other pre-existent principles of law than those established by the Pact of Paris. Indeed, Secretary Stimson used to talk about the Pact as something revolutionary, giving rise to a new order of international relations.[84] Not only war would be illegal, but through the withholding of recognition, effective pressure could be applied to the Pact violator. Non-recognition was thus to be the instrument through which the sanction of public opinion would become effective.[85]

We will see, however, that both the American historical *substratum* and the continued upholding of the doctrine by the League of Nations would permit the newly

[81] See [1934] Special Supplement: Official Documents *The American Journal of International Law* 78.

[82] A. Pert (n 30) 4.

[83] New York Times, January 18, 1933, 1.

[84] 'Under the Pact of Paris, according to Secretary Stimson, war "is no longer to be the source and subject of rights. It is no longer to be the principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing". This being true, a new order of international relations is presumed to have come into existence, a regime which has "made obsolete many legal precedents and [..] given the legal profession the task of re-examining many of its codes and treatises"', F. A. Middlebush (n 35) 45 citing F. A. Middlebush, 'The Pact of Paris, Three Years of Development', Address before the Council on Foreign Relations, New York City, August 8, 1932, Pub. No. 357, Department of State, 5.

[85] '[..] But China [..] has thereby demonstrated to the world that she takes these treaties [the Covenant of the League, The Pact of Paris and the Nine-Power Treaty] seriously and has complete faith in the good faith of other signatories to uphold them', M. T. Tchou, 'The Report of the Lytton Commission', address under the auspices of the Foreign Affairs Forum over Station WCDA, New York City, November 21, 1932, 3.

established norm to quickly acquire in the following years the status of a custom and to be considered by the international community as a necessary instrument of international law.

Indeed, it must be underlined that, even if some authors have put in doubt the binding nature of the resolutions of the League's Assembly[86], and although the League of Nations had far fewer members than the United Nations does today, the widespread nature of its membership and its importance as international conclave makes a resolution adopted by a convincing majority an important evidence of an *emerging* rule of customary international law.[87]All the more so if one considers that '[a]ll of the states of the world, of any political importance, [were] parties to one or the other of these instruments. Consequently, the doctrine now [had] the status of universal international law'.[88]

1.4. The field of application of the obligation of non-recognition

One of the controversial issues among scholars is whether or not the obligation of non-recognition did encompass territorial entities claiming statehood. According to O'Connell, if any obligation of non-recognition existed at that time, it related to a rule prohibiting the extinction of States or violations of territorial sovereignty.[89] Before him, Lauterpacht wrote that '[a] State cannot come into existence contrary to a treaty; there is no rule of international law prohibiting secession from the parent State [..] In so far as the doctrine of non-recognition applied in that case it was an announcement of the intention or the acceptance of the obligation of non-recognition of any future situations amounting either to a formal incorporation of Manchuria as part of Japan or to a relationship involving the actual overlordship of Japan'.[90] Chen concedes that non-recognition 'is often spoken of in connection with new States [and] new governments' but claims that such definition is not accurate as those situations do not constitute violations of international law; it maintains that '[t]he element of illegality only enters when the establishment of a State or government is brought about by the acts of foreign States'. Thus, 'the question is rather one of recognition of conquest to which the doctrine of non-recognition should apply'.[91] Authors like Dugard and Raič,

[86] H.A. Smith (n 43) 157.

[87] 'In the present case, the use of the word 'binding', quite clearly in the sense of 'legally binding', could undoubtedly be viewed as evidence of the *opinio juris sive necessitatis* that is essential for the formation of a rule of customary international law', D. Turns (n 14) 124.

[88] Q. Wright, *The legal foundation of the Stimson Doctrine* (n 2) 440.

[89] D. P. O'Connell, *International Law* [Vol. 1, Stevens & Sons Limited, London, 1965] 153.

[90] H. Lauterpacht, *Recognition in International Law* (n 42) 420.

[91] T. Chen (n 77) 429.

on the contrary, claim that the preceding views are difficult to reconcile with the clear language of the resolutions of the League, as well as with the measures taken by the League as regards the non-recognition either *de jure* or *de facto* of the regime established in Manchuria.[92]

Many scholars of that time interpreted the wording of the Stimson Note as to encompass a general and *pro futuro* application of the doctrine.[93] According to them, with the phrase 'any situations' the US administration intended the Stimson Declaration to be applied actually to *any situations* contrary to the Pact of Paris or the Covenant of the League. The Note was however directed to the Sino-Japanese dispute, in other words to the unlawful territorial acquisition perpetrated by Japan at the expenses of China. One can thus assume that Art. I of the Pact of Paris was mainly and immediately interpreted so that States, acting individually, were by necessary implication obliged to withhold recognition from any territorial transfer contrary to the Pact itself. Indeed, while the so-called "Stimson Doctrine of non-recognition" is usually referred to as a new rule of public international law as regards statehood and recognition, one can not ignore the fact that the Stimson declaration 'predated the actual establishment of Manchukuo and its appeal for international recognition by nearly two months'.[94] Therefore, the Note, by the date of its issue, was not aimed at encompassing the creation of the State of Manchukuo. President Hoover himself, in his acceptance speech of August 11, 1932, stated that, under the doctrine, the United States did not and never would recognize title to possession of territory gained in violation 'of the peace pacts which were signed with us'. No mention was made of any other "situation" which may be brought about by means contrary to the Pact of Paris.[95]

This interpretation seems to be in accordance with that given by the League's members to Art. 10 of the Covenant.[96] The multiple legal restatements of the principle of non-recognition within inter-American relations went also in that direction.[97]

Dugard maintains that the clearest evidence in support of the argument that the League of Nations sought to bar recognition of a new State is given by Assembly

[92] D. Raič, *Statehood and the Law of Self-Determination* [Kluwer Law International, The Hague, 2002] 32-34.
[93] J. Dugard (n 36) 31.
[94] D. Turns (n 14)114.
[95] F. A. Middlebush (n 35) 48-49. However, it has to be noted that the American government immediately understood the importance of such a principle in international law and its future potentialities. According to the Acting Secretary of State, Mr. Castle, a new dictum of international law was created. 'Inasmuch as international law is built up by an accumulation of specific pledges of this kind", the policy of non-recognition "immediately assumed an importance extending far beyond the present situation. It seemed to the President that his attitude of the American Government ought to be made even more definite both because it was important in the present situation and because it added a new principle of law' (ibid 45).
[96] See section C of the present paragraph.
[97] See section B of this paragraph.

Resolution of February 24, 1933.[98] This expressly called upon member States not to recognize the Manchurian regime either *de jure* or *de facto*. They argue that measures taken by the League to remedy the situation in Manchuria were mainly directed at ensuring that Manchukuo was not recognized as a State in the light of the fact that on 15 September 1932 Japan abandoned any intention it may have had of annexing Manchuria when it formally recognized Manchukuo as an independent State 'organized in accordance with the free will of its inhabitants'.[99]

However, the State of Manchukuo was to be regarded by many States as a puppet State completely controlled by the representatives of the Japanese military power in Manchuria. Especially the Republic of China dismissed the new entity as a 'fictitious personality' and its creation as the work of Japanese militarists in fulfilment of Japan's policy of *de facto* annexation of Manchuria.[100] In a speech delivered on 29 August 1932 the Chinese Foreign Minister, Lo Wen-Kan, referred to 'a bogus government styled by the epithet of the Independent State of Manchukuo' and described it as an 'unlawful regime.. established, maintained and controlled by the Japanese military forces', to whose existence China would never acquiesce.[101]

Furthermore, when Mr. Sato, on behalf of Japan, announced the independence of the Manchurian provinces before the Council of the League in February 1932, he did not support the creation of a new State in international law. Mr. Sato simply disclaimed any territorial ambitions or "permanent occupation" by Japan in Manchuria and stated that Japan wished to 'preserve in Manchuria a field of action for the Japanese'.[102] On behalf of the Republic of China, Mr. Yen referred in response to 'the setting up of a puppet government in Manchuria' and emphasized that Manchuria had been for 1,000 years and continued to be 'politically, historically and ethnically Chinese', before noting dryly that Japan's protestations of innocence in relation to Korea in 1910 had resulted in that country being annexed by Japan.[103]

In the Lytton report there are several references to the Manchurian "regime" or "State". However, the emphasis is put on the fact that the erection and maintenance of Manchukuo by the Japanese was nothing but a legal fiction: the territory was *de facto* under Japanese military occupation. An entire chapter (IV) of the Report was indeed devoted to the military events by which Mukden was seized and by which,

[98] J. Dugard (n 36) 32-33.

[99] Protocol signed at Changchun on 15 September 1932 by the representatives of Japan and Manchukuo, League of Nations Official Journal, Special Supplement 111, 79-81.

[100] T. Lang-Li (ed.), *The Puppet State of Manchukuo*, 1935, cited in D. Turns (n 14) 112.

[101] Speech reproduced in *ibid.*, 112.

[102] League of Nations Official Journal, 1932, 364.

[103] League of Nations Official Journal, 1932, 367. See also M. T. Tchou (n 85) 4: 'Japan having fought two wars over Korea and Manchuria and having annexed Korea in 1910, thinks that Manchuria is not necessarily Chinese territory, which is a point often emphasized by Japanese speakers in public'.

later, a large part of Manchuria was added to the zone of military occupation. Finally, the report definitely stated that: '[i]t is a fact, without declaration of war, a large area of what was indisputably the Chinese territory has been forcibly seized and occupied by the armed forces of Japan and has, in consequence of this operation, been separated from and declared independent of the rest of China'.[104]

Moreover, the Commission of Enquiry concluded - in the Chapter "Manchurian Issues Between Japan and China" - that the difference between China proper and Manchuria laid in the fact that the Japanese claimed there a 'special position'. The Commission found that, whatever the definition of such special position, it was in conflict with Chinese sovereign rights and it was natural that the 'Japanese use of this expression in diplomatic language should be obscure, and that other States should have found it difficult, if not impossible, *to recognise it by international instruments*' (emphasis added).[105]

Interestingly, Japan proceeded to the recognition of the new "State" of Manchukuo a few days before the Report of the Committee of Nineteen would be examined by the Council of the League of Nations. The President of the Council expressed his regret that at moment when the Council was awaiting the receipt of the Lytton Report, Japan recognized Manchukuo, signing a treaty with it. It was clear then that the Japanese aim was to take 'steps which were bound to prejudice the settlement of the dispute'.[106] However, the President of the Committee of Nineteen promptly stated: 'it has been suggested in some quarters that the official recognition of Manchukuo by the Japanese government was a fact which made our report out of date [..] That is not so [..] The fact that Japan alone among the nations of the world has recognised this new State strengthens rather than weakens the opinions expressed in the report regarding the genesis of this State and Japanese responsibility for its existence'.[107]

[104] 'The steps by which this was accomplished are claimed by Japan to have been consistent with the obligations of the Covenant of the League of Nations, the Kellogg Pact and the Nine-Power Treaty of Washington, all of which were designed to prevent action of that kind', see Appeal by the Chinese Government, Report of the Commission of Enquiry, Geneva, October 1st, 1932, Official No: C. 663. M. 320, 127.

[105] *Ibid.*, 39.

[106] League of Nations Official Journal, November 1932, 1731.

[107] League of Nations Official Journal, Special Supplement 111, 25. This was the position expressed by many representatives in the Assembly. The Irish delegate, Mr. Connolly, said 'It is argued that Japan is not involved directly in the creation of the Republic of Manchukuo [..] Their officials are at least active, if not dominant, in that area, and the fear is expressed, and I think with some justifications, that ultimately they will completely control it' (Ibid 33). See also J. W. Garner, *Non-Recognition of Illegal Territorial Annexations and claims to Sovereignty* (n 62) 679: 'In the latter case the aggressor set up under its aegis a supposedly independent though actually a puppet State within the territory occupied, the existence of which other States were asked to recognize. This procedure was doubtless resorted to by Japan in the hope of obtaining more easily international recognition of the fruits of her conquest'.

Thus, also Assembly Resolution of February 24, 1933, though referring to *any situation*, was inspired by the circumstances of the case at issue. At that time, the emerging obligation of non-recognition was only related to a supposedly violated sovereignty or a possible occupation/incorporation of territory. Non-recognition was applied to the illegal use of force by Japan to perpetrate a seizure of territory. If some form of non-recognition was applied to the purported statehood of Manchukuo, it could be related to its lack of independence[108], or it can be seen as non-recognition of an advantage deriving from that illegal use of force.[109] The obligation of non-recognition, as envisaged by the Covenant of the League and by the Pact of Paris, was thus confined to acts of unlawful territorial acquisitions and the advantages thereof.[110]

1.5. The effects of non-recognition and the debate over its function in international law

The application of non-recognition was already troublesome prior to the Manchurian crisis. As highlighted in the previous chapter, international tribunals and arbitrators, in a certain sense, decided to undo the effects of such a policy and at the domestic level judges were faced with the choices of their executives.[111] However, the Far Eastern crisis took place in a slightly different context. Non-recognition was now a collective duty imposed upon each State party of the League and extended to some non-member States. The international consequences could not be ignored any longer.

A. Committee of Twenty-One's recommendations

With a view to giving greater clarity and meaning to the non-recognition obligation as applied to the Manchurian situation, the Assembly Resolution of February 24, 1933 appointed an Advisory Committee, the so-called Committee of Twenty-One.[112] On

[108] H. Lauterpacht, *Recognition in International Law* (n 42) 420.

[109] In this sense, the non-recognition of the Japanese puppet Government of Manchukuo really amounted to non-recognition of the seizure of alien territory.

[110] Not by chance, at the Yalta Conference in 1945, the Agreement provided merely that China would retain full sovereignty in Manchuria'. No formal action was deemed necessary for the resumption of actual control by China of the occupied provinces, and there was no reference to Manchuria in the Japanese Peace Treaty of 1951. In particular there was no retrocession or renunciation of title by Japan. This confirms that Manchuria remained under Chinese sovereignty in the period 1932 to 1945; see J. Crawford, *The creation of States in International Law* [2nd ed., Clarendon Press, Oxford, 2006] 78-79.

[111] See, for example, the US jurisprudence since the end of the Civil War.

[112] It consisted of the representatives of the Committee of Nineteen (provided for in the Assembly Resolution of March 11, 1932: Belgium, United Kingdom, Colombia, Czechoslovakia, France, Germany, Guatemala, Hungary, Ireland, Italy, Mexico, Norway, Panama, Poland, Portugal, Spain, Sweden, Switzerland, Turkey) plus Canada and the Netherlands. The Committee invited the United States and Russia to cooperate in its work. While the US accepted, Russia rejected the invitation.

14th June, 1933, with a letter from the Secretary-General, the members of the League and those non-members States to which the Assembly's report was sent, were informed of the measures adopted by the Committee resulting from the non-recognition of Manchukuo.[113] It was assumed by the Committee that, unless informed to the contrary, the governments of those states represented in the Advisory Committee, would apply the measures recommended.[114] As regards the States not represented in the Committee as well as several States not members of the League, they communicated to the Secretary General their intention to follow the concerted policies of non-recognition.[115]

The problems which the Committee investigated were the following: 1) the question of the participation of the government of Manchukuo in international conventions; 2) whether Manchukuo would be admitted to the universal postal service; 3) the question of non-recognition of the currency of Manchukuo; 4) problems that could be raised by the acceptance by foreigners of concessions or appointments in Manchukuo; 5) the question of passports; 6) the position of consuls; and finally 7) the application to Manchukuo of the import and export certificates system applicable to trade in opium, under provisions of the Geneva Opium Convention of 1925 and the Limitation Convention of 1931.[116]

As regards the first point, in deciding to continue not to recognize either *de jure* or *de facto* the existing regime in Manchuria, member States of the League had the view that, should Manchukuo manifest its intention of acceding to certain general international Conventions, they would take all the necessary steps to prevent such accession.[117]

[113] League of Nations Official Journal, Special Supplement 113, 10.

[114] League of Nations Official Journal, January 1934, 17.

[115] *Ibid.*, 17-18.

[116] League of Nations Official Journal, Special Supplement, no. 113, 11. See also F. A. Middlebush, 'International Affairs: The Effects of the Non-Recognition of Manchukuo' in [August 1934] 28(4) *The American Political Science Review* 677-683.

[117] See League of Nations Official Journal, Special Supplement 113, 1933, Annex, 11-12. The Committee distinguished two categories of conventions – closed conventions and open conventions. In the case of closed conventions, under which the parties have to be consulted as to admission of new members, the Committee assumed that the members of the League would have refused to agree to the admission of Manchukuo. In the case of open conventions, those to which states could accede by unilateral action, the Committee recommended that the states with which the acts of accession to such conventions are deposited should consult all the contracting parties to the convention in question. The parties would thus have been given the opportunity to give a negative opinion as to acceptance of the accession of Manchukuo. The Committee finally gave special attention to the case of conventions concluded under the auspices of the League of Nations. The majority of these were open to subsequent accession, subject to the decisions taken solely by the Council of the League. In this case, the Secretary-General of the League could not receive any accession from Manchukuo. The Committee also examined the statues of certain international commissions and associations not set up under international conventions. Inasmuch as these commissions and associations were not set up under international conventions, the Committee concluded that no claim to *de jure* or *de facto* recognition could be deduced from the participation or admission in these commissions/associations.

With regard to postal services, the Committee simply reminded the Members of the League that Manchukuo was not a member of the Universal Postal Union. Thus, if the question of its accession to the Universal Postal Convention should have arisen, the procedure to be followed was that explained above for the accession to international conventions.[118]

As for the currency question, the Committee declared that it deemed it inexpedient to propose that individual governments should prohibit transactions in Manchukuo currency, since 'a domestic currency is created by a domestic law and is actually utilised in the same way as any other object of value that is bought or sold in the international market'. However, the Committee called attention to the desirability of preventing official quotations in Manchukuo currency in those countries who maintained an official foreign exchange market.

The Committee then observed that there was nothing in the Assembly's Report of February 24, 1933, which could be interpreted as prohibiting nationals of State members of the League from entering into contractual business relations or from accepting appointments/concessions from the authorities of Manchukuo. It rested upon each member of the League 'to decide for itself whether it is desirable to call the attention of its nationals to the special risks attendant upon the acceptance of concessions or appointments in Manchuria'. Individuals should also be informed of the 'probable attitude of Chinese authorities with regard to the validity of such concessions or appointments in the present circumstances from the authorities established in Manchuria'.

In the Committee's opinion, a Government which did not recognize either *de jure* or *de facto* the existing regime in Manchuria, could not accept passports issued by authorities dependent upon the Manchukuo government and could not allow its agents to visa such documents. On the other hand, however, it was stated that 'there is no reason why an inhabitant of the territory subject to the "Manchukuo" authorities

[118] *Ibid.* The Committee incorporated in its recommendations the notification sent by the Chinese government on July 24, 1932, under the provisions of Article 27 of the Universal Postal Convention, where it intimated the Universal Postal Union to send the following notification to all member states:

1. That all postal service in Manchuria has been temporally suspended;
2. That all mails destined for Europe and America would henceforth be forwarded respectively via the Suez Canal and the Pacific Ocean. The Chinese Government requested that all post offices of the member States will do the same with their mails destined for China;
3. That all stamps issued by the puppet government will be invalid. All mail matter or parcels bearing these illegal stamps will be charged postage due.

who is desirous of proceeding abroad should not, receive an identity document or a *laissez-passer* from the consul of the country which he wishes to visit'.[119]

Moreover, the Committee was of the opinion that States could make provisions for replacing consuls in Manchuria, since these agents were there for the purpose of protecting the nationals of their own countries and gathering information for their governments. However, governments had to inform their consuls that they should 'do nothing which could be interpreted expressly or by implication as a declaration that they regard the authorities established in Manchuria as the proper Government of the country'.

Finally, with reference to the Geneva Opium Convention of 1925 (Chapter V), the Committee recommended to the Members of the League and to interested non-member States that applications for the export to "Manchukuo" territory of opium or other dangerous drugs should not be granted unless the applicant produced an import certificate in accordance with the Convention of such a nature as to satisfy the Government to which application was made that the goods in question were not to be imported into "Manchukuo" territory for a purpose which was contrary to the Convention.

B. Ineffectiveness of the doctrine

It has been pointed out that the United States and the members of the League of Nations withheld recognition from the occupation of Manchuria for two years. During that time the territory was not returned to China, nor did Japanese aggression cease.[120] This situation led many scholars to harshly criticize the doctrine.[121]

However, it should be pointed out that notwithstanding Japan effectively seceded from the League in March 1935, the League continued to address the Manchurian crisis. It is significant that the work of the sub-committee appointed by the Committee of Twenty-Two – and delegated to examine the practical implications of the non-recognition of Manchukuo – went on for several years; traces of it can be found until the last edition of the Official Journal of the League of 1940. Among the most

[119] 'The same procedure might be adopted as regards countries of transit, unless the authorities of the countries of transit were willing - as, in fact, they probably would be - to visa the identity document or *laissez-passer* issued by the authorities of the country of destination. The consul would have to make sure of the identity of the applicant, and there would be no reason why he should not, for this purpose, utilise the documents issued by the "Manchukuo" authorities and called by the latter passports, *laissez-passer, etc.* The above considerations, which apply to ordinary passports, apply with even greater force to diplomatic passports or diplomatic visas on diplomatic or ordinary passports', *Ibid.*, 13.

[120] Not only Japan continued its military occupation of Manchuria, but it waged an undeclared war with the Chinese Republic from 1937 until 1941, when finally, the attack upon the American installations at Pearl Harbour caused official declarations of war by the United States, Great Britain and China.

[121] Cf. H. Briggs (n 38).

important passages there is the adoption, on 27 September 1937, of a resolution of condemnation by the sub-committee[122] (now called *Far East Advisory Committee*) and then endorsed by the Assembly within the legal framework already set by the Resolution of February 24, 1933. On October 6, 1937, the Assembly also adopted another resolution in which it was stated that member states 'should refrain from taking any action which might have the effect of weakening China's power of resistance and thus of increasing her difficulties in the present conflict, and should also consider how far they can individually extend aid to China'.[123] The resolution was also reaffirmed in the Council in February 1938.[124]

It is useful to underline, moreover, that from a formal point of view, the dispute between Japan and China was not defined as a "resort to war" either by the Lytton Commission or subsequently by the Assembly Resolution of February 24, 1933, which had approved the report of the aforementioned Commission.[125] Therefore, the actions of non-recognition by the League, after the effective withdrawal of Japan, could not be considered framed in those articles of the Covenant aimed at regulating disputes between member and non-members States.[126] Such declarations of non-recognition[127] should instead be interpreted as the continuation of the policy of sanctions adopted by the League since 1932 according to articles 10 and 12 of the Covenant; considering Japan, to a certain extent, still under the jurisdiction of the League.

[122] 'The Advisory Committee [..] Declares that no excuse can be made for such acts, which have aroused horror and indignation throughout the world; And solemnly condemns them', League of Nations Official Journal, Special Supplement 169, 89.

[123] League of Nations Official Journal, Special Supplement 169, 121.

[124] League of Nations Official Journal no. 19, 120.

[125] H. Lauterpacht, '"Resort to war" and the Interpretation of the Covenant during the Manchurian Dispute' in [January 1934] 28(1) *The American Journal of International Law* 45-46.

[126] In particular art. 11(1) according to which '[*a*]*ny war or threat of war*, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations'. The same for art. 17 of the Covenant, which affirmed that, in case a dispute arises between a member and a non-member State, the latter 'shall be invited to accept the obligations of membership in the League for the purposes of such dispute'. If the invitation to submit the dispute to the League's Council is refused by the non-member state, the latter is still subject to sanctions according to Art. 16 but only in the circumstance of a 'resort to war', see League of Nations Covenant.

[127] Still in February 1939, during the 104th session of the Council, the Chinese government referred to a note sent to it by the British government which read as follows: 'His Majesty's Government are at a loss to understand how Prince Konoye's assurances that Japan seeks no territory, and respects the sovereignty of China, can be reconciled with the declared intention of the Japanese Government to compel the Chinese people by force of arms to accept conditions involving the surrender of their political, economic and cultural life to Japanese control, the indefinite maintenance in China of considerable Japanese garrisons, and the virtual detachment from China of the territory of Inner Mongolia. For their part, His Majesty's Government desire to make it clear that *they are not prepared to accept or to recognise changes of the nature indicated which are brought about by force*" (emphasis added), League of Nations Official Journal no. 20, 75.

C. De facto recognition of the Manchurian situation

Another critique concerned the scope of the document adopted by the Committee. Even though the Advisory Committee wished to take a drastic stance with regard to the situation in Manchuria[128] – not conceding any distinction between *de jure* and *de facto* recognition – many authors regarded the proposed measures as too compromising and inadequate.[129] Particularly, by allowing the granting of passports to citizens of Manchukuo by non-recognizing states, by permitting transactions in Manchukuo currency and by enabling nationals of a non-recognizing state to enter into contractual relations with anyone in Manchukuo, it seemed that the Advisory Committee was reluctant to recommend measures which might impair the commercial interests of the nationals of the non-recognizing states 'and that it resorted therefore to expedients and half-way solutions [..]'.[130] They then claimed that non-recognition should be inconsistent with both *de jure* and *de facto* recognition.[131]

On the other hand, others pointed out that the obligation of non-recognition should be extended only to the regime and not to the people of that regime, who were not bound to abstain from dealing with the nationals of the non-recognizing States.

Surely, since not all economic relationships were barred, non-recognition alone could not encompass economic boycott.[132] To this it may be added that the recommendations did not oppose the replacement of consuls and, at a later stage, technical agreements between the postal administrations of Members States of the League and that of Manchukuo. Thus, beyond whatever declaration, the Committee actually 'went a long way in the direction of *de facto* recognition'.[133]

[128] In concluding its statement of recommendations regarding the Sino-Japanese dispute, the Assembly stated that, in adopting the report, 'the members of the League intend to abstain, particularly as regards the existing regime in Manchuria, from any act which might prejudice or delay the carrying-out of the recommendations of the said report. They will continue not to recognize this regime either *de jure* or *de facto*. They intend to abstain from taking any isolated action with regard to the situation in Manchuria and to continue to concert their action among themselves as well as with the interested states non-members of the League', League of Nations Official Journal, Special Supplement, no. 113, 1933, 11.

[129] Editors, 'Non-recognition: A Reconsideration' in [Autumn 1954] 22(1) *The University of Chicago Law Review* 268.

[130] R. Langer, *Seizure of territory. The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice* [Princeton University Press, New Jersey, 1947] 72.

[131] Editors (n 129) 265. See also Professor M. W. Graham in H. W. Briggs (n 38) 95.

[132] Indeed, "Manchurian trade with the United States rose steadily from 1932 to 1936. In 1936 exports from the United States to Manchuria dropped off, but the following year multiplied nearly five-fold. In 1937 a shrinkage of imports from Manchuria took place. The Japanese trade of the United States (which may form a part of the trade with Manchuria), as well as the total foreign trade of Japan, have shown a steady tendency to rise in value and in amount, excepting in the year 1938-1939, notwithstanding the application of the doctrine of non-recognition. So far as non-recognition is concerned with respect to Manchukuo, then, one may conclude that the United States has proceed with regard to the realities of the situation while at the same time establishing a caveat of non-recognition', Norman J. Padelford in *Ibid.*, 85.

[133] H. Lauterpacht, *Recognition in International Law* (n 42) 433.

According to Lauterpacht this is not to be regarded as a negative fact. Not every measure of intercourse is barred under an obligation not to recognize an unlawful situation.[134] The rationale is that the obligation of non-recognition should necessarily respond to a careful balance between legality and effectiveness in order not to create a heavy burden on non-recognizing states[135] – so that their particular disadvantages overrode to a large extent the world community advantages of having that situation barred from legality. However, it is undeniable that non-recognition did not avoid incurring in some ill-will by states withholding recognition.[136]

D. The delay of League's action

Another critical remark regarded the delay with which the League's organs imposed concrete measures of non-recognition, a delay which made the League's action less effective. Indeed, while the occupation began in September 1931, the League did not adopt its resolution of non-recognition until March of the following year. There was then a further time span necessary for the Advisory Committee's report to spell out the recommended measures.[137] However, the procedure by which the League arrived at a collective determination of the aggressor was necessarily a slow process. In presence of a ban of the use of force still subject to many uncertainties, the League tried indeed to vindicate the newly established objective laws of the international system by collective procedures which were used for the first time in the history of international law. This problem will be tackled in depth at the end of this chapter.

E. Non-recognition as a detachment of law from facts

Moreover, some authors insistently referred to the risk inherent in the doctrine of a detachment of law from facts. Professor Borchard said: 'What good does it do not to recognise facts? International law was as practiced was not designated to constitute a moral approval or disapproval of the state of the world. It was calculated to deal with

[134] 'If it could be shown that adherence to the principle of non-recognition unavoidably results in ignoring altogether the existence of the power which actually exercise control and in avoiding anything which may bring the non-recognizing state in contact with the effective authority, then there might be room for the suggestion that the price paid for the symbolic upholding of a principle is unduly high. However, in normal circumstances there is nothing in the attitude of non-recognition which necessarily constitutes an obstacle in the way of a measure of intercourse – so long as the State against which it is directed does not insist on full and formal recognition of the results of the illegal act'. Furthermore *de facto* recognition would have diminished 'the urgency of *de jure* recognition', see *Ibid* 431-32.

[135] McNair indeed questioned: 'What then are the disadvantages which will result to the annexing state and its newly acquired territory from non-recognition, and are those disadvantages greater than those which will result to the states which withhold recognition?', See McNair (n 53) 72.

[136] F. A. Middlebush, *Non-Recognition as a Sanction* (n 35) 54.

[137] Editors (n 129) 269.

facts as they are, political facts, unfortunate perhaps [..] You can admit the inevitable, or you can close your eyes to it. [..] Holmes said, the life of the law is not logic but experience [..] and experience teaches that changes in the world are continuous [..]'.[138] Separating the facts from realities, according to them, would mean to preserve a certain fictious *status quo*, despite the changed circumstances.

An answer to this critique was given by Wright, one of the earlier advocates of the principle of non-recognition. According to Wright, it is of course desirable that law and facts would eventually come into relation with each other. *De facto* conditions unrecognized in law may constitute situations unfavourable to peace. In this case, further actions, such as consultation or other procedure, may be invoked on the basis of the Pact of Paris or the Covenant in order to remedy such conditions dangerous to peace. By common action, all states could at any time recognize a territorial transfer, as for instance by a resolution under Article 11 of the Covenant. 'Such a general recognition, even of a situation originating in illegal violence, cannot be considered an act of assistance to the state whose illegal behaviour may have originated the *de facto* situation, but as a legal procedure to bring law into harmony with fact in the interests of the peace of the community of nations. The community of nations as a whole cannot be regarded as lacking competence to give legal validity to any principle or claim'. It was certain, however, that under the new law of the Pact and the Covenant, States, through procedures of a legislative character, should now act in the interests of the community of nations and not in their own selfish interests.[139] It is important to highlight here the strong collective dimension attached by scholars to the obligation of non-recognition. It was intended indeed as a function of States acting collectively like an organ of the community of nations.

Hersch Lauterpacht would have explained it better about ten years later, in 1947. According to Lauterpacht, indeed, an accumulation of illegal conduct, when tolerated or left unpunished by the society, can be validated, among the others, through an act of recognition, which in this instance assumes a quasi-legislative function ('law-

[138] E. M. Borchard in H. Briggs (n 38) 96.

[139] 'The peace of the community of nations is more important than the interests of any state and it is for procedures of general consultation to determine whether that peace requires non-recognition or recognition of a given *status quo*. The Stimson doctrine therefore does not fossilize any *status quo*, it merely insists that general shall be substituted for individual action in conferring the sanction of law upon a situation which originated in violence. Its effect is merely to extend the conception of premature recognition. Heretofore, international law, while treating recognition as discretionary, has always recognized that premature recognition is illegal [..] The Stimson doctrine extends this conception of premature recognition by insisting that, with respect to a claim resting upon illegal resort to force, recognition is always premature until such claim has been confirmed by a procedure of general consultation manifesting the will of the community of nations as a whole', Q. Wright, *The Legal Foundation of the Stimson Doctrine* (n 2) 444-46. Indeed, the Lytton Report did not contemplate a simple return to the *status quo*, in other words the return of Manchuria to China. It instead affirmed that a solution must be reached that would take into account the interests of Japan in the region, as well as those of Soviet Russia.

creating influence of facts'). In this way, he dismantled the view by which the principle of non-recognition would create a situation of extreme rigidity in the international system of law.[140]

The maxim of *ex iniuria ius non oritur* is not impaired by the parallel maxim – fundamental to international law – of *ex factis ius oritur*. The doctrine of non-recognition indeed does not aim at invalidating an act that would have been legally valid. It addresses acts which are contrary to international law, so in themselves devoid of any legal force. Thus, while not impeding changes to occur, the doctrine preserves the validity itself of the law – by impeding that an illegal act could affect the international system of law without resistance or processes of verification.

F. Non-recognition as a weak sanction

Finally, some scholars argued that the application of non-recognition was resorted to with the view to finding a convenient substitute for active participation in the maintenance of the law of nations. They argued that the mere withholding of recognition intended as a supplementary moral sanction attached to the Pact of Paris and the Covenant – to preserve the territorial integrity of States – was not sufficient alone to secure the ends the doctrine sought to achieve[141] and deplored the failure of non-recognition as a sanction.[142]

Stimson and Hoover placed great reliance on the coercive effect of moral disapproval which supposedly was given specific meaning through the application of non-recognition. They talked about non-recognition as the strongest moral sanction ever known and, when used in conjunction with the practice of consultation, capable of transforming the Pact of Paris from a simply inspiring declaration of high purpose into an organized instrument for the peaceful settlement of international disputes.[143]

[140] 'Law is a body of rules operating under the aegis of a system of force actually operative in society. This does not mean that all breaches of the law, if successful, become part of the legal order. A balance must be achieved somewhere. It cannot be found in the immediate validation of the illegal act; it must be sought in considerations of a general nature which would justify the legislator in incorporating the result of the illegality as a part of the law', H. Lauterpacht, *Recognition in International Law* (n 42) 412, 427. See also F. A. Middlebush, *Non-Recognition as a Sanction* (n 35) 53-54: '[..] the non-recognition doctrine does not fix the *status quo* but implies that whatever injustice may exist in the field of international relations shall be rectified by peaceful means and not by the commission of further injustices'.

[141] 'As a moral sanction alone, and it is in this respect that the widest claims have been made for the policy of non-recognition, it can not operate effectively where the alleged Covenant-breaker is thoroughly convinced that he is in the right. If non-recognition carries with it the threat or promise of more direct and material force, it is the present fear of these more direct forms of coercion which make it effective', Ibid 54. See also A. McNair (n 53) 74.

[142] See Editors (n 128) 274. Even Quincy Wright admitted: 'I think certainly non-recognition is not, in itself and alone, a constructive action. I do not think it has ever been claimed by any informed persons that it was. It must be accompanied by something else', see Q. Wright in H. Briggs (n 38) 89.

[143] F. A. Middlebush, *Non-Recognition as a Sanction* (n 35) 52 citing Acceptance speech, August 11, 1932, New York Times.

As a matter of fact, at that time, the doctrine of non-recognition was conceived mainly as a peaceful sanction, completely detached from important economic or military measures. It was, instead, strongly attached to the principle of pacific settlement of disputes.

A few scholars, however, already pointed out that the doctrine of non-recognition had a more fundamental function for the international legal order, intimately connected with the basis of international law itself (see also *infra*, par. 4.6). Particularly Quincy Wright identified the doctrine of non-recognition as the passage from of what he called the second stage of maturity of the international legal system to the third stage: 'In the second stage, might to become right requires express or tacit recognition by other members of the community, but such recognition is seldom withheld when the party requesting it has a great deal of might. In the third stage, the community withholds its recognition of advantages achieved by violence whether that violence is employed by strong or weak, and in the final stage the community takes active efforts to prevent violence and to restore to the victim his losses. The Stimson Note [..] will affirm that the world has advanced to the third stage, even if all of its members have not reached the fourth stage envisaged by the League of Nations Covenant'.[144]

G. Further criticisms to the doctrine

Finally, some authors commented negatively about the doctrine referring to the fact that from 1934 on a number of States granted recognition to the Manchukuo government.[145] The first was El Salvador, which was followed by Italy (1937), Spain (1937), Germany (1938), Poland (1938), Hungary (1939), Romania (1939) and Finland (1941). However, this fact does not dismantle our analysis. Indeed, it has to be noted that most of them were "fascist" states who reciprocally seek recognition for their seizures of territory.[146]

Critiques concerned also the fact that after the Manchurian crisis, non-recognition had no more been applied on a global scale to the subsequent cases of aggression and

[144] Q. Wright in H. Briggs (n 38) 90-91. See also Q. Wright, *The Stimson Note of January 7, 1932* (n 15) 344-45. Similarly Lauterpacht, in 1947: 'Even when there exists a duty to vindicate the law of nations by means more substantial than a verbal declaration of non-recognition, such advantages as that declaration possesses are preferable to total inaction. The attitude of non-recognitions shows that the law, though temporarily shorn of its strength, is potentially a powerful factor so long as there is predominant the sentiment of its ultimate authority. Law is not necessarily disintegrated by impotence; but it is destroyed by unqualified submission to the lawlessness of force', H. Lauterpacht, *Recognition in International Law* (n 42) 420-21, 435.

[145] See the academic debate in H. Briggs (n 38).

[146] See F. Rodao, 'Japan and the Axis, 1937-8: Recognition of the Franco Regime and Manchukuo' in [July 2009] 44(3) *Journal of Contemporary History* 431-47.

acquisition of territory.[147] Thus, we now turn to the analysis of such cases to see whether this consideration holds true.

2. Other (Non) Applications of Non-Recognition by the League of Nations? Decentralization and *appeasement*

2.1. The Chaco and Leticia cases

Shortly after the League Assembly had formulated its policy of collective non-recognition in respect of Manchukuo, the international community was confronted with two territorial disputes in Latin American which provided the opportunity for a reaffirmation of the principle.[148]

A. The Bolivia-Paraguay border conflict: the first test for decentralization and the centrality of peaceful settlement of disputes

On September 10, 1931, the Secretary General of the League of Nations received a letter from the Bolivian delegation by which he was informed of an incident occurred the day before at the frontier between Bolivia and Paraguay. [149]

The causes of the conflict between the two countries were related to a long-standing territorial dispute. Indeed, the control of the Grand Chaco region, where the Paraguay River flows, would have given to one of them access to the Pacific Ocean. Other scholars have also underlined the role played by big oil companies in the dispute. At that time huge oil deposits had been discovered on the Andean plains and oil companies erroneously thought that the Grand Chaco region too might prove a rich source of petroleum.[150]

[147] See the following question by Professor Briggs: '[t]his of course, raises the question of evidential value of these conquests: Are they evidence that in practice the Kellogg Pact and Article 10 of the Covenant are not generally regarded by the parties thereto as forbidding conquest? Or are they merely violations which do not disprove the existence of the obligation?', H. Briggs in H. Briggs (n 38) 79.

[148] J. Dugard (n 36) 35.

[149] '[a]t a time when Bolivia - while remaining in contact with the Committee of Neutrals and to facilitate the discussion with Paraguay of a plan of non-aggression which Bolivia has herself prepared and proposed - has just accredited to Buenos Ayres M. Sanchez Bustamante, a former Minister for Foreign Affairs, thus furnishing the clearest proof of her peaceful intentions, Paraguay has suddenly disturbed this situation, which should have been so favourable for reaching an agreement', League of Nations Official Journal, January 1932, 151. On the other hand, the Paraguayan reply was of complete dissociation from the Bolivian reconstruction of the facts. Furthermore, Paraguay stated that as a signatory of the Pact of Paris, the country was prepared to sign any other pact which could serve to reinforce the latter. Moreover, it would never violate the engagements which it assumed becoming a Member of the League of Nations. However, on May 1932 Paraguay declared war on Bolivia.

[150] The Royal Dutch Shell backing Paraguay and Standard Oil supporting Bolivia.

On September 4th, 1934 Bolivia sent to the Secretary General a communication invoking Art. 15(2) of the Covenant with a view to obtaining a final settlement of the dispute. Bolivia presented its titles to the disputed territory. It claimed – with official acts emanating from the Spanish Crown – that the Chaco region had been part of the original colonial provinces of Moxos and Chiquitos to which Bolivia was the successor. The Paraguayan position would be instead based on a supposedly *de facto* occupation which by prescription would give it the sovereignty over the region. However, Bolivia pointed out that 'while Paraguay, particularly during recent years, has made repeated attempts to usurp territory, Bolivia has not only consistently protested against and opposed those attempts, but for more than a century has given material proof of her possession, in spite of all the obstacles placed in the way of her activities by natural conditions. She has by no means allowed her rights to be barred by prescription'. According to this reconstruction, Bolivia finally recalled the principle of non-recognition of the validity of territorial acquisitions obtained by occupation or conquest.[151]

After numerous attempts of conciliation made by the Committee of Neutrals at Washington and previous committees set up by the Assembly and the Council, finally the Assembly created a committee with the task of formulating recommendations by virtue of Art. 15(4) of the Covenant.[152]

Unlike in the Manchurian crisis, however, the Committee's Report – adopted by the assembly on November 24th, 1934 – did not arrive at clearly taking a position in favour of one side, in other words it did not identify the aggressor.[153] Surely, this fact prevented the application of non-recognition by the League as '[t]he application of the doctrine of non-recognition does not avoid the necessity of ultimately determining the aggressor'[154] (see *infra*, par. 4.3).

The Report first required the parties to cease all hostilities within a period of six days from the notification of the recommendations by the Secretary General.[155] Then it provided a scheme for the peace negotiations which shall be opened at a conference in Buenos Aires within a period of six months from the cessation of hostilities. Furthermore, there was stated that, by accepting these recommendations, the parties would acknowledge the fact that if – on the expiry of a period of two months from

[151] League of Nations Official Journal, Special Supplement 124, Annex, 89.

[152] *Ibid.*, Resolution of September 27th, 1934.

[153] Rather it stated that: '[t]he dispute which has arisen between the two countries is the consequence of the fact that their common frontier has never been fixed by any final treaty and that hostilities were brought about by the inevitable impact of the two movements of occupation of which the Chaco has been the scene: that of Paraguay to the north and west and that of Bolivia to the south and east', League of Nations Official Journal, Special Supplement 132, 48.

[154] F. A. Middlebush, Non-Recognition as a Sanction (n 35) 53.

[155] League of Nations Official Journal, Special Supplement 132, 48.

the opening of the conference – the frontier was not fixed by negotiations, or if no arbitration agreement was concluded, the Permanent Court of International Justice (PCIJ) would be called upon to give judgment.[156]

Significantly, the Committee said that the PCIJ would apply the rules of law enumerated in Art. 38 of its Statute[157], but with due regard to the accession of the parties to the Declaration of Principles of the American Nations, dated August 3rd, 1932. Here, the other nineteen American Republics had agreed on a joint declaration about the Chaco Dispute, which read: '[t]he American nations further declare that they will not recognize any territorial arrangement of this controversy which has not been obtained by peaceful means nor the validity of territorial acquisitions which may be obtained through occupation or conquest by force of arms'.[158] This reference to the American document seems to suggest that the Committee was aware that non-recognition could be applied to the situation in the Chaco, but it was not in the position to determine the exact nature of the dispute.[159] An arbitral tribunal or the PCIJ would be better placed to do that.[160]

While Bolivia accepted immediately the Report of the Committee, Paraguay refused.[161] In the meanwhile, the conflict went on and Paraguay increased its territory. As it was remarked by Bolivia in a letter to the Secretary General of 22 December, 1934, it seemed that 'Paraguay considers it essential that a fairly long period should elapse between the termination of the war and the commencement of the diplomatic negotiations; she would take advantage of this period in order to compel Bolivia to disarm completely and enable Paraguay to complete without hindrance her plan for

[156] *Ibid.*, 49.

[157] Art. 38: 'The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

2. International custom, as evidence of a general practice accepted as law;

3. The general principles of law recognized by civilized nations;

4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto', Statute of the Permanent Court of International Justice, available at <https://www.refworld.org/docid/40421d5e4.html> accessed 04 July 2019.

[158] Reproduced in H. Briggs (n 38) 74.

[159] Furthermore, it is an additional evidence that those American declarations of non-recognition were of important legal significance.

[160] 'The jurisdiction vested in the Court shall be as follows:

Whereas there exists between Bolivia and Paraguay a territorial or frontier dispute and whereas what one Party considers to be exercise of its territorial sovereignty is considered by the other Party to be usurpation upon its rights and an illegal occupation, to examine the titles and arguments presented on either side, and, as the result of such examination, to give judgment and declare whether there are districts and, if so, what districts, which one or other of the Parties should evacuate and hand over to the other Party as falling under the latter's sovereignty, the two Parties undertaking in advance to accept and execute the judgment of the Court', League of Nations Official Journal, Special Supplement 132, 49.

[161] *Ibid.*, 70-74.

the appropriation of the Chaco'.[162] In light of this situation, the Advisory Committee – appointed by the Report of November 24th, 1934 – specified that Paraguay could not resort to war against Bolivia according to Artt. 12 and 15 (6, 10) of the Covenant, in so far as the latter had accepted the terms of the Report.[163]

The Advisory Committee then took a stance when it informed the Members of the League that the arms embargo previously enforced towards both States, should not any longer be applied with regard to Bolivia. Furthermore, the Committee recommended Member States to 'supplement the measures already adopted by any other measure which may be required to render the existing measures more effective'. The language however was vague and purely exhortative and it was not clearly stated that Paraguay was conducting an aggressive war.[164] The Advisory Committee thus did not please the explicit Bolivian request, made some days before and addressed to the American Governments, about the application of the doctrine of non-recognition to the conflict in the Chaco.[165]

Notwithstanding the mild condemnation by the Advisory Committee, the pressure exerted by the League and its members, particularly through a dense diplomatic exchange, was not without impact.[166] Paraguay followed the pattern of Japan when on February 23, 1935 sent a notification of its intention to withdraw from

[162] League of Nations Official Journal, Special Supplement 133, 40-41, *Observations of the Bolivian Government on the Paraguayan Governments Reply concerning the Recommendations Adopted by the Special Assembly on November 24th, 1934.*

[163] 'Under Article 12 of the Covenant, the Members of the League agree in no case to resort to war until three months after the report by the Council. [..] Furthermore, according to paragraphs 6 and 10 of Article 15 of the Covenant, since the Assembly's report was unanimously agreed to, the Members of the League may not go to war with the party to the dispute which complies with the recommendations of the report', Ibid 49, "Report, dated January 16th, 1935, by the Advisory Committee on the situation created by the replies of Bolivia and Paraguay concerning the recommendations adopted by the Assembly on November 24th, 1934".

[164] *Ibid.*, 50, *Report, dated January 16th, 1935, by the Advisory Committee on the situation created by the replies of Bolivia and Paraguay concerning the recommendations adopted by the Assembly on November 24th, 1934.*

[165] 'In virtue of the obligations embodied in the Covenant of the League, which are binding on it no less than on Paraguay, the Bolivian Government, yielding to the universal demand that this war should be terminated by pacific settlement, accepted the Assembly's recommendations without qualification or reservation and carefully refrained from making the least observation in regard to them. In so doing the Bolivian Government was happy to have such an opportunity of doing homage to the American spirit and also of complying with the doctrine of August 3rd, 1932, which refused to recognise occupation and conquest as means of acquiring territory. At the present juncture and in view of the facts enumerated above, the Bolivian Government considers itself entitled to expect all the American nations to take unmistakable steps to support the integrity and authority of the doctrine cited above and of the recommendations, which cannot but obtain the universal support of all the States of the League of Nations', *Ibid.*, 48-49, *Letter, dated January 12th, 1935, from the Permanent delegate of Bolivia to the Secretary-General, transmitting the text of a memorandum addressed by the Bolivian minister for foreign affairs to the various American Governments on January 9th, 1935.*

[166] Almost every Member State of the League and some non-Members in February 1935 promptly informed the Secretary General of their intention to follow the recommendations of the Advisory Committee, see League of Nations Official Journal 16, March 1935, 447-50.

the League of Nations to the Secretary General.[167] The steps taken by the Advisory Committee could in fact lead the Assembly to subsequently pronounce itself on the matter of non-recognition of the territory acquired by Paraguay after the adoption of the report of 24 November 1934, and to apply other sanctions (for instance under Art. 16 of the Covenant).

However, at the session of the Advisory Committee held in Geneva from 11 to 15 March 1935, Member States, while recognizing that Paraguay was still bound by the resolutions of the League[168], began to recant instead of advancing in the determination of responsibilities.[169] There was thus no possibility that a further report be submitted to the vote of the Assembly.

The Report finally adopted by the Advisory Committee on March 15, 1935 relied completely on the efforts to be made by American countries at the Peace Conference in Buenos Aires.[170] The League was not only delegating to the American nations the determination of the guilty party, but also the restatement of the principle of non-recognition.[171]

By the time a ceasefire was negotiated on June 10, 1935, Paraguay controlled most of the Chaco region. After signing the Peace Protocol of June 12, 1935, the two parties decided – signing the Treaty of Peace, Friendship and Boundaries on July 21, 1938 - to submit the dispute to an arbitral tribunal composed of the official representatives of Argentina, Brazil, Chile, the United States, Peru, and Uruguay.[172] On October 10, 1938, finally the arbitral award was delivered and it sanctioned the retention by Paraguay of some of the contested territory.[173]

The auspices of the League of Nations that a peace conference – then tribunal – could pronounce itself about the determination of the legality or illegality of the

[167] '[..] The Advisory Committee's resolution of January 16th constitutes in the judgment of the Paraguayan Government an arbitrary act against which there is no appeal. Having joined the League of Nations in the conviction that her obligations as a Member would be confined to those specified in the Covenant and that she would be treated on a footing of perfect equality with other nations, Paraguay finds herself compelled to leave the League. The Paraguayan Government accordingly hereby gives formal notice as provided in the Covenant of its decision to withdraw from the League of Nations', *Ibid.*, 451.

[168] Art. 1(3) of the Covenant of the League of Nations indeed stated that 'Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal'.

[169] See League of Nations Official Journal, Special Supplement 134, 46-54, "Situation created by the Paraguayan Government's Notification, dated February 23rd, 1935, of its Intention to withdraw from the League of Nations. General Discussion".

[170] *Ibid.*, 56-58; see also League of Nations Official Journal, Special Supplement 143, 15.

[171] 'The Venezuelan delegation does not forget that the League has the right to hope, in the present deadlock, that its American Members will fulfil their primary and inescapable duty of maintaining the declaration made jointly on August 3rd, 1932. My Government maintains it in its entirety', League of Nations Official Journal, Special Supplement 134, 17.

[172] Treaty of Peace, Friendship and boundaries, reproduced in 32(4) Supplement *The American Journal of International Law* 139-41.

[173] *Chaco Arbitral Award* reproduced in [1939] 33 AJIL 180-82.

Paraguayan conquest did not materialize. As pointed out by Professor Briggs: '[i]n the Treaty of Peace, Friendship and Boundaries [..] the title of Paraguay to the major part of her conquests was accepted as a *fait accompli*; the arbitrators were restricted to drawing a frontier with narrow limits. Their real function was to determine only the extent of Paraguay's conquest, not its legality or propriety'.[174]

There is no evidence that States made individual statements of non-recognition of Paraguay's acquisitions by conquest nor of the settlement made at the end of the war. Thus, it was suggested that American countries who delivered the arbitral award contravened the obligation of non-recognition contained in numerous American documents and treaties.[175]

Without denying the feeble response of the League of Nations with regard to the Chaco dispute, there is another possible interpretation of the facts. According to Wright, indeed: 'the settlement arrived at there was not at all an incident of the application or non-application of non-recognition. There was a settlement arrived at by a collective procedure among the American states and it was accepted. It was, it is true, based on certain acts of violence by Paraguay, but the American states decided collectively on a procedure which led to certain settlement, and so the states of the world, in recognizing this settlement, were not departing from the non-recognition doctrine'.[176] It seems to us that Wright's observation is correct, especially if we keep in mind what the function non-recognition had in international law at that time. Non-recognition went hand in hand with the pacific settlement of disputes and procedures of consultation.[177] Thus, the arbitral award could be seen an alternative way by which States seek to adjust law with facts for the peace of the nations, without returning to the *status quo ante*.[178]

[174] H. Briggs in H. Briggs (n 38) 77. Also, the Bolivian expectations were deceived. Shortly after the signing of the Peace Protocol, Bolivia first of all expressed its disappointment about the lack of collective action on the part of the the League of Nations: '[p]ublic opinion in my country, ingenuous like public opinion in all countries, had pinned its faith to the spirit and the letter of the Covenant, from which it expected peace through justice, and, if necessary, peace through collective help'. Then the Bolivian government explained what according to itself were the points upon which the arbitral tribunal should deal with. They were the following: *a)* Release of war prisoners; *(b)* Responsibility for the war; *(c)* Study of the territorial question; *(d)* Economic reconstruction of the ex-belligerent States. So, it was clear that Bolivia seek to arrive at the determination of responsibilities for the war. (See League of Nations Official Journal, Special Supplement 143, 17-18).

[175] H. Briggs in H. Briggs (n 38) 77.

[176] Q. Wight in H. Briggs (n 38).

[177] See paragraph 2.1.*E*. It was so since the Berlin Conference of 1884.

[178] 'Of all the conquests and titles which have been taken by conquest since 1932, Paraguay was perhaps most influenced by the doctrine of non-recognition and the principle that international disputes must be settled by peaceful means, in the long run and in the final analysis. Non-recognition here was coupled up with the latter doctrine, and the American States did influence the final settlement', N. J. Padelford in H. Briggs (n 38) 85.

It should be noted that all Member States – particularly American ones – as well as the organs of the League repeatedly referred to and recalled the doctrine of non-recognition as of extreme legal relevance and bindingness.

It is true, however, that the League of Nations already in this case showed a symptom that it would reiterate in subsequent disputes, that is the decentralization in the application of the sanction of non-recognition. It did not take the responsibility – as made for the Manchurian crisis – to determine the aggressor and to submit such finding to all States reunited in the Assembly.[179]

B. Peru-Colombia conflict over Leticia: the recall to Assembly Resolution of March 11, 1932 and the concept of reparations

In 1933, another conflict broke out in Latin America between Peru and Colombia over the Leticia region, in the territory of the Amazon rainforest. Already at the end of 1932, Peru had dispatched some regiments in the region. On November 12th, 1932, the Government of Ecuador sent a communication to the Secretary General to inform the League of the memorandum already transmitted to the Chancelleries of America. After having remarked that it could not regard the difficulty between Colombia and Peru with indifference – due to its geographical proximity - Ecuador recalled in a veiled manner the principle of non-recognition of violent territorial transfers.[180]

Then, in a letter dated January 4th, 1933, the Colombian government itself informed the Secretary General that in the night between September 1st and September 2nd a 'group of armed individuals coming from places situated in the territory of the Peruvian Republic invaded the river port of Leticia, the capital of the Colombian district of the Amazon [..] The assailants have since consolidated their position in the invaded region and have made preparations of a military nature with a view of resisting the measures taken by Colombia to restore the legitimate authorities and to terminate this violent occupation, for which there is no justification or excuse'.

Furthermore, the Colombian government recalled that the frontier question with Peru had already been settled in the Treaty signed at Lima on March 24th, 1922 and by which the port of Leticia was accorded to the sovereignty of Colombia. Moreover,

[179] Without a clear affirmation on who was the aggressor, Member States could not apply the principle of non-recognition as envisaged by Art. 10 on territorial integrity. However, it has to be noted that while Manchuria was clearly part of the sovereign territory of China, doubts were raised on who detained paternity over the Gran Chaco region.

[180] 'This principle is particularly plain because history, and the American tradition of international law, and various public instruments and international declarations of recent times, remind us that our peoples, set well upon the path which civilisation seems likely to follow, are convinced that the real solutions of disputes between States are those arrived at by peaceful and voluntary means which do not injure the vital interests or the sense of legality of the communities to which they are to apply', League of Nations Official Journal 14, January 1933, 117-18.

Colombia made clear that it would not accept to submit the questions connected with the events at Leticia to any conciliation procedure, as it was proposed by Peru. Indeed, Colombia pointed out that, since the acts occurred undisputedly on its territory, there was no basis for negotiating a compromise. According to it, the international community would have understood the measures taken by its government to re-establish its own authority over the region.[181]

Finally, the communication stated that '[i]f, contrary to Colombia's hopes and desires, the Peruvian Government lends effective assistance to those who have invaded and are occupying Colombian territory and are endeavouring to violate solemn treaties, against which no objection has ever been made, the world will clearly be faced with acts which openly infringe, not only the existing treaties between Peru and Colombia, but also the League Covenant and the Pact of Paris, which explicitly and categorically proscribe and condemn acts of this kind'.[182]

Subsequently, in another communication to the Secretary-General, Colombia explicitly recalled the solemn obligation entered into by Member States of the League to respect and preserve the territorial integrity and existing political independence of all Members.[183]

On the contrary, Peru tried to reverse the accusation of aggression upon the Colombian government.[184] Furthermore, Peru asked that the frontier treaty with Colombia of 1922 be modified in the part which it 'has proved to be inapplicable'. It supported the argument of the rectification of the treaty with the fact that 'although Leticia passed into the hands of Colombia [..], all the inhabitants are of Peruvian

[181] 'It would not be possible, without introducing a highly disturbing element into international relations, to allow acts of this kind to afford a pretext or basis for international disputes and the occupation of territory by irregular armed bands to give rise to the conciliatory procedure', Ibid 545, Annex, "Letter, dated January 4th, 1933, from the Colombian Government to the Secretary-General of the League of Nations".

[182] Then it continued: '[t]he Colombian Government cannot and will not believe that the Peruvian Government will assume the responsibility for such an attitude, and trusts that the Leticia incident will be settled as a question of a strictly legal character, without any infringement of the obligations and rights created by international engagements', *Ibid.*, 545.

[183] *Ibid.*, 553, April 1933, Annex, "Letter, dated January 24th, 1933, from the Colombian Government to the Secretary-General of the League of Nations".

[184] '[..]considerable Colombian naval forces are at this moment advancing against Leticia on the pretext that the question is a purely internal one, although foreign mediation in this matter has been accepted and although other Governments are making friendly representations with a view to securing a peaceful settlement. Our attitude, which is exclusively defensive, is also in contrast with that of Colombia, who has expended considerable sums in order to improvise a numerous fleet which it is announced will proceed from Manaos with landing forces in order to attack Leticia, which constitutes the commencement of an aggression against Peru, whose responsibility is thus covered', *Ibid.*, 565 "Telegram, dated January 16th, 1933, from the Peruvian government to the Secretary-general of the League of Nations".

nationality and demand the right to remain Peruvian, as they and the place itself have been by the tradition of centuries'.[185]

It is interesting to note that on the one hand Peru resorted to the argument of self-defence as it was previously made by Japan, but then it added other justifications based on the protection of its nationals abroad and on the Leticia citizens' right 'to decide their own nationality' – that would be taken up again by future aggressor States, like Italy and Germany, and in recent times by Russia.[186]

At its meeting of January 26th, the Council approved the text of two telegrams to the parties. The telegram sent to Peru clearly requested the country to 'refrain from any intervention by force on Colombian territory and to ensure that all necessary instructions are given to the Peruvian commanders concerned to the effect that the military forces of Peru should take no action beyond the defence of Peruvian territory and *should not hinder Colombian authorities from the exercise of full sovereignty and jurisdiction in territory recognised by treaty to belong to Colombia*' (italics added). While the telegram sent to Colombia simply asked that government to exercise all possible clemency and precaution when restoring order in its own territory. That was an evidence of the fact that Member States had already identified the aggressor in the Peruvian government.

On February 17, 1933 finally, Colombia requested Council intervention in accordance with Art. 15 of the Covenant. The Council thus convened a first special meeting on February 21st, 1933. Here, in the absence of the representative of Peru, it was agreed that the Committee of Three of the Council should be entrusted with the task of endeavouring to secure a settlement of the dispute in the manner provided for in paragraph 3 of Article 15 of the Covenant.

At the second special meeting of March 1st, 1933, the Council adopted the report proposed by the Committee under Art. 15(3) of the Covenant.[187] According to it, *inter alia* 1) the territory surrounding Leticia should be taken in charge by a Commission of the Council, 2) Colombia had to place forces at the disposal of the League Commission, these to become international forces for the duration of the negotiations, 3) the two parties should decide as to the method of carrying on the negotiations, which will be undertaken for the purpose of studying in a conciliatory atmosphere the

[185] 'Accordingly while not disregarding treaties in force, my Government cannot neglect its obligation to protect its nationals who are threatened with subjection by violence. We therefore aspire to the rectification of the treaty which transferred Leticia to Colombia without consulting the wishes of the inhabitants', *Ibid.*, 565-66 "Telegram, dated January 19th, 1933, from the Peruvian government to the Secretary-General of the League of Nations".

[186] We will resume the topic of nationality and what has been recently called the phenomenon of "passportization" in Chapter VI, as it has arisen particularly in connection with the Crimean crisis.

[187] Art. 15(3): 'The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate'.

whole of the problems outstanding.[188] Then the Council adopted some conclusions in which it clearly stated that Leticia's territory 'has been invaded by Peruvians'[189] and recalled Assembly Resolution of March 11, 1932 as well as the American Declaration of August 3rd, 1932 about the doctrine of non-recognition of territorial seizures.

While Colombia immediately agreed on the report, Peru asked for a period of several days before giving an answer. Moreover, Peru made a number of counter-proposals to modify the recommendations contained in the report, but the Council's committee rejected them.

At the fifth special meeting of the Council held in March 18, 1933, notwithstanding the continued opposition of Peru, the Council adopted unanimously the report of the Committee of Three, this time under Art. 15(4)[190] of the Covenant.[191]

At the meeting of the Council held in May 25th, 1933, both parties signed the document containing the procedure for putting into effect the recommendations proposed by the Council on March 18th, 1933.[192] The document provided for the following procedure: the Council should appoint a Commission which, in the name of the Government of Colombia, would administer the territory of Leticia for a period not exceeding one year, during which negotiations should be carried out. Moreover, the Peruvian forces in that territory shall withdraw immediately upon the Commission's arrival. Finally, the abovementioned Commission would have the right to decide all questions relating to the performance of its mandate, including the calling upon of military forces of its own selection.[193] It was the first time that the League of Nations appointed a Commission to temporarily administer a contended territory, inaugurating a practice that would be pursued by its successor – the United Nations – through peace-keeping operations and territorial administrations.

In June 1934, Peru and Colombia signed a peace treaty and the territory of Leticia returned to Colombia. Moreover, Peru was asked to apologize for the invasion and to sign again the 1922 boundary agreement. We can thus see here not only a return to the *status quo ante*, but also the request for reparations towards the injured party, even if only in the form of satisfaction. The League addressed the Leticia case in a highly organized and straightforward manner.[194]

[188] League of Nations Official Journal 14, April 1933, Annex, 599-609 "Report of the Council, provided for in Article 15, paragraph 4, of the Covenant, submitted by the Committee of the Council".

[189] *Ibid.*, 609.

[190] Art. 15(4): "If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto".

[191] League of Nations Official Journal 14, April 1933, 523.

[192] *Ibid.*, 944, July 1933.

[193] *Ibid.*, 945.

[194] In line with Wright's fourth stage of international law, see *supra*, par. 1.5.F.

2.2. Italy: Indirect Non-Recognition

A. The 1928 Treaty of Amity and the League's disengagement

The Italian aggression upon Ethiopia was the first large-scale war enterprise of a European power after the end of the First World War. Moreover, it started a series of conflicts that soon spread in Europe leading to the Second World War.[195]

As soon as December 14th, 1934, the Abyssinian government sent to the Secretary General a telegram in which it drew the Council's attention to the gravity of the situation according to Art. 11 (2) of the Covenant.[196]

The Italian reply arrived on January 19th, 1935. Italy informed the Secretary General that direct negotiations between the two parties at dispute were already started and that the discussion inside the League over this *affair* would not facilitate in any way the continuance of this process. Then the Italian government proposed that the question be settled under Art. 5 of the Treaty of Amity signed between Italy and Abyssinia in 1928.[197]

For the moment, the Ethiopian government agreed on this procedure of dispute resolution and the discussion on the Abyssinian request was thus postponed to the next meeting of the Council.[198]

It was only on May 25th, 1935, that the question returned on the Council's table. Member States had to acknowledge that diplomatic channels had failed to settle the dispute. Italy and Ethiopia then appointed arbitrators, as arbitration was the second step envisaged for the settlement of disputes in the 1928 Treaty of Amity.[199] The Council adopted two resolutions by which it left the parties in 'full liberty to settle the dispute in question'.

[195] E. Di Nolfo, *Storia delle Relazioni Internazionali. Dal 1918 ai giorni nostri* [Edizioni Laterza, Bari, 2009] 189.
[196] League of Nations Official Journal 16, February 1935, Annex, 274.
[197] *Ibid.*, 162.
[198] *Ibid.*, 163.
[199] Art. 5 Treaty of Amity, Conciliation and Arbitration, signed at Addis Ababa on August 2nd, 1928: 'Both Governments undertake to submit to a procedure of conciliation and arbitration disputes which will arise between them and which it may not have been possible to settle by ordinary diplomatic methods, without having recourse to armed force. Notes shall be exchanged by common agreement between the two Governments regarding the manner of appointing arbitrators', *Ibid.*, 639, June 1935.

Even if the Council remarked that it would have followed the whole procedure with attention,[200] surely, the recourse to the 1928 treaty conceded again to the Council a pretext not to discuss the issue at large for the time being.[201]

Italy, notwithstanding its declaration of good intentions and good faith in the procedure of arbitration, already at this stage advanced some justifications that aimed to prove its extraneity to the causes of the conflict. In particular, the Italian government recurred to the justification of self-defence, as Japan, Paraguay and Peru had done before. Indeed, Baron Aloisi, on behalf of Italy, stated: 'I am obliged to say a few words on another aspect of the matter. In the course of a dispute which, like the present one, originated in a military attack, the Italian Government has naturally taken steps to put the territory of its colonies into a state of defence'.[202]

At the Council's meeting of July 31st, 1935, member States were confronted with a stalemate of the arbitration procedure carried out by the parties at dispute. Indeed, the arbitrators appointed by one party had reached conclusions diametrically opposed to those of the counterpart. However, Italy did not want to proclaim the process as a complete failure because this would mean that the Council could discuss the dispute in the merit. For this reason, Italy gave all the responsibilities for the suspension of the works of arbitration to the Ethiopian government and stressed that as a procedure of conciliation was still in place between the two countries, the Council was not entitled to examine the issue.[203] The Council approved this point in the Resolution adopted at the end of the meeting.

Italy was successful also in limiting the scope of the mandate of the arbitral commission. The Italian government indeed asked that the latter confine itself to determine who was the aggressor in the Walwal incident of December 5th, 1934 – who

[200] The sentence 'The Council, Leaving to the two parties full liberty to settle the dispute in question [..]' provoked different reactions in the two parties at dispute. Ethiopia remarked that 'The Ethiopian delegation understands that, by the words "full liberty", the Council does not mean a reversion to the former position and that it is taking no interest in the arbitration procedure. Arbitration will take place in accordance with the 1928 Treaty, but the Council is not dissociating itself from the development of that procedure'. Italy, on the contrary, stressed again that any interference in the arbitration procedure would undermine their sincere efforts at peace: 'I am, however, bound to draw the Council's attention, on behalf of my Government, to the danger that certain manoeuvres, the object of which is to arouse or mislead public opinion, may disturb the course of a procedure which is in complete harmony with the existing agreements between the two parties as well as with the provisions of the Covenant. [..] In conclusion, I request the Council to act in conformity with the principles of the Covenant whereby in cases when a dispute is submitted to an arbitration procedure in due form (and that is the present case), there no need for it to take any action: *Electa una via non datur recursus ad alteram*', see *Ibid.*, 640-42.

[201] See A. Zimmern, 'The League's Handling of the Italo-Abyssinian Dispute' in [November-December 1935] 14(6) *International Affairs (Royal Institute of International Affairs 1931-1939)* 754.

[202] League of Nations Official Journal 16, June 1935, 641.

[203] 'The Italian Government desires to recall that, under the terms of the Covenant, the Council cannot proceed to an examination of the dispute, since the latter is at the moment submitted to arbitral procedure. The Council has always conformed to this rule. In view of existing precedents, the Italian delegation has not even contemplated the possibility of a wider discussion, and could not therefore take part in any such discussion in the course of the present session', *Ibid.*, 966, August 1935.

prompted the beginning of the conflict – not extending its work to wider issues, such as the delimitation of the frontier between Ethiopia and Italian colonies. This point too was approved in Council Resolution of August 3rd, 1935.[204]

On September 3rd, 1935 the Italo-Ethiopian Commission of Conciliation and Arbitration, arrived at a decision. After having remarked its narrow space of action – - that did not permit it to 'take into account the circumstance that Walwal is under the sovereignty of one or the other of the two parties'[205] – the Commission enunciated its rather weak conclusions: '1) [t]hat neither the Italian government nor its agents on the spot can be held responsible in any way for the actual Walwal incident [..] 2) [t]hat, although the Ethiopian Government also had no reasonable interest in provoking that engagement, its local authorities, by their attitude, and particularly by the concentration and maintenance [..] of numerous troops in the proximity of the Italian line at Walwal, may have given the impression that they had aggressive intentions'; 3) finally, the arbitral award established that no international responsibility was incurred either by Italy or Ethiopia.[206]

B. The League's handling of the Italo-Abyssinian dispute and the stumbling block of appeasement

Through the second Resolution adopted on August 3rd, 1935, the Council convened a meeting at the beginning of September 1935, to examine, in various aspects, the relations between Italy and Ethiopia.[207] Ethiopia appealed again to Art. 15 of the Covenant and asked the Council to assume its responsibilities.

More importantly, the Ethiopian government stated: '[..] the Council's task now is solemnly to state what is the value, the practical significance of the pledge given in Article 10 of the Covenant by each Member of the League to respect and preserve as

[204] *Ibid.*, 967-68.

[205] The decision, availed by the Council, not to include the question of sovereignty in the Walwal case was certainly beneficial to Italy. Particularly, maps printed prior to December 1, 1934, official Italian maps included, indicated that the frontier in this region laid one hundred or more kilometres east of Walwal, thus under Ethiopian sovereignty. Furthermore, "title by occupation could not have been acquired by the Italians in any such period as had elapsed since their entry into that region. Even if they had been at Walwal itself ever since 1930, which was the maximum extent of their claims, and was hardly borne out by the evidence, this would be far from sufficient to establish title; nothing short of twenty years would have a chance of being regarded as creating title in this manner [..] they held the region clandestinely, in the sense of never having avowed this possession or notified it to Addis Ababa or the world at large; even their own maps denied it. And they held it very precariously in both the original physical sense of that test and also in the later legalistic sense, in view of the provisions of the League Covenant and the tripartite treaty of 1906. If the requirements of the law for effective possession are that it shall be possession *nec vi, nec clam, nec precario*, the Italian possession surely was inadequate to create either title (for lack of time) or claim to respect as such', see P. B. Potter, 'The Wal Wal Arbitration' in [January 1936] 30(1) *The American Journal of International Law* 42-43.

[206] League of Nations Official Journal 16, November 1935, 1355.

[207] *Ibid.*, 968, August 1935.

against external aggression the territorial integrity and political independence of all the Members of the League. The Council's task in the present instance, when Ethiopia, a Member of the League, is threatened with aggression and is in mortal danger of aggression, is to advise upon the means by which the obligation contracted towards Ethiopia by Italy, as a signatory of Article 10 of the Covenant, shall be fulfilled'.[208]

Soviet Russia[209] and Mexico[210] strongly expressed themselves in support of Ethiopia. France and the United Kingdom instead adopted a more cautious position. They confined themselves at showing to the Council's members the results of the tripartite exchange of views – between them and Italy – occurred a month earlier in Paris. The extensive programme that France and the United Kingdom had presented to Italy contemplated the maintenance of the territorial integrity and political independence of Ethiopia while recognizing the special interests of Italy in the country, but Italy refused to accept the programme.[211]

Between September 4th and the outbreak of hostilities on October 3rd, 1935, the Council was passing though the stages provided for in Article 15. On September 6th, it appointed a Committee (the Committee of Five[212]) to make a general examination of Italo-Ethiopian relations and to seek a peaceful settlement of the dispute according to paragraph 3 of the Article.[213] The Committee of Five presented its Report to the

[208] 'The issue now is whether, in resisting the covetousness of a powerful neighbour unmindful of the engagements entered into in international treaties, the non-militarised States can count on the effective support accorded them by Articles 10 and 15 of the Covenant. [..] Do not refuse to Ethiopia, because she is weak while her aggressor is powerful, the effective aid promised her by the Covenant. Do not let it be written in the annals of history that, as a result of intimidation, or by connivance or selfish indifference, the nations abandoned a small people the very existence of which is menaced. Ethiopia refuses to believe that she must count only on the strength of her despair to defend her territory and her life', *Ibid.*, 1141, November 1935.

[209] '[..] we are faced by the direct threat of impending military operations between two Members of the League, by a threat of aggression, which is not only not denied but, on the contrary confirmed by the representative of Italy himself. Can we ignore this threat and forget the existence of Articles 10, 11 and 15 of the Covenant of the League? Would that not be a flagrant violation of the Covenant" would not its violation by the whole Council mean the complete repudiation and negation of the Covenant?', *Ibid.*, 1142.

[210] 'As a member of the community of American nations whose anxiety for co-operation she believes she faithfully interprets in the sense of the observance of accepted undertakings, Mexico considers it her duty to remind the Council of the declaration of August 3rd, 1932, whereby the 'Republics of the -American continent placed on record, in connection with the dispute between Bolivia and Paraguay the principles of non-recognition of any settlements that might be obtained by other than peaceful means and the non-validity of territorial acquisitions which might be obtained through occupation or conquest by force of arms', *Ibid.*, 1145.

[211] *Ibid.*, 1133.

[212] Composed of representatives of the following countries: United Kingdom, France, Poland, Spain, and Turkey.

[213] *Ibid.*, 1145.

Council on September 26th.[214] However, this attempt at conciliation was not successful because Italy rejected the Committee's observations.[215]

Then, the Council proceeded to appoint another Committee (named Committee of the Thirteen)[216] with the task of drawing up a Report according to paragraph 4 of Art. 15.[217] This new body had yet not proceeded far with its work when hostilities broke out on October 3rd. When the report of the Committee of Thirteen was presented to the Council on October 5th, it concerned only the circumstances of the dispute while it lacked completely conclusions and recommendations. It only stated that the Council had the right to make 'the recommendations which are deemed just and proper in regard thereto'.[218] In other words, it was the Council, not the Committee of Thirteen, that was in charge of putting forward terms of settlement.[219]

On the same day, the President of the Council decided to appoint another Committee, called Committee of Six[220], with the task of dealing with the examination of the information received with regard to further developments since the Council last discussed the matter.[221] It was the appropriate time to determine the responsibilities and to attach sanctions to the aggressor. The task of the Committee of Six was twofold: 1) to determine whether a state of war existed between Italy and Ethiopia, and if so, 2) to determine whether the war has been resorted to in disregard of Artt. 12, 13 or 15 of the Covenant.[222] Finally, the Report of the Committee arrived at the conclusion that the 'Italian government has resorted to war in disregard of its covenants under Article 12 of the Covenant of the League of Nations'.[223]

The Report was submitted to the Council on October 7th and members were asked, individually by roll-call, whether they agreed with it or not. Of the fifteen members present, all but the Italian delegation answered in the affirmative.[224] Four days after the outbreak of the conflict, the responsibility was established.

[214] *Ibid.*, 1201.

[215] 'The international assistance which Ethiopia, in virtue of her rights under the Covenant, was requesting from the League of Nations seemed to offer a solution which would be acceptable to both Parties: the independence and territorial integrity of Ethiopia would be respected, Italy would have the possibility of resuming, in security relations with Ethiopia based on good understanding and confident collaboration' (For the Report of the Committee of Five see *Ibid.*, 1620-21).

[216] The Committee consisted of all the members of the Council other than the representatives of the parties.

[217] League of Nations Official Journal 16, November 1935, 1201.

[218] *Ibid.*, 1605-19, Annex, "Report of the Council under Article 15, Paragraph 4, of the Covenant submitted by the Committee of the Council on October 5th and adopted by the Council on October 7th, 1935".

[219] A. Zimmern (n 201) 762.

[220] The Committee was composed as follows: United Kingdom, Chile, Denmark, France, Portugal, and Romania.

[221] League of Nation Official Journal, no. 16, November 1935, 1209.

[222] *Ibid.*, 1223.

[223] *Ibid.*, 1225.

[224] *Ibid.*, 1225-26.

The time was now favourable for invoking Art. 10 of the Covenant. However, the League's action moved instead towards the very first attempt to apply Art. 16 on economic sanctions. On November 6th the Committee of Eighteen was appointed under a recommendation of the Assembly[225] with a view to coordinating the measures of Member States under Art. 16 of the Covenant.[226]

Thus, despite urgent appeals by Ethiopia to the League to reaffirm the doctrine of non-recognition, so proudly enunciated in the Manchurian crisis, both the Council and the Assembly did not respond.[227]

It was particularly France that was tacitly opposed to the adoption of a declaration of non-recognition, and before that to the clear condemnation of Italy as the aggressor. In January 1935, Italy and France had signed a series of accords in which they settled some pending issues that divided the two countries since 1919. Indeed, France saw Italy as an important strategic actor for guaranteeing a European security system against German revisionism.[228]

Italy, on its part, interpreted the 1935 treaties between Italy and France as giving it the power to act in Abyssinia without any limitations. Even if the content of those treaties remains in part obscure – some documents were kept secret[229] – it is sure that France was ready to make some concessions to Italy in exchange for it to stand on the right side.

The attitude of the United Kingdom changed too. Whereas the UK, led by Sir John Simon, had given full support to the League's action against Japanese occupation of Manchuria, in 1935 it took the lead in the League's renunciation to a collective sanction of non-recognition in the Ethiopian case.[230]

Both France and the United Kingdom were moving towards a policy later labelled as *appeasement*, coming to terms with fascist and aggressive States in the belief that in this way those countries would limit their expansive aspirations. Needless to say, such a policy went contrary to the logic of non-recognition.

[225] League of Nations Official Journal, Special Supplement 145, 2 "Recommendation adopted by the Assembly on October 10th, 1935".

[226] *Ibid.*, 13, "Recommendation adopted by the Assembly on October 10th, 1935".

[227] J. Dugard (n 36) 36.

[228] E. Di Nolfo (n 195) 169-84.

[229] 'The evidence strongly indicates that Laval did give his approval for Italy to invade Ethiopia. Laval hoped to maintain limited French economic interests, but sacrificed French treaty rights in Ethiopia in order to enlist Italy in a defensive front against Germany. Laval failed to foresee the results of his diplomacy, and ended up alienating the Italian dictator', see G. B. Strang, 'Imperial Dreams: the Mussolini-Laval accords of January 1935' in [2001] 44(3) *The Historical Journal* 799-809.

[230] J. Dugard (n 36) 36.

C. The question of non-recognition of the Italian annexation: the failure of decentralization

In a Resolution of July 4th, 1936, the Assembly recommended Member States to terminate the application of economic sanctions, but it assured that it 'remained firmly attached to the principles of the Covenant, which are also expressed in other diplomatic instruments such as the declaration of the American States dated August 3, 1932, excluding the settlement of territorial conquests by force'.[231]

However, in the meeting of May 12th, 1938, Lord Halifax raised the Ethiopian question in the Council of the League in order to obtain support for Britain's opinion that 'the question of the recognition of Italy's position in Ethiopia is one for each Member of the League to decide for itself in the light of its own situation and its own obligations'.[232] Most members of the Council – including France[233] – fell in line with the British Government and emphasized the freedom of States in the field of recognition. Only China, New Zealand and the Soviet Union protested against this interpretation, arguing that the principle of non-recognition was implicit in Art. 10 of the Covenant and had been endorsed by a Resolution of the Assembly. Consequently, the principle could be repealed only by a collective decision of the Assembly.[234] However, no vote was taken on this issue in the Council. Mr. Munters of Latvia, President of the session, finally concluded that '[i]t is, however, clear that, in spite of regrets which have been expressed, the great majority of the Members of the Council feel that, so far as the question which we are now discussing is concerned, it is for the individual Members of the League to determine their attitude in the light of their own situations and their own obligations'.[235]

Does this decentralizing attitude constitute enough evidence to maintain that the international community was still holding to the theoretical collective rule of non-recognition while leaving the practical application to the individual States?[236]

Many States granted recognition of the new *de facto* status of Ethiopia following the Italian military occupation[237], even if most of them did not concede *de jure*

[231] Reproduced in Q. Wright, 'The British Courts and the Ethiopian crisis' in [October 1937] 31(4) *The American Journal of International Law* 683-84.

[232] League of Nations Official Journal 19, May-June 1938, 335.

[233] 'It [the French Government] associates itself with that Government in expressing to you the desire for general recognition of fact that circumstances henceforward entitle every State Member to judge for itself as to the decisions to be taken', *Ibid.*, 340.

[234] *Ibid.*, URSS (340), China (344), New Zealand (355).

[235] *Ibid.*, 346-47.

[236] This was the opinion of D. P. Myers in H. Briggs (n 38) 92.

[237] See N. J. Padelford in *ibid.*, 86. According to the information available to the US Department of State, the following states signified their recognition, either express or implied, of a change in the international status of

recognition. For some time following the triumphs of Italian arms, Ethiopian representatives abroad were accorded diplomatic rights and privileges. However, the consulates of practically all foreign Powers were closed, and foreign consuls that wished to enter in Ethiopia had to be accorded an exequatur from the Italian Government.[238] Furthermore, it seems that the *de facto* recognition by many States was instead a way for granting full Italian sovereignty over Ethiopia, without conceding those limitations arising from the persistence of the *de jure* authority of the Negus. For instance, British Courts, relying on *Luther vs. Sagor*, considered themselves bound by Foreign Office statements to hold that as far as the internal and the external effects of *de facto* government's acts were concerned, that government was completely sovereign.[239]

Thus, it seems that the decentralization of the sanction of non-recognition used "successfully" in the dispute between Bolivia and Paraguay, now it had become a screen to hide the disagreement of the international community in response to the Italian aggression. As dramatically said by Graham: '[..] we must lay responsibility for the present status of the doctrine of non-recognition on the doorstep of the Council of the League of Nations, as one of the sacrificial pre-Munich tidbits laid on the altar of appeasement'.[240]

D. Non-recognition through accreditation of the government in exile and Italy's withdrawal from the League

While failing to adopt an express declaration of non-recognition of Italy's claim over Ethiopia, curiously both the Council and the Assembly tried as long as possible to continue to recognize Ethiopia as an independent State and its membership in the League.

On May 9, 1936, Mussolini had proclaimed the annexation of the whole Ethiopian territory to the Kingdom of Italy and solemnly conferred the title of Emperor of Ethiopia upon King Victor Emmanuel II. On May 3, the Negus had left his country to go into exile. The Credential Committee of the Assembly was thus confronted with

Ethiopia: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Bulgaria, Canada, Egypt, Estonia, Finland, France, Germany, Great Britain, Greece, Guatemala, Honduras, Hungary, Iraq, Iran, Ireland, Japan, Latvia, Netherlands, Nicaragua, Norway, Panama, Paraguay, Poland, Portugal, Rumania, Salvador, Saudi Arabia, Spain, Sweden, Switzerland, Thailand, Turkey, Union of South Africa, Uruguay, the Vatican, Yemen, Yugoslavia.

[238] *Ibid.*

[239] However, Wright underlined: 'It is familiar doctrine that national courts must follow the national political authorities with respect to political questions. [..] It is suggested, however, that, in view of the international obligations of Great Britain [..] obligations which, may be noted, were not applicable in the case of *Luther v. Sagor*, that statement should have been construed as narrowly as possible', Q. Wright, *The British Courts and the Ethiopian crisis* (n 231) 686.

[240] M. W. Graham in H. Briggs (n 38) 95.

the difficult task of deciding whether the credentials issued by a Head of State in exile should be accepted or not.[241]

At the meetings of the Council in May and of the Assembly in June, the Italian Prime Minister insistently requested Members to acknowledge the fact that Ethiopia had ceased to exist as a result of its conquest and ought not to be represented. However, in both occasions the Council and the Assembly continued to accredit Ethiopian delegates, including the Negus. At the meeting of the Assembly in September 1936, when a delegation appointed by the Negus appeared, the Committee of Credentials of the League, disregarding the Italian demand for the exclusion of Ethiopia from the Assembly as a condition for its return to Geneva, reported that Ethiopian delegates were entitled to their seats. Such report was adopted by the great majority of States in the Assembly. Indeed '[..] to have excluded the Ethiopian delegation would have been tantamount to recognizing Italy's claim of sovereignty over Ethiopia and of acquiescing in her conquest of the country. By refusing to pay this price for Italy's return to Geneva, the Assembly displayed a courage and regard for the obligations of the Covenant which will doubtless find widespread approval'.[242] As late as September 1937, the Negus was allowed to communicate to the League's organs the atrocities that its population was suffering.[243] Even after the 1938 British proposal about the complete decentralization of the sanction of non-recognition, Ethiopia was kept on the official lists of the League's members.[244]

It is interesting to note that when Italy informed the Secretary-General of its intention to withdraw from the League on December 11th, 1937[245], economic sanctions had already been suspended for a long period, since July 4th, 1936. Hence, one can wonder whether the withdrawal of Italy from the League was a late reaction to the economic sanctions or rather, most likely, was due to the continued accreditation of the Ethiopian delegation to the League – that was the evidence of a persistent, tendency to restore the legitimate sovereignty in the country.[246] It seems that this form of *indirect* non-recognition exerted more pressure on Italy than the economic sanctions – ineffective and flawed by the sabotage of France and the United

[241] K. D. Magliveras (n 11) 31.
[242] J. W. Garner, *Non-Recognition of Illegal Territorial Annexations and claims to Sovereignty* (n 62) 683.
[243] League of Nations Official Journal 18, 268, 658.
[244] R. Langer (n 130) 151-52.
[245] League of Nations Official Journal 19, January 1938, 10.
[246] In his speech in Rome in front of an immense crowd of people, the night of December 11th, 1937, Mussolini announced the decision taken by the Grand Council of Fascism and it stated: 'Abbiamo voluto, durante lunghi anni, offrire al mondo uno spettacolo di inaudita pazienza. Non avevamo dimenticato e non dimenticheremo l'obbrobrioso tentativo di strangolamento economico del popolo italiano perpetrato a Ginevra. Ma qualcuno pensava che ad un certo momento la Lega delle Nazioni avrebbe compiuto un gesto di doverosa riparazione. Non lo ha fatto. Non lo ha voluto fare', Benito Mussolini, 'Per l'uscita dell'Italia dalla Società delle Nazioni', 11 december 1937, available on the following website <http://www.adamoli.org/benito-mussolini/pag0710-.htm> accessed 18 June 2019.

Kingdom.[247] This fact may draw our attention again on the impact of a public denunciation of international delinquencies, above all on a neo-imperialist State whose logics still responded to the Old World-Order.

E. Non-recognition against the extinction of States

Such *indirect* non-recognition was also in part the result of the fact that the Italian aggression on Ethiopia presented a different situation both from the Japanese invasion and occupation of Manchuria and from the Latin-American border disputes. In the Manchurian conflict, third states had something not to recognize, i.e. the puppet regime of Manchukuo, and a treaty entered into by Japan and the purported new regime.[248] In South America, third states could as well invoke non-recognition of the territorial gains at national borders by the other party. Ethiopia instead was completely annexed by Italy. In this case non-recognition of the Italian *de jure* title to territory meant the survival of a State, an action against the extinction of Ethiopia.

The recognition of the legal continuity of a State without a legitimate government – because in exile – was harshly criticized and labelled as a paradox.[249] These scholars' concern was about the increased disorder that the non-recognition doctrine could bring about. They held that the doctrine created a great amount of hostility and indeed threw Mussolini in the hands of Hitler.[250] According to us, however it was a rather simplistic and quite conservative view of international relations and international law.

If there was still a space of action for the *de jure* authority of the Negus, it can be summarized in Wright's answer at the question of Samuel Flag Bemis about what good, if any, the doctrine of non-recognition does: 'It gives them a hope that they will

[247] The economic sanctions provided for many exceptions regarding important strategic goods in the armaments sector, such as iron, steel, copper, zinc, lead, cotton, and wool. Moreover, there was the exception of the sanction of the interruption of oil supplies, which alone could have led to the paralysis of the Italian action. It should also be remembered that while the League of Nations carried out this effort to condemn Italian action, the secret Anglo-French negotiations went ahead, in search of that diplomatic compromise known as the "Hoare-Laval compromise", see E. Di Nolfo (n 195) 194.

[248] J. W. Garner, *Non-Recognition of Illegal Territorial Annexations and claims to Sovereignty* (n 62) 679:

[249] 'We are left today with certain paradoxes in that we do not recognize the extinction of states. This is the positive-negative aspect which Mr. Padelford brought out: we have the recognition of the continuance of a state, but without a government to represent it. And we have, conversely, some instances in which this substitute authority exists outside of the original territory and is also non-recognized! So we find ourselves with the non-recognition of a conquest and a non-recognition of a substitute authority. The paradoxes grow', M. W. Graham in H. Briggs (n 38) 95.

[250] E. M. Borchard in *Ibid.*, 96.

eventually escape the oppressor [..] They still have the hope that it will be restored when the present period of wars is over'.[251]

In conclusion it may be said that the international community, led by France and Great Britain, violated obligations under the Covenant of the League by allowing a complete decentralization of the obligation with regard to the Italian title over Ethiopia. However, a form of indirect non-recognition – through the issuing of credentials to the Negus and his delegates – was put into effect. The Italian case indeed inaugurated a period in which the doctrine would be used against the extinction of States, giving governments in exile the hope to regain full sovereignty at the end of the war.[252]

As a matter of fact, the decision about the decentralization of the sanction of non-recognition was taken without a vote in the Assembly, but per *consensus*, showing how Member States were unwilling to go openly against a norm of the Covenant, that embodied in Art. 10. We can thus suppose that States were aware to act contrary to international law.[253]

2.3. German and Russian conquests: the test for the obligation of non-recognition outside the League

On October 19, 1933, about nine months after Adolf Hitler was appointed chancellor of Germany, the German Government sent the League's Secretary-General a notice

[251] Q. Wright in *Ibid.*, 94. Professor Padelford expressed a similar idea: '[..] conquered governments would be committing no aggression in using armed force to regain the territory or political integrity which they had lost. This may be a matter of consequence some day', N. J. Padelford in *Ibid.*, 83-4. This practice can also be read as an anticipation of the establishment of the principle of self-determination of people in the aftermath of the war.

[252] The US in particular would remain loyal to the doctrine of non-recognition. In a memorandum of conversation with the Chargé d'Affaires of the Italian Embassy, Mr. Cosmelli, the Assistant Chief of the Division of European Affairs, Tittman reported: 'Apparently Cosmelli felt in making this recommendation that it would be easier for us to recognize the Empire after England and France had done so. In fact, he stated in so many words that action on the part of Great Britain or France might present a good opportunity for us to take a similar step in connection with the appointment of a new Italian Ambassador' (Foreign Relations of the United States Diplomatic Papers, 1938, the British commonwealth, Europe, Near East, and Africa, Volume II, *Memorandum of Conversation, by the Assistant Chief of the Division of European Affairs* (*Tittman*), October 5th, 1938, Washington, available on the website of the Department of State of the United States <https://history.state.gov/historicaldocuments/frus1938v02/d573> accessed 18 June 2019. Then, it was the Under-Secretary of State, Welles, that informed the outgoing Italian Ambassador of the President's reply. The President desired to make very clear that accepting the new Ambassador 'would imply in no sense any change' in their relationship with Italy, in other words, the recognition of their Empire (Foreign Relations of the United States Diplomatic Papers, 1938, the British commonwealth, Europe, Near East, and Africa, Volume II, *Memorandum of Conversation, by the Under Secretary of State* (*Welles*), November 5th, 1938, available on the website of the Department of State of the United States at <https://history.state.gov/historicaldocuments/frus1938v02/d574> accessed 19 June 2019.

[253] 'I have no question, but that Great Britain and France and other countries violated their obligations under the Covenant of the League of Nations when they recognized the Italian title to Ethiopia. *But they did recognize it.* It was an exercise of a legal power, and possibly, through the large number of those recognitions, even though they were in breach of legal obligations, Italy may have acquired title. If the recognitions had not been accorded, however, Italy would not have acquired legal title' (emphasis added), see Q. Wright in H. Briggs (n 38) 90.

of withdrawal.[254] The ostensible reason was the refusal by Western powers and by the League to acquiesce in Germany's demand for military parity. It was however well known to the world that the German withdrawal from the League and its massive military build-up was a prelude to an aggressive policy in Europe, which in fact would be substantiated by the annexations of Austria, the Czechoslovak provinces of Bohemia and Moravia and finally of Poland.[255] It has to be said, however, that at the time of these territorial seizures, Germany was no more in the two years' period triggered by the notice of withdrawal and thus no more under the obligations imposed by the Art. 1(3) of the Covenant. From October 1933 to October 1935, however, Germany could be still held accountable by the members of the League for violations of the Covenant and for its massive re-armament policy pursued in contravention of numerous international agreements.[256]

A. The reluctance of the League's Members to apply non-recognition to the German rearmament

On October 14, Germany had left the Disarmament Conference, whose task was the implementation of Art. 8 of the Covenant – which required States to reduce 'national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations'. None of the Great Powers delivered a direct protest to Germany nor they imposed sanctions. They adopted a very cautious stance and tried to resolve the issue on a bilateral basis.[257] Subsequently, in March 1935, Germany unilaterally denounced Part V of the Versailles Treaty, which imposed an almost total disarmament of the country.[258] In the same days, Germany was passing a law which re-established the compulsory military service.

[254] League of Nations Official Journal 15, January 1934, 16.

[255] 'These, gentlemen, are the purposes for which Germany requires the remilitarisation of the Rhineland zone bordering on France. It is a question of setting up the hegemony of Germany over the whole European continent, and I ask you, Must and shall the League of Nations condone the promotion of this objective?', M. Litvinoff, Soviet Union Delegate, at Council Third Meeting of the Ninety-First Extraordinary Session, League of Nations Official Journal 17, April 1936, 321.

[256] As regard the obligations under the Covenant, Germany was prompt in paying to the League $134,000 in gold on its contributions in arrears and promised to settle its accounts entirely.

[257] K. D. Magliveras (n 11) 34.

[258] The German justification for the unilateral action of March 1935 was based on the principle of reciprocity. Germany argued that the Allied Powers were bound to her by treaty obligations to reduce their own armaments, and her duty to continue to observe the clauses of Part V of the Versailles Treaty was conditional upon the fulfilment of the Allied Powers' duties.

At this point, France, concerned with these developments, presented the matter before the Council invoking Art. 11(2) of the Covenant.[259] The French Government pointed out that in both cases Germany had deliberately repudiated by a unilateral act the contractual engagements embodied in the treaties it had signed. Moreover, France drew the Council's attention on the fact that by virtue of the Preamble to the Covenant, Germany remained bound to 'observe a scrupulous respect for all treaty obligations' until the expiry of the two years' period from her notification of withdrawal.[260]

On April 17, 1935, the Council adopted a draft Resolution where it declared that Germany had failed in the duty incumbent on the members of the international community to respect the undertakings which they have contracted. Moreover, it condemned any unilateral repudiation of international obligations. Importantly, the Council affirmed that 'by this unilateral action, the German Government *confers upon itself no right*'.[261] This was a timid attempt by the Council to appeal again to the doctrine of non-recognition, declaring German actions as null and void. However, it deliberately avoided to strongly condemn military conscription in Germany because it feared that such a resolution would make Germany's return to the League impossible.[262] The Council confined itself to appoint a committee of enquiry with the purpose of advancing 'measures to render the Covenant more effective in the organization of collective security and to define in particular the economic and financial measures which might be applied, should in future a State, whether a Member of the League or not, endanger peace by the unilateral repudiation of its international obligations'.[263]

In a letter, dated April 29th, 1935, the Canadian Government informed the Council that it intended to join the Committee of enquiry that was to be set up. Interestingly, however, Canada referred that '[i]n view [..] of the possibility of its participation in the work of the Committee being interpreted as involving acceptance of the view that, under the Covenant of the League of Nations, repudiation of such international obligations without recourse to war calls for the application of sanctions

[259] Art. 11(2) of the Covenant of the League of Nations (n 4): 'It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends'.

[260] League of Nations Official Journal 16, May 1935, 569.

[261] League of Nations Official Journal 16, May 1935, 551(emphasis added). More specifically the resolutions pointed out that such unilateral denunciation might endanger the very existence of the League of Nations as an organization for maintaining peace and security, see C. G. Fenwick, 'The denunciation of the disarmament clauses of the Treaty of Versailles' in [October 1935] 29(4) *The American Journal of International Law* 676.

[262] K. D. Magliveras (n 11) 35.

[263] League of Nations Official Journal 16, May 1935, 551-52.

by League Members, or that the adoption of such a policy is necessarily feasible and desirable, the Canadian Government wishes to make it clear that its participation does not imply acceptance on its part of such an interpretation of the Covenant'.[264] This declaration was the symptom that States were sceptical about imposing sanctions – including those flowing forth from non-recognition – to unilateral repudiation of international treaties on disarmament. The committee, indeed, was never set up.

B. Unlawful possession of armaments as a means contrary to the Pact and the Covenant? The preventive behaviour of Germany

A. D. McNair included in the means contrary to the Pact of Paris and the Covenant of the League of Nations, which caused the doctrine of non-recognition to apply, in addition to certain uses of armed force, also the possession of armaments without the concurrence of the Council and in excess of the limits set out in Art. 8 of the Covenant. Under this light, Germany could represent the perfect case to test the application of the doctrine as a result of a violation of international engagements on disarmament.

The German rearmament, however, could be hardly classified as a means contrary to the Pact of Paris or the Covenant of the League. The Stimson Note and Assembly Resolution of March 11th, 1932 referred to 'any situation, treaty, or agreement which may be brought about by means contrary...' As already said, the emergence of an obligation of non-recognition was strictly connected with Art. 10 of the Covenant which aimed at protecting members from external aggressions. The obligation, as envisaged by the Covenant of the League and by the Pact of Paris, although widely referred to any *situations* brought about contrary to these treaties, was confined to acts of unlawful territorial acquisitions and the advantages thereof.

Germany acted in a preventive manner, by increasing its military arsenal before and by proceeding to the occupation of neighbouring countries only after its effective withdrawal from the League.[265] In 1933, there was only the spectrum of German expansionism but not yet its concrete application. Therefore, the German unilateral withdrawal from international obligations found the League with inadequate instruments to react.[266]

[264] *Ibid.*, 909, July 1935, "Preparation of Measures to Render the Covenant More Effective in the Organisation of Collective Security". The United Kingdom too adopted a narrower interpretation of the question of sanctions, see C. G. Fenwick (n 261) 676.

[265] Germany indeed withdrew from the League of Nations violating the principle of good faith inherent in Art. 1(3) of the Covenant.

[266] Even if it was clear that Hitler's plans were of conquest and aggression. 'What is to be done, I ask, if a State demanding or seizing the right to armaments is ruled by people who have announced to the whole world a programme of foreign policy consisting not only in a policy of *revanche*, but also of unlimited conquests of foreign territory and

C. The remilitarization of the Rhineland

Germany continued to violate international obligations even after its withdrawal from the League. On March 19, 1936 Germany unilaterally repudiated its obligations under Articles 42 and 43 of the Versailles Treaty with respect to demilitarization of the Rhineland zone guaranteed by the Treaty of Locarno[267], by which Germany and France agreed to guarantee the maintenance of the territorial *status quo* of their frontiers, their inviolability, and the observance of the stipulations concerning the demilitarized Rhineland zone.[268]

With the remilitarization of the Rhineland in March 1936, France and the United Kingdom were confronted for the first time with the result of their *appeasement* policy towards Germany. In a tripartite meeting between France, United Kingdom and Belgium, the possibility of applying economic and financial measures to Germany was discussed. However, since the public opinion in Great Britain was inclined to see the Versailles Treaty as unfair to Germany and over-restrictive, the British government decided not to act.[269]

In the meanwhile, the Council of the League of Nations on March 19th, 1936, condemned Germany's occupation of the Rhineland as illegal.[270] The Council noted that the only legal justification adduced by Germany for the violation of the treaty relied on the incompatibility between the Franco-Soviet Treaty and the Locarno Treaty. Since the Franco-Soviet Treaty had not been ratified, it was not in force when German troops marched into the Rhineland. Moreover, even if the treaty had been ratified, Art. 3 of the Locarno Treaty[271] requested that every dispute arising between

the destruction of the independence of entire States, by people who, having publicly announced such a programme, far from repudiating it, continually circulate it and bring up their country in that spirit?', M. Litvinoff, Soviet Union Delegate, in Council Meeting of April 17th, 1935, League of Nations Official Journal 16, May 1935, 556.

[267] Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy; October 16, 1925 (The Locarno Pact), available on Avalon Project website at <http://avalon.law.yale.edu/20th_century/locarno_001.asp> accessed 26 January 2019.

[268] K. D. Magliveras (n 11) 38. The argument put forward was that the Treaty of Locarno was incompatible with the Franco-Soviet Pact of May 2, 1935, which was described as a "Mutual Assistance Pact".

[269] See Minutes from the Foreign Office meeting on the Treaty of Locarno of 11 March 1936 at <http://www.nationalarchives.gov.uk/education/resources/german-occupation/> accessed 19 June 2019.

[270] 'That the German Government has committed a breach of Article 43 of the Treaty of Versailles by causing, on March 7, 1936, military forces to enter and establish themselves in the demilitarized zone referred to in Article 42, and the following articles of that treaty, and in the Treaty of Locarno', League of Nations Official Journal 16, March 1936, 78.

[271] Art. 3: 'In view of the undertakings entered into in Article 2 of the present treaty, Germany and Belgium, and Germany and France, undertake to settle by peaceful means and in the manner laid down herein all questions of every kind which may arise between them and which it may not be possible to settle by the normal methods of diplomacy:

Any question with regard to which the Parties are in conflict as to it respective rights shall be submitted to judicial decision, and the parties undertake to comply with such decision.

All other questions shall be submitted to a conciliation commission. If the proposals of this commission are not accepted by the two Parties, question shall be brought before the Council of the League of ns, which will deal with it in accordance with Article 15 of the covenant of the League [..]', The Locarno Pact (n 267).

the parties should be submitted to judicial procedures, conciliation procedures or, on its failure, to the Council of the League of Nations according to Art. 15 of the Covenant.[272]

Was non-recognition applicable in these circumstances? As for the previous German violations of international obligations on armaments, the doctrine could not be applied because there had not been resort to force.[273]

D. The post-war assurances of Austrian independence

After World War I, the Allied Powers tried to create a bulwark against any future attempt on the part of Germany to bring about a union of the two countries. Art. 80 of the Treaty of Versailles read in part: 'Germany acknowledges and will respect strictly the independence of Austria [..] she agrees that this independence shall be inalienable, except with the consent of the Council of the League of Nations.'[274] Austria, on its part, recognized by Art. 88 of the Treaty of St. Germain that: '[t]he independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power'.[275]

Since Germany was bound by the Treaty of Versailles to recognize the Treaty of St. Germain, the provisions of the latter were equally binding on Germany.[276] These guarantees were later reinforced by the Geneva Protocol No. 1 of October 12th, 1922. According to the Protocol, Austria agreed also to 'abstain from any negotiations or

[272] Q. Wright, 'The Rhineland Occupation and the Enforcement of Treaties' in [July 1936] 30(3) *The American Journal of International Law* 487.

[273] Wright rightly stated: 'The development of collective sanctions against treaty violations in general is far more difficult than the development of collective sanctions against an aggression defined as resort to force in violation of obligation', see Q. Wright, 'The Concept of Aggression in International Law' [July 1935] 29(3) *The American Journal of International Law* 375. Moreover, one has to keep in mind that Germany was no more a member of the League at all effects. League's actions would prove less effective than before.

[274] Treaty of Peace with Germany (Treaty of Versailles), singed at Versailles, June 28, 1919, Section VI, "Austria", Art. 80 at 87, available at <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf> accessed 20 June 2019.

[275] Treaty of St. Germain, signed at Saint-Germain-en-Laye, September 10th, 1919, Art. 88, available at <https://en.wikisource.org/wiki/Treaty_of_Saint-Germain-en-Laye/Part_III#Article_88> accessed 20 June 2019.

[276] In Art. 434 of the Versailles Treaty (Ibid) Germany agreed that 'Germany undertakes to recognise the full force of the Treaties of Peace and Additional Conventions which may be concluded by the Allied and Associated Powers with the Powers who fought on the side of Germany and to recognise whatever dispositions may be made concerning the territories of the former Austro-Hungarian Monarchy, of the Kingdom of Bulgaria and of the Ottoman Empire, and to recognize the new States within their frontiers as there laid down'.

from any economic or financial engagement calculated directly or indirectly to compromise this independence'.[277]

E. The 1931 project of customs union between Germany and Austria. The PCIJ Advisory Opinion and the inapplicability of Art. 10 of the Covenant

The force of these treaties, and in particular the last one, was tested prior to the *Anschluss*. In March 19, 1931, indeed, Germany and Austria signed a Protocol for the formation of a customs union.[278]

It was France that brought the matter on the Council's table. In the memorandum of May 18th, 1931, it stated: 'the signatories of the Protocol of March 19th, 1931, had agreed that the Council should be the arbitrator of Austria's independence. It is therefore for the Council to seek to discover by all means which it may consider desirable whether the Austro-German Protocol compromises this independence.'[279]

The Council of the League of Nations requested the Permanent Court of International Justice to render an Advisory Opinion stating whether such Protocol could be compatible with Art. 88 of the Treaty of St. Germain and the Geneva Protocol No. 1 of 1922. The majority of the Court judges found that the Protocol was not inconsistent with Art. 88 of the Treaty of St. Germain since 'Austria's independence is not strictly speaking endangered'. On the contrary, the projected regime between the two countries 'would be incompatible with Protocol No. 1 signed at Geneva on October 4th, 1922' as 'it is difficult to maintain that this regime is not calculated to threaten the economic independence of Austria'.[280]

Could Art. 10 be applied at this stage of the Austro-German affair and thus also the doctrine of non-recognition? The Advisory Opinion of the PCIJ remarked on this

[277] Geneva Protocol No. 1, signed by Austria, Czechoslovakia, France, the United Kingdom and Italy and adhered to by Spain and Belgium, available at <https://archive.org/details/restorationofaus00leagrich/page/38> accessed 20 June 2019.

[278] Text of Austro-German Protocol for the Establishment of a Custom union, March 19th, 1931, League of Nations Official Journal 12, July 1931, Annex 1283a, 1160-63.

[279] *Ibid.*, 1163-72, Annex 1283b.

[280] PCIJ, *Customs Regime between Germany and Austria, Advisory Opinion*, PCIJ Series A/B. No 41, 52. Six members of the Court, while concurring in this opinion, released a declaration in which they stated that the proposed customs union would violate both the Treaty of St. Germain and the 1922 Treaty (see *Declaration of M. Guerrero, Count Rostworowski, M. Fromageot, M. Altamira, M. Urrutia and M. Negulesco*, available at <https://jusmundi.com/en/document/opinion/en-customs-regime-between-germany-and-austria-declaration-of-m-guerrero-count-rostworowski-m-fromageot-m-altamira-m-urrutia-and-m-negulesco-saturday-5th-september-1931#opinion_1703> accessed 20 June 2019); seven members of the Court instead wrote a dissenting opinion which contended that the proposed project was 'compatible both with Article 88 and with the Geneva Protocol No. 1 of 1922' (see *Dissenting Opinion of M. Adatci, M. Kellogg, Baron Rolin-Jaequemyns, Sir Cecil Hurst, M. Schücking, Jonkheer van Eysinga and M. Wang*, PCIJ Advisory Opinion 74, available at <https://jusmundi.com/en/document/opinion/en-customs-regime-between-germany-and-austria-dissenting-opinion-of-m-adatci-m-kellogg-baron-rolin-jaequemyns-sir-cecil-hurst-m-schucking-jonkheer-van-eysinga-and-m-wang-saturday-5th-september-1931#opinion_429> accessed 20 June 2019).

point: '[a]s regards the Covenant of the League of Nations, however, while it certainly contains an undertaking to respect the territorial integrity and political independence of each Member and even to preserve as against external aggression this territorial integrity and political independence, it must be observed that it contains neither any undertaking on the part of States not to alienate their own independence, of which they alone are in principle entitled to dispose, nor any undertaking not to seek economic advantages calculated to compromise the independence of another State which is free to dispose of it as it pleases'.[281] The answer is thus that non-recognition by the League of Nations ex Art. 10 could not be invoked because the Covenant did not provide for the hypothesis in which it was the State concerned which intentionally accorded the release of part of its sovereignty to another State. This was exactly the plan that Hitler has in mind from the beginning: 'to convince the world that the Anschluss was the result, not of force, but of a mutual desire on the part of the inhabitants of both countries'[282]

F. The Anschluss: democratic aspirations or German use of force?

In July 25th, 1934, Austrian Nazis under the instructions of German Nazi Officials murdered Chancellor Dollfuss. The *putsch*, however, was not successful, and the anti-Nazis managed to constitute another government under Chancellor Kurt von Schuschnigg.[283]

It was exactly von Schuschnigg that was summoned in Berchtesgaden on February 12th, 1938, for a conference with Hitler.[284] It was later revealed that 'a great deal of force was displayed at this time. General Jodi's diary, which was presented as evidence during the trial of the major war criminals at Nuremberg, noted that Schuschnigg was 'put under heaviest political and military pressure.'[285] Schuschnigg indeed opposed the German plan of annexation of the two countries, so much that he announced that a plebiscite would be held on March 13th. On March 11th, however, Hitler gave him a very strict ultimatum.[286]

[281] *Customs Regime between Germany and Austria, Advisory Opinion* (n 278) 48-9.

[282] R. E. Clute, *The International Legal Status of Austria, 1938-1955* [Ph.D Dissertation, Department of Political Science in the Graduate School of Arts and Sciences at Duke University, September 1957] 10, available from ProQuest Dissertations and Theses database.

[283] E. Di Nolfo (n 195) 168.

[284] Indeed, already at the end of 1937, the Austrian government had become aware of collaboration plans between German and Austrian Nazis to overthrow von Schuschnigg's government. The Austrian chancellor had thus

[285] R. E. Clute (n 282) 11.

[286] 'You are planning to hold a plebiscite. It must be called off. You must resign. A man of my choosing must be put in your place. If this is not done, the German army will march into Austria. You have just sixty minutes to decide', *Ibid.*, 12 citing K. von Schuschnigg, *My Austria* [A. A. Knopf, 1938] 8.

Schuschnigg resigned on that same day and the plebiscite was cancelled. The tone and the urgency of the ultimatum were indication of the fact that Hitler feared that the majority of Austrian people did not desire an *Anschluss*. And this was another display of German threat of use of force.

The same day, German Nazis imposed the election as Chancellor of Seyss-Inquart, whose first action was to call for the intervention of German troops in Austrian territories to re-establish order.[287]

On March 13, two days after the entry of German troops, the Austrian Government passed a law declaring Austria to be a part of the German Reich. By this time the Germans were well in control of the whole country. Indeed, Germans eventually decided to call a plebiscite on April 10, 1938. The 99.73% of the population voted in favour of union with Germany, but there is little doubt that a lot of pressure was exerted also during the plebiscite.[288]

Now it was clear to the international community that Germany had perpetrated an acquisition of territory through non-pacific means.

G. Austria's de facto withdrawal from the League of Nations

In a letter, dated March 18th, 1938, the German government informed the Secretary General that since the issuing of the Federal Constitutional Law[289] '[..] the former Federal State of Austria ceased to be a Member of the League of Nations'.[290]

On March 19th, the Mexican government replied to that communication stating that the suppression of Austria as an independent State was the result of armed foreign intervention. Furthermore, since the Council had not yet summoned a meeting with a view to the application of Art. 10 of the Covenant, the Mexican government announced that it unilaterally refused 'to recognize any conquest made by force' and

[287] 'As a result of Nazi pressure on aging President Miklas, Seyss-Inquart, an ardent Austrian Nazi, replaced Schuschnigg. The German forces entered Austria on the same day. The Germans claimed that their forces crossed the Austrian border in answer to a telegram from Seyss-Inquart requesting German troops to restore order in Austria. However, the testimony given at the Nuremberg trials proved conclusively that although Goering requested Seyss-Inquart to send such a telegram the Chancellor refused to comply. The telegram was in fact never dispatched. A German in the staff of the German Embassy falsely informed Goering by telephone that Seyss-Inquart assented to the plan. The entry of German troops must, therefore, be considered a premeditated, unilateral action', *Ibid.*, 13.

[288] *Ibid.*, 15. For a detailed account of the events which led to the German annexation see also Q. Wright, 'The Legality of the Annexation of Austria by Germany' in [October 1944] 38(4) *The American Journal of International Law* 627-33.

[289] On March 13, 1938 the Austrian government (in reality the Nazi regime set up by Germany) promulgated the Constitutional Law by which Austria was united with the Third Reich, to become what then was called 'Great Germany'.

[290] League of Nations Official Journal 19, March-April 1938, 237, "Situation of Austria in relation to the League of Nations".

it entered 'the most emphatic protest against the external aggression of which the Austrian Republic had just been the victim'.[291]

However, the Assembly, though deciding that Germany's communication did not constitute a proper notification of withdrawal, substantially accepted the *Anschluss* and made no claim for payment by Austria of her budgetary obligations after March 18, 1938.[292] Thus, unlike the Ethiopian case, Austria did not retain any *de jure* relation with the League, leading to its "*de facto* withdrawal" from the organization. In other words, while the annexation of Ethiopia by Italy did not lead to Ethiopia's termination of League' membership (through a form of *indirect* non-recognition by the League), Germany's annexation of Austria did lead to Austria's termination of membership in the League.

The Austrian annexation, as in the Ethiopian case, was only recognized *de facto* by the international community. In fact, the whole community did not hesitate to condemn it as an illegal act and few countries, except the Axis powers and their allies[293], granted *de jure* recognition of the incorporation of Austria into the German Reich.[294] However, generally, Germany's annexation was accompanied by fewer protests and condemnations with compared to Ethiopian annexation.[295]

This was likely due to some differences between the Austrian case and the Ethiopian one. The most important one is represented by the fact the Austrian government itself recognized the annexation.[296] Even if the act of recognition emanated from a puppet Nazi government, the fact that there was no other government embodying legal continuity of the Austrian State placed the country in a more difficult situation compared to Ethiopia – where the Negus strongly vindicated its role inside and outside the League. As a consequence, some States (but even some scholars) – in the international atmosphere preluding to WWII – could hide

[291] *Ibid.*, 239.

[292] K. D. Magliveras (n 11) 57.

[293] As soon as March 11, 1938, Mussolini gave his approval to the Anschluss, showing a complete disregard of the Stresa Front and committing all its foreign policy on the side of the Axis.

[294] When Germany claimed that the application for and grant of an exequatur involved recognition of the *status quo,* the United States held to the view that *de jure* recognition would not follow. See N. J. Padelford in H. Briggs (n 38) 87.

[295] Remarkably, some States – including the United States – proceeded to acknowledge that Austria had ceased to exist as an independent and sovereign nation and accordingly withdrew their legations from Vienna. K. D. Magliveras (n 11) 57. See also J. W. Garner, 'Questions of State Succession raised by the German Annexation of Austria' in [1938] 32(3) *The American Journal of International Law* 422.

[296] For example, on April 6, 1938, the US Ambassador in Berlin reported of having received a notification from the Austrian Minister in Washington to the effect that his country 'had ceased to exist as an independent nation and had been incorporated in the German Reich', see J. W. Garner, *Questions of State Succession* (n 293) 422.

themselves behind the idea that Austria had been genuinely incorporated into Germany and that this was a matter outside international purview.[297]

H. The two periods of Austria's international legal status: from the de facto recognition to the legal continuity of the State

As anticipated, from 1938 to 1940, most States granted *de facto* recognition to the *Anschluss*. The United States admitted the factual situation of the German occupation of Austrian territory, holding the German government responsible for Austrian debt services and payments. Moreover, it made no protest against the taking over of the Austrian Legation in Washington. As far as Great Britain is concerned, its position was aggravated by the strained relations with Italy due to the latter's failure to give guaranties as to the withdrawal of Italian troops from Spanish civil war. Indeed, 'Britain could hardly be expected to take any strong action in the Austrian matter except in cooperation with Italy'.[298]

With the outbreak of the Second World War – States' practice instead began to turn away from recognition of the *Anschluss* in a more decisive manner. On July 27, 1942, the Secretary of the United States announced that the US Government 'had never taken the position that Austria was legally absorbed in the German Reich'. Prime Minister Churchill, as well, in a speech at Mansion House on November 9th, 1940, referred to Austria as one of the countries for whom Great Britain had 'drawn the sword' and for whom victory would provide liberation.[299] This movement finally culminated in the Moscow Declaration of 1943 which declared the Anschluss to be 'null and void'. The signatories were 'in no way bound by any changes effected in Austria' and they wished to 'see re-established a free and independent Austria'.[300] It

[297] 'In the Austrian case, in my judgement, the non-recognition matter does not arise, because it seems to have been generally accepted that, owing to historical antecedents, Austria was a potential part of Germany, that the actual circumstances of March, 1938, while of course they were engineered, nevertheless took place within the national system which at the time was regarded as being outside of the international purview in a large measure', D. P. Myers in H. Briggs (n 38) 92.

[298] Q. Wright, *The Legality of the Annexation of Austria by Germany* (n 288) 627.

[299] Speeches reproduced in R. E. Clute (n 282) 27.

[300] Declaration on Austria: 'The governments of the United Kingdom, the Soviet Union and the United States of America are agreed that Austria, the first free country to fall a victim to Hitlerite aggression, shall be liberated from German domination. They regard the annexation imposed on Austria by Germany on March 15, 1938, as null and void. They consider themselves as in no way bound by any changes effected in Austria since that date. They declare that they wish to see re-established a free and independent Austria and thereby to open the way for the Austrian people themselves, as well as those neighbouring States which will be face with similar problems, to find that political and economic security which is the only basis for lasting peace. Austria is reminded, however that she has a responsibility, which she cannot evade, for participation in the war at the side of Hitlerite Germany, and that in the final settlement account will inevitably be taken of her own contribution to her liberation', Joint Four-Nation Declaration, October 1943, Moscow Conference, available on Avalon Project website at <https://avalon.law.yale.edu/wwii/moscow.asp> accessed 25 June 2019.

seems that the Allies regarded the Moscow Declaration as having re-established pre-Anschluss Austria. As a matter of fact, the majority of scholars today agree on the legal continuity of the Austrian State between the two periods.[301]

Nevertheless, it has to be pointed out that in the Moscow Declaration the allies specified: 'Austria is reminded, however, that she has a responsibility which she cannot evade for participation in the war on the side of Hitlerite Germany'.[302] Most likely, the allies wanted to stress the principle that an occupied/annexed territory must do whatever it can to oppose the annexing power and to regain its sovereignty (see *infra*, Chapter VII).

I. The Munich Agreement and the end of the Czechoslovak State

The territory of the Sudetes was an extensive mountain region that constituted the entire western border of Czechoslovakia and which was populated mainly by a German-speaking population (about 3 and a half million inhabitants). The Treaty of St. Germain signed after World War I did not recognize them the right of self-determination and consequently the constitution of their own State.

Since the victory of Nazism in Germany, a German autonomous movement had developed throughout Sudetenland. In 1932 Konrad Henlein founded a political party named *Sudetendeutsche Partei*. This party remained loyal to the Czechoslovak institutions until 1937, when Hitler began to manipulate it as an instrument of the Nazi action of undermining the Czechoslovak State. According to the coordinated plan between Hitler and Henlein, the question would be posed as a matter of autonomist claims to become gradually assessionist instances with respect to Germany.[303]

The German annexation of Sudetenland represented the most flagrant failure of Great Britain's policy of *appeasement*. At the end of September 1938, Prime Minister Chamberlain informed Hitler that there was still space to find a compromise.[304] He summoned a meeting in Monaco, to which also Mussolini and Daladier were invited.[305]

The Munich Agreement – signed in the night of September 29th, 1938 – stated: 'Germany, the United Kingdom, France and Italy, taking into consideration the

[301] For a detailed account of this issue see R. E. Clute (n 282) 21-41.

[302] Joint Four-Nation Declaration, Moscow Conference, 30 October 1943, available on Avalon Project website at <https://avalon.law.yale.edu/wwii/moscow.asp> accessed 29 June 2019.

[303] E. Di Nolfo (n 195) 237-38.

[304] *Ibid.*, 234-37. It seems that Chamberlain acted in the knowledge that Great Britain was not yet ready to face a world war, neither politically nor economically. Moreover, it has to be noted that Labourite pacifism was the prevalent sentiment in the British public opinion.

[305] *Ibid.*, 246-47.

agreement, which has been already reached in principle for the cession to Germany of the Sudeten German territory, have agreed on the following terms and conditions governing the said cession and the measures consequent thereon, [..]'. Then they listed eight points by which the fulfilment of the cession of Sudetenland to Germany would be carried out.[306]

If Chamberlain genuinely thought to prevent an armed conflict by conceding Sudeten territory to Germany, he would be disappointed only some months later, in March 1939, when Hitler definitely invaded Czechoslovakia and proceeded to the occupation of the provinces of Bohemia and Moravia.[307]

L. Recognition attitudes of the international community

Following the establishment of the protectorates on March 15th, 1939, the United States condemned German actions and announced their intention not to recognize the legality of the conquest. On March 21, Wilbur J. Carr, former Assistant Secretary of State and Chief of the Consular Bureau, closed the US legation in Prague and departed on April 6, on the ground that there were no authorities with whom to carry on diplomatic relations.[308] In addition, the United States, France, the United Kingdom and Egypt continue to recognize and deal with a Minister of the Czechoslovakian State.

As far as consular representatives were concerned, those States who continued to recognize the Czechoslovakian State, maintained their consuls and allowed Czechoslovakian consulates located in those territories to continue functioning. It is interesting to note that Germany did not request - as a rule - foreign consuls to obtain a German exequatur before entering Czechoslovakia.[309]

[306] 1) the Czechoslovak evacuation of Sudetenland starting from October 1st; 2) the completion of the evacuation within October 10th; 3) the creation of a commission in which Czechoslovakia would be represented and with the task of determining the conditions of evacuation; 4) the occupation of those same territories by German troops by October 1st; 5) the commission referred to above would also determine the territories where to hold a plebiscite and 6) fix definitive boundaries; 7) the concession of the right of option into and out of the transferred territories within six months from the date of the agreement; 8) the Czechoslovak commitment to release from their military and police forces any Sudeten Germans (see Munich Pact September 29, 1938, available at the Avalon Project website at <https://avalon.law.yale.edu/imt/munich1.asp> accessed 8 July 2019).

[307] In the meanwhile, also Hungary and Poland took advantage of the situation by occupying some portion of the Czechoslovak territory. Later, also an independent State of Slovakia would be created on the east of the country.

[308] See 'A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Czechoslovakia', available on the Office of the Historian website at the following website <https://history.state.gov/countries/czechoslovakia> accessed 09 July 2019.

[309] 'Various types of consular situations prevail in Czechoslovakia: (1) consuls who have obtained exequaturs from the "Protectorate" authorities; (2) consuls who have been provisionally recognized but who have not obtained exequaturs; (3) consular officials of countries which have asked for exequaturs but have not been granted them; (4) the case of the United States, which has not asked that its consul be given an exequatur', N. J. Padelford in H. Briggs (n 38) 87.

Unlike the Austrian case – where there was no government in exile neither before nor during WWII[310] – former President Edvard Beneš created the Czechoslovak National Liberation Committee in Paris in October 1939. The latter was recognized by the British and French Governments and from 1941 onwards also by the United States and all the allied countries.

Such attitude worked in the direction of the non-extinction of the Czechoslovakian State which, at the end of the war, returned to the pre-aggression situation. Thus, also here, according to the theory on the continuity of States, the original State never extinguished. Moreover, Czechoslovakia remained a member of the League until 1945.

M. Russian occupation of Finland and the expulsion from the League of Nations

In November 1939, the Soviet Union waged a bloody war against Finland. Stalin was indeed eager to expand his influence in Eastern Europe. The Council of the League of Nations, on December 14th, 1939, adopted a Resolution through which it 'associates itself with the condemnation by the Assembly of the action of the Union of the Socialist Republics against the Finnish State' and it decided that by its act, the URSS 'has placed itself outside of the League of Nations'. In other words, the Union of the Socialist Republics was expelled from the League of Nations.[311]

This was not the normal reaction of the League of Nations in front of an act of aggression. As a consequence of the expulsion of URSS from the League, member States had to deal with Russian annexations unilaterally. However, it has been pointed out that the treaty imposed upon Finland by the Soviet Union at the end of the Winter War of 1939-1940 (and in which URSS had been already identified as the aggressor) and by which Finland was forced to cede Karelia was not subjected to general non-recognition.[312]

3. The Beginning of the War: Non-Recognition as a Political-Military Expedient in the Hands of the Allies?

Since the Italian occupation of Ethiopia, the United Kingdom and France adopted the so-called policy of *appeasement* towards fascist and aggressive States (whose goal

[310] This is probably the reason why at the end of the war, the Allied Powers felt it necessary to stress out in a written declaration (the Moscow Declaration of 1943) that Austria should return to its pre-Anschluss condition, according to the theory of the continuance of States.

[311] League of Nations Official Journal 20, November-December 1939, 506.

[312] D. Turns (n 14) 129.

was to prevent a war on a global scale). The consequence of *appeasement* on the recognition field was that territorial acquisitions were only slightly condemned. States usually conceded *de facto* recognition only but in concrete allowed aggressive powers to dispossess nations of their sovereignty.

It seems, however, that the Allies acted consciously that *appeasement* was a temporary accommodation. Not by chance, when the precarious peace of the '30s had collapsed and WWII had broken out in September 1939 – with the German invasion of Poland – different considerations were applied.

With the beginning of the war, the German annexation of *Warthegau* in conquered Poland in 1939 was not recognized by the Allied Powers, who also refused to recognize the puppet States established in Slovakia in 1939 and in Croatia in 1941. These last two cases strongly resembled that of Manchukuo, where States did not recognize the advantage deriving from conquest, an advantage taking the form of new puppet entities.[313] Not even the annexation of Albania by Italy in 1939 was recognized by the United States and other western governments which only conceded de facto recognition. As for Ethiopia and Czechoslovakia, Albania retained membership in the League.[314] After the Soviet occupation of Eastern Poland by Soviet armed forces in September 1939, the US and other countries recognized a government in exile as the lawful government of Poland. The Soviet incorporation of the Baltic Republics too was not recognized by the majority of States, with the US in particular continuing to give diplomatic status to representatives of the former governments within their country.[315]

It has been underlined that Allied Powers' attitude towards new entities like Slovakia was due 'to the special circumstances of wartime and the fact that these entities were established by and allied to the Axis Powers, rather than to any sudden enthusiasm for the Stimson Doctrine *per se*'.[316] This factor obviously needs to be taken into account when examining the revival of non-recognition in wartime. However, it seems that the war took back the Allied Powers to a level of truth, especially in the Declarations by the great powers between 1941 and 1945.[317] Allied Powers' attitude had the merit of having guaranteed the non-extinction of States victim of aggression between 1935 and 1941 (*inter alia* Ethiopia, Austria, Czechoslovakia, Poland, and later the Baltic States).

[313] J. Crawford (n 110) 79.
[314] I. Brownlie (n 8) 415, 417.
[315] *Ibid.*, 417.
[316] J. Crawford (n 110) 130.
[317] Cold War logics were not yet properly into operation. Thus, one can suppose that the Allied Powers acted in the interest of victim States taking them back to the pre-aggression situation.

4. Concluding Remarks

Until recently, the principle of non-recognition was a matter of policy only. A fundamental step towards transforming the policy of non-recognition into an obligation was taken by the American administration through the enunciation of the Stimson Doctrine and then by the Assembly of the League of Nations in connection with the invasion of Manchuria by Japan.

The Stimson Declaration relied on the 1928 Pact of Paris while the League's Resolution relied on Art. 10 of the Covenant. Neither the Pact of Paris nor the Covenant of the League expressly provided for the obligation of non-recognition. However, it clearly emerged that the obligation of non-recognition was implicit in both instruments. With the Pact of Paris, the parties agreed not to recourse to war and to resolve international controversies by pacific means. It meant that to recognize a seizure of territory obtained by the use of force would rather seem an encouragement to recourse to war. As regard the Covenant, if the final goal of Art. 10 was to safeguard the territorial integrity of the members, the act of recognizing a seizure of territory would have been contrary to this object.

The Manchurian Affair – as well as subsequent cases of seizures of territory in the '30s – demonstrated that the field of application of the obligation of non-recognition, though widely referred to *any situation* contrary to the Pact or the Covenant – was only confined to acts of unlawful territorial acquisitions and the advantages thereof. In the Manchurian situation the advantage took the form of new puppet regime called "Manchukuo" so that the obligation amounted to non-recognition of acquisition of alien territory. Similarly, the other cases analysed above – even presenting different situations – can be all classified as unlawful seizures of territory and not as questions of statehood or governmental capacity.

The Chaco and Leticia cases represented an opportunity for the reaffirmation of the principle of non-recognition by the League of Nations that had taken the lead in respect of Manchukuo. The Peru-Colombia conflict over the Leticia region can be surely seen as a success as long as the Council clearly stated that Colombia's territory had been invaded by Peruvians and it recalled Assembly Resolution of March 11, 1932. One should also note that finally Peru returned to Colombia the region in question and it was induced to make reparations – even if only in the form of satisfaction. This was the evidence that, despite the criticism by which after Manchukuo non-recognition had become dead letter, the principle was steadily evolving.

The Bolivia-Paraguay border conflict, instead, was a more controversial case. The first point at issue was that member States did not unanimously agree on the identification of the aggressor between the two parties. As already remarked, the

sanction of non-recognition cannot avoid the necessity of ultimately determining the aggressor. Indeed, the League of Nations for a long period of time awaited to take a stand in the matter. Progressively it began to take an active attitude by informing Member States that the arms embargo should not be any more applied to Bolivia and inviting them to adopt further measures in order to render the existing ones more effective.

However, the League was not ready to face directly the question of non-recognition of the Paraguayan seizure of territory and no report was submitted to the vote of the Assembly. Instead for the first time the League experimented the decentralization of the obligation of non-recognition. Finally, indeed, the matter was the object of an arbitral award released on October 10, 1938, by the official representatives of Argentina, Brazil, Chile, the United States, Peru and Uruguay. Since most of Paraguayan conquests had been accepted, scholars of the time strongly criticized the League's inaction as well as the American nations' denial of the principle of non-recognition that they had reiterated with regard to the Chaco dispute in the Declaration of Principles of the American nations of August 3rd, 1932. However, one cannot forget the fact that before 1945, the peaceful settlement of dispute was the other side of the coin of the principle of non-recognition. As well explained by Quincy Wright before and by Hersch Lauterpacht later, the doctrine of non-recognition while responding to a logic of legality, did not break away too much from reality. Indeed, situations unrecognized in law could be the object of international purview. It was the international community that had to decide for the peace of the nations whether to validate or to invalidate an illegal conduct. Thus, the process of peaceful settlement of disputes perfectly represented the way by which a solution to a situation arising out of an illegal act could be cured by the international community even without returning to the *status quo ante*.

It is true, however, that the Leticia and Chaco cases represent two diverse conceptions of the principle of non-recognition. In the latter, the principle is associated with the concept of peace intended as 'order'. In the former, the Leticia case, the principle is instead the expression of peace as 'justice'. They, in other words, reflect two different stages of Quincy Wright's scale of legal maturity in so much as only in the Leticia case the international community 'restore victim of his losses'.[318]

In the latter line of thought, we can also read the practice from the Italian annexation of Ethiopia till the end of WWII. Since the *indirect* non-recognition of the Italian annexation of Ethiopia, indeed, there has been a progressive shift towards the 'fourth stage' of Wright, in other words there has been efforts to return to the

[318] Q. Wright, *The Stimson Note of January 7, 1932* (n 15) 344-345.

status quo ante with respect to the acts of aggression. The principle of non-recognition indeed developed as a tool against the extinction of victim States, which at the end of war regained their territorial integrity and political independence.

On the other hand, however, it is undeniable that the ever-increasing decentralization of the obligation of non-recognition has been detrimental to its effectiveness in the short time and one can also wonder whether the restoration of the *status quo ante*, i.e. the restoration to victim States of the situation prior to aggression, in the long run, would have been effectuated in the same manner without a world conflict.

It has to be recalled indeed that Great Britain and France decided to apply a policy of *appeasement* towards seizures of territory by fascist States with a view to circumscribe their expansionist aims. This policy prevented the full application of non-recognition to acquisitions of territory through non-pacific means. However, States formally conceded only *de facto* recognition to those seizures, and more importantly, they continued to accredit representatives of the governments in exile. Thanks to this *fil rouge*, at the end of the war, the Allied Powers *retroactively* banned the legality of the fruits of aggression and allowed the continuity of the personality of the victim States.

4.1. The relationship between the obligation of non-recognition and the ban on the use of force

In the previous chapter, we saw thatattempts to establish an obligation of non-recognition anticipated attempts to formalize a ban on the threat or use of force. One can safely assert that the instrument of non-recognition has been functional to the goal of progressively forbidding the use of force in international law.

The first link between non-recognition and the notion of use of force emerged during the Latin-American conferences in the second half of the XIX century. These countries developed a very progressive conception of the obligation of non-recognition. It was referred to an absolute prohibition of the use of force to effectuate territorial changes, also in the case of legitimate self-defence. However, these treaties were not ratified, and they did not become positive law. As a consequence of the US influence in the Pan-American movement, the principle of non-recognition would be limited to the notion of aggressive war.

Not by chance, both the 1928 Pact of Paris and the 1919 Covenant of the League of Nations contained the term 'war' rather than the wider and non-technical term 'armed force'.

It has been noted that Art. 11 of the Covenant of the League of Nations was less advanced than Art. I of the Pact of Paris in so far as it was only with the latter that the

prohibition to resort to war became unconditional.[319] However, the League's Covenant with 'arrangements for conciliation, discussion, and compromise'[320], lacking in the Pact of Paris, was maybe stronger. This is true also in relation to the doctrine of non-recognition. It has been noted, indeed, that the Stimson Note would be only a unilateral declaration if not endorsed by the Assembly of the League of Nations[321] with its all set of functionings.

The text of the resolutions of the Assembly about non-recognition surely overcome the problem of the limited reference to 'war'. The resolutions indeed seemed to comprehend a wider conception of 'use of force' in international relations.[322] This permitted to apply the obligation of non-recognition also to conflicts not properly labelled as 'resort to war', as in the Manchurian affair.[323]

4.2. The interplay between the obligation of non-recognition and the pacific settlement of disputes

During the first Pan-American conference of 1890, the US introduced the element of the treaty of arbitration as a condition for outlawing the right of conquest and applying the doctrine of non-recognition. They inserted a buffer element between the assessment of illegality of the territorial seizure and the articulation of the legal consequences arising from that illegality. It is safe to assert that the US played their strategic game since they were experiencing their neo-colonial phase at the end of XIX century and thus did not want to jeopardize completely their freedom of action in Latin-America. However, if ratified, this would have been a development with respect to the European experience. With the General Act of Berlin of 1884-5, indeed, European States limited themselves to affirm the duty of notification by the occupying/annexing power and the right of objections by third States.

The Stimson doctrine reversed previous US position. As it was explained by Acting Secretary of State Castle, the matters at issue were matters of opinion and of a careful evaluation of the facts rather than of legal points. Thus, according to the US government, cases of violation of the Pact of Paris seldom were capable of judicial decisions.[324] Great reliance was instead placed on non-recognition in conjunction with the practice of consultation, capable of transforming the Pact from a simply inspiring

[319] E. Milano (n 6) 103. Stimson in his address of August 1932, stated that the Covenant 'left unrestricted a zone in which…wars might occur without reprobation', reproduced in Ferrell (n 110) 165.
[320] R. H. Ferrell (n 7) 165.
[321] H. Lauterpacht, Recognition in International Law (n 42) 415-17.
[322] A. McNair (n 53) 68.
[323] H. Lauterpacht, *"Resort to war" and the Interpretation of the Covenant* (n 124) 45-46.
[324] F.A. Middlebush, *Non-Recognition as a Sanction* (n 35) 46.

declaration to an instrument for the peaceful settlement of disputes. Indeed, the US government excluded both the sanction of armed force and the economic boycott to respond to violations of the Pact. Non-recognition was conceived as a moral sanction preferable to any other coercive means as far as they would have been acts of war themselves.

As regards the Covenant of the League, instead, in case of resort to war by a member State, the other parties could apply economic or military measures. However, military sanctions were never applied and the economic boycott – applied only towards Italy – proved to be unsuccessful. Thus, the League too relied consistently on the instrument of non-recognition. Here the latter acquired the form of a collective legal obligation on all members of the League according to Art. 10 of the Covenant.

The logic of pacific settlement of disputes was inherent also in the obligation of non-recognition as formulated by the League. In its resolution of March 11, 1932, the Assembly stated that the provisions of the Covenant and of the Pact of Paris, at least in so far as 'the principles governing international relations and the peaceful settlement of disputes' were concerned, they were in full harmony.

Thus, also in the Covenant of the League of Nations the obligation of non-recognition was seen as a 'peaceful' alternative to other forms of sanctions provided in the Pact (cf. *infra*, Chapter VII, par. 7). Not only, but also the content of the obligation itself was dissociated completely from military or economic measures.[325] It is true that the obligation as implemented by the League provided for some measures of economic character, but it fell short of encompassing economic boycott.

4.3. The problem of objective law and the determination of the aggressor

In addition to the above reasons for objecting to the use of force and the economic boycott as international sanctions, there was another factor of primary importance for the United States. A necessary preliminary step in the application of these sanctions was the determination of the aggressor State and, in this delicate process, it was held, the United States could not take a part if the aggressor was to be determined by collective action. It means that the US government believed that the application of the doctrine of non-recognition did not necessitate of ultimately determining the

[325] 'In Article 16 the Covenant provided for economic sanctions as an instrument of redress, but Article 10, stipulating that members should undertake "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members", was not linked to the sanctions system. Rather, the Council of the League was entrusted with the task of 'advising' on the methods of complying with this obligation. The uncertainty on the precise implications of this provision was the main reason why the United States Senate refused to ratify the Covenant', see P. Malanczuk, *Akehurst's Modern Introduction to International Law* [Seventh Revised ed., Routledge, London/New York, 1997] 24.

aggressor. However, it has been pointed out that such a determination was a prerequisite for the doctrine.[326] The doctrine of non-recognition is indeed based upon the assumption of the existence of law and the possibility to distinguishing between what is lawful and what is unlawful. This distinction, however, while it does not present many difficulties in municipal systems, does not seem to be self-evident in the international society. Here, indeed, the State is both the subject as well as the legislator[327], and very often even the judge.

The Covenant of the League of Nations as well as the Pact of Paris contemplated the establishment of a system of objective law in the international community. The development of such objective obligatory laws pointed clearly to the creation of an international community in which a breach of law was deemed an offence against the entire community and each of its members. It is against this objective standard that the legal validity of the acts of States should be tested. The problem remained, however, about who was entitled to administer this test in the international society.[328] With the US getting out of the problem, the League of Nations developed its own test (also because it was the League that factually set the doctrine into operation).

It was not always an easy and speedy process for the League to arrive at a collective determination of the aggressor. One of the criticisms brought against the application of the doctrine in the Manchurian Affair was exactly that of the delay of the League's action. In presence of a ban on the use of force in international law subject to many exceptions (and towards which many differing opinions were expressed) and in the absence of an international tribunal with compulsory jurisdiction, the League tried anyway to vindicate the new objective law of nations and to have an impartial assessment of the facts. The League's *modus operandi* indeed was that of appointing committees of enquiry, which had to investigate *in loco* the situation at hand and by which an impartial assessment of the facts was expected. The reports of the committees were then submitted to the vote of all States reunited in the Assembly.

4.4. What about the international effects of non-recognition? Between order and justice

The reliance on the pacific settlement of disputes both in the Pact of Paris and in the Covenant of the League can be partly explained in relation to the function scholars attached to non-recognition. According to Quincy Wright before and by Hersh Lauterpacht later, the principle *ex factis ius oritur* is not contrary to the maxim of *ex*

[326] F. A. Middlebush, Non-Recognition as a Sanction (n 53) 53.
[327] T. Chen (n 77) 420.
[328] *Ibid.*, 427-28.

iniuria ius non oritur, or in other words, non-recognition does not detach law from facts. This not only because the maxim aims at invalidating an illegal act, but also because the *status quo* can be changed through a procedure of general consultation manifesting the will of the community of nations as a whole. It flows that the pacific settlement of disputes can represent a way by which a situation arising out of an illegal act can be cured by the international community even without returning to the *status quo ante*.

As a matter of fact, the Lytton Report did not contemplate a simple return to the *status quo ante* the aggression, instead it affirmed that a solution should be reached that would take into account the interests of Japan in Manchuria, as well as those of Soviet Russia.

The Paraguayan case was the most influenced by the principle that international disputes must be settled peacefully. As we have seen, indeed, the dispute was settled by an arbitral award delivered by some American nations and it did not return the Chaco region to Bolivia, rather it found a compromise solution.[329] Such a conception of non-recognition responded, as already stated elsewhere in this work, to the quest of peace with the concept of 'order'. In other words, the aim of the international community was to guarantee the international order among nations.

On the contrary, in the Leticia case the Assembly bravely stated that the territory of Colombia had been invaded by Peruvians. Not only, the Council also appointed an international commission who administered the occupied territory for one year. Moreover, the League's intervention allowed for the very first time the deployment of a military force under the flag of an international authority.[330] In this occasion, the principle of non-recognition though conformed to the pacific settlement of disputes, responded to a different logic, that of peace as 'justice'. From this narrative, it follows an important conclusion. Even conceived as a peaceful sanction, non-recognition could be informed of two different international effects, one more lukewarm and one more radical. Depending on different factors and equilibria, the international community is more or less capable of responding to attempts at changing the international order by defiant States. In the first case, it will try to re-establish the situation prior to aggression, in the other case, it will try to find a half-way solution

[329] 'Of all the conquests and titles which have been taken by conquest since 1932, Paraguay was perhaps most influenced by the doctrine of non-recognition and the principle that disputes must be settled by peaceful means, in the long run and the final analysis. Non-recognition here was coupled with the latter doctrine, and the American States did influence the final settlement', see N. J. Padelford in H. Briggs (n 38) 85.

[330] P.-E. Bourneuf, ''We Have Been Making History': The League of Nations and the Leticia Dispute (1932–1934)' in [2016] *The International History Review* 2.

(in each case at different degrees) to the situation at hand which does not correspond to the perfect vindication of justice according to existing rules.

The history of non-recognition starting from the Italian annexation of Ethiopia can be read as a confirmation of the trend inaugurated by the Leticia case. The great difference, however, and we turn back on this below, is that situations prior to aggression have been re-established at the end of WWII. Whereas the *appeasement* policy prevented the proper application of non-recognition by the League of Nations towards Italy, Germany and Russia, it was only with the 1941-1945 declarations that the Allied Powers got back to the principles enshrined in the Covenant.

4.5. The obligation: communitarianism or decentralization? Inside or outside the League of Nations? Assessing efficacy

The Manchuria crisis was marked by a truly collective response by the international community through the first application of the obligation of non-recognition. Statesmen and scholars from the beginning attached a strong communitarian value to the obligation as far as its application was ascertained by way of consultation among the collectivity of States and then enforced by a decision of the organs of the League. The Lytton Report was indeed adopted by unanimity in Assembly Resolution of February 24, 1933 and every member States – as well as some non-member States – then joined the enforcement measures formulated by the Committee of Twenty-One. The Leticia case too was addressed by the League with this highly organized communitarian approach.

On the other hand, the Chaco case represented the first decentralization of the obligation of non-recognition. The League of Nations delegated some American nations to reaffirm the principle of non-recognition and to set the dispute. Notwithstanding the result of the award, which condoned to Paraguay part of its conquests, the delegation to a regional setting was anyway based upon a previous clear stand taken by the League. The decision to lift the ban on the export of armaments only towards Bolivia, indicated at least that the League was about to determine the aggressor. Furthermore, on several occasions, before and during the American diplomatic effort to settle the dispute, the delegates of almost every member States in the Assembly reiterated that the American nations were acting in performance of the principles contained in the Covenant of the League of Nations (in particular Art. 10) and on behalf of the entire collectivity of States. These elements should not be disregarded because they signify that the members of the League were still holding to the theoretical collective rule of non-recognition while entrusting a group of States of its practical application, maybe also for a reason of subsidiarity.

The Italian invasion of Ethiopia represented instead a failure of the decentralization of the obligation of non-recognition. The difference between the Italian case and the Chaco case is that in the former the Assembly was not delegating a group of States with a clear task of settling the dispute according to the principles of the Covenant. The enforcement of the obligation was left to *individual* members of the League 'in the light of their own situations and their own obligations'. This 'formula' was clearly weaker than that adopted in the Chaco case. The reason lying beneath such a decision of decentralization was the *appeasement* policy pursued by some major powers, particularly the UK and France. Still, this can not be seen as a complete departure from the collective obligation of non-recognition.

After the lifting up of the economic sanctions on July 4th, 1936 – because ineffective and flawed by the sabotage of the UK and France – the Assembly assured however to remain firmly attached to the principles of the Covenant and other diplomatic instruments such as the declaration of American States of August 3rd, 1932. This means that the Assembly, faced with the non-cooperation of two powerful nations in implementing the economic sanctions, was still upholding the illegality of the Italian conquest and the principle of non-recognition of the fruits of aggression. Not by chance, the subsequent decision about the decentralization of the policy of non-recognition was taken without a vote in the Assembly, but *per consensus*, showing how member States were aware to act contrary to international law.

The organs of the League of Nations, through the Credential Committee, decided indeed to continue to accredit the Emperor and his delegates to the Assembly and the Council. Such form of non-recognition, that we called 'indirect non-recognition', exerted much pressure upon Italy so that it consequently decided to leave the League on December 11th, 1937.

It can be inferred that although the obligation of non-recognition underwent a considerable downsizing with regard to the Italian annexation, the League of Nations played a major role in determining Italy as the aggressor (on October 7th, 1935) and then continuing to accredit the Ethiopian government in exile. In other words, the League tried to oppose as much as it could the policy of *appeasement* of some western powers. The mark of illegality attached by the League over the Italian annexation was not easily erasable and most States did not go further than *de facto* recognition.

As for the annexations perpetrated by Germany, they were placed outside the reach of the League of Nations. The German government, indeed, adopted a very preventive behaviour by increasing its military arsenal before and by proceeding to the occupation and annexation of neighbouring countries only after its effective withdrawal from the League of Nations in October 1935. The massive rearmament policy pursed since 1933, shortly after the rise of Hitler to power, did not flow into the adoption of a policy of non-recognition, nor did the customs union with Austria

in 1931. The issue of the recognition of the *Anschluss*, effectuated in 1938, was thus left to each individual State to decide without even weak coordination on the part of the League of Nations. Nevertheless, the attitude of the international community was the same as for the Italian annexation. States indeed conceded only *de facto* recognition to the German title over Austria, not hesitating to condemn it as an illegal act. The fundamental difference with respect to the Ethiopian case was that the Austrian government itself recognized the annexation. The fact that there was no other government embodying the legal continuity of the Austrian State placed the country in a more difficult situation compared to Ethiopia. From this point of view, the policy of non-recognition, not being supported by a government in exile, was far less efficient than for Ethiopia or Czechoslovakia (whose leaders in exile had formed the Czechoslovak National Liberation Committee).

The German disintegration and then annexation of Czechoslovakia represented the *apex* of Great Britain's policy of *appeasement*. Starting from the conquest of Poland in 1939, indeed, different considerations were applied and there was a revival of non-recognition by the part of the Allies. Particularly, with the Declarations by the Great Powers from 1941 to 1945 all States victim of aggression were guaranteed the restoration of their *status quo ante*. In sum, all States victim of aggression between 1935 and 1941 experienced two periods in their international legal status. They were initially accorded *de facto* recognition as invaded States; then they were returned their previous status of independent entities.

We saw thus two shifts of the policy of non-recognition: from a purely communitarian approach to a progressive decentralization and then to its application outside the League by the part of the Allies. However, the efficacy of the instrument of non-recognition was not decremental along the shift. Manchuria only returned to China at the end of the war as well as, as just said, all states victim of aggressions between 1935 to 1941. Here the doctrine of non-recognition explicated its complete efficacy only after some years, and in particular, after the end of WWII. On the contrary, the Chaco and Leticia cases were resolved shortly after the aggressions by the community of States.[331]

Surely, the world war had a strong impact on the restoration of the situations prior to aggressions. A world conflict always rectifies the discrepancy between the force of

[331] This element is particularly relevant to examine. Very likely it was due to the American tradition on the field of the prohibition on the use of force in international law and the principle of non-recognition which made it easier to solve the dispute and to ban the fruits of aggression.

stability and the force of change.[332] However, the affirmation of the continuity of victim States was the result primarily of the operation of the obligation of non-recognition. There was an 'ideal' continuity before and after WWII based on the fact that the Allies resumed the principles enshrined in the Covenant and applied them. There is an element which makes us think that the war not necessarily was the only means for ensuring the efficacy of the principle of non-recognition in the long run. The policy of appeasement was indeed perceived by the major powers as a temporary accommodation. If the war had not broken out in 1939, there would have been a turning point anyway at a certain moment in which the western powers would have allegedly negated the fruits of aggression. The conflict, of course, triggered a chain of events that would be otherwise achieved through a long period of time and with uncertain results.

4.6. What about its function in international law? Is it only a sanction? Preventive and retroactive capacities

Being dissociated from any form of economic or military measure, the sanction of non-recognition was criticized by scholars of the '30s-'40s. They argued that the mere withholding of recognition intended as a supplementary moral sanction attached to the Pact of Paris and the Covenant of the League was not sufficient alone to secure the ends the doctrine sought to achieve and deplored the failure of non-recognition as a sanction.

First, it should be stressed that the obligation within the League was given a content slightly different from that formulated by Stimson. We have seen, indeed, that the Resolutions of the Assembly set forth some additional measures aiming at isolating as completely as possible the unlawful territorial situation from the rest of the world. Thus, it was not a mere moral sanction based on the pressure exerted by the public opinion of the world, as the US administration claimed.

Second, even if it is true that the US administration could have intended the principle of non-recognition as a convenient substitute for active participation in the maintenance of the law of nations[333], this was not so for the League of Nations. As we have seen, in the League the obligation of non-recognition was not theoretically the

[332] 'It is indeed true that war performs an important function in international society, and like revolution within a State, it is a means of rectifying the discrepancy between law and fact, between the force of stability and the force of change', T. Chen (n 77) 422.

[333] Not by chance, the US Secretary of State talked about the Stimson Doctrine as a 'formula which make the Kellogg Pact more effective without incurring the danger that this country would have to fight to preserve the peace', see F. A. Middlebush, *Non-Recognition as a Sanction* (n 35) 47 citing Address by Acting Secretary Castle on 'Recent Developments in the Kellogg Pact'.

first preferable response to violations of the Covenant. However, as long as the utilization of economic and military sanctions was problematic (due to the problems inherent in the collective security system and to the loopholes in the rule on the prohibition of the use of force), the sanction of non-recognition became the minimum of resistance to aggressions by third States. In its form of sanction, thus, the obligation of non-recognition was considered better than total inaction.

Moreover, it should be stressed that the obligation of non-recognition was not only a peaceful sanction. Rather, the ultimate function of the obligation was that of preserving international law. As already said, the obligation is based on the assumption that we can distinguish what is lawful and what is unlawful. In the international system, however, where States are both the subjects as well as the legislators, an act in derogation of the existing rule of law may be an illegal act or, in certain circumstances, may develop into a new rule.

While not denying that facts can have a law-creating effect (*ex factis ius oritur*), the obligation of non-recognition restrains the possibilities that an illegal act could permanently affect the international legal order without any challenge or process of verification. Its inherent *raison d'être* is the maxim *ex iniuria ius non oritur* by which an illegality cannot become *suo vigore* a source of legal right for the wrongdoer. As a result, the law of the strongest cannot replace existing law, at least not until there is a widespread agreement amongst the members of the international community corresponding to a shared interest to modify existing rules.

Moreover, from the practice until the end of WWII, it is possible to enucleate other two 'capacities' of the obligation of non-recognition. The first one is a 'preventive' capacity as far as the obligation aims at deterring future wrongdoers from committing the same violation.[334]

Of course, it is undeniable that the principle did not prove to be a fruitful deterrent prior to the war, but this happened partly because the fascist 'aggressor' States managed to withdraw from the League of Nations. In this way, the pressure exerted on them diminished and they thought they could not be prosecuted for their violations of the Covenant and the Pact of Paris (this impression was certainly given also by the policy of *appeasement* by UK and France). The behaviour of Germany, above all, which awaited its official withdrawal to affect the seizure of the Rhineland and then of Austria, can be read as a confirmation of the fact that as a collective sanction the obligation of non-recognition would have produced a deterrent effect upon would-be offenders.

[334] Cf. with the 'precautionary' function of non-recognition developed later on, *infra*, Chapter VI, par. 6.4.

The other capacity of the obligation of non-recognition is that of 'retroactivity'. We refer to retroactive capacity to indicate that the principle of non-recognition can heal a situation or at least banning its legality even some years later.

It has already been mentioned that the major powers only turned back to strongly condemn Italian, German and Russian annexations from 1941. In the 1943 Moscow Declaration, the Allies stated: '[t]hey regard the annexation imposed on Austria by Germany on March 15, 1938, as null and void. They consider themselves as *in no way bound by any changes effected in Austria since that date*' (emphasis added). Thus, they declared in 1943 that they did not recognize the annexation *ab initio*.[335] They had not conceded formal or *de jure* recognition, which had not given rise to any estoppel effect. However, the obligation of non-recognition could also bar the legality of a situation even contravening an estoppel effect produced by an act of recognition[336] (see *supra*, Chapter I, par. 2.1.E.). Consider, for example, the Italian annexation of Ethiopia. The UK had recognized it *de jure* on November 11, 1938. Nevertheless, in a communication sent in November 1940 by the British Secretary of State for the Colonies to the High Commissioner for Palestine, in connection with an action pending there, it was stated that '*de jure* recognition by His Majesty's government of the Italian conquest of Ethiopia had been withdrawn'.[337] On February 5, 1941, the Foreign Secretary announced in the House of Commons that 'His Majesty's government would welcome the re-appearance of an independent Ethiopian State, and recognize the claim of the Emperor Haile Selassie to the throne'.[338] Lauterpacht supposes that such withdrawal of recognition was due to the fact that the reason underlying the *de jure* recognition in 1938, i.e. the achievement of a general settlement aiming at the pacification of Europe and of the world, was destroyed with the Italian declaration of war upon Great Britain and France in 1940. More generally, we can deduce that in presence of a manifest violation of international law, such as the prohibition of conquest by the force of arms, also a *de jure* recognition can be subsequently withdrawn without incurring in international responsibility.

[335] In such a case, the 'withdrawal of recognition [..] is bound to have retroactive force. For, what is "null and void" (in French: "nul et non avenu") must be held invalid from its inception; this means that by virtue of the declaration the effects of the previously granted recognition are deleted "nunc pro tunc"', R. Langer (n 130) 114.

[336] Usually indeed '[d]ans la conception déclarative classique, la reconnaissance est irrévocable', J. Charpentier, *La Reconnaissance Internationale et l'Évolution du Droit des Gens* [Éditions Pedone, Paris, 1956] 275.

[337] Reproduced in H. Lauterpacht, *Recognition in International Law* (n 42) 356.

[338] *Ibid.*

4.7. What about the content? *De jure* and *de facto* recognition: which measures of intercourse are allowed?

The most exhaustive attempt at giving a content to the obligation of non-recognition was that of the Committee of Twenty-One. On June 14th, 1933, the Secretary-General informed member States of the measures adopted by the Committee resulting from the non-recognition of Manchukuo. Notwithstanding the Committee wished to take a drastic stance – not conceding any distinction between *de jure* and *de facto* recognition – it ended up in a *de facto* recognition of the Manchurian situation. Even if some writers have criticized the League of Nations' recommendations as too compromising and inadequate, it should be stressed that the interpretation put upon the obligation of non-recognition by the majority of States throughout the era of the League of Nations, reflected that view. In other words, States considered only *de jure* recognition as contrary to the principles of the Covenant.[339]

The granting of *de facto* recognition permitted the undertaking of some measures of intercourse with the non-recognized regime for the sake of international order as well as for avoiding an unduly high burden on non-recognizing States.

It is true, however, that the amount of intercourse in the absence of recognition is limited and it is largely of a remedial character. The question about which measures are allowed under an obligation of non-recognition is extremely important in order not to deprive the obligation itself of any real significance.[340] Indeed, some measures of intercourse can amount to implied (even called tacit/silent/presumed) recognition (see *supra*, Chapter I, par. 2.1.D.).

We saw that in the Covenant of the League of Nations, Art. 10 was not linked with Art. 16 about economic sanctions. In part as a consequence of this, the recommendations of the Committee of Twenty-One did not encompass economic boycott.[341] The main point of the Committee was that the puppet regime in

[339] '[..] in his statement to the Council of the League of Nations on 12 May 1938, the Emperor Haile Selassie insisted the recognition *de jure* – but not, it seems, recognition *de facto*, of the Italian conquest of Abyssinia was contrary to the obligations of the Covenant. This, moreover, was the interpretation which Great Britain and other States put upon their obligation of non-recognition. Thus, Great Britain, while professing to adhere to the obligation of non-recognition, recognized *de facto* the Italian occupation of Abyssinia. Other States acted in the same way – a line of conduct which was not challenged as being contrary to the assumed obligation of non-recognition', *Ibid.*, 347-48.

[340] '[..] when preceded by the acceptance of an obligation of non-recognition, it [de facto recognition] is a legitimate device only so long as we bear in mind that the difference between *de jure* and *de facto* recognition is one of substance and so long as *de facto* recognition is not used for the purpose of avoiding any obligation of non-recognition that may have been undertaken', *Ibid.*, 341.

[341] According to Lauterpacht, this should be a constituent feature of the obligation of non-recognition: '[t]he attitude of non-recognition cannot, in the nature of things and without giving rise to international complications over a prolonged period, be an instrument of effective pressure in the economic and cognate fields. Its purpose is an

Manchukuo would be excluded from the accession to international conventions and treaties, either closed or open to unilateral adherence. The granting of passports to citizens of Manchukuo by non-recognizing states, the permission of transactions in Manchukuo currency and the enabling nationals of a non-recognizing State to enter into contractual relations with anyone in Manchukuo, in part responded to the logic of protecting the citizens of the non-recognized regime as well as the freedom of commerce of the nationals of the non-recognizing States. Surely, however, this was also the mirror of the important commercial interests which non-recognizing States had with respect to Japan. As regards the replacing of consuls, the Committee highlighted that States could make provisions for replacing consuls in Manchuria without implying recognition of Manchukuo. Importantly, it also said that they should do nothing which could be interpreted expressly or by implication as a declaration that they regarded the authorities established in Manchuria as the proper Government of the country.

These were all measures which, according to scholars, would not amount to implied recognition of the new territorial situations also in normal circumstances[342] (i.e. without the operation of an obligation of non-recognition). More doubts were raised instead by those measures of intercourse which normally did presume recognition, particularly the granting and issuing of exequaturs, and the establishment of formal diplomatic relations[343] (a matter not regulated by the report of the Committee).

The picture is far more complicated by the fact that both *de facto* or *de jure* recognition can be implied[344]. Since we ascertained that only *de jure* recognition was considered contrary to the Covenant by member States, it is difficult to distinguish from acts implying *de facto* recognition and those implying *de jure* recognition.

expression of both moral disapproval, and, in law, of reservation of freedom of action in relation to a change brought about by means contrary to international law and expressly declared to be illegal. An attitude of this kind may be compatible with *de facto* recognition. The provisional character of the latter emphasizes the absence of any obligation to continue the recognition. It stresses the irregularity and the illegality of the new situation. As such it may be deemed to be compatible with the limited purpose of the necessarily imperfect sanction of non-recognition', *Ibid.*, 348.

[342] See P. Saganek, 'Forms of recognition' in (W.Czaplinski and A. Kleczkowska eds.), *Unrecognized Subjects in International law* [Scholars Publishing House Ltd., Warsaw, 2019] 82-88; H. Lauterpacht, *Recognition in International Law* (n 42) 383.

[343] Indeed, if the very preservation of consular offices where exequatur is neither asked nor received was not considered an act of implied recognition, scholars have expressed different opinions as regard the legal significance of a request and the issuance of a consular exequatur; P. Saganek (n 342) 90.

For Manchuria, this question did not arise since for a long period of time prior to 1932 consuls in Manchuria were not required to have exequaturs by the Chinese Government. That situation seemed to continue, and Manchukuo did not require foreign consuls residing in the territory to obtain an exequatur; see Padelford in Briggs and Padelford (n 185) 84.

[344] H. Lauterpacht, *Recognition in International Law* (n 42) 346.

These issues are solved by Lauterpacht with the following consideration: '[r]ecognition is primarily and essentially a matter of intention. Intention can be replaced by questionable inferences from conduct. Such inferences are particularly inappropriate when the general attitude of the State in question points to its continued determination to deny recognition'.[345] It follows that more so, whether some acts of States normally can be interpreted as presuming recognition (either *de jure* or *de facto*) of a new territorial situation, in presence of an obligation of non-recognition they lose their capacity of implying the intention of States.[346]

In this light, one can argue that even when an exequatur was requested on the part of the annexing power (for example in the Italian case) or diplomatic relations were established (for example the US towards German authorities in Austria[347]), recognition was not implied.

4.8. The 'time' factor

The 'time' factor is extremely relevant with respect to the obligation of non-recognition. From the beginning, indeed, the obligation played the role of a 'legal stabilizer'. In other words, the obligation prevented the consolidation of a certain acquired title that resulted from a violation of international law. In this way, as already

[345] *Ibid.*, 371.

[346] 'That principle [of non-recognition] pursues two independent objects. The first is to preserve the existing legal position and to prevent the operation of prescription. The second is to express moral disapproval manifested in the continued denial of legal title regardless of the apparent success achieved by the conduct, stigmatized as unlawful, as well as to exercise pressure upon the wrongdoer [..] that second purpose may, without affecting the first, be modified in practice, having regard to the necessities of commercial and other intercourse. Such modifications may materially impair the effectiveness of the weapon of non-recognition as an instrument of direct pressure, but its indirect value in the system of international jurisprudence and morality may still remain substantial and beneficent. This is one the reasons why the exaggerations of the doctrine of implied recognition must be carefully scrutinized in relation to the principle of non-recognition. If we fall a prey to the tendency to interpret various kinds of conduct as implied recognition, we may often be led to assume, without good cause, that the principle of non-recognition has been abandoned in a particular case. Conversely, if the doctrine of implied recognition is confined within its proper sphere, States may be in a position, without necessarily becoming disloyal to the general obligation of non-recognition, to adapt their conduct to the requirements of international intercourse and to the protection of their interests and those of their nationals. [..] This means that particularly exacting evidence of recognition is required in the case of States which have declared themselves to be pursuing a policy of non-recognition or, even more so, as being bound by an obligation of non-recognition. There is room for the view that in such circumstances nothing short of an explicit and unequivocal act of recognition will have the result of recognition', *Ibid.*, 395.

[347] 'On April 6 the United States the United States Ambassador in Berlin informed the German Government that [..] it "finds itself under the necessity as a *practical measure*" of closing its Legation at Vienna and of establishing a Consulate-General in its place". Did these statements amount to a recognition of the annexation of Austria? Such is the fascination of the doctrine of implied recognition that even writers who were critical of the action taken interpreted it as constituting both *de facto* and *de jure* recognition. [..] The view of the State Department as to the legal significance of its action was made known on a much later occasion, on July 29, 1942. The Secretary of State referred to the prevalent confusion as to the status of Austria and said: "[..] This Government has never taken the position that Austria was legally absorbed into the German Reich"', *Ibid.*, 398.

said in this work, it prevented the international order be changed by defiant States through the use of force.

Being caught between two rival maxims, *ex factis ius oritur* and *ex iniuria ius non oritur*, the principle of non-recognition holds the situation in suspense. Such suspension may ultimately 'result either in the restoration in fact of the *status quo ante*, or in the adjustment of law to the changed situation of facts'. In this second case, according to Chen 'a change of law indicates that the doctrine of non-recognition has exhausted is usefulness acquired under the pre-existing legal order'.[348] This does not mean that every successful breach of law can immediately assume the dignity of a new legal order. The problem of jurisprudence is precisely to find the point at which a rule of law ceases to represent the social reality and ought to give place to a new rule.

The results of an illegal act can become part of international law in three ways: 1) by prescription, 2) by consent of the injured party and 3) by recognition.[349] In cases where an obligation of non-recognition is in place, these methods of 'validation' of illegal acts are subject, however, to considerable restraints.

First, the consent of the injured party alone can hardly influence the legal situation, being it usually subject to duress.[350] For example, the fact that German authorities organized a plebiscite to endorse the annexation of Austria did not convince the world that the *Anschluss* was the result of democratic aspirations of the inhabitants of both countries. The international community, even if recognizing *de facto* the new territorial situation, did not acquiesce the fact that Austria had freely expressed its will and condemned it as an illegal act.[351]

As for recognition, when it is used to validate an illegal act, it is meant to have a 'quasi-legislative' function. However, as already underlined in this work, recognition must be carried out by the community of States as a whole for the sake of international peace and progress.[352] The international community's response to the Chaco dispute which recognized to Paraguay part of its conquests can be read under this light.

Finally, prescription, i.e. the passage of time with undisturbed possession, may eventually lead to a historical consolidation of title. Here, the principle of non-recognition plays a fundamental role. Indeed, continued protests and condemnations

[348] T. Chen (n 77) 441.

[349] H. Lauterpacht, *Recognition in International Law* (n 42) 428.

[350] This is intimately connected with another issue, that of the termination of the application of the obligation of non-recognition. The question is whether with the consent of the injured party the doctrine ceases to apply; see *infra*, par. 4.10.

[351] Also, because the Pact of Paris and the Covenant established a system of objective law according to which substantial violations, such as the prohibition of the use of armed force, was a matter of concern for all the contracting parties and not only for the States directly concerned.

[352] H. Lauterpacht, *Recognition in International Law* (n 42) 429. It has been also said that in this exceptional circumstance, recognition would have a constituent effect, see P. Malanczuk (n 325) 153.

by third States may prevent the changing of the *status quo* by defiant States for the merely passage of time.[353]

Yet, the problem of the passage of time is not completely resolved. It is uncertain if, once in operation, the obligation of non-recognition can be applied indefinitely. To put things differently, it is questionable whether third States can bear the effects of this privative consequence of international law for a prolonged period ([354]). On the one hand, it is arguable that as a matter of principle, the initial illegality can never be the source of legal right and that negative prescription does not merit acceptance as a general principle of law.[355] On the other hand, the efficacy of the doctrine depends on the degree by which States stick to their commitment to non-recognition over time, but we already observed that the application of the obligation of non-recognition can sometimes impose heavy burdens on the non-recognizing States. Authors have indeed maintained that non-recognition can not be conceived as an open-ended obligation.[356] Whereas the *termination* of the obligation in principle should consist in a return to the *status quo ante*, practically it is not necessarily so. The conditions to be applied to a contested situation over time should also take into account evolving factual conditions in the international society, in order to reach a final, enduring, settlement of the dispute.

4.9. What about its source of law?

The maxim of *ex iniuria ius non oritur* represents the *raison d'être* of the instrument of non-recognition. However, it differs from the duty's legal source. We already ascertained that in 1932, when the Stimson Note and the Assembly's resolutions were issued, the obligation of non-recognition had its basis in treaty law. Indeed, the Stimson Declaration relied on the Pact of Paris while the Resolutions of the League relied on Art. 10 of the Covenant. Neither instrument expressly provided for the

[353] See I. Brownlie (n 8) 422.

[354] M. Arcari, 'The relocation of the US embassy to Jerusalem and the obligation of non-recognition in international law' in [May 2018] Zoom-in 50 *Questions of International Law* 12.

[355] I. Brownlie (n 8) 422 note 3. In this regard it can be interesting to note that also for the formation of a custom the factor 'time' is extremely important. For the international custom which prohibits the threat or use of force by States, in particular, the international community as well as scholars have always been cautious in asserting that a new rule or a different interpretation had come into existence. Most importantly, it is a consolidated opinion that the custom on the ban of threat or use of force is not invalidated by 'frequent' violations of it, also because States usually care about legally justifying their actions, thus strengthening the legal force of the rule (see E. Cannizzaro, *Diritto Internazionale* [4th ed., Giappichelli Editore, Torino, 2018] 34-35). Thus, it means that with regard to particular norms, prescriptive rights have even more difficulty in being accepted. The application of the obligation of non-recognition, that developed as a precursor of the rule on the complete prohibition of threat or use of force, is probably the most evident expression of this presumption against prescription with regard to these rules.

[356] M. Arcari, 'The UN SC, Unrecognised Subjects and the Obligation of Non-recognition in International Law' in *Unrecognized Subjects in International law* (n 342) 239.

obligation of non-recognition. However, the principle was considered implicit in both treaties since their original ratification. It was only made explicit by the joint action of the Stimson Note and the League's Assembly Resolutions.[357]

It remains to be seen whether at the end of the period analysed in this part of the work – i.e. at the end of WWII in 1945, the obligation of non-recognition had become also a custom. Authors like O'Connell are sceptical about asserting that an international custom of non-recognition crystallized during the '30s.[358] From our historical/juridical conceptualization instead it can be inferred that a custom was in process of emerging.

When assessing the existence of a rule of customary international law, we need to see whether there are the necessary *usus* and *opinio iuris*. As regards the latter, the fact that the League of Nations approved the resolutions on non-recognition by unanimity could be cited as evidence of an emerging rule of customary international law. Moreover, no one State challenged the assumption that an obligation of non-recognition was flowing forth from Art. 10 of the Covenant and the Pact of Paris. Even if there were no individual statements of non-recognition by State members of the League, it is assumed that they felt the principle of non-recognition as legally binding upon them. Moreover, the obligation of non-recognition was stated again in many Latin-American instruments, which undoubtedly confirm the existence of the duty and the commitment of those States to the principle of non-recognition. Even at the critical turning point of 1935, States did not openly go against the principle of non-recognition – see for example the decision about the decentralization of the obligation with regard to the Ethiopian crisis – properly because States were aware of the fact that non-recognition was a binding rule of law. The fact that States usually conceded *de facto* recognition to annexations does not affect this conclusion in so far as in that period the obligation of non-recognition was conceived as contrasting only with *de jure* recognition.

As for the practice of States, it has to be noted that the Manchurian crisis was characterized by a truly collective response by the international community through the first application of the obligation of non-recognition. Every member States – as

[357] 'This action will go far toward developing into terms of international law the *principles of order and justice which underlies those treaties*, and the Government of the United States has been glad to cooperate earnestly in this effort" (emphasis added), Q. Wright, *The Stimson Note of January 7, 1932* (n 15) 344 citing the Statement of Secretary of State Stimson in reference to Assembly Resolution, March 11, 1932. See also L. Oppenheim (n 39) 141: 'So far as members of the League are concerned, the obligation [of non-recognition] implied in that Resolution must be regarded as *declaratory* of the obligations of Article 10 of the Covenant'. In fact, in the Resolution of the Council of the League of February 16, 1932 (League of Nations Official Journal, 1932, 383), i.e. the communication of the President of the Council to the Japanese representative, the obligation of non-recognition is said to follow from the terms of Article 10.

[358] D. P. O'Connell (n 89) 159. See also A. Pert (n 30) 6.

well as some non-member States – implemented the measures suggested by the Committee of Twenty-Two to give practical effect to the obligation of non-recognition of the Japanese occupation. The settlement of the Chaco and Leticia cases also implied the application of the obligation of non-recognition by the League through a rather organized way, under the direction of the League of Nations. Contrary to the commonly held view that since the Italian occupation of Ethiopia, the principle of non-recognition was completely abandoned and States returned to a logic of power politics and alliances, we have demonstrated that subsequent practice should also be regarded as a general confirmation of the policy of non-recognition. As observed by Brownlie: "[t]he British de jure recognition of Italian sovereignty over Ethiopia and the Munich Agreement were the most significant instances of failure to observe legal standards but the predominant trend in state practice was in favour of non-recognition'.[359] The fact that from 1939 the principle has been enforced by the Allies does not detract from this conclusion, helping instead to reinforce it.[360] We already stressed that when the Allies issued important declarations from 1941 to 1944, Cold War logics were not properly into operation and we can thus suppose that the Allied Powers acted in the interests of the victim States. Moreover, since there was an 'ideal' continuity before and after WWII, it means that the Allies resumed the principles of the Covenant and the Pact of Paris and applied them; enabling their actions to constitute a relevant practice for the purpose of ascertaining the customary nature of the obligation.[361] Moreover, it can be maintained that in 1945 the customary norm of non-recognition reflected the content of the norm initially contained in treaty instruments, the Pact of Paris and the Covenant of the League. Thus, there was no discrepancy between the customary norm and the norm developed through the application of conventional instruments.

In the end it can be maintained that in 1945, the principle of non-recognition had assumed a customary character, thus before the rule on the prohibition of the threat or use of force. Maybe it was exactly this continuous effort by the League to vindicate

[359] I. Brownlie (n 7) 420.

[360] Consider that quite all aggressor States decided to leave the League of Nations according to Art. 1 para. 3, violating the principle of good faith inherent in it (*inter alia*, Japan, Paraguay, Italy, Germany). This means that they thought to avoid the consequences of their actions by simply exiting the Organization. They thus implicitly believed that the obligation was not yet a customary norm (even if some of these States were also part of other conventional instruments such as the Pact of Paris and/or the Anti-War Treaty of Non-Aggression and Conciliation). It seems indeed reasonable to affirm that the obligation, while enjoying the *status* of 'universal law', did not form a custom until 1939 with the intervention of the Allies.

[361] It should be stressed that the League of Nations was always influential on the application of the obligation of non-recognition, and thus on the preservation of the international legal order, even after 1936. The determination with which the Organization continued accrediting governments in exile (indirect non-recognition) and labelling States as aggressors is an evidence of the centrality of its role for the survival of the obligation of non-recognition in general international law.

the force of the law against the force of arms through the principle of non-recognition that there has been a passing of the baton and an 'ideal' continuity between the League of Nations and the United Nations (UN) and the establishment of Art. 2(4) in the United Nations Charter. More precisely, it can be said that it has been the principle of non-recognition to – in a certain way – transfer that customary 'status' to the rule on the ban of the threat or use of force.[362]

4.10. The obligation of non-recognition, the continuity of States and international responsibility

O'Connell maintains that the obligation of non-recognition is only referred to the relationship between the aggressor and the victim State. It means that 'the violated right is that of the offended State, and not that of the community of nations, so that the illegality can cease to exist only with the consent of the offended'.[363] Such an interpretation of the obligation of non-recognition would however entail that 'the consent of a totally extinguished State must be obtained when there is no other authority left within the State to express that consent'.[364]

During this work, on the contrary, we shared the view that the obligation of non-recognition is based on a system of 'objective' laws which point to the creation of an international order where the violation of the rule on the use of force by States is deemed to be an offence against the international community as a whole. As a consequence, it was reasonable that third States could pronounce on the legality of acts of other States, lacking a central authority or tribunal to do it.[365]

Let us look at the German annexation of Austria in 1938. Here, as widely underlined, there was not a government in exile that could represent the legal continuity of the Austrian State. However, the fact that the Austrian government itself had given consent to the *Anschluss* did not mean that it was legal in the eyes of the

[362] Brownlie states that the evidence of a 'customary rule that the use of force as an instrument of national policy otherwise than under a necessity of self-defence was illegal' is to be found in the practice of States between 1920 and 1945. Particularly he refers to 'numerous statements in diplomatic correspondence and the instruments relating to non-recognition' which constitute evidence of a general practice accepted as law (I. Brownlie (n 7) 110). So, the author implicitly admits that it has been the principle of non-recognition of the fruits of aggression which has been instrumental, preparatory for the establishment of a complete ban on the use of force in 1945.

[363] D. P. O'Connell (n 89) 155.

[364] *Ibid.*

[365] '[The] principle [..] that a State is competent to determine the legality of the acts or conduct of other States [..] has been severely criticized from various quarters, but the criticism is misplaced and unsound. What wrong is there in such a judgement by a state whose interests are affected by the conduct of another state either directly by the conduct being violative of the provisions of a treaty made with it or indirectly by the breach of a general principle of international law as a member of the international order who is obviously interested in upholding the maintenance and vindication of international law? And largely the breaches are so definite and gross that a state may justly and rightly pronounce upon the illegality of a situation', S. R. Patel (n 45) 112.

international community, which in fact denied it recognition *de jure* from the beginning. This means that our hypotheses were valid: first, the consent of the injured (extinguished) party is not sufficient to legalize title nor to make the doctrine of non-recognition cease to apply; and secondly, it means that third States could permit the legal continuity of States victim of complete annexation.

We can thus wonder whether the fact that there has been no State succession at the end of the war for these victim States had some legal consequences. We already underlined that in the Moscow Declaration the Allies specified that Austria should bear some responsibility for the participation in the war on the side of Hitlerite Germany. With this declaration, the Allies wanted to uphold the principle by which an occupied/annexed territory must do whatever is in its power to oppose the annexing power and to regain its sovereignty. Since its original international status is not changed by the annexation, it necessarily follows that the victim State could be called to account for possible violations of international law once the proper sovereignty is restored.

4.11. About the erga omnes and jus cogens status of non-recognition

It must be acknowledged that few States of the international community demanded the correct application of the obligation of non-recognition by the other States. Only Russia consistently tried to stress the fact that acts of recognition of the Ethiopian annexation were contrary to the obligation of non-recognition as contained in Art. 10 of the Covenant. Notwithstanding scholars repeatedly underlined that States were violating rules of the Pact and the Covenant, the latter were more inclined to 'acquiesce' to violations of the obligation of non-recognition by other third States. It can thus be concluded that at this stage the obligation of non-recognition did not have an *erga omnes* character. Surely, however, the fact that inside the League of Nations non-recognition was conceived as pertaining to violations against the *community* as a whole, means that the Organization tried to attach that status (of *erga omnes*) also to the principle of non-recognition. Very likely, the obligation of non-recognition was the first solidarity tool in the hands of the New World Order's forerunners, but it was a slow process.

As for the *jus cogens* status of the obligation of non-recognition, it should be reminded that, like the *erga omnes* concept, it had not been developed yet in the international legal literature. Thus, we are analysing developments which are prodromes to current legal categories. In this case, we should notice that the obligation responded to violations of the prohibition of aggressive war to perpetrate territorial seizures, obligation which had acquired a kind of peremptory character in

international law (and as already said above, *erga omnes* status).[366] So, to answer the question whether also the obligation itself was a peremptory norm of international law, we should also answer the question whether the obligation automatically participates of the status of the primary rules lying beneath its application. And even prior to that, we must see whether the obligation of non-recognition, at the end of the war, can be classified as a secondary rule only, or it had an autonomous standing in international law, qualifying also as a primary rule.

Beginning with this last question, it can be said that as a peaceful sanction the obligation qualifies as a secondary rule. However, since the obligation performed other functions in the international legal order, in particular that of preserving international law – having its own legal *raison d'être* in the maxim *ex iniuria ius non oritur* – it can be also seen as a primary self-standing obligation. This is also confirmed by the fact that it developed in a wider sphere of application with respect to the underlying prohibition of aggressive war (i.e. also to the more general prohibition of use of force) – thus showing a certain autonomous action of the obligation. This dual position in international law (one as a secondary rule of international responsibility and the other as a primary rule of the system) make us appreciate the multifaceted nature of the obligation of non-recognition (on circularity of the principle of non-recognition see *supra*, Chapter I, par. 3.2, and *infra*, Part II).

We now turn to the other question, i.e. whether the obligation itself was conceived as a peremptory norm. According to us, both as a secondary rule and as a primary rule, the obligation did not enjoy the status of a peremptory norm in international law. The discrepancy between the narrower prohibition of aggressive war as established in the Pact as well in the Covenant and the wider prohibition of use of force (which had not acquired a peremptory character) as comprehended in the obligation of non-recognition, while contributing to advance a complete ban on the use of force in international law, created however a burden for the principle to be perceived too as a peremptory rule of law.

4.12. An emerging '*pyramid structure*' to analyse the application of the obligation of non-recognition in international law

The Stimson Note as well as the Resolutions of the League's Assembly referred to 'any situation' contrary to the Pact and the Covenant. However, it has emerged from practice that the doctrine was instead circumscribed from two sides. First, it was applied only to conquests and other territorial changes accomplished by recourse to

[366] J. Dugard (n 36) 134.

force, i.e. to acquisitions of alien territory and the advantages thereof (included treaties aimed at conferring good titles to those seizures). It implies that questions of non-recognition of States and governments only arouse when they were established by acts of foreign States. In other words, when speaking about non-recognition of States and/or governments it was assumed that there had been a territorial acquisition or at least a claim to title to sovereignty over a given territory by a foreign State. There was a sort of pyramid structure: at the top, there was conquest, whose illegality and non-recognition then regarded indirectly statehood, governmental capacity and lastly domestic acts of the new entity eventually formed after seizure. This pyramid structure would leave strong marks in the development of the sanction of non-recognition after 1945.

Furthermore, the obligation was only triggered by the norm on the ban of use of force[367] to perpetrate territorial seizures. Both in its narrower form before – the prohibition of aggressive war – and later in its wider form – the prohibition of the threat or use force – it was the first and for some time the only norm of a 'peremptory' character in international law.[368] It was thus already clear at this stage that the obligation of non-recognition is only referred to violations of higher rules, and not to every violation of international law. From 1945 on, other norms would enter the rank of '*jus cogens*', such as self-determination and basic human rights principles. However, we will see that the practice is scarce with regard to these norms.[369]

[367] As widely interpreted by the doctrine of non-recognition. The *complete* prohibition of the threat or use of force finally become a clear duty in 1945 with the Charter of the United Nations (as already said, thanks to the contribution of the obligation of non-recognition).

[368] Also piracy was already considered a 'peremptory' norm.

[369] See S. Talmon (n 76) 99-125.

PART II

THE MODERN PRINCIPLE OF NON-RECOGNITION FROM 1945 TO PRESENT

CHAPTER IV

Non-recognition and law-making

1. Non-recognition as evidence of the existence and expansion of the higher law

Scholars have long debated about the way a rule acquire a peremptory status, ranging from deductive to inductive methods.[1] Beyond the agreement on the existence of jus cogens norms – detractors are indeed very few – scholars widely diverge on how to identify these norms and their concrete effects in various fields of international law. Nor the International Law Commission (ILC) which recently completed the first reading of its topic on peremptory norms of international law seems to have gone much further than a restatement of the words of the Vienna Convention on the Law of Treaties as far the identification of such fundamental norms is concerned.[2]

What seems to be nearly uncontroversial, however, is that such higher law is not created only with the consent of States, according to a purely positivist approach, but it is informed by a value-based purport, i.e. it is the legal expression of the 'conscience' of the international community.[3] To add to this debate, the present study shows that the instrument of non-recognition is a manifestation of that conscience; it provides evidence of the existence of the value-driven axiom already emerged, but it also possibly influences the very same development of the fundamental norm.

[1] For an appraisal see, K. Zemanek, 'The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order' in (E. Cannizzaro ed.), *The Law of Treaties Beyond the Vienna Convention* [Oxford University Press, Oxford, 2011] 384-387.

[2] S. D. Murphy, 'Peremptory Norms of General International Law (Jus Cogens) and Other Topics: The Seventy-First Session of the International Law Commission' in [2020] 114(1) *The American Journal of International Law* 68-72. In Conclusion 23 the Commission provides for a non-exhaustive list of norms of jus cogens. However, 'Rather, as is clear from the carefully written commentary, the Commission has simply provided in draft conclusion 23 and the annex a list of some of the norms that have been "referred to" in prior work of the Commission, without assessing whether those norms, as of 2019, are jus cogens or are properly formulated as such. Moreover, that prior work: is invariably cursory in nature (there is no indication in each instance of the evidence for why a particular norm should be regarded as jus cogens); at times does not directly declare norms to be jus cogens; is sometimes inconsistent in the formulation of the same norm; and at times is not even the work of the Commission as a whole. […] Having completed the first reading, the Commission transmitted the draft conclusions, through the UN secretary-general, to governments for comments and observations, with the request that they be submitted by December 1, 2020. The Commission is then expected to return to this topic for the second reading in 2021, the final year of the Commission's current quinquennium'.

[3] G. Sperduti, *Lezioni di diritto internazionale* [Giuffré, Milano, 1958] 69-70.

In the words of Alain Pellet: '*jus cogens* rules have no determinate form and are only *recognizable by their effects*: contrary provisions are null and void'[4]. The instrument of non-recognition exactly aims to render visible the nullity already triggered the higher norm. To put things differently, non-recognition is a 'duty not to contribute by a positive act to rendering valid the results of an *act which is in itself devoid of legal force*'.[5] In the ICJ Advisory Opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*[6], the Court conceives non-recognition as a direct 'consequence' of a situation in violation of peremptory rules of international law. More precisely, notwithstanding the lack to any reference to non-recognition in SC Resolution 276 (1970), the very fact that such a situation is declared illegal and invalid by the Council, directly implies an attitude of non-recognition by the part of the international community.[7] Hence, it is clear that those violations of the higher law, their invalidity and non-recognition are closely interlinked. It can be maintained that non-recognition automatically and logically derives from an express declaration of illegality of an act or situation originating by a violation of fundamental norms.

In a nutshell, non-recognition constitutes the missing second element (or better one of the elements) for a higher order to be established internationally. Whereas invalidity is inherent in the higher norm, identification has been said to be lacking: '[..] the designation of the norms forming the 'higher order' is left to processes which are partly obscure and their results therefore open to challenge. [...] The second condition is thus not met.'[8] However, non-recognition as evidence of the existence of fundamental norms can be taken with good approximation as an identification tool that satisfies the second condition.

A similar view may be found in Ulf Linderfalk's understanding of *jus cogens*. The instrument of non-recognition indeed may fall under what he calls "second order rules

[4] A. Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' in [1989] 12 *Australian Yearbook of International Law* 38.

[5] H. Lauterpacht, Recognition in International Law [Cambridge University Press, London, 1947] 420 (emphasis added).

[6] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 52, par. 112: 'It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of a11 member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf'.

[7] Though, the Court has in other occasions adopted a more restrictive stance; see, for instance, ICJ, *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 103, par. 31.

[8] K. Zemanek (n 1) 399.

of the jus cogens regime" since they 'are instrumental to the identification of the first order rules'.[9] In short, non-recognition is a device that can be used by States to detect the invalidity of an act which is contrary to a fundamental norm of the international legal order and to identify the rule itself. Whereas conceptually, indeed, the moment of creation and identification are not identical, it is not easy to pinpoint the exact moment in which the value-based axiom at the basis of the higher law has been set and a certain isomorphism between the two moments, of creation and identification (verification) must be assumed.[10] Not by chance, definitive evidence of the existence of fundamental norms only comes in the latter moment. In other words, *jus cogens* is tangibly discernible by way of the invalidity of acts contrary to it. It is a rule of customary international law or a principle of law[11] whose *jus cogens* character is ascertainable through the operation of an ordinary (in the sense above, *secondary*) rule of customary international law: non-recognition.[12]

A peculiar feature of peremptory norms is that the *opinio iuris* is far more important than conduct to establish them, because they do not compel affirmative action.[13] Since they are mainly negative duties (for instance, the prohibition of aggression, the prohibition of genocide, etc.), by which States are compelled *not to do* something, it is clear that by their very nature they are not ascertainable through *actions*. Since the main traced practice consists in violations of those rules; however, for a logical reason it would be highly unbalanced to take it into account as the only evidence when assessing the validity of a fundamental rule. On the contrary, the role played by non-recognition in case of violation of the higher law by States can be seen

[9] U. Linderfalk, 'The Source of Jus Cogens Obligations - How Legal Positivism Copes with Peremptory International Law' in [2013] 82(3) *Nordic Journal of International Law* 377. By way of a metaphor he continues: 'we may say about the second order rules that they relate to the first order rules as the concept of a cup does to the categorisation of a particular amount of a dark-brown, aromatic drink as a cup of coffee. Without the concept of a cup, it makes no sense to speak about a cup of coffee. The idea of a cup helps us conceptually understand any particular amount of the relevant drink as a cup of coffee'

[10] Generally on the identification of customs, cf. L. Gradoni, 'La Commissione del diritto internazionale riflette sulla rilevazione delle consuetudine' in [2014] *Rivista di diritto internazionale* 667.

[11] A. Bianchi, 'Human Rights and the Magic of Jus Cogens' in [2008] 19(3) *The European Journal of International Law* 493.

[12] R. Kolb, *Peremptory International Law - Jus Cogens: A General Inventory* [Hart Publishing Ltd, Oxford/Portland, Oregon, 2015] 110. For a contrary position see the dissenting opinion of Judge Skubiszewski in ICJ, *East Timor* (n 7) 262, par. 124: 'The rule [of non-recognition] may be said to be at present in the course of possibly reaching a stage when it would share in the nature of the principle of which it is a corollary, ie the principle of the non-use of force'; and A. Orakhelashvili, 'Jurisdictional Immunities of the State' in [2012] *The American Journal of International Law* 609, 615-16.

[13] M. E. O'Connell, 'Jus Cogens: International Law's Higher Ethical Norms' in (D. E. Childress III ed.), *The Role of Ethics in International Law* [Cambridge University Press, New York, 2012] 80: '[t]hose invoking jus cogens in the case of affirmative action or programmatic rights presumably believe that the power of jus cogens norms extend to imposing duties, including finding the resources to provide rights. Although jus cogens norms are clearly superior to all other norms, they are limited in nature. They form a barrier to government action, but they do not compel affirmative action'.

as an expression of *opinio iuris* of the continued validity of such rules and their non-derogable character. In other words, the principle of non-recognition acts as a 'detecting instrument' with regard to the 'reinforced' *opinio iuris* requested for establishing the existence of higher customary laws, encompassing both the mandatory and the non-derogable character. In *The Concept of Law*, Hart formulates the idea of 'secondary rules of recognition' to describe those rules by which different actors within a legal system can identify primary obligations. In a word pun, we may say that non-recognition constitutes one of those rules in the international system, in order to detect higher norms.[14]

The departure from the traditional approach to custom, can be read also as an element of the 'humanization' or 'moralization' of international law. In particular the idea that in the field of human rights and humanitarian law customs the subjective element should be given a predominant position. This analysis indeed can contribute to understand why for the verification of the existence of a norm of jus cogens, subsequent opposite practice by States is hardly taken into consideration by international actors, included the International Court of Justice[15], and International Criminal Tribunals.[16] This function of non-recognition emerged from the very beginning of the new international order established in 1919.

In the Preamble to the League's Covenant, the High Contracting parties agreed to achieve international peace and security by 'the acceptance of obligations not to resort to war'. Art. 11(1) of the Covenant also stated that any war or threat of war would be a matter of concern to the whole League. Furthermore, by Art. 10, regarded by Wilson as the bedrock of the new system, member States undertook 'to respect and

[14] 'It is [..] a mistake to suppose that a basic rule or rule of recognition is a generally necessary condition of the existence of rules of obligation or binding rules. This is not a necessity, but a luxury, found in advanced social systems whose members not merely come to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rules, marked out by general criteria of validity. In the simpler form of society we must wait and see whether a rule gets accepted as a rule or not; in a system with a basic rule of recognition we can say before a rule is actually made, that it will be valid if it conforms to the requirements of the rule of recognition'; H. L. A. Hart, *The Concept of Law* [Oxford, Oxford University Press, 2012] 235.

[15] How it is often underlined critically, in the ICJ Nicaragua Judgment, while confirming the existence of the customary *jus cogens* rule on the prohibition on the threat or use of force, conduct (practice) of States is not taken into consideration or is even contrary to what was required. No additional evidence is offered in support of the (implied) peremptory character of the customary rule.

[16] See A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' in (P. Gaeta, S. Zappalà eds.) *The Human Dimension of International Law. Selected Papers* [Oxford University Press, Oxford, 2008]; (2008); M. Frulli, 'The Contribution of International Criminal Tribunals to the Development of International Law: The Prominence of *opinio juris* and the Moralization of Customary Law' in [2015] 14 *The Law and Practice of International Courts and Tribunals* 90-91. See also R. Cryer, 'International Criminal Tribunals and the Sources of International Law. Antonio Cassese's Contribution to the Canon' in [2012] 10 *Journal of International Criminal Justice* 1049-1057.

preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'.[17]

Although the Covenant of the League represented the first attempt to impose a limitation on the freedom of States to resort to war, it was only with the Pact of Paris[18] that such prohibition became unconditional.[19] Both the Covenant of the League and the Pact of Paris however used the term 'war' rather than the less technical term 'armed force'. These instruments thus restricted the prohibition to aggressive war, which was already regarded by States as a peremptory rule in the inter-war period.[20]

This restriction was overcome in 1932 with the enunciation of the Stimson Doctrine and the subsequent resolutions by the Assembly of the League of Nations about the non-recognition of the Japanese invasion and occupation of the Chinese region of Manchuria.[21] Not only the instrument of non-recognition confirmed the existence of the peremptory prohibition of aggressive war; but it also developed at a very fast rate complementing the rules directly addressing the collective reaction of the League's members towards serious violations of the Covenant.[22] Resolutions of the League's Assembly in particular, referred to a wide conception of use of force in

[17] The Covenant of the League of Nations (Including Amendments adopted to December 1924), available on Avalon Project website <https://avalon.law.yale.edu/> accessed 5 December 2019.

[18] Kellogg-Briand Pact 1928, available on Avalon Project website at the following address < https://avalon.law.yale.edu/20th_century/kbpact.asp> accessed 5 December 2019. Art. I of the Pact of Paris read as follows: 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another'.

[19] E. Milano, *Unlawful Territorial Situations in International Law. Reconciling Effectiveness, Legality and Legitimacy* [Martinus Nijhoff Publishers, Leiden/Boston, 2006] 103. On the basis of the Covenant, in fact, if the Council of the League failed to agree unanimously on a solution to a dispute, the individual States concerned could eventually resort to war. War was also permissible in disputes declared by a party to be a matter of domestic jurisdiction. On the other hand, notwithstanding the admitted loopholes in Art. 15 of the Covenant, the Pact of Paris was subject to a wider exception of self-defence compared to the Covenant. Furthermore, the League's Covenant with its arrangements for conciliation, discussion and compromise, was probably stronger than the Pact of Paris regarding peaceful settlement of disputes (see R. H. Ferrell (ed.), *The American Secretaries of State and Their Diplomacy* [Volume XI, New York, Cooper Square Publishers, 1963] 165). The general tenor of the Covenant indeed went against an arbitrary use of war by States: '[..]It would be misleading to give too much emphasis to the subordination of the Covenant restrictions to Article 15, paragraph 7, and the customary law. It is significant that States which resorted to war and other types of force in the lifetime of the League did not attempt to justify their action by reference to a full-blooded right to resort to war inherent in general international law. States either made no legal apology at all, denied the existence of war in the formal sense, or talked in terms of necessity and self-defence. The Covenant in view of its general purpose and its particular provisions created a presumption against the legality of war as a means of self-help; and as time went by various instruments, and *legal developments such as the Stimson Doctrine, were to reinforce that presumption*; I. Brownlie, *International Law and the Use of Force by States* [Clarendon Press, Oxford, 1963] 56-57 (emphasis added).

[20] J. Dugard, *Recognition and the United Nations* [Grotius Publications Limited, Cambridge, 1987] 134.

[21] For the events that brought Japan to invade and occupy *de facto* the Chinese region of Manchuria see D. Turns, 'The Stimson Doctrine of Non Recognition: Its Historical Genesis and Influence on Contemporary International Law' in [2003] 2 *Chinese Journal of International Law* 107-110.

[22] A. McNair, 'Stimson Doctrine of Non-Recognition' in [1933] 65 *British Yearbook of International Law* 68.

international relations, including those manifestations of force falling short of war.[23] This doctrine was then applied to other disputes in Latin America and in Europe. Not by chance, in 1963, Ian Brownlie in his seminal work "International Law and the Use of Force by States", supported the customary status of the prohibition of the threat or use of force at the end of WWII by referring to the practice of States between 1920 and 1945, in particular to the 'numerous statements in diplomatic correspondence and the *instruments relating to non-recognition* which constitute evidence of a general practice accepted as law'.[24] Not only, but it seems appropriate to consider in 1945, with the drafting of the UN Charter and art. 2(4) especially, the prohibition of the use of force to acquire sovereignty over alien territory as already a *jus cogens* rule carrying with it the sanction of invalidity – a result achieved mainly through the principle of non-recognition. The attempt of German officials during the Nuremberg Trial of 1945 to say that because the collective security system had failed, there has been a return to unrestricted self-help in international relations[25], was discharged by the Tribunal which finally convicted them for crimes against peace. The functioning of the collective security system seemed to be in a lower position with regard to the moral imperative of the law on the non-use of force[26] – we may add – constantly upheld by the principle of non-recognition.[27]

Still today, the latter principle provides a meaningful proof of the peremptory status of the norm on the prohibition of threat or use of force.[28] A similar development

[23] Whereas war was permitted when the imperfect tools of collective security failed, indeed, conquest was never considered as legal and thus ought not to be recognized. In other words, even a legitimate war could never give rise to seizures of 'enemy' territory (see R. Langer, *Seizure of Territory. The Stimson Doctrine and Related Principles* [Princeton University Press, Princeton, 1947]).

[24] I. Brownlie (n 19) 110 (emphasis added).

[25] The same attempt put forward by the Soviet Union during the Cold War years, unsuccessfully, and more recently the attempt by States to return to a just war theory, under which umbrella would fall different practices such as humanitarian intervention, self-defence against non-state actors, the responsibility to protect. Also the ICJ in its jurisprudence (Corfu Channel case; Nicaragua case) has reaffirmed the fact that the misfunctioning of the collective security system does not allow a weakening of the absolute prohibition on the use of force; see D. Vitiello, 'Il ricorso alla forza a protezione dei propri cittadini all'estero: evoluzione e limiti della prassi' in (A. Lancellotti and A. Tanzi eds.) *Uso della forza in legittima difesa nel diritto internazionale contemporaneo* [Jovene Editore, Napoli, 2021] 232.

[26] It is important to highlight, indeed, that the same Tribunal traced the legal basis for including aggression as an international crime in the Statute in the 1928 Paris Pact. The findings of the Tribunal made the assumption that the reference to 'war' in the Pact had no limiting effect (see I. Brownlie (n 19) 88).

[27] As of today, as remarked by Hannikainen, even if the '1987 GA Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations does not include any statement regarding the peremptory character of the prohibition of the use of aggressive armed force [..] However, as do a number of other GA declarations and resolutions, the 1987 Declaration stresses that "no consideration of whatever nature" may be invoked to warrant resorting to the threat or use of force in violation of the UN Charter, and declares that the principle of non-recognition [..] applies'; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law. Historical Development, Criteria, Present Status* [Lakimiesliiton Kustannus, Helsinki, 1988] 325. Thus, for the author the invocation of the principle of non-recognition is a meaningful proof of the peremptory status of the norm on the prohibition of threat or use of force.

[28] For a detailed analysis see *Ibid.*, 325.

occurred with respect to the principle of self-determination of peoples. Consider, for example, that notwithstanding such a principle was enshrined already in a UN General Assembly (GA)'s resolution of 1960[29], it was only in 1966 that invalidity was expressly claimed for acts contrary to self-determination of peoples, namely when the SC and the GA adopted a policy of non-recognition with regard to the racist regime in Southern Rhodesia. In fact, in the very same year, Eric Suy cited the SC's condemnation (and non-recognition) of Rhodesian declaration of independence as a case where States had recourse to the notion of *jus cogens*[30] and the principle of self-determination was mentioned as a possible peremptory norm by the ILC in its Commentary on the Draft Articles on the Law of Treaties.[31]

2. Non-recognition as a bar to consent

2.1. Limits to law-making

The crucial role of non-recognition is visible beyond the identification of the higher law. Once these rules emerge, because of the acknowledgement of their superior position in the hierarchy of sources as a value-based guideline[32], the immediate reaction of the international community is to protect them from further law-making by States which could impair their content. It is indeed since the era of the League of Nations that we observe a trend towards curbing the freedom of States to choose the object of their international agreements which could contravene such rules. Long before the Vienna Convention on the Law of Treaties (VCLT) of 1969 would spell out the notion of *jus cogens* in Artt. 53 and 64, the instrument of non-recognition was applied to the law of treaties for banning the legality of agreements contrary to 'peremptory' rules of international law, included those treaties concluded by means of violence towards the State or its representative.[33] Originally used as a means of protecting the rights of third States[34], especially neo-imperial powers with respect to

[29] UN General Assembly Resolution 1514 (1960), *Declaration of the Granting of Independence to Colonial Countries and Peoples.*

[30] E. Suy, *The concept of jus cogens in Public International Law* in (Carnegie Endowment for International peace ed.), *Conference on International Law* [Lagonissi, April 3-8, 1966] cited in J. Dugard (n 20) 146.

[31] Ibid, 159.

[32] K. Zemanek (n 1) 383.

[33] Q. Wright, 'The Stimson Note of January 7, 1932' in [1932] 26(2) *The American Journal of International Law* 346-348.

[34] T. Chen, *The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States* [Stevens & Sons Limited, London, 1951] 433: 'If a treaty between two States should be in violation of a legal right of a third State, is that third State entitled to invalidate the treaty by means of non-recognition? Some writers answer this question categorically in the affirmative'.

colonized territories or territories subjected to a system of capitulations[35], the non-recognition of treaties gradually regarded the violation of 'fundamental principles of international law'[36]. Thus, the application of non-recognition regarded directly the treaty concluded by the use of force and indirectly the treaty aimed to confer good title to the consequences of a use of force against the territorial integrity and political independence of a State.[37] In 1976 Rozakis indeed affirmed, in the context of the invalidity of treaties, that '[t]he introduction of the *jus cogens* norms in international law plays, inter alia, the same role as the non-recognition scheme only in a more concrete and effective manner'.[38] However, non-recognition does not coincide with the notion of *jus cogens*, the former being, as already said, the manifestation of the latter.

With the VCLT, there has been an attempt to bestow the 'constitutional control' of treaties upon the ICJ.[39] However, major obstacles remain, like for example the uncertainty about who is entitled to request the invalidity of a treaty contrary to peremptory norms.[40] Not by chance, the procedure set out in Art. 66 has never been used by States.[41]

[35] In this category, very likely falls the 1915 Bryan Note by which the United States notified the Japanese government that they would not recognize 'any agreement or undertaking which has been entered into or which may be entered into between the Governments of China and Japan impairing the treaty rights of the United States and its citizens in China, the political or territorial integrity of the Republic of China, or the international policy relative to China commonly known as the Open Door Policy', reproduced in H. Lauterpacht (n 5) 415.

[36] *Ibid.* See also T. Chen (n 34) 433: 'If a treaty between two States should be in violation of a legal right of a third State, is that third State entitled to invalidate the treaty by means of non-recognition? Some writers answer this question categorically in the affirmative'.

[37] See recently A. Gianelli, 'Absolute Invalidity of Treaties and their Non-Recognition' in (E. Cannizzaro ed.) *The Law of Treaties Beyond the Vienna Convention* (n 1) 342: 'In general terms, non-recognition may be said to find its origins in the movement, at first regional and later universal, to ban the use of force. With regard to treaties, the expressions "invalidity" and "non-recognition" are at times used interchangeably. This usage is telling about the strict relationship between the nullity of the agreement concluded under the threat or use of force and non-recognition not only for territorial changes, but more generally of all situations – factual or legal – arising from the agreement'; L. Hannikainen (n 27) 136: 'According to the analysis of the ILC, there began to develop with the League of Nations Covenant and the Pact of Paris a strong body of opinion that treaties imposed by the threat or use of force should no longer be recognized as legally valid'.

[38] L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* [North Holland Publishing Co., Amsterdam/New York/Oxford, 1976] 26.

[39] Irony of fate, fragmentation of the notion of jus cogens has been recently promoted more by courts than States. For example, in the *Kadi* case, the Court of Justice of the EU implied its power to include in the notion of jus cogens the right to property, the right to be heard, and the right to access to court (see CJEU (Grand Chamber), *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, par. 5). If the idea catches on with domestic courts, we may soon find fragmentation of the respective judges. That is exactly the fate which the UN Conference on the Law of treaties wanted to avoid by establishing the ICJ as sole arbiter of disputes over jus cogens.

[40] B. Conforti, A. Labella, 'Invalidity and Termination of Treaties: The Role of National Courts' in [1990] 1 *European Journal of International Law* 44-66.

[41] See, recently, M. Buscemi, L. Marotti, 'Obblighi procedurali e conseguenze del recesso dai trattati: quale rilevanza della Convenzione di Vienna nella prassi recente?' in [2019] *Rivista di diritto internazionale* 945. See also L. Rozakis (n 38)118 ss.

As a matter of fact, treaties have been declared null and void by the international community as a whole acting through declarations and resolutions of international organizations.[42] Since the enunciation of the doctrine of non-recognition (Stimson Note and the League General Assembly's resolutions), the latter was said to apply to 'any situation, treaty, or agreement' which was brought about by means contrary to the Pact of Paris or to the Covenant of the League of Nations.[43] During the Manchurian crisis, indeed, the League applied a policy of non-recognition not only to the Japanese occupation, but also the treaty entered into by Japan with the puppet Government of Manchukuo.[44] More recently, the UN General Assembly in Res. 34/65 B rejected those provisions of the Camp David accords of 1978 infringing the right to self-determination of the Palestinian people as invalid and condemned strongly all partial agreements and separate treaties as a flagrant violation of the rights of the Palestinian people.[45] The GA and the SC have also resorted to the declaration of invalidity and to non-recognition of dealings, including treaty relations, between third States with South Africa concerning Namibia.[46] Finally, mention can be made to the ICJ Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*[47], where the Court endorses the conclusions

[42] L. Hannikainen (n 27) 307: 'When UN organs have declared a given instrument or act void, they have generally proclaimed the obligation of non-recognition upon UN members or upon all States'.

[43] Q. Wright, *The Stimson Note of January 7, 1932* (n 33) 342; League of Nations Official Journal, 1932, Special Supplement 101, 87, 88. Consider also, as reported by Brownlie, that '[t]he League Covenant and especially the provisions of Article 10 stimulated suggestions on non-recognition. In the committee on blockade and disarmament of the Second Assembly Braga of Brazil made a proposal, which was shelved, for amendment of the Covenant in these terms: "All the Members of the League of Nations consider null and void, *pleno jure*, the provisions of any international treaty concluded in the future which grant to a State which has made war contrary to Articles 12, 13 and 15 of the Covenant, the following: (a) Indemnity for war costs and reparations for damage caused by the war; (b) Clauses relating to the economic pressure against the conquered country; (c) The annexation of territory." Consequently, all the Members of the League of Nations agree to introduce at once into their legal systems provisions for the purpose of investing their Governments with the following Powers: … (6) Not to recognize in any form in their diplomatic and consular services, the sovereignty of the aggressor over the territories of the State attacked', I. Brownlie (n 19) 411.

[44] Protocol signed at Changchun on 15 September 1932 by the representatives of Japan and Manchukuo, League of Nations Official Journal, Special Supplement 111, 79-81.

[45] United Nations General Assembly Resolution 34/65 (B).

[46] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 6) 55, par. 121-122: 'member States [of the UN] are under an obligation to abstain from entering into treaty relations with South Africa which, under the Charter of the United Nations and general international law, should be considered inconsistent with the declaration of […] invalidity' and also 'no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof'.

[47] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, par. 172.

already reached by the UN GA Committee of Twenty-Four[48] about the invalidity of the 1965 bilateral treaty by which Mauritius had ceded the archipelago to the UK.[49]

Notwithstanding the persistent difference (or better coexistence) between the rule of non-recognition and the nullifying effect of the rules of the VCLT, the greater role of non-recognition is played with respect to supervening customary laws likely to modify the content of fundamental norms, a sphere where it is left alone to act. As suggested by Lauterpacht in 1947, the instrument of non-recognition bars, or at least suspend, the operation of the three methods by which an illegality may enter the legal system: recognition, prescription, and consent of the injured.[50] Thus the instrument of non-recognition can run in the long distance and face also the attempted establishment of a contravening new customary rule. Furthermore, in light of the circularity of higher law and non-recognition described above, the establishment of a customary rule conflicting with higher law is prevented by the role of non-recognition as a sanction that bars the legality of factual situations emerged in contravention of higher rules. Finally, it is linked also with the application of non-recognition to those unilateral legal acts of States aimed, more or less intentionally, to influence the development of higher rules.[51] The most valuable example is the recognition by a third State of a territorial acquisition achieved through the use of force.[52] Recognition,

[48] UN General Assembly, "Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples", UN Doc A/5800/Rev.1 (1964-1965), 352, par. 154.

[49] Even if it is true that the principle of non-recognition has not been recalled *directly* by the Court as far as the UK's illegal continued administration of the islands is concerned (see F. Salerno, 'L'obbligo di non riconoscimento di situazioni territoriali illegittime dopo il parere della Corte internazionale di giustizia sulle Isole Chagos' in [2019] 102(3) *Rivista di Diritto Internazionale* 729), however the principle has been upheld by the Court with reference to the invalidity of the 1965 bilateral treaty.

[50] The results of an illegal act can become part of international law in three ways: 1) by prescription; 2) by consent of the injured party; 3) by recognition. Under an obligation of non-recognition, resulting from a violation of a rule of international law – such as the prohibition on the use of force, these methods of 'validation' of illegal acts are subject to considerable restraints. First, the consent of the injured party alone can hardly influence the legal situation, being it usually subject to duress. For example, the fact that German authorities organized a plebiscite to endorse the annexation of Austria did not convince the world that the Anschluss was the result of democratic aspirations of the inhabitants of both countries. The international community, even if recognizing de facto the new territorial situation, did not acquiesce the fact that Austria had freely expressed its will and condemned it as an illegal act. Moreover, the Pact of Paris and the Covenant established a system of objective law according to which substantial violations, such as the prohibition of the use of armed force, was a matter of concern for all the contracting parties and not only for the States directly concerned. As for recognition, it must be carried out by the community of States for the sake of international peace and progress. The international community's response to the Chaco dispute which recognize to Paraguay part of its conquest can be read under this light. Finally, prescription, i.e. the passage of time with undisturbed possession, may eventually lead to historical consolidation of title. Here, the principle of non-recognition plays its fundamental role. Indeed, continued protests and condemnations by third States prevent the changing of the status quo by defiant States.

[51] It is to be assumed, indeed, that nullity can be inflicted on a unilateral legal act that violates a norm of jus cogens only if this has created an obligation vis-à-vis another State and consequently a right for the latter.

[52] R. Kolb, *Théorie du* ius cogens *international. Essai de relecture du concept* [Presses Universitaires de France, Paris, 2001] 91.

indeed, when it is used to validate such an illegal act is meant to have a 'quasi-legislative' function.[53]

2.2. Non-recognition and change by violation

This opens to the criticisms of scholars as regards the immutability of norms of *jus cogens*. Glennon pointed out that once a customary *jus cogens* norm is established, it becomes immutable because the process by which a customary law intervenes is precluded by the very notion of *jus cogens*.[54] Interestingly, this position resembles very closely the critics made by scholars of the '30s to the instrument of non-recognition. According to some authors, the risk inherent in the doctrine was a detachment of law from facts which, ultimately, would mean to preserve a certain fictious *status quo*, despite the changed circumstances.[55]

Not surprisingly, the reply to such criticisms has been very similar. Authors dealing with *jus cogens*, have answered to the sceptics that it is 'inherent in the modification of custom, whether the disappearing norm is peremptory or ordinary in nature, that the reaction of other states decides whether conduct deviating from the old rule is a violation of it or the beginning of a new rule'.[56] Pioneers of non-recognition replied, and here one has to catch the seed of change, that non-recognition gives priority to the normative character of the law, which is always more inclined to preserve the

[53] Thus the opinion expressed by Krystyna Marek by which a single State could violate international law through a unilateral legal act, but it could not create law, is not shared here; see K. Marek, 'Contribution à l'étude de jus cogens en droit international' in *Recueil d'études de droit international en hommage à Paul Guggenheim* [IUHEI, Geneva, 1968] 426, 441. Recognition of a situation created in violation of jus cogens norms, is considered a violation of the very same norms and is declared null and void. Moreover, it is subjected to non-recognition as usually the 'primary' violation before. The US recognition of Israeli sovereignty over Jerusalem is a case in point (see UN General Assembly Resolution ES-10/19). The 'illegal' recognition engages the individual aggravated responsibility of the recognizing State for being in contrast to the higher law. Responsibility can be direct or indirect, according to whether recognition is granted by way of a declaration or a highly conclusive action, or instead it is inferred from the conclusion of a treaty. See A. Pert, 'The "Duty" of Non-Recognition in Contemporary International Law: Issues and Uncertainties' in [2012] 30 *Chinese (Taiwan) Yearbook of International Law and Affairs* 20-22. Another example of unilateral legal act giving rise to non-recognition concerns a unilateral declaration of independence (only) when in violation of peremptory norms; see ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 38, par 81. Referendums as well, held in contravention to higher rules of international law, are not recognized by the international community; see, for instance, UN General Assembly Resolution A/RES/68/262, 'Territorial Integrity of Ukraine', 27 March 2014, par. 5 and 6.

[54] M. J. Glannon, 'De l'absurdité du droit impératif (*jus cogens*)' in [2006] 110 *Revue Générale de Droit International Public* 529.

[55] Professor Borchard said: 'What good does it do not to recognise facts? International law was as practiced was not designated to constitute a moral approval or disapproval of the state of the world. It was calculated to deal with facts as they are, political facts, unfortunate perhaps [..] You can admit the inevitable, or you can close your eyes to it. [..] Holmes said, the life of the law is not logic but experience [..] and experience teaches that changes in the world are continuous [..]'; E. M. Borchard in H. Briggs, 'Non-Recognition of Title by Conquest and Limitations of the Doctrine' in [May 13-15, 1940] 34 *Proceedings of the American Society of International Law at its Annual Meeting (1921-1969)* 96.

[56] K. Zemanek (n 1) 395-96.

status quo, but does not impedes however that whenever new legitimate needs of the society are felt by the majority of States, the law can be changed accordingly. As a result, the law of the strongest cannot replace existing law, at least not until there is a widespread agreement amongst the members of the international community corresponding to a shared interest to modify existing peremptory rules. Thus, change is possible, but it necessarily implies that the higher rule be modified or replaced by a new higher rule only after it has been possible to ascertain that this is the intention of the 'community as a whole'.[57]

Furthermore, it is to be noted that, caught between two rival maxims, *ex factis ius oritur* and *ex iniuria ius non oritur*[58], the principle of non-recognition holds the situation in a limbo. Such suspension may ultimately 'result either in the restoration in fact of the status quo ante, or in the adjustment of law to the changed situation of facts'. In this second case, according to Chen, 'a change of law indicates that the doctrine of non-recognition has exhausted is usefulness acquired under the pre-existing legal order'.[59] The solution, however, may be not necessarily so radically black or white. The conditions to be applied to a contested situation – in violation of peremptory norms – should also take into account evolving factual conditions in the international community, in order to reach a final and enduring solution.[60] Thus, in some circumstances, the impossibility to return to the status quo ante and to completely revoke the legal effects of a violation, does not necessarily prejudice the validity of the higher law.

This explains also why the 'secondary' rules of *jus cogens*, as it is non-recognition, cannot be peremptory rules themselves, because they have to allow a certain degree of flexibility in the unfolding of effects of the higher law. Most likely, though,

[57] As Wright affirmed, non-recognition 'does not fossilize any status quo' and continued '[t]he Stimson doctrine extends [the] conception of premature recognition by insisting that, with respect to a claim resting upon illegal resort to force, recognition is always premature until such claim has been confirmed by a procedure of general consultation manifesting the will of the community of nations as a whole', Q. Wright, 'The Legal Foundation of the Stimson Doctrine' in [December 1935] 8(4) *Pacific Affairs* 444-45. Similarly Lauterpacht some ten years later: 'it must be sought in considerations of a general nature which would justify the legislator in incorporating the result of the illegality as a part of the law', H. Lauterpacht (n 5) 412. The role played by the General Assembly – of the League of Nations and then of the United Nations – is absolutely important in keeping the higher rule 'valid'. With its resolutions containing the principle of non-recognition, it provides continuous evidence of the existence of the higher rule (In general, on the role of the General Assembly see R. St. J. MacDonald, 'Fundamental Norms in Contemporary International Law' in [1987] *25 Canadian Yearbook of International Law* 140). It is guessable however that even when it is not possible to assert non-recognition in the General Assembly, the very possibility that States – even a combative minority – seek to invalidate the situation by recurring to non-recognition precludes the incorporation of illegality into the legal order.

[58] See recently A. Lagerwall, *Le principe ex iniuria ius non oritur en droit international* [Édition Bruylant, Bruxelles, 2016] 141-159.

[59] T. Chen (n 34) 441.

[60] M. Arcari, 'The UN SC, Unrecognized Subjects and the Obligation of Non-recognition in International Law' in (W. Czaplinski and A. Kleczkowska eds.) *Unrecognized Subjects in International Law* [Scholars Publishing House Ltd., Warsaw, 2019] 239.

secondary rules of jus cogens have *erga omnes* character for they are opposable to each State of the international community.[61]

2.3. Non-recognition, reservations, and withdrawals from treaties

Another two expressions of non-recognition as a bar to consent need to be briefly addressed, namely non-recognition of unilateral withdrawals from treaties considered to be foundational of the international legal order and which entail the protection of fundamental values of the community of nations, and non-recognition of reservations contrary to fundamental principles established in a treaty.

As regards the former, starting from the League of Nations era, it is possible to trace a practice of non-recognition of withdrawals or denunciations of treaties, alongside the already mentioned practice of non-recognition – i.e. the invocation of nullity – of treaties which entailed the breach of fundamental principles of international law.[62]

In the '30s, the League was confronted with the unilateral withdrawals of several States, among which Japan, Germany, Italy but also Paraguay. Art. 1 para. 3 of the Covenant permitted withdrawal provided that the State concerned had fulfilled all its international obligations and obligation under the Covenant.[63] As a consequence,

[61] The case of the US recognition of Israeli sovereignty over Jerusalem is the clearest example of the erga omnes character of principle of non-recognition. On the point see M. Arcari, 'The relocation of the US embassy to Jerusalem and the obligation of non-recognition in international law' in [31 May 2018] Zoom-in 50 *Questions of International Law* 1-13.

[62] Actually, this practice is traceable back to the end of XIX century, but it was mainly related to treaties affecting the particular rights of third States. Examples are the non-recognition by France of the British protectorate over Zanzibar because contrary to the 1862 treaty; or the non-recognition of the British occupation of Egypt by because contrary to the Anglo-French treaty of 1904. Instead starting from the League of Nations era, as observed by Lauterpacht: 'the determination to refuse recognition [was] not only on account of a violation of the particular rights of the State concerned, but also because of a violation of a general rule of international law as embodied in a treaty or in fundamental principles of international law relating to the independence of States', Lauterpacht, cit., pp. 414-415. The non-recognition of withdrawals or denunciations of treaties too started at the end of the XIX century, in the context of a crisis of multilateralism. For example, in 1870 Russia invoked the clause rebus sic stantibus to denounce the provisions of the 1856 treaty regarding the neutralization of the Black Sea. The response of the other contracting States was the issuing of the 1871 London Declaration, the first document in order of importance at asserting a general presumption against the unilateral termination of treaties, and by which they formalized the non-recognition of the Russian denunciation (see J.P. Bullington, 'International Treaties and the Clause "Rebus Sic Stantibus"' in *University of Pennsylvania Law Review* [1927], 156). In 1886, Russia denounced art. 59 of the Berlin Treaty of 1878 with the regard to the 'free port' regime to be applied to the city of Batoum. The other contracting parties to the treaty, in particular the British government, declared the non-recognition Russian action (UK Secretary of States said: 'Her Majesty's Government *cannot* [..] *consent to recognize* or associate themselves in any shape or form with this proceeding of the Russian Government', italics added; see A. McNair, *The Law of Treaties* [Clarendon Press, Oxford, 1961] 499, Despatch from the Earl of Rosebery to Sir R. Morier of 13 July 1886).

[63] Art. 1(3) Covenant of the League of Nations reads as follows: 'Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal'; see Covenant of the League of Nations (n 17).

'abusive' acts of withdrawal advanced by the – then – Axis powers were not recognized, at various degrees, by the League.[64] These events had a strong impact on the negotiating history of the Charter of the United Nations: not only on the decision not to include an express withdrawal clause in the Charter but also on other provisions aimed at deterring unilateral withdrawals from the Organization. The only case in practice, that of Indonesia in 1965, seems to confirm that also in the context of the UN the principle of non-recognition can be applied to 'abusive' withdrawals.[65] Also some specialized agencies of the UN system, the UNESCO and the WHO, developed a similar approach to purported 'abusive' withdrawals in the '40s – '50s.[66]

The same pattern can be observed in some human rights treaties, such as the 1966 Covenant on Civil and Political Rights (ICCPR) or the 1966 Covenant on Economic, Social and Cultural Rights (ICESCR).[67] The attempted withdrawal of North Korea from the Treaty of Non-Proliferation of Nuclear Weapons (NPT) is another telling example.[68] In conclusion, it can be said that in presence of multilateral treaties which protect fundamental values of the international community, a unilateral 'abusive' withdrawal in breach of the principle of good faith carries with it non-recognition,

[64] Just to mention the most explicit case, Paraguay, see W. R. Harris, 'Legal Aspects of Indonesia's Withdrawal from the United Nations' in [1965] 6(172) *Harvard International Law Club Journal* 177: 'Paraguay was maintained as an involuntary member of the League [..] because she failed to pay League assessments and to fulfil her obligations under the Covenant'.

[65] See, among the others, O. Schachter, 'Legal Problems' in [1966] *Annual Review of United Nations Affairs 1964-1965* 119-120. At the XXI session of the General Assembly, when Indonesia announced the resumption of full cooperation with the UN, the Secretary General affirmed that 'the bond of membership has continued'; UN DOCUMENT A/PV.1420, United Nations General Assembly, Twenty-First Session, Official Records, 28 September 1966, 2, par. 7.

[66] See for instance, N. Feinberg, 'Unilateral Withdrawal from an International Organization' in [1963] 39 *British Yearbook of International Law* 205.

[67] Well-known is the CCPR General Comment No. 24 on the continuity of obligations, released shortly after the attempt of North Korea to withdraw from the treaty in 1993 (UN Human Rights Committee, *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6). For a critical position see E. Klein, 'Denunciation of Human Rights Treaties and the Principle of Reciprocity' in (U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer, and C. Vedder eds.), *From Bilateralism to Community Interests. Essays in Honour of Judge Bruno Simma* [Oxford University Press, New York, 2011] 484-85: 'In view of explicit denunciation clauses it is difficult to conceive that they are obsolete because of the specific nature of the human rights guarantees protected under the same treaty … neither the (objective) nature of human rights obligations as such forms part of jus cogens, nor has a peremptory rule emerged that excludes the denunciation of human rights treaties despite the existence of a clause permitting denunciation. The specific nature argument does not erode the express will of the contracting States to have the opportunity to free themselves from their commitments'.

[68] *Treaty on the Non-Proliferation of Nuclear Weapons. Opened for signature at London, Moscow and Washington on I July 1968*, UN Treaties Series, No. 10485. In 1993, when North Korea announced its intention to withdraw fromm the treaty, Bruno Simma held the position that '[h]ere we are in the presence of a treaty in the case of which community interest in universal adherence has become so strong that any course of action in contradiction to aims which the treaty is designed to serve is considered inadmissible' (Bruno Simma cited in V. Pergantis, *The Paradigm of State Consent in the Law of Treaties. Challenges and Perspectives* [Elgar, Cheltenham, 2017] 168.

channeled through the acts of the organs of IOs or the activity of treaty-monitoring bodies.

Although the principle of good faith requires that parties to a treaty refrain from engaging in acts contrary to the object and purpose of the same treaty, the ICJ in the *Nicaragua* judgment has affirmed that 'an act cannot be said to be one calculated to deprive a treaty of its object and purpose, or to impede its due performance [in violation of the principle of good faith], if the possibility of that act has been foreseen in the treaty itself'.[69] In the context of our analysis, this means that a State's withdrawal could be contrary to the object and purpose of the treaty, but that the principle of good faith cannot operate as a legal basis to invalidate the withdrawal act, if contracting states have expressly or implicitly provided for this possibility.[70] In other words, a withdrawal can be in contrast to the principle of *bona fide* but not constitute a substantial violation of the treaty or give rise to a wrongful act in international law.[71] It is precisely in response to this difficulty that it seems to emerge also in the area of treaty law, a principle of non-recognition, with respect to the (in)validity of the withdrawal act, with the aim of safeguarding fundamental values of the international community.

A confirmation comes from the recent Advisory Opinion released by the Inter-American Court of Human Rights regarding withdrawal from the American Convention of Human Rights and the Charter of the Organization of American States (OAS).[72] Here, not only the Court affirms that the decision to withdraw must be carried out in good faith, but also that it must follow a specific domestic procedure, that is it should engage at least a plural, public and transparent debate.[73] Even if the Court does not address the mode and possible consequences of the review of the

[69] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgement, ICJ Reports 1980, 14, par. 272.

[70] T. Meyer, 'Good faith, Withdrawal and the Judicialization of International Politics' in [2014] 2 *Questions of International Law* 5-6.

[71] D. Fleck, *State Responsibility Consequences of Termination of or Withdrawal from Non-Proliferation Treaties* in (D.H. Joyner, M. Roscini eds.), *Non-proliferation Law as a Special Regime. A contribution to Fragmentation Theory in International Law* [Cambridge University Press, New York, 2012] 251. See also K. Schmalenbach, 'Article 26' in (O. Dörr, K. Schmalenbach eds.), *Vienna Convention on the Law of Treaties. A Commentary* [2nd ed., Springer, Berlin, 2018] 470.

[72] IACHR, *La Denuncia De La Convención Americana Sobre Derechos Humanos Y De La Carta De La Organización De Los Estados Americanos Y Sus Efectos Sobre Las Obligaciones Estatales En Materia De Derechos Humanos*, Advisory Opinion OC-26/20, Inter-American Court of Human Rights Series A No 26 (9 November 2020), 54 ff.

[73] The respect of the democratic and constitutionals procedures of domestic systems can thus be seen as a requirement for withdrawal in *bona fide* because it represents a further safeguard for those fundamental values underlying human rights treaties. Such pro-active approach to withdrawal has found 'allies' in the Supreme and Constitutional Courts of States which in recent years have challenged from within the legality of an act of withdrawal emanated from the executive. See, for example, *Democratic Alliance v Minister of International Relations and Cooperation and Others* (Council for the Advancement of the South African Constitution Intervening) (83145/2016), ZAGPPHC (2017), 53.

withdrawal[74], it is very likely that an 'abusive' withdrawal would be the object of non-recognition by State parties or by the treaty bodies of the relevant organization.

As regard reservations, the most relevant practice is found in human rights treaties. Treaty bodies have indeed *refused to recognize* the validity of reservations to treaties under their supervision thus placing themselves in contrast to the discipline of reservations as contained in the VCLT and in customary international law.[75]

In CCPR General Comment No. 24 of 1994, it was stated that: '[..] provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations'.[76] This document has then been taken up by other treaty bodies such as the CEDAW in 1997.[77] Similarly, regional human rights courts have endorsed such an approach in their jurisprudence, namely the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR).[78]

[74] See S. Steininger, 'Don't Leave Me This Way: Regulating Treaty Withdrawal in the Inter-American Human Rights System' in [5 March 2021] *EJIL:Talk! The Blog of the European Journal of International Law.*

[75] Art. 19 of the Vienna Convention on the Law of treaties indeed fails to 'provide a means to measure a reservation against the object and purpose of the relevant treaty and by leaving open the consequences to be attached to a reservation considered impermissible under this test [..] To counter this gap, various human rights supervisory bodies turned to adopting a practice of their own regarding the admissibility and effect of reservations to human rights treaties', B. Simma, G. Hernández, 'Legal Consequences of an Impermissible Reservation to a Human Rights Treaty. Where Do We Stand?' in (E. Cannizzaro ed.), *The Law of Treaties Beyond the Vienna Convention* (n 1) 64.

[76] Full quote: 'Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations', UN Human Rights Committee, *CCPR General Comment No.* 24 (n 68) par. 6.

[77] I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime. Conflict, Harmony and Reconciliation* [Martinus Nijhoff Publishers, Dordrecht, 2004] 22 ss.

[78] B. Conforti, 'The Specificity of Human Rights and International Law' in (U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer, and C. Vedder eds.), *From Bilateralism to Community Interests. Essays in Honour of Judge Bruno Simma* (n 68) 434-436.

CHAPTER V

Non-recognition and ascertainment of wrongfulness

1. The origins of objectivity in the 'ius ad bellum' almost four hundred years after Grotius

According to Kelsen, the application of the law in a legal order comes through two stages: the stage of the ascertainment of the delict and the determination of the party responsible for it, and the stage in which the use of force is authorized by the law as a sanction.[1]

Apparently, the instrument of non-recognition has little to do with this phase of the legal order, that is in determining which party has been responsible for a violation, for instance, of the peremptory rule on the prohibition of 'aggression'. It has been indeed underlined by some scholars that the definition of aggression is not necessary for the doctrine of non-recognition 'since definition is directed at characterization of international conduct, whereas non-recognition is contemplated whenever transfer of territory has been effected as an outcome of violence however initiated'.[2] On the contrary, as it has already been said, the principle of non-recognition cannot avoid the necessity of ultimately determining the aggressor.[3]

At the outset of the international collective security system, the US got out of the problem[4] while the political organs of League of Nations proudly developed their own test for the legal validity of States' acts, especially with regard to the use of force, which

[1] Then he added that decentralization in the first stage is far more serious than in the second stage; H. Kelsen, *Collective Security under International* [United States Government Printing Office, Washington,1957] 39.

[2] D. P. O'Connell, *International Law* [vol. 1, Stevens & Sons Limited, London, 1965] 156.

[3] F. A. Middlebush, 'Non-recognition as a Sanction of International Law' in [April 27-29, 1933] 27 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 53.

[4] Stimson placed great reliance on non-recognition in conjunction with the practice of consultation, capable of transforming the Pact from a simply inspiring declaration to an instrument for the peaceful settlement of disputes. Indeed, the US government excluded both the sanction of armed force and the economic boycott to respond to violations of the Pact. Non-recognition was conceived as a moral sanction preferable to any other coercive means as far as they would have been acts of war themselves.

led to the application of the policy of non-recognition.[5] Of course, organs of 'government' of the community do not enjoy the status of impartiality of a tribunal. However, given the difficulty in bringing the matter before a judge, the League recognized that the first step of the international rule of law – that was primarily a collective regulation of force – was to try to ascertain as objectively as possible the wrong part in a dispute, which is undisputedly the basis of all further steps leading to the enforcement of the law.[6]

The fact that conquest was considered illegal even as a result of a 'legitimate war'[7] was not intended to equalize again all wars as it was in the old international order prior to 1919. Quite the contrary, in era of the League of Nations there was a departure from the *might is right* principle which prevailed for centuries. The parties to a dispute were not anymore considered on the same level by the international community, as it happened until the early XX century when it was not possible to differentiate between just or unjust causes of war.[8] As a consequence, the law of neutrality underwent a considerable restraint. As explained by Wright 'this branch of law as a whole does flow from a general principle, namely, that the circumstances under which war is initiated between two states is no concern of other members of the family of nations' and he continues '[t]he principle is challenged today by the idea of a conventional outlawry of war [...] Both the medieval and the recent system also assumed that among the *violations of fundamental principles of law* which all the

[5] In presence of a ban on the use of force in international law subject to many exceptions (and towards which many different opinions were expressed) and in the absence of an international tribunal with compulsory jurisdiction, the League tried anyway to vindicate the newly born 'objective' law of nations and to have an impartial assessment of the facts. The League's modus operandi indeed was that of appointing committees of enquiry, which had to investigate in loco the situation at hand and by which an impartial assessment of the facts was expected. The reports of the committees were then eventually submitted to the vote of all Member States reunited in the Assembly.

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[7] S. Korman, *The Right of Conquest. The Acquisition of Territory by Force in International Law and Practice* [Clarendon Press, Oxford, 1996] 180-199.

[8] 'The standard reasoning that connected legal war to just war held that in the light of the impossibility to establish among sovereigns who had right on his side, both sides as well as third parties in the external forum had to act as if both sides had just cause. By consequence, all belligerents were supposed to have a right to wage war. Under the conception of legal war, the discrimination between the just and the unjust belligerent was lifted since the judgment of the underlying claims was suspended until the final judgment. This explanation for legal war as a default solution to the riddle of justice in war was repeated by numerous writers from the 15th to the early 20th centuries', R. Lesaffer, 'Aggression before Versailles' in [2018] 29(3) *The European Journal of International Law* 780. See also H. Kelsen (n 1) 8: 'In the mind of primitive men living under a completely decentralized legal order [..] it is impossible to give an objective answer to the question of who is a murderer and who an avenger, or, more generally, whether a use of force is illegal (a delict) or legal (a sanction)'; T. Chen, *The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States* [Stevens & Sons Limited, London, 1951] 427-28.

states might protest, is resort to violence contrary to international obligation, called in the Middle Ages "unjust war" and in the recent period "aggression". Neutrality in the sense of impartiality is inconsistent with these assumptions'.[9] With the 2001 ARSIWA – particularly art. 41(2) – it became clear that whenever a violation of the *erga omnes* prohibition of the use of force occurs, third States cannot invoke neutrality.[10]

Objectivity in the law of armed conflict was probably already arisen with the formulation of the Martens clause in the 1899 Hague Convention. In the words of Antonio Cassese: 'the Martens Clause proclaimed for the first time that there may exist principles or rules of customary *international law* resulting not only from state practice, but also from the laws of humanity and the dictates of *public conscience*.'[11] Despite the many controversial aspects surrounding the Martens clause, it is undisputable that the reference to the interests and core values of the international community as a whole was a ground-breaking step in international humanitarian law and in international law in general. It has been described indeed as an 'objective' means of determining natural law.[12]

Later, this 'objectivity' has spread to other peremptory norms of international law. Certain human rights, for instance, are considered of an 'objective' nature, their massive violations being a concern to the international community as a whole. Numerous human rights supervisory bodies have in last decades clarified this 'objective' nature of human rights, asserting their intrinsic characteristic of being universal and of aspiring to the common good of humanity.[13]

[9] Q. Wright, 'The present status of neutrality' in [1940] *The American Journal of International Law* 396-97 (emphasis added).

[10] 'To the extent that this trend [relating to Art. 41 ARSIWA] will find further confirmation in state practice and will lead to the development of stricter rules imposing duties on third states, the law of neutrality—the scope of applicability of which has already been reduced by the system of collective security established by the UN Charter—appears destined to find still less room for application, if not to vanish entirely through obsolescence', see P. Palchetti, 'Consequences for Third States as a Result of an Unlawful Use of Force' in (M. Weller ed.), *The Oxford Handbook of the Use of Force*, [Oxford University Press, Oxford, 2015] 1229-1230.

[11] Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' in (P. Gaeta, S. Zappalà eds.) *The Human Dimension of International Law* [New York, Oxford University Press, 2008] 40.

[12] R. Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' in [1997] 317 *International Review of the Red Cross* 125, 133.

[13] See, for instance, UN Committee on the Elimination of Racial Discrimination, Inter-State communication submitted by the State of Palestine against Israel (12 December 2019), UN Doc CERD/C/100/5 par. 3.25-3.26: '[..] The objective of such category of treaties is the common good, in contrast with other treaties the object and purpose of which are restricted to the interest of individual State parties. The Committee notes that regional human rights bodies have confirmed this assertion. Indeed, the European Commission of Human Rights in the case Austria v. Italy, based on article 24 of the European Convention of Human Rights, held that such ha Convention was essentially of an objective character, designed to protect the fundamental rights of the individual human beings [..] rather than to create subjective and reciprocal rights for the High Contracting States themselves'.

2. Objectivity of the higher law and non-recognition

Whether we are concerned with normative conflicts involving higher rules (see the Chapter above) or with 'material' conflicts (see the Chapter below), non-recognition implies a categorization of 'actions' as legal or illegal; this is a prerequisite for its functioning. This ingrained element of the doctrine is remarked by Lauterpacht: 'this distinction between acts consistent with and those contrary to international law enables us to understand the principle of non-recognition in terms of the general doctrine of recognition conceived as an act of application of international law'.[14] In fact, non-recognition has been said to rely on the existence of the law and on the assumption that one can distinguish between what is lawful and what is unlawful.[15] In this way, non-recognition aims to become an objective parameter of the international legal order with respect to fundamental rules. This not to say, of course, that higher rules are immutable – as the natural law school may propound.[16] The very fact that this objectivity was asserted by the organs of the League of Nations (and today United Nations) rather than by the Permanent Court of International Justice (and today the ICJ), reflects the embedment of higher rules in the political mutable environment of the international community.[17] However, one has to recognize that they enjoy a greater degree of 'objectivity' when compared to other rules of the system. It is precisely the instrument of non-recognition to strengthen or even to confer objectivity upon higher customary rules.[18]

[14] H. Lauterpacht, *Recognition in International Law* [Cambridge University Press, London, 1947] 410.

[15] T. Chen (n 8) 420.

[16] Natural law is highly static – at same time depending on the particular scholar's conception, and it risks not to be supported by the practice of States. For this reason, natural law scholars have been labelled as 'idealists' together with other schools of thought, such as certain branches of constitutionalism. Rather, higher law needs to be flexible enough to cope with the dark side of international law. Power structures change: not to detect this change does mean that law is trapped in anachronistic dynamics unable to address the needs of the 'new weaker'. It is important to report the words of Verbatim Record of Proceedings of the 10th AALCO (Asian-African Legal Consultative Organization) Annual Conference of 1969: '[t]here seems to be no inconvenience in the fact that the rules of the jus cogens are not precisely defined or clearly fixed in advance in every imaginable case for every possible situation. Like any other rules of international law in the age of its progressive development, there can be no static and inflexible rule. To oppose dynamism is to discourage orderly and progressive development'. Verbatim Record of the Proceedings of AALCO 10th Annual Session (1969), 190 (Preliminary Report Submitted by the Committee's Special Rapporteur, Dr. Sompong Sucharitkul - Thailand), cited in K. Gastorn, 'Defining the Imprecise Contours of Jus Cogens in International Law' in [2017] 16 *Chinese Journal of International Law* 647.

[17] The advantage of obtaining a declaration of non-recognition by the Security Council or the General Assembly is given by the consideration that 'such resolutions are essential in that they provide certainty by substituting for a decision of an individual State a collective determination of illegality and nullity', see J. Dugard, *Recognition and the United Nations* [Grotius Publication Limited, Cambridge, 1987] 135.

[18] Q. Wright (n 9) 403-404: 'It is believed that the acknowledgment that the violation of certain rules of international law is a concern of all members of the community of nations, implies the capacity of those members juridically to establish the fact of violation by general [non-]recognition. [..] This does not mean that the majority rules, nor does it mean unanimity, but rather the consensus of states. It is abundantly clear that decisions of this type

The question of objectivity was specifically addressed also by Chen in his 'The International Law of Recognition'. In reply to Sir John Fischer Williams, according to which there was no such a thing as objective illegality and that an act could be illegal only when the right of a subject of law is violated, Chen asserted that '[t]o say that an act is objectively illegal does not mean that it can be illegal without any right being injured. It means only that the right injured is the public right of a member of the society to have the law maintained.'[19] Chen thus conceived an objective rule of law, a rule whose violation is deemed to be an offence against the entire community and each of its members.[20] It can be concluded that the author was theorizing the *erga omnes* concept as a distinctive element of the New world order, which in turn gave title to each State to question the legal validity of acts of other States thanks to an objective standard, given by the Covenant of the League and the Pact of Paris (and then the Charter of the United Nations) and not to recognize such acts. The author then seems to make a distinction between 'erga omnes' and 'peremptory' norms. Whereas for the former it can be the case that the lack of support (non-recognition) by the community may be ignored by the parties concerned, in the case of peremptory rules of international law the act would be null and void *ab initio*.[21] However, Chen's 'peremptory' rules were different from the contemporary understanding of 'jus cogens' inasmuch as he referred to the abandoned concept of *traité-loi*, that is abstract, general, *objective* and normative rules of conduct – as opposed to the concept of *traité-contrat*, that is concrete, particular and subjective obligations. As a result, it is not entirely clear the distinction between *erga omnes* and *jus cogens* in the work of the author and the distinctive function played by non-recognition in both. Maybe it rests on the greater degree of objectivity of peremptory rules with compared to the wider category of erga omnes rules. A fact that leads us not to discard completely the idea that also erga omnes rules can be included in the notion of 'higher law', even still preserving to them a different *ratio*.[22]

are not decisions purely of fact, but are decisions involving elements of fact, of policy and of law. The recognizing state has weighed its interpretation of the factual situation in view of its legal commitments and of its political interest in accepting or attempting to change that situation, and has decided upon recognition or non-recognition. [..] Thus, general [non-] recognition may be regarded as an act of the family of nations as a whole. It may be either legislative or judicial in character. It may be achieved either by the gradual accumulation of individual recognitions or by a collective act'.

[19] T. Chen (n 8) 424.

[20] *Ibid.*, 427.

[21] *Ibid.*, 425.

[22] In the *Wall* case (ICJ, *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004) the Court derived the obligation of non-recognition of the illegal situation from the *erga omnes* character of certain obligations violated by Israel, namely the right of the Palestinian people to self-determination and some principles of humanitarian law (*Ibid*, par. 155, 159). Following the logic of our analysis, this makes clear the actual opening towards *erga omnes* norms as part of the 'Higher Law' because backed by a 'sanction' of nullity manifested by non-recognition.

Thus, non-recognition assumes that 'it is competent for one State to pronounce judgement on the legality of the acts of another and to determine the validity of a new title acquired by such acts. [..] Undoubtedly, the position would be more satisfactory if an international court were endowed, as a matter of course, with obligatory jurisdiction to decide questions relating to the legality of the conduct of States. But as no such obligatory jurisdiction is normally vested in any international tribunal, States themselves are both entitled and *constrained to pass judgment* upon the *legality of the actions of other States*; the inescapable alternative would be for them to treat such acts invariably as valid and as establishing legal rights.'[23]

Roberto Ago, in the 1996 Second Report on the Responsibility of States for Internationally Wrongful Acts, indeed placed the primary 'responsibility' for ascertaining whether a crime had been committed upon the injured State(s) (by claiming reparation) and all other States (through non-recognition). Only whereas 'the wrongdoing State chose to challenge the decisions of other States that it had committed a crime, then a dispute would arise'.[24] Some proposed to bestow the task of pronouncing on disputes related to State crimes upon the International Court of Justice, as in the VCLT for violations of *jus cogens*, but the proposal was discarded.[25] Even if Art. 19 on international crimes was abandoned, Art. 53 about the special consequences to be attached to crimes of States has been transplanted, with little modifications, in Art. 41 of ARSIWA about grave breaches of peremptory norms. Art. 41 is placed in Chapter III of Part II on the "Content of the International Responsibility of a State", thus separated from the following Part III about the "Implementation of the International Responsibility of a State" and particularly Artt. 48 and 54 (on actions that can be taken by others than the injured State). It is true that Art. 41 relates to peremptory norms and Arts. 48 and 54 to *erga omnes* obligations, but the placement in Part II underlines the *preliminary* nature of the principle of non-recognition and its preeminent role in the ascertainment of grave breaches of peremptory norms of international law, in addition to its role as a special consequence of international responsibility.

One can enquiry whether the objectivity of the higher law, provided by non-recognition, exerts some effects on the judicial ground. Higher rules, indeed, in this

[23] H. Lauterpacht (n 14) 413. This change of paradigm occurred after WWI. Indeed, prior to that moment, the leading theory among scholars was that no State could consider itself a judge when a violation of international law was committed by another State, unless its own rights were infringed by the breach of law; see L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law. Historical Development, Criteria, Present Status* [Lakimiesliiton Kustannus, Helsinki, 1988] 52-55.

[24] *Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996*, General Assembly Official Records, Fifty-first Session, Supplement No. 10 (A/51/10), 162.

[25] *Ibid.*, par. 13.

stage of international law, hardly exerts some effects in judicial proceedings, due to the distinction between procedural and substantive rules of international law.[26]

2.1. Some (potential) consequences of objectivity

Generally, the ICJ has not consented nor to *jus cogens* nor the *erga omnes* rules to overthrow the principle of consent as the basis for its jurisdiction[27], as well as the third-party rule.[28] This point has been highlighted as an inherent limit in the *jus cogens* doctrine.[29] However, it seems that non-recognition could bring developments also in this field, providing some answers to pragmatists. In 1950 Quincy Wright said: "General recognition establishes status objectively. All States, *international tribunals*, and international organizations are bound to give appropriate effect, when the occasion arises, to a status thus established".[30] This opinion may be shared with regard to non-recognition (which he included in the notion of "general recognition") as the only means of general international law capable to confer objectivity at the present stage of international law.[31]

In the case *East Timor (Portugal v. Australia)*, Portugal contended that the Court had jurisdiction on the basis that resolutions of the GA and the SC had already declared the use of force and the presence of Indonesia in East Timor as illegal. The Court would have not to 'decide *de novo* on their content', rather it should 'take them as "givens"'.[32] The Court rejected the claim on the basis of the *Monetary Gold* principle[33] (insofar as it would adjudicate on the conduct of Indonesia which was not party to the proceedings), but specifying that this was because 'the argument of Portugal under consideration rests on the premise that the United Nations resolutions, and in particular those of the security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory [..] The Court is not persuaded, however, that the relevant resolutions

[26] S. Talmon, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished' in [2012] 25 *Leiden Journal of International Law* 979-1002.

[27] ICJ, *Armed Activities on the Territory of the Congo (New Application:2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, par. 64, 78.

[28] ICJ, *East Timor (Portugal v. Australia), Judgement,* ICJ Reports 1995, 102, par. 29.

[29] See C. Focarelli, 'I limiti dello *jus cogens* nella giurisprudenza più recente' in [2007] *Rivista di diritto internazionale* 639-641.

[30] Q. Wright, 'Some thoughts about recognition' in [1950] 44(3) *The American Journal of International Law* 548, 557.

[31] The term 'objectivity' is used here in a neutral way, in the sense that non-recognition can indicate what is the shared common understanding of the international community on the status of certain norms, but it is always the result of a certain 'politics of international law' (see *infra*, par. 3).

[32] ICJ, *East Timor* (n 28) 103, par. 30.

[33] See ICJ, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America) (Prelimiinary Question),* Judgment, ICJ Reports 1954.

went so far'.[34] This position of the ICJ seems to open to the possibility that if UN organs had adopted resolutions containing an explicit obligation of non-recognition, that would have created a situation of 'objective' violation of higher rules so that the Court could adjudicate on the 'objective' conduct of Australia. Judge Weeramantry and Judge Skubiszewski in their dissenting opinions not only affirmed that it should be the case because non-recognition was implicit in UN resolutions, but they went even further, affirming a duty of recognition of rights.[35]

In the *East Timor* case, such a course of action would have been possible because the dispute was brought before a judge by Portugal against Australia, and not against Indonesia who was exercising illegally the sovereignty over the Territory. Thus, non-recognition could be a judicial tool for for indirectly enforcing higher rules; having thus a repercussion also on the procedural rules on locus standi of third States in proceedings and the future justiciability of *erga omnes* obligations.

More precisely, it emerges that non-recognition, giving objectivity to the rule breached, it is the only tool of customary international law to ensure the respect of the higher rules across the board. In other words, the application of non-recognition to a certain situation seems to be the parameter against which one can uphold the violation

[34] ICJ, *East Timor* (n 28) 103, par. 31. The Court concluded that '[w]ithout prejudice to the question whether the resolutions were binding in nature, the Court considers as a result that they cannot be regarded as 'givens' which constitute a sufficient basis for determining the dispute between the parties', *ibid.*, par. 32.

[35] In *Dissenting Opinion of Judge Weeramantry*, in *East Timor* (n 28) 209, it is stated: 'The existence of a right is juristically incompatible with the absence of a corresponding duty. The correlativity of rights and duties, well established in law as in logic […] means that if the people of East Timor have a right *erga omnes* to self-determination, there is a *duty lying upon all Members States to recognize* that right. To argue otherwise is to empty the right of its essential content and, thereby, to contradict the existence of the right itself. It is too late in the day […] for the accompanying duties to be kept at a level of non-recognition or semi-recognition'. In *Dissenting Opinion of Judge Skubiszewski*, in *East Timor* (n 28) 264, 266, it is stated: 'Non-recognition might protect or indeed does protect the rights to self-determination and to permanent sovereignty over natural resources. Any country has the *corresponding duty* to respect these rights and no act of recognition can release it from that duty'; and he continues: '[Self-determination] is part of *jus cogens*; consequently, the "international community could not remain indifferent to its respect" […] States, "both individually and collectively", have the duty to contribute to decolonization". These judges endorsed the position by which the higher law can impose duties on States. Unfortunately, we saw that at the present stage of international law, jus cogens does not go that far. Their call to a duty of recognition inherent in the status of erga omnes/jus cogens of the underlying norms (the language afferent to the field of the international law of recognition is thus significant), already theorized by Lauterpacht, is still a progression that has yet to come. Whereas they would seem two facets of the same coin, the first one is a much wider concept: it imposes duties on States whenever a jus cogens or erga omnes norm is said to apply to a certain situation and it may lead to the enlargement of the set of behaviours requested to States to facilitate the accomplishment of that right. The second one, is in line with the current development of jus cogens norms, that it is their negative character, and also with the fact that they are only recognizable by the voidness effect that follows their violation in a certain case. See also A. Orakhelashvili, 'The Classification of International Rules: A Reply to Stefan Talmon' in [2013] 26 *Leiden Journal of International Law* 100: 'In all areas where jus cogens applies, it deals with situations arising after the wrongful act. Apart from the 1969 VCLT, the areas of state responsibility, statehood and recognition, waiver and acquiescence, or acts of international organizations are virtually unanimous in recognizing the effects of jus cogens in relation to situations produced after the violation of the relevant peremptory norm'. According to us, also in the first case mentioned, it is appropriate to talk about 'normative conflicts', thus also here non-recognition is triggered by a violation of higher norms.

of the underlying peremptory rule (in the East Timor case, the self-determination of Timorese people) against third *actors*.[36]

Other international bodies, namely treaty-monitoring bodies, made a further step. For example, the UN Committee on the Elimination of Racial Discrimination (CERD) established its jurisdiction in the *Inter-State Communication submitted by the State of Palestine against Israel* by non-recognizing the validity of the Israeli reservation made at the time of Palestine accession to the treaty (that supposedly would establish a lack of treaty relations with the Palestinian "entity"). According to Israel 'the Applicant [Palestine] conflates the substantive legal obligations of the contracting State parties under the Convention with a procedural provision, namely the inter-state mechanism'. On the other hand, Palestine, supported the idea that the jus cogens and erga omnes character of some provisions of the treaty, 'excludes the possibility of a State party to unilaterally exclude bilateral treaty relations vis-a-vis another State party'; otherwise, the Convention 'would be rendered obsolete'. The Committee established its jurisdiction by reaffirming the objective status of human rights, in particular those of *erga omnes* character among which the prohibition of systematic racial discrimination (as ruled also by the ICJ) and the fact that certain human rights treaties aspire to 'the common good, in contrast with other treaties the object and purpose of which are restricted to the interest of individual State parties'.[37]

Another controversial effect of *jus cogens* regards the possibility of casting it as an exception to foreign immunity, especially foreign sovereign and status-based immunity when higher norms are at stake.[38] Starting from *Ferrini v. Federal Republic*

[36] This emerges also with respect to unilateral acts of States, precisely recognition of violations of peremptory norms, that was at stake also in the East Timor case (with regard to the Timor Gap treaty). See also the US recognition of Israel's sovereignty over Jerusalem.

[37] Committee on the Elimination of Racial Discrimination, *Inter-State communication submitted by the State of Palestine against Israel* (n 13) esp. par. 3.20, 3.21, 3.23, 3.25.

[38] A conflict may also arise between the *jus cogens* exception and conduct-based immunity; however, it is less critical than the other two cases above in the text. Moreover, 'conduct-based immunity may be understood as a substantive, as opposed to a jurisdictional, defence on the current state of the law, especially in criminal suits', thus jus cogens has more chance to supersedes such claim to immunity. See, A. J. Colangelo, 'Jurisdiction, Immunity, Legality, and *Jus Cogens*' in [2013] 14(1) *Chicago Journal of International Law* 53, 74-89. See also D. Tladi, 'The International law commission's recent work on exceptions to immunity: Charting the course for a brave new world in international law?' in [2019] 32 *Leiden Journal of International Law* 187: 'In the context of immunity, state practice reveals that, in the limited case of criminal proceedings, there is a basis for the recognition of exceptions to immunity *ratione materiae*. Whether this recognition will lead to other exceptions, e.g. immunity *ratione parsonae*, immunity in civil proceedings, and immunity of the state itself, remains to be seen. But for now, it can be said that the adoption of Draft Article 17 [on exceptions to immunity ratione materiae for jus cogens crimes] by the International Law Commission paves the way for the advancement of a brave new world in international law'.

of Germany[39] and *Prefecture of Voiotia v. the Federal Republic of Germany*[40], there has been a trend in the US and in Europe (and recently also in South Korea and Brazil) to lift sovereign immunities in front of violations of *jus cogens* (notwithstanding the ICJ judgment *Germany v. Italy*[41] and the ambiguous – according to some scholars, adversative[42] – stance adopted in the United Nations Convention on Jurisdictional Immunities of States and Their Property[43]). This envisaged exception is related to the discussion just made about the possibility that the ICJ could relieve its rules on jurisdiction. There is indeed a *de facto* impunity that usually accompanies the provision of immunity due to the lack of an alternative forum by law or in practice other than national courts. Such development of international law would be very welcomed to combat the lack of accountability and to guarantee justice. However, concerns have been raised about the fragmentation of the notion of *jus cogens*[44], the possible abuses by States for political or other purposes in civil proceedings against another State and the risk of destabilization of the international order. In this respect, China has so far been the most assertive opponent to the acceptance of a *jus cogens* exception to sovereign immunity due to the 'possibility that individual states might abuse domestic judicial processes and undermine China's sovereign independence and equality'.[45] These political questions seem thus to be the major obstacle for the progressive development of the law. What happens however when a situation is not recognized in international law?

Generally, States have negated sovereign immunity to non-recognized entities, at the same time granting access to their courts by natural and legal persons to bring a

[39] *Ferrini v Federal Republic of Germany* (Cass Sez Un 5044/04) (reproduced in the original Italian text in [2004] 87 *Rivista di diritto internazionale* 539.

[40] *Prefecture of Voiotia v FRG* Case No 11/2000, Areios Pagos. See Maria Gavouneli and Ilias Bantekas, 'Sovereign Immunity-Tort Exception-Jus Cogens Violations-World War II Reparations-International Humanitarian Law' [2001] 95 AJIL 198-204, 200 (translating the judgment of the court).

[41] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012.

[42] L. McGregor, 'State Immunity and Jus Cogens' in [2006] 55 *International Law & Comparative Law Quarterly* 437-445.

[43] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, New York, 2 December 2004 (UN Treaty Collection: https://treaties.un.org/); not yet in force.

[44] Dr Hemi Mistry, 'The Proposed Genocide Amendment to the UK Trade Bill: Paper Tiger or Self-Inflicted Wound?' in *EJIL:Talk!*, November 19, 2020.

[45] J. G. Ku, 'The Significance of China's Views on the Jus Cogens Exception to Foreign Government Official Immunity' in [201] 26 *Duke Journal of Comparative & International Law* 513. The recent lawsuits established by US private individuals and federate States against the Chinese government, Chinese officials and Chinese private entities (allegedly de facto organs of the State), due to the Covid-19 pandemic, relying among others also on the gravity of the violations involved (amounting to jus cogens violations), have been quasi-universally labelled 'as politically motivated, factually tendentious and legally dubious'; see Sean Mirski, Shira Anderson, 'What's in the Many Coronavirus-Related Lawsuits Against China?', online journal *Lawfare*, posted Wednesday, June 24, 2020 (https://www.lawfareblog.com/whats-many-coronavirus-related-lawsuits-against-china).

case against the non-recognized entity or authorities – but not the other way round.[46] This practice comprehends non-recognition as a faculty and non-recognition as an obligation. Far from encouraging a widespread recourse to voluntary and political non-recognition, what is important to remark is that if this practice is applied comprehensively, *a fortiori*, it should absolutely be the case whenever there is an authoritative determination of non-recognition of violations of peremptory norms. In a perspective of progressive development of the law, in lack of the prerequisite of (lawful) sovereignty, as the basis for procedural rules of immunity, the substantive protection of fundamental rules could be attained.

It is interesting to note that the ICJ in the *Jurisdictional Immunities of the State* stated: '[…] recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a jus cogens rule, or rendering aid or assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility'.[47] However, it seems that whenever an obligation of non-recognition exists upon the international community towards a certain situation, recognizing immunity from jurisdiction to the entity in question or its authorities in violation of the said obligation, would probably entail its recognition *de jure* and thus the violation of Art. 41 of the Draft Articles by the State of the forum.

It has also been the case where to be questioned were specific legislations of a recognized State. Such legislations, in fragrant violation of rules of international law of fundamental importance, were not recognized by the State of the forum, making the dispute justiciable.[48] Examples in the UK jurisprudence are not rare and they constitute an exception to the 'act of State' doctrine: see, for instance, *Oppenheimer v Cattermole*[49], and *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5).*[50] In other words, national courts, whether there is or not an authoritative determination of non-

[46] See ILA, *Recognition/Non-Recognition in International Law*, Washington Conference (2014), Second (Interim) Report, March 2014. See also M. Mancini, *Statualità e non riconoscimento nel diritto internazionale* [Giappichelli Editore, Torino, 2020] 201-208.

[47] ICJ, *Jurisdictional Immunities of the State* (n 40) 93.

[48] See D. McGoldrick, 'The Boundaries of Justiciability' in [2010] 59(4) *The International and Comparative Law Quarterly* 994: 'In exceptional cases the UK courts will not give effect to a foreign law because considers that it constitutes a flagrant violation of rules of public international law of fundamental importance. *Oppenheimer v Cattermole* is explicable on this basis. A November 1941 Nazi Government decree purported to deprive German Jews of their German nationality. It was treated as ineffective by the House of Lords because it constituted so 'grave an infringement of human rights that the courts of this country ought to *refuse to recognize it* as a law at all [..] Following Iraq's invasion of Kuwait in 1990, the Iraqi government had passed Resolution 369 by which it purported to dissolve Kuwait Airways Corporation and transfer its assets to Iraqi Airways Co. In *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* the House of Lords held that Resolution 369 had amounted to a gross breach of the established rules of international law and accordingly, as a matter of public policy, that it *would decline to recognize it*' (italics added).

[49] *Oppenheimer v Cattermole* [1976] AC 249.

[50] *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5),* 89 [2002] UKHL 19, [2002] 2 AC 883.

recognition by the UN, can declare null and void foreign legislations, non-recognizing them, when in contrast to fundamental principles of international law. Of course, when there is no UN resolution of non-recognition, it has been underlined the need to ascertain 'the flagrancy of the breach in question and [the] degree of international consensus about it'.[51] This practice has been also applied at the international level.

In the International Criminal Tribunal for the Former Yugoslavia (ICTY)'s *Furundžija* judgment of 10 december 1998, there is clearly stated that any national legislative, administrative or judicial act authorising torture 'would not be accorded international legal recognition'.[52]

Such a practice raises a connection between law and morality, thus reaffirming what we called above the 'moralization' of *opinio iuris*.[53] As a matter of fact, non-recognition already displays some practical ways to enhance the protection of higher values and thus the accomplishment of higher laws in national and international courts and bodies, even if not perfect and not applicable *in omnibus*.

3. Objectivity and Legitimacy

The objectivity of the higher law, that is its authoritative opposability against any international subject (States, international organizations, individuals, courts etc.), together with its foundation on considerations of morality, may lead to the conclusion

[51] D. McGoldrick (n 48) 995, paraphrasing Lord Steyn. As regards the non-recognition of the legislative, administrative and judicial acts of unrecognized entities it was already established as a direct consequence of the obligation *de quo* (see for example, Security Council Resolution S/RES/277(1970) of 18 March 1970, 5: '2. [The Security Council] Decides that Member States shall refrain from recognizing this illegal regime or from rendering any assistance to it; 3. Calls upon Member States to take appropriate measures, at the national level, to ensure that any act performed by officials and institutions of the illegal regime in Southern Rhodesia *shall not be accorded any recognition*, official or otherwise, including judicial notice, by the competent organs of their State'). However, the ICJ in the *Namibia* Advisory Opinion indicated also a limit to the invalidity of acts issued by authorities with respect to which there is an obligation of non-recognition, later named as 'Namibia exception'. According to this customary principle, invalidity can not be attached to 'to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory' (ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Report 1971, 56, par. 125).

[52] And continues: '[p]roceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act'; ICTY, *Prosecutor v. Anto Furundžija*, Judgment, 10 December 1998, IT-95-17/1-T, 59-60, para. 155. Even if not properly labelled as 'non-recognition', also the Audiencia Nacional in the case *Adolfo Francisco Scilingo* and the case *Pinochet*, rejected the validity respectively of the Argentinian laws 23.492 and 23.521, and the Chilean decree law 2.191 of 1978 by which Argentina and Chile seek to decriminalize the crime of torture committed by the accused. See respectively, *Auto de la Audiencia Nacional (España), de 4 de noviembre de 1998, por el que se considera competente la Justicia española para perseguir delitos de tortura, genocidio y terrorismo cometidos en Argentina* and *Auto de la Audiencia Nacional (España), de 5 de noviembre de 1998, por el que se considera competente la Justicia española para perseguir delitos de genocidio, tortura y terrorismo cometidos en Chile* (available online at http://www.derechoshumanos.net/).

[53] M. Frulli (n 16).

that higher law can never be in contrast with legitimacy.[54] However, as we have seen, objectivity does not rest upon a metaphysical objective, value-based purport of international law.[55] The normativity of the higher law is not derived from intellectual or doctrinal operations, but instead from the same phenomenology of the international legal order.

The argument about the incompatibility of objectivity and normativity in the law[56] is based indeed on the fact that values are the foundations of positive law.

But tor the same very reason, it could happen that the higher law be in tension with legitimate objectives. In particular, legitimate aims have been called on when the prohibition of the use of force conflicts with some other imperative goals of the international community, such as protection of people from massive violation of human rights. Take for example the conclusion of the Goldstone report on the conflict in Kosovo about the fact that the NATO intervention was 'illegal but legitimate'. Can we assume that a process of legitimization can be accepted to supersede legality in some circumstances where higher norms are at stake?[57]

For the sake of analysis, it is indeed appropriate to cite the differentiation between two types of international *jus cogens* norms: the prohibition of the use of force on one hand, and norms associated with human rights on the other.[58] There is then a third category of norms of *jus cogens* that, though human rights-related, have been drawn into the sphere of the former category, namely the principle of self-determination of peoples and the prohibition of apartheid. The first category is based on the sovereign equality of States, whereas the second one is addressed towards the individual. Non-recognition as a sanction has usually been attached only to the former, especially where a violation of higher rules entrenches the intervention of a foreign State at the

[54] For an appraisal of the concept of legitimacy in international law see C. A. Thomas, 'The Uses and Abuses of Legitimacy in International Law' in [2014] 34(4) *Oxford Journal of Legal Studies* 729-754.

[55] See J.G. Van Mulligen, 'Global Constitutionalism and the Objective Purport of the International Legal Order' in [2011] 24 *Leiden Journal of International Law* 277-294.

[56] Cf. M. Koskenniemi, 'The Politics of International Law' in [1990] 1 *European Journal of International Law.* The author outlined that international law is always in front of dualisms which express in different ways the conflicting pull of the demands for concreteness (which he considers the most important component of objectivity) and normativity. The more the law is conceived as a social process whereby States create the law (concreteness), the less the law is perceived as a methodology for verifying the law's content independently from political opinions.

[57] This is the position of Marco Milanovic, 'Illegal But Legitimate?' in [April 10, 2017] *EJIL:Talk The Blog of the European Journal of International Law.* For a contrary position see J. Vidmar, 'Excusing Illegal Use of Force: From Illegal but Legitimate to Legal Because it is Legitimate?' in [April 14, 2017] *EJIL:Talk The Blog of the European Journal of International Law.* According to him, the next logical step of that kind of reasoning indeed would be that because the intervention was legitimate it was legal.

[58] American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States; such a distinction, according to us, may also rely on the different source of law for the two categories. Whereas the ius cogens norms prohibiting the use of force have gone through a process of customary international law-making, jus cogens norms on human rights (genocide, torture, crimes against humanity, war crimes, certain principles of humanitarian law) have instead arisen through general principles of international law.

expense of the territorial State. Thus, as we will see better in the fourth paragraph, Art. 41 ARSIWA laying down the special consequences of serious violations of peremptory norms of international law does not apply substantively to human rights-related crimes.[59] Such situation is maybe due to the misconception that non-recognition relates to new criteria of statehood – together with territorial changes – i.e. the fact that *new* entities must respect criteria based on legality as requested by international law.[60] On the contrary, non-recognition is triggered whenever a peremptory rule is violated. Thus, nothing in principle impedes it being applied to human rights-related crimes.[61] This would signify that even if we are in front of established States, non-recognition renders the situation null and void, impeaching thus the full content of the principle. New or old governments would be equally affected. There is no question of inter-temporal application of the law.[62] Indeed, in presence of a manifest violation of international law, also a *de jure* recognition can be subsequently withdrawn without incurring in international liability.[63] In such a case,

[59] S. Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in (C. Tomuschat and J.-M. Thouvenin eds.) *The Fundamental Rules of the International Legal Order Jus Cogens and Obligations Erga Omnes* [Martinus Nijhoff, Publishers, Leiden/Boston, 2005] 107.

[60] See for example J. Crawford, *The creation of States in International Law* [2nd edition, Clarendon Press, Oxford, 2006] 84-85.

[61] In ICJ, *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, 32, par. 34, the ICJ mentioned for the first time the obligations *erga omnes*, including the duty to outlaw genocide.

[62] In this regard, it is quite interesting to note what Lauterpacht wrote about the non-recognition of the Soviet regime by the United States. He categorized this practice partially under the label 'the method of the revolutionary change as a Test of Recognition'. The US would have refused to accord recognition to the Soviets because of the inhumanity and ruthlessness which have accompanied the emergence of the revolutionary government. Such a qualification leads to the possible interpretation of the US non-recognition policy, as well as that of Great Britain as regard the Congo, as 'inextricably linked with humanitarian considerations' (see J. Dugard (n 17) 26-27). We stressed that this practice was anyway instrumental to the political goals of the major powers; however, in part it can be seen as a precursor of the changes to occur in the second half of the XX century. Lauterpacht however strongly opposed such a method and supports instead the utilization of humanitarian interventions. He raises also the question of intertemporal law. 'When the revolutionary regime lends itself to acts of cruelty and savagery which shook the moral sense of the civilized world, mere refusal of recognition is an ineffective and inadequate substitute for immediate suppression of the evil by a determined act of intervention. [..] It deprives States adopting that attitude of the opportunity for intercession and for appeal to the sense of humanity and pity of the revolutionary authorities. Finally, unless humanitarian intervention is made a rule of international practice to a larger extent than is at present, it is difficult to see why drastic disapproval on the part of foreign nations by means of non-recognition or withdrawal of recognition should be restricted to cases of inhuman conduct in the course of a revolution, and leave untouched barbarous suppression of opponents and minorities by an apparently well-established regime', H. Lauterpacht (n 14) 107.

[63] Usually indeed '[d]ans la conception déclarative classique, la reconnaissance est irrévocable', J. Charpentier, *La Reconnaissance Internationale et l'Évolution du Droit des Gens* [Éditions Pedone, Paris, 1956] 275. See, for example, the Italian annexation of Ethiopia. The UK had recognized it *de jure* on November 11, 1938. Nevertheless, in a communication sent in November 1940 by the British Secretary of State for the Colonies to the High Commissioner for Palestine, in connection with an action pending there, it was stated that '*de jure* recognition by His Majesty's government of the Italian conquest of Ethiopia had been withdrawn'. On February 5, 1941, the Foreign Secretary announced in the House of Commons that 'His Majesty's government would welcome the re-appearance of an independent Ethiopian State, and recognize the claim of the Emperor Haile Selassie to the throne'; reproduced in H. Lauterpacht (n 14) 356.

the 'withdrawal of recognition [..] is bound to have *retroactive* force. For, what is "null and void" (in French: "nul et non avenu") must be held invalid from its inception; this means that by virtue of the declaration the effects of the previously granted recognition are deleted "nunc pro tunc"'.[64] However, these different kinds of peremptory norms have different timelines of historical emergence and evolution, so that for instance human rights norms are still in process of being properly tackled by non-recognition.

Moreover, the words of Lauterpacht should be remarked: '[w]hen the (revolutionary) regime lends itself to acts of cruelty and savagery which shook the moral sense of the civilized world, mere refusal of recognition is an ineffective and inadequate substitute for immediate suppression of the evil by a determined act of intervention. [..] It deprives States adopting that attitude of the opportunity for intercession and for appeal to the sense of humanity and pity of the (revolutionary) authorities.'[65] Even Antonio Cassese envisaged the possibility that humanitarian intervention, in the stalemate of the UN SC, may by allowed to establish under 'strict conditions'.[66]

However, it has to be noted that those strict conditions, that would assure the fairness of such operations, have not been met on many occasions. In other words, States have not proven to be acting as an organ of the international community when force has been used in contravention to the UN Charter for humanitarian purposes. The risk of abuse that emerges from the recent practice of States – with negative consequences with regard to the stability of the territorial State and the same very protection of individuals[67] – raises many concerns.[68] It is to be remarked indeed that 'the law on the inter-State use of force serves in the first place to protect State sovereignty, but in doing so it also serves to protect individuals. Indeed, one might think of the ius ad bellum as an outer layer of protection of the right to life. The protection of State sovereignty and of territorial integrity – which in other ways often presents a barrier to the protection of human rights – can [..] constitute an important

[64] R. Langer, *Seizure of Territory. The Stimson Doctrine and Related Principles* [Princeton University Press, Princeton, 1947] 114. Further studies would highlight how this venue of retroactivity in the law can be applied to past atrocities, making them justiciable once recognition has been withdrawn.

[65] H. Lauterpacht (n 14) 107.

[66] A. Cassese, 'Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' in [1999] 10 *The European Journal of International Law* 23-30.

[67] A. J. Kuperman, 'The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans' in [2008] 52(1) *International Studies Quarterly* 49.

[68] That also explain why the International Law Commission (ILC) has been very cautious in drafting the rule permitting States other than the victim to adopt countermeasures, with the formula of 'lawful measures' in Art. 54 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) available at <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 05/03/2020.

component of the protection of individuals [..]'.[69] The return to a 'just war' theory, superseded since 1919, is a very uncertain and problematic prospect[70], by which no objective standard is supposed to survive.[71]

And yet, in other occasions, when there is no such perceived conflict of law – quite the contrary, when it seems that the illegality may prompt the accomplishment of another imperative goal – legitimacy can represent the key to reconciling (il)legality and effectiveness (or so to say, the law-creating effect of facts).[72] If the legitimacy claims at the basis of illegality gain international consensus, then the unlawful situation is recognized and incorporated in the system. In these particular cases, the international community, acting as a collective organ, does not leave open vacuums to lawlessness or to hegemonic power, rather it confers the sanction of law upon a situation which originated by illegal means through a procedure whereby general is substituted for individual action[73] (see *supra*, Chapter IV, par. 2.2). For example, the Canadian Supreme Court in its pronouncement on the *Secession of Quebec*[74] has pointed out that by way of a major international recognition an illegal act may acquire legal status. Widespread recognition on the international plane can thus determine the ultimate success of a secession.[75]

[69] C. Heyns, D. Akande, L. Hill-Cawthorne, T. Chengeta, 'The International Law Framework Regulating the Use of Armed Drones' in [2016] *International Comparative Law Quarterly* 794.

[70] From a positivist perspective the question is: 'To what extent can good legal reasons be used to support a departure from the rule?', U. Linderfalk, 'The Source of Jus Cogens Obligations - How Legal Positivism Copes with Peremptory International Law' in [2013] 82(3) *Nordic Journal of International Law* 389. See also I. Pavone, 'The Crisis of the "Responsibility to Protect" Doctrine in the Light of the Syrian Civil War' in [2014] 1 *Yearbook of International Law and Jurisprudence* 103-134; N. Ronzitti, 'NATO Intervention in Libya: A Genuine Action to Protect Civilian Population in Mortal Danger or an Intervention Aimed at Regime Change?' in [2011] 21 *Italian Yearbook of International Law* 3; I. Brownlie, 'Humanitarian Intervention' in (J. Norton Moore ed.) *Law and Civil War in the Modern World* [The Johns Hopkins University Press, Baltimore/London,1974] 217, 228; B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects' in [1999] 10 *European Journal of International Law* 1; O. Corten, 'Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?' in (P.Alston and E. Macdonald eds.) *Human Rights, Intervention and the Use of Force* [Oxford University Press, Oxford, 2008] 87.

[71] Cf. M. Koskenniemi (n 56)171-173.

[72] A. Tancredi, 'State Sovereignty: Balancing Effectiveness and Legality/Legitimacy' in (R. Pisillo Mazzeschi, P. De Sena eds.) *Global Justice, Human Rights and the Modernization of International Law* [Springer, Cham, 2018] 31-34.

[73] Q. Wright, 'The Legal Foundation of the Stimson Doctrine' in [December 1935] 8(4) *Pacific Affairs* 444.

[74] Supreme Court of Canada (1998) *Re Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada*, reproduced in ILR 115, 535–595, para. 106: 'Although under the Constitution there is no right to pursue secession unilaterally, that is secession without principled negotiation, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community'.

[75] '[..] recognition of non-State actors, despite the desuetude of formal institutions in contemporary international law such as that of belligerency and that of *de facto* recognition, may become relevant under international law, in particular when it relates to territorial entities aiming to achieve separation from the parent State, or struggling to gain power within the State. In this respect, the legal notion of international community interferes with the more traditional

In conclusion, legitimacy should be taken seriously by international actors to see whether illegality may be *recognized* and 'legalized'.[76] However, legitimacy has to conform to a high standard of proof to allow that *ex iniuria ius oritur*. Especially, the *opinio iuris* of States should be sufficiently unanimous to respect that standard. Indeed, legitimacy provides for looser, less transparent and less objective devices of power acceptance.[77] The same multilateral bodies, such as the UN Security Council 'can be used to circumvent legal norms and boost effective power in the international arena'.[78] Thus, conferring the sanction of law – recognition – upon illegality must always be the fruit of a careful balancing exercise by the part of the international community as a whole.[79] Also because, how we said above in this work, recognition of an illegal act does have a quasi-legislative function.

In the present globalized world, whereas international law has become (formally) universal, legitimacy alone can hardly suffice to justify an illegality. Only the affirmation of a positive obligation to recognize when specific elements are met – already envisaged by Lauterpacht in 1947 – would bring to unity all the *Law of Recognition*, overcoming many present inconsistencies.[80]

bilateral paradigm, increasingly allowing third States to resort to recognition as a means of enforcing fundamental values of the international community as a whole. In sum, recognition may become the flipside of non-recognition for serious violations of peremptory norms', E. Milano, 'Recognition (and Non-recognition) of Non-state Actors' in (W. Czaplinski and A. Kleczkowska eds.) *Unrecognized Subjects in International Law* [Scholars Publishing House Ltd., Warsaw, 2019] 17.

— [76] 'Formalism can no longer be blind to its own politics. Having shed pretentions of objectivity it must enter the political terrain with a programme of openness and inclusiveness, no longer interpreted as effects of neutral reason but of political experience and utopian commitment, as articulation of what might be called the "sedimented practices constituting the normative framework of a certain society". To be sure, formalism can no longer believe that it merely translates this framework to particular decisions. This is why it does not suffice only to provide a hearing of the political other but also to include in political contestation the question about who are entitled to make claims and what kinds of claims pass the test of validity', M. Koskenniemi (n 55) 174. As remarked by Shapiro and Hathaway 'the outlawry of war has not brought world peace. Even as its bright promises have been fulfilled, other dark threats have rush into the void. By opting for outlawry, we have traded a world of interstate war for one of intrastate war [..]', O. Hathaway, S. J. Shapiro, *The Internationalists and their Plan to Outlaw War* [Allen Lane, Great Britain, 2017]. The incredible decrease in interstate violence since 1919, has been accompanied with a growing trend of civil wars and domestic unrest. Equally, the principle of self-determination of peoples has shown in the last decades conflicting forces within it, and someone claim that the external dimension should be accompanied by an internal dimension of the principle, justifying in some cases the so-called 'remedial secession'. In front of these instances, the principle of non-recognition has demonstrated not to be operative, for the very reason that the state of the higher law is negatively defined, as discussed above, and most of the time based on the external relations between States, or more generally, between defined territorial entities. What happens within those entities, without external interferences, is usually left to United Nations' discretion or to unilateral acts of States (which are precisely justified by legitimacy).

[77] E. Milano, *Reconciling Effectiveness, Legality and Legitimacy* [Martinus Nijhoff Publishers, Leiden/Boston, 2006] 202, 272.

[78] A. Tancredi (n 72) 33. In this sense, a declaration by the General Assembly is always more indicative of general acceptance.

[79] See *infra*, Chapter VII, par. 3 on some cases of recognition of governments in which the UN and the international community has not made such a balancing.

[80] Furthermore, a positive obligation to recognize would at present engage values and principles which are not universally accepted, and thus neither part of jus cogens, such as the principle of 'democratic government' or 'democracy'. The risk thus is to undermine the authority of international law as a world-ordering paradigm.

CHAPTER VI

Non-recognition and enforcement of the law

1. The post-WWII settlement and the ultimate banning of conquest

The Covenant of the League of Nations and the Briand-Kellogg Pact marked the beginning of a new international order. However, scholars are used to identify the end of WWII as the moment in which the 'New World Order' finally came into view.[1] What distinguished the First World War (and many wars before it) from WWII is that in the latter, the losing States were not carved up and parcelled out to the victors. Germany and Japan, both of which unconditionally surrendered, were occupied but not with the intention to establish claims of sovereignty by the part of the Allies. Not only, but they also transferred authority over the defeated powers back to the defeated powers.[2]

Such course of action was already made clear in the Atlantic Charter, a statement issued by Roosevelt and Churchill on August 14, 1941, setting out US and British goals for the period following WWII. In the document, it was stated *inter alia* that they did 'seek no aggrandizement, territorial or other'; that they 'desire[d] to see no territorial changes that [did] not accord with the freely expressed wishes of the people concerned'.[3] The governments allied with the US and the UK formally adhered to the principles of the Atlantic Charter at the meeting of the Inter-Allied Council, held in London on September 24th, 1941.[4] Similarly to the Atlantic Charter, also the Treaty of Alliance between the UK and the Soviet Union signed in May 26, 1942 contained a mutual commitment of parties not to seek territorial aggrandizement for themselves.[5] Then, also the Cairo Declaration of December 1, 1943 between Roosevelt, Chang Kai-shek and Churchill, contained the following statement: '[t]he Three Great Allies are fighting this war to restrain and punish the aggression of Japan.

[1] O. A. Hathaway and S. J. Shapiro, *The Internationalists, And Their Plan to Outlaw War* [Allen Lane, Great Britain, 2017] xvii, 314.

[2] *Ibid.*, 321-22.

[3] *Atlantic Charter*, August 14, 1941, available on Avalon Project website at <https://avalon.law.yale.edu/> (accessed 03/06/2020).

[4] R. Langer, *Seizure of territory. The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice* [Princeton University Press, New Jersey, 1947] 84.

[5] *Twenty-Year Mutual Assistance Agreement Between the United Kingdom and the Union of Soviet Socialist Republics, May 26, 1942*, Art. V, available on Avalon Project website at <https://avalon.law.yale.edu/> (accessed 03/06/2020).

They covet no gain for themselves and have no thought of territorial expansion'.[6] Not only there were no other acquisitions of territory but, as already suggested at the end of the preceding chapter, all conquests between 1928 and 1949 were reversed, going back exactly to the year 1928. Germany lost the territories it had gained throughout Europe, including Poland, Czechoslovakia, and Austria. Japan's seizure of Manchuria and other part of mainland China, as well, was undone. The vanquished States lost also all their colonial territories which were placed under Allied administration.

It is true, however, that there have been some territorial transfers at the end of the war, particularly at the advantage of the Soviet Union which was the only ally to gain any significant territory: part of East Prussia, the southern part of the island of Sakhalin, Bessarabia and Northern Bukovina. Scholars have discussed of these transfers at length. Korman, for instance, believes that territorial changes of the kind imposed by the victorious Allies on the defeated Axis would have no legal basis the war been an organized community action conducted under Art. 10 and 16 of the Covenant. According to him, indeed, the Covenant had established an 'absolute' prohibition of conquest, thus even after a 'legitimate war' (a war resorted to after having extinguished the procedures set out in Artt. 12, 13 and 15) or a war in self-defence. A conclusion endorsed also by Art. 15(2) of the 1924 Geneva Protocol for the Pacific Settlement of Disputes.[7]

On the contrary, he suggests that the Pact of Paris was not seen by the major powers to exclude, in a successful *war of sanction* (a war resorted against a State which had violated the Pact itself and therefore had lost the benefit of it), the acquisition of territory by conquest, provided that the acquisition was a necessary measure of security against future aggressions. Seen in this way, the Allies would have acted under the Pact of Paris only, in so far it still permitted conquest in case of a 'lawful' war.[8]

Without dismissing Korman's premises about the different tenor of the two instruments in outlawing conquest, we believe that such transfers of territory were 'regrettable deviations from accepted law'.[9] In other words, the Allies acted

[6] Cairo Conference, 1 December 1943, available on Avalon Project website at <https://avalon.law.yale.edu/> (accessed 03/06/2020).

[7] '[..] in view of Article 10 of the Covenant, neither the territorial integrity nor the political independence of the aggressor State shall in any case be affected as the result of the application of the sanctions mentioned in the present Protocol', League of Nations, *Protocol for the Pacific Settlement of International Disputes*, 2 October 1924, available at: <https://www.refworld.org/docid/40421a204.html> (accessed 07/05/2020).

[8] S. Korman, *The Right of Conquest. The Acquisition of Territory by Force in International Law and Practice* [Clarendon Press, Oxford, 1996] 180-199.

[9] O-A. Hathaway and S. J. Shapiro (n 1) 322. See also I. Brownlie, *International Law and the Use of Force by States* [Clarendon Press, Oxford, 1963] 115: ' The effect of the preamble, which deprives the violator of the benefits of the treaty as against other contracting parties […] [does not mean] that the treaty ceases to bind contracting parties *vis-à-vis* the violator henceforth and for all purposes: in all probability it provides for collective defence in reaction to the particular act of violation'.

consciously that the New World was based on the assumption that conquest was illegal. They were actually fighting also for re-establishing independence in occupied territories. As remarked by Brownlie: 'By 1942 the war against Germany and its allies was regarded by many governments as a war of collective defence and sanction against a source of aggression and lawlessness which constituted a common danger. It was with this spirit that the United Nations Declaration of 1 January 1942 was made' (emphasis added).[10] Even framed as a war of collective self-defence and sanction towards the aggressors, the war did not give way, as already underlined, to massive readjustments of territory. We can thus reaffirm the conclusion reached at the end of the preceding chapter, that the Allies largely resumed the principles of the Covenant and applied them. Of course, since 1944-45 when the war was almost won, and particularly during the Yalta and Potsdam conferences, the logics of the West-East contraposition began to surface. Great Britain and the United States were obliged to make concessions to the Soviet Union for the sake of international order. Such outcome is explicable also in light of the fact that the principle of self-determination was still a feeble limit as regards post-war readjustments.[11]

[10] I. Brownlie (n 9) 108, 109. Of course, it must be reminded that it is true as far as the beginning of the war is concerned. The Allies, indeed, then exceeded this scope when the US deplorably deployed atomic bombs in Japanese territory.

[11] During WWI, Woodrow Wilson in its famous speech to the Congress of January 8, 1918 on the Fourteen Points, a statement of principles to be used for peace negotiations, had declared that '[t]here shall be no annexations, no contributions, no punitive damages'. Lenin, before him, in the Decree on Peace of 8 November 1917 asked for 'an immediate peace without annexations'. The principle which inspired both leaders was that of self-determination of people. Wilson included it also in draft Article 10 of the Covenant which would have provided: 'The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may be in the judgement of three-fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary' (reproduced in J. Crawford, *The creation of States in International Law* [2nd edition, Clarendon Press, Oxford, 2006] 108, note 41). However, some scholars have pointed out that, immediately the Paris Peace Conference, it became clear that the victors applied this principle only where it did not conflict with their neo-colonial interests. The mandate-system itself represented a 'surrogate' of conquest to the advantage of the victorious powers. The *Åland Islands* case before the first session of the League of Nations too is often cited as evidence of the fact that self-determination was not a legal principle before 1945. Notwithstanding 'there had been a strong tendency to annex former enemy colonial territories' [..], the final outcome of the negotiations [for the final version of Art. 22 of the League's Covenant about the mandate system], however difficult of achievement, was a rejection of the notion of annexation' (ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, ICJ Reports 1971, 18, par. 50). It follows that also after WWI, there had been an attempt to counter massive readjustments of territory, but not through a genuine principle of self-determination but through the emerging principle of non-annexation, that is the prohibition of conquest and its consequent non-recognition. Indeed, the Court assumed that the principle of self-determination of people was a 'subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations' (*ibid.*, 19, par. 52). Most importantly this assertion of the Court seems to suggest that a principle of non-annexation, at least in the context of colonialism, was already emerged prior to the establishment of the League of Nations (see the Latin-American developments since 1889).

What is an incontrovertible fact is that from 1948 on, 'a chance an average state would suffer conquest fell from once in a lifetime to *once or twice in a millennium*'.[12] And those conquests which still would have occurred continued not to be recognized by the international community.

2. Legal developments about aggression, right of conquest and non-recognition from 1932 to 1948

Before starting to analyse the period from 1948, it is worth going over again all the legal documents that have been adopted since the Stimson Declaration and League's Assembly Resolutions in 1932, to further examine some legal aspects concerning the right of conquest. In the preceding section we have underlined that by the Covenant of the League, conquest was never considered as legal and ought not to be recognized, even as a result of a legitimate war. The absolute prohibition of seizures of territory was stated also by a number of other instruments of the inter-war period.

In Latin America, the first document to be adopted was the Saavedra Lamas Pact (or Anti-War Treaty of Non-Aggression and Conciliation), which at Art. 2 stated that '[..] between the high contracting parties territorial questions must not be settled by violence, and that they will not recognize any territorial arrangement which is not obtained by pacific means, nor the validity of the occupation or acquisition of territories that may be brought about by force of arms'. According to Dr. Saavedra Lamas, the Pact should be a contribution to the uniform acceptance of the Briand-Kellogg Pact as well as to its effective application.[13] However, like Art. 10 of the Covenant and contrary to the Pact of Paris, it seems to clearly refer to 'any territorial arrangement' which is 'brought by force of arms'. Moreover, the Saavedra Lamas Pact mentioned both occupation and acquisition of territory, leading us to suppose that in any case and in any form, the acquisition of territory was not allowed. Indeed, even if a war in self-defence was regarded by the drafters as an accepted right of States against foreign aggressions, Art. 2 of the treaty stipulated a juridical principle according to which 'victory gives no rights'.[14] Numerous States, American as well as European, adhered to the treaty.[15]

The 1933 Montevideo Convention on the Rights and Duties of States not only reiterated a precise obligation of non-recognition of territorial acquisitions or special

[12] O. A. Hathaway and S. J. Shapiro (n 1) 314.

[13] P. C. Jessup, 'The Saavedra Lamas Anti-War Draft Treaty' in [January 1933] 27(1)*The American Journal of International Law* 109.

[14] *Ibid.*, 111.

[15] To see the status of adhesion and ratification in 1945 see R. Langer (n 4) 77.

advantages (thus confirming the tenure of the pyramid framework) and confirmed an *absolute* prohibition of conquest, but also enlarged considerably the notion of 'force' employed by a foreign State. It is thus useful to quote Art. 11 in full: '[t]he contracting states definitely establish as a rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other coercive measures. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another State *directly or indirectly or for any motives whatever even temporarily*' (emphasis added). Thus, whereas in the preamble the parties referred to 'wars of aggression and territorial acquisitions that may be obtained by means of armed conquest', once again the obligation of non-recognition contained in Art. 11 exceeds the limitation to aggression to encompass a wider understanding of use of force. Not by chance, this progressive article was the object of reservations by Brazil and Peru, according to which the principle of non-recognition was not codifiable because not yet positive law.

In 1936, the Inter-American Conference for the maintenance of peace delivered two documents: the Declaration of principles of Inter-American solidarity and cooperation and the Convention to coordinate, extend and assure the fulfilment of the existing treaties between the American States. Art. 3(a) of the Declaration read as follows: 'The Inter-American Conference for the Maintenance of Peace declares [..] That the following principles are accepted by the American community of Nations: (a) Proscription of territorial conquest and that, in consequence, no acquisition made through violence shall be recognized [..]'.[16] The Convention provided in Art. 6 that the Contracting Parties reaffirmed their loyalty to the principles enunciated in various agreements, among which the Pact of Paris and the Saavedra Lamas Pact.[17]

At the Eight Inter-American Conference, held at Lima in 1938, the principle of non-recognition was included in a declaration adopted on December 22: '[t]he… Conference declares… that it reiterates as a fundamental principle of the Public Law of America, that the occupation or acquisition of territory or any other modification of territorial or boundary arrangement obtained through conquest by force or by non-pacific means shall not be valid or have legal effect'.[18]

With the beginning of WWII, the absoluteness of seizures of territories, however, was overshowed by the fact that the principle of non-recognition was mainly

[16] Declaration of Principles of Inter-American Solidarity and Cooperation; December 21, 1936, available on Avalon Project website at <https://avalon.law.yale.edu/20th_century/intam07.asp> (accessed 05/15/2020).
[17] R. Langer (n 4) 79.
[18] Cited in *ibid.*, 80.

associated with the concept of aggression. The main concern for the American States was indeed to prevent territorial changes in the Western Hemisphere effected by acts of aggression on the part of non-American powers.[19] On October 3rd, 1939, the Foreign Ministers of American States met in Panama and adopted a resolution providing for consultation 'in case any geographic region of America subject to the jurisdiction of any non-American State should be obliged to change its sovereignty and there should result therefrom a danger to the security of the American continent'.[20]

After the invasion of Europe by Germany, the US Congress adopted a Joint Resolution on 17-18 June, 1940 in which it stated, *inter alia*, that '(1) The United States would not recognize any transfer, and would not acquiesce in any attempt to transfer any geographic region of this Hemisphere from one non-American Power to another non-American power [..]'.[21]

In July, 1940, a second meeting of Foreign Ministers of American States was held at Havana. The XV declaration adopted stated that '[a]ny attempt on the part of a non-American State against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered as an act of aggression against the States which sign this Declaration'.[22]

When the war was over, however, references to the principle of non-recognition in inter-American documents returned to have a wide-ranging application. In February-March 1945, an inter-American Conference on the Problems of War and Peace was held in Mexico. On March 6, it adopted a 'Declaration on Reciprocal Assistance and American Solidarity', which became known as 'Act of Chapultepec' since it was signed at Chapultepec Castle.[23] Its preamble emphasized the principle of non-recognition to the effect that '[..] the American States have been incorporating in their international law, since 1890, by means of conventions, resolutions and declarations, the following principles: (a) The proscription of territorial conquest and the non-recognition of all acquisitions made by force'.

We have already seen that the war against the Axis also produced declarations of a global scope, among which the Atlantic Charter, the Moscow Declaration and the Cairo Conference. Even if non-recognition was not explicitly mentioned there, it was

[19] *Ibid.*, 82.

[20] See Consultative Meeting of Foreign Ministers of the American Republics, in [1940] Supplement: Official Documents *The American Journal of International Law.*

[21] Cited in R. Langer (n 4) 81.

[22] Havana Meeting of Ministers of Foreign Affairs of the American Republics, July 21-30,1940, available at OAS website <http://www.oas.org/consejo/meetings%20of%20consultation/Actas/Acta%202.pdf> accessed 20/09/2020.

[23] Inter-American Reciprocal Assistance and Solidarity (Act of Chapultepec), March 6, 1945, available on Avalon project website at <https://avalon.law.yale.edu/20th_century/chapul.asp> accessed 25/09/2020.

surely involved in their implications and aimed at banning conquest definitely in international law and its consequent *absolute* non-recognition.

Given the consolidated fact that conquest was considered illegal even a result of a 'legitimate war', some scholars have argued that a definition of aggression is not necessary for the doctrine of non-recognition 'since definition is directed at characterization of international conduct, whereas non-recognition is contemplated whenever transfer of territory has been effected as an outcome of violence however initiated.'[24] How to explain then, the manifold attempts at defining aggression in the inter-war period? And, above all, how to explain the efforts of the League of Nations at determining the aggressor before proceeding to apply non-recognition?

Illegal war and aggressive war were almost identical concepts; even if illegal war was intended to have a wider scope, comprehending aggressive war but also all wars initiated in violation of the principles of Covenant, so to say, without a previous recourse to the mechanisms of pacific settlement of disputes.

As already said, war was still permitted in case of self-defence, of matters of domestic jurisdiction, or Council's failure to settle the dispute. There were actually some moves towards affirming that war was not considered legal if not in self-defence or with the authorization of an international organ (resembling the future Art. 2(4) of the UN Charter) but in general those documents ended up reflecting positive law and did not go beyond the text of the Covenant and the Pact of Paris.[25] As a consequence, almost every scholar agree on the fact that it is highly difficult to establish whether the Pact of Paris and the Covenant of the League referred only to the technical term 'war' or whether they were intended to prohibit also any forcible measures short of war.[26] According to us, as already said elsewhere in this work, the leap from the text of the two instruments to a wider prohibition of use of force has been effectuated through the doctrine of non-recognition.[27] Art. 10 was indeed the less technical article of the whole Covenant and it permitted the Organization to exit the strict limits of 'war'. By negating to States the material advantages of armed force (a force even not properly

[24] D. P. O'Connell *International Law* [Vol. 1, Stevens & Sons Limited, London, 1965] 156.

[25] I. Brownlie (n 9) 71-73.

[26] *Ibid.,* 84-92.

[27] Brownlie admits that the evidence of a 'customary rule that the use of force as an instrument of national policy otherwise than under a necessity of self-defence was illegal' is to be found in the practice of States between 1920 and 1945. Particularly he refers to 'numerous statements in diplomatic correspondence and the instruments relating to non-recognition' which constitute evidence of a general practice accepted as law (I. Brownlie (n 9) 110). So, the author implicitly admits that it has been the principle of non-recognition of the fruits of aggression which has been instrumental, preparatory for the establishment of a complete ban on the use of force in 1945. In fact, this has been so since the first link between non-recognition and the notion of use of force during the Latin-American conferences in the second half of the XIX century. Latin-American countries, indeed, advanced the principle of non-recognition of unlawful seizures of territory, in a historical moment in which the use of force (not even aggressive war) has been outlawed in international law.

labelled as 'resort to war'), indirectly they seek to diminish significantly the manifestations of force themselves in international relations.[28]

This leap however could not be an abrupt one. That is why the determination of the aggressor in a given case was perceived as important in international law in the inter-war period. There was a discrepancy between a 'conservative' constitutional text and a progressive move of some statesmen and scholars towards enlarging the ban on the use of force. Thus, for the League's organs it was important to maintain a legitimacy ground when invoking the peaceful sanction of non-recognition, balancing the Covenant with progressive principles.

This element also explains why no express provision was drafted to include the cases of illegal acquisition of territories. The attempt by the GA and the ILC to approve a Draft Declaration on the Rights and Duties of States, which included the express legal requirement of non-recognition of territorial changes brought about by the use of force in Article 11, was not successful, due to disagreement among members on the definition of aggression.[29] Only in 1967, after many years of neglect of the question, the United Nations returned to address the problem of the definition of aggression, which culminated in the adoption of the 1974 Resolution of the Definition of Aggression.

The necessity of determining the aggressor before applying the sanction of non-recognition departed from the just war (or legal war) theory which dominated the old international order. We already underlined that the obligation of non-recognition relies on the assumption that one can distinguish between what is lawful and what is unlawful. This means, for example, that the two (or more) parties in conflict are no more treated on equal grounds by the international community, as it was until the early XX century due to the fact that States were not able to differentiate between just or unjust causes of war.[30] In this way, non-recognition aimed to become an 'objective' parameter of the international legal order.[31]

[28] O. A. Hathaway and S. J. Shapiro (n 1) 314-315.

[29] See G. Ziccardi Capaldo, *Le situazioni territoriali illegittime nel diritto internazionale* [Editoriale Scientifica, Napoli, 1977] 44; E. Milano, *Unlawful Territorial Situations In International Law. Reconciling Effectiveness, Legality and Legitimacy* [Martinus Nijhoff Publishers, Leiden/Boston, 2006] 104.

[30] 'The standard reasoning that connected legal war to just war held that in the light of the impossibility to establish among sovereigns who had right on his side, both sides as well as third parties in the external forum had to act as if both sides had just cause. By consequence, all belligerents were supposed to have a right to wage war. Under the conception of legal war, the discrimination between the just and the unjust belligerent was lifted since the judgment of the underlying claims was suspended until the final judgment. This explanation for legal war as a default solution to the riddle of justice in war was repeated by numerous writers from the 15th to the early 20th centuries', R. Lesaffer, 'Aggression before Versailles' [2018] 29(3) *The European Journal of International Law* 780.

[31] As we will see below, the defence's line of argument at Nuremberg was that the collapse of the collective security system that came into existence after the First World War signalled a return to the jus ad bellum; the anarchical international system where the use of force as part of foreign policy was quite acceptable. The defence thus

In this connection, the extent of the new 'objective' parameter of the international legal order is identifiable also in the development of the crime of aggression during the Nuremberg and Tokyo trials after WWII.

The Nuremberg trial, for the very first time, provided for individual liability for engaging in crimes against peace. The legal basis for including aggression as an international crime in the Statute of the tribunal was the 1928 Paris Pact.[32] The findings of the Tribunal made the assumption that the reference to 'war' in the Pact had no limiting effect.[33] The progressive elements in the Pact, brought to light by the instrument of non-recognition, revealed themselves completely during the proceedings of the trial. In other words, the practice of States[34], not only had materialized a customary rule prohibiting a war of aggression;[35] for the Tribunal also accepted the most progressive implications of the rule towards the complete banning of the use of force in international law.[36] Even if Art. 6 of the Nuremberg Charter did not contain a definition of aggression[37], from some documents it emerges that the reference to aggression was a wide-ranging concept. Already at the London Conference in 1945, Robert H. Jackson, the US Supreme Court Justice appointed by President Truman as prosecutor of the International Military Tribunal (IMT) at Nuremberg, suggested to add to Art. 6 a definition of the "aggressor" as the State which has committed one of the following actions: '1. Declaration of war upon

maintained that the distinction between 'legal' and 'illegal' wars became unworkable. Significantly, the IMT rejected them as irrelevant. See G. Kemp, *Individual Criminal Liability for the International Crime of Aggression* [Intersentia Publishers, Mortsel, 2010] 93-94.

[32] H. T. King, Jr., 'Nuremberg and crimes against peace', in [2009] 41(2/3) *Case Western Reserve Journal of International Law* 274.

[33] Brownlie (n 9) 88.

[34] Notwithstanding notable deviations such as the British recognition of the annexation of Ethiopia.

[35] Some scholars however have questioned the existence of evidences of the establishment of a customary rule prohibiting aggression in international law before 1945. See, for example, G. A. Finch, 'The Nuremberg Trial and International Law' [1947] 41 *American Journal of International Law* 26: 'It cannot be denied that beginning with the establishment of the League of Nations the concept of preventing aggressive war has been growing [..] But unratified protocols can not be cited to show acceptance of their provisions and resolutions of international conferences have no binding effect unless and until they are sanctioned by subsequent national or international action; and treaties of non-aggression that are flagrantly disregarded when it becomes expedient to do so can not be relied upon as evidence to prove the evolution of an international custom outlawing aggression [..] Moreover, the Tribunal failed to take into consideration or give due weight to the attitudes of the prosecuting governments toward the same events at the time they took place'.

[36] Again, contrary to the defence which asked whether States had observed the corollaries in relation to the law of neutrality, the laws of war, and the concept of non-recognition of unlawful gains and answered negatively. Dr. Jahrreiss in his concluding speech affirmed that 'In the practice of the relations between States there existed – at least during several years prior to 1939 – no effective general ruling on International Law regarding prohibited war', see Brownlie (n 9) 170.

[37] Art. 6(a) of the IMT Charter, annexed to the London Agreement, provided as follows: 'The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) crimes against peace: namely planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing'.

another State. 2. Invasion by its armed forces, *with or without a declaration of war*, of the territory of another State. 3. Attack by its land, naval or air forces, *with or without a declaration of war*, on the territory, vessels or aircraft of another State'.[38] Even if, due to Soviet disapproval, Jackson was ultimately to get the alternatives of "war of aggression" and "war in violation of international treaties, agreements or assurances" into the Charter, losing the reference to international law and the detailed list of ways in which aggression could be carried out, the concept of aggression continued to be broadly understood. Even the Control Council Law No. 10 contained a definition of crimes against peace covering not only a war of aggression and wars in contravention of treaties, agreements and assurances, but also invasions of other countries, an hypothesis which does not necessarily entail 'shooting' or resistance by the victim of the aggression.

The substance of the Nuremberg Tribunal's judgment is devoted to violations of treaties. Particular reference is made to the Hague Conventions, the Treaty of Versailles, numerous treaties of mutual guarantee, arbitration and non-aggression, and most importantly the Pact of Paris (or Pact Briand-Kellogg). The judgment then turns to what is termed "the Law of the Charter" and most of the argument here is based on the criminality of aggressive war. The Tribunal specified that '[t]he Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law'.[39] The judgment then tackles the argument brought by the defence on the basis of the principle of legality – *nullum crimen sine lege, nulla poena sine lege*. It rejects the application of the principle in these words: '[…] Occupying the positions they did in the Government of Germany, the defendants or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes, they must have known that they were *acting in defiance of all international law* when in complete deliberation they carried out their designs of *invasion and aggression*. On this view of the case alone, it would appear that the maxim has no application to the present facts'.[40] The Tribunal goes on to insist that '[t]his view is strongly reinforced by a consideration of the *state of international law in 1939, so far as aggressive war is concerned*'.[41] The leap from the language of

[38] Reproduced in R. S. Clark, 'Nuremberg and the Crime Against Peace', in [2007] 6(3) *Washington University Global Studies Law Review* 530.

[39] *International Military Tribunal (Nuremberg), Judgment and Sentences*, reproduced in [1947] 41 *American Journal of International Law* 175–216.

[40] *Ibid.*, 217.

[41] *Ibid.*

international responsibility to individual criminal liability is made as follows: '[i]n the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing'.[42] Thus, the criminalization of aggression was considered a logical development of the law as it stood.

The focus on crimes against peace at Tokyo served a highly significant and undeclared legal purpose: to shore up the Nuremberg judgment on aggressive war. When the International Military Tribunal for the Far East (IMTFE) opened, indeed, the crimes against peace charge had already attracted much criticism on grounds of its retroactivity and selectivity.[43] William Donald Patrick, the British judge appointed to the IMTFE, justified the crime of aggression in the London Charter as follows: 'I thought there was sufficient justification for the declarations in the Charter in the series of pronouncements of the nations which began with the Treaty of Versailles [of which the League Covenant was a part] and culminated in the Pact of Paris'.[44] It was maintained that, even if the Pact of Paris did not contain the term 'crime', from the language of the document it could be inevitably inferred that the illegality of aggressive war and its criminality were perceived and acknowledged.[45] According to Quincy Wright, the illegal acts of a State may have such serious consequences that 'there is no lack of justice or reason in punishing the individual who gives reality and substance to the acts of the state, since it is he and not the state entity which has the *mens rea*'.[46] In effect, there are many evidences that crimes against peace as defined in the Charters of the International Military Tribunals at Nuremberg and Tokyo have been accepted as a part of positive law since 1946, among which there is the UN General Assembly's resolution 95 (I) of 13 February 1946.[47] The tendency to ban the

[42] *Ibid.*

[43] K. Sellars, 'William Patrick and "Crimes Against Peace" at the Tokyo Tribunal, 1946-1948' in [2011] 15(2) *The Edinburgh Law Review* 168. According to some scholars, the reference to crimes against peace indeed was not motivated solely by a desire to promote peace and security. The Americans were interested in criminalising the Germans and Japanese for starting the war in order to justify respectively, breaching their own neutrality against Germany and succumbing to military defeats at the hands of Japan. It is interesting to note that the British government was opposed to the process, but the United States exerted efforts to persuade it to support the tribunals. Foreign Secretary and future Prime Minister Anthony Eden, Foreign Office lawyers such as Gerald Fitzmaurice, and lawyers close to the establishment like Arnold McNair, were particularly insistent that international law before the war did not prohibit war or attract individual criminal responsibility. On this point see K. Sellars, *Crimes against Peace and International Law* [Cambridge University Press, 2013] 37, 40, 59-60, 75, 120-121.

[44] Reproduced in *ibid.*, 173.

[45] G. Kemp (n 31) 96.

[46] I. Brownlie (n 9) 166.

[47] UN Document A/64, Resolution of the General Assembly during First Part of First Session, 1946, 9. With this resolution, the Assembly was taking note of the agreement of all States for the establishment of the tribunals and the prosecution of the major war criminals and of the definition of war crimes and crimes against peace and humanity contained in the Charter of the IMT at Nuremberg.

use of force in international law if not authorized by an international organ or by the exception of self-defence, which was emerging thanks to the instrument of non-recognition, was now positive law.[48]

To conclude, non-recognition not only permitted the transition from a conservative to a progressive understanding of the law on the use of force, but also paved the way for the establishment of individual criminal liability for the 'supreme crime' of aggression.[49]

3. The Charter of the United Nations and the (once again) implicit reference to non-recognition

Art. 2(4) of the UN Charter reads as follows: 'The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles: [..] 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.[50] As it appears immediately the article sanctions a comprehensive prohibition of force as opposed to the limited concept of 'war'. In other words, 'force' finally replaced 'war' as the focus of the contemporary prohibition contained within the UN Charter.[51] Once again it is important to remark that the juridical basis for asserting that the use of force or threat of force otherwise in self-defence or with the authority of an organ of the United Nations is illegal, is found in a customary rule developed in the '30s and consolidated definitely at the end of WWII which rests on state practice and on the League's Covenant and the Pact of Paris.[52] A customary rule which originated thanks to another custom relating to the absolute non-recognition of seizures of territories. So, while some scholars have advanced the idea that non-recognition is a corollary to the rule prohibiting the threat or use of force as contained in Art. 2(4) of the UN

[48] UN Document A/519, Resolution of the General Assembly, no. 177 (II), 112.

[49] See also UN Document A/1858, Report of the ILC on the Work of the Third Session, General Assembly, 6th Session, Supplement no. 9, 1951.

[50] UN Charter, available online at https://www.un.org/en/sections/un-charter/un-charter-full-text/ (accessed 07/20/2020).

[51] C. Henderson, *The Use of Force and International Law* [Cambridge University Press, 2018] 16: 'In that respect, the provision does not simply prohibit the launching of aggressive wars, but also covers those acts involving the use of force that fall short of war'. Please note that while Art. 2(4) refers to 'threat or use of force', Art. 10 pertained *only* to 'external aggression'.

[52] I. Brownlie (n 9) 112.

Charter[53], it would be more appropriate to say the contrary. More precisely, the principle of non-recognition lies beneath the whole art. 2 of the Charter.

The Charter does not refer directly to a principle of non-recognition in its text. By calling on member States to respect the sovereignty, territorial integrity and political independence of other States, Art. 2(4) resembles in many respects Art. 10 of the Covenant. While for the latter, however, the majority of scholars and statemen expressed themselves in favour of the interpretation by which the principle of non-recognition was implicit in the article, as regards Art. 2(4) there seems to be a silence as to whether it encompasses the obligation of non-recognition. Nevertheless, the new obligation contained in Art. 2(4) carried within it the whole history behind the expansion of the concept of war towards the complete banning of the use of force, thus in particular it already had in its *genes* the fact that it was born out of the principle of non-recognition – which was already a custom in 1945 – making superfluous to mention it explicitly.

It is to be noted that Art. 10 of the Covenant bound States to 'respect and *preserve*' the territorial integrity and political independence of the other Members of the League. Art. 2(4) instead contained a verb ('refrain') likely implying a 'negative' obligation or, so to say, requiring only 'abstention' from carrying out a certain conduct. However, the rule prohibiting the use of force in international relations shall be read in context with the other principles contained in Art. 2 of the Charter and the more structured system of collective security of the United Nations.

As for Art. 10 of the Covenant, even more so for Art. 2(4) Lauterpacht's consideration holds true, that is that the principle of non-recognition constitutes the minimum of the obligation to respect the territorial integrity and political independence of other member States. This flows not only from logic, but also from Art. 2(2) which provides that 'All Members […] shall fulfil in good faith the obligations assumed by them in accordance' with the Charter. To recognize a forcible interference affecting the territorial integrity or the political independence of another State would be contrary to a *bona fide* interpretation of Art. 2(4).[54]

[53] 'The rule may be said to be at present in the course of possibly reaching a stage when it would share in the nature of the principle of which it is a corollary, i.e., the principle of the non-use of force. In that hypothesis non-recognition would acquire the rank of a peremptory norm of that law (jus cogens) The rule [..] of non-recognition now constitutes part of general international law'; ICJ, *Dissenting Opinion of Judge Skubiszewski (Case Concerning East Timor)*, 262, par. 125. See also M. Arcari, 'The relocation of the US embassy to Jerusalem and the obligation of non-recognition in international law' in [2018] 50 *Questions of International Law* 5; W. Czapliński, 'The Crimean crisis and the Polish practice on non-recognition' in [2014] Zoom Out I *Questions of International Law* 74.

[54] Not by chance, the obligation of non-recognition presupposes the central place of solidarity in international law; see T. Tzimas, 'Solidarity as a Principle of International Law: Its Application in Consensual Intervention' [2018] 6(2) *Groningen Journal of International Law* 335-36; A. G. Karoma, 'Solidarity: Evidence of an Emerging

Moreover, it is important to stress the wording of Art. 2(5): 'The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles [...] 5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement measures'. This paragraph contains the express obligation not to provide assistance to any State against which the UN is taking preventive or enforcement actions. This article becomes relevant especially when the obligation of non-recognition is embodied in a Security Council's decision (see Art. 25 of the Charter), whereas instead it is less clear when it is contained in General Assembly's resolutions or in recommendations.[55]

We will see that the obligation not to provide assistance to a wrongdoer is usually tied with the obligation of non-recognition, both in UN organs' resolutions and in the case-law, and we will enquiry on their relationship, given that sometimes it can be a troubled one.[56]

The principle enshrined in Art. 2(1)[57] about the sovereign equality of States also is to be considered, which in turn is closely linked with Art. 2(7)[58] about the limit of

International Legal Principle' in (H. P. Hestermeyer, D. König, N. Matz-Lück, V. Röben, A. Seibert-Fohr, P-T. Stoll and S. Vöneky eds.) *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* [Martinus Nijhoff Publishers, Leiden/Boston, Vol. 1, 2012] 104. In this light it is also remarkable that in the Preamble to the Charter, all Members agreed to be determined to unite their 'strength to maintain international peace and security, and *to ensure*, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest'.

[55] J.A. Frowein in (Bruno Simma ed.) *The Charter of the United Nations. A Commentary* [Oxford University Press, New York, 1994] 130. In a decision concerning the border dispute between Djibouti and Eritrea under the item "Peace and security in Africa", the Council referred to the principles of the Charter of the United Nations as set out in Article 2, paragraphs 1-7 as a whole, placing however particular emphasis on its 'commitment to the principles of the political independence, sovereign equality and territorial integrity of all States, and respect for the sovereignty of all States'; UN Security Council Resolution 1894 (2009) *[on the protection of civilians in armed conflict]*, 11 November 2009, S/RES/1894 (2009). However, given that non-recognition was an already established custom, it is possible to affirm that the obligation of non-recognition should be fulfilled by States even when it is contained in a non-binding document of the United Nations' organs, for 'Resolutions of the Security Council and the General Assembly are, from a jurisprudential perspective, declaratory in the sense that they confirm an already existing duty on States not to recognize such situations. In practical terms such resolutions are essential as they provide certainty by substituting for the decision of an individual State a collective determination of illegality and nullity. Furthermore, they may (as in the cases of Rhodesia and Namibia) add the backing of the Charter's obligatory provisions to the duty of non-recognition'; J. Dugard, *Recognition and the United Nations* [Grotius Publication Limited, Cambridge, 1987] 135.

[56] S. Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?', in C. Tomuschat e J.-M. Thouvenin (eds) *The Fundamental Rules of the International Legal Order Jus Cogens and Obligations Erga Omnes* [Martinus Nijhoff, Publishers, Leiden/Boston, 2005] 105-106.

[57] Art. 2(1) reads as follows: 'The Organization is based on the principle of the sovereign equality of all its Members'.

[58] Art. 2(7) reads as follows: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'.

domestic jurisdiction. The prohibition of threat or use of force was intended to apply to relations between States, and not in the context of conflicts within the domestic domain of States.[59] This is linked to the fact that the sanction of non-recognition is fundamentally attached with the concept of *sovereignty*. The modern doctrine of non-recognition developed as a means to ensure the maintenance of the new international order, which finally took its shape after WWII and the establishment of the United Nations. The primary focus of non-recognition was to guarantee the territorial integrity and political independence of each State with respect to the other sovereign States, preventing that international violence could change the *status quo*, and – one might say – preserving international law itself. Thus, the word 'justice' used in Art. 2(3) ('All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and *justice*, are not endangered') must be intended exactly in the sense that the each State should stick to the rules of international law, not permitting the law of strongest to impair the sovereign equality of another State.[60] However, with the passage of time, the principle of non-recognition as an enforcement tool has developed in practice beyond the original understanding in the UN Charter. The principle of non-recognition, whose *raison être* rests on the maxim *ex iniuria ius non oritur*, is thus the guiding light of modern international law as it finally came into view in 1945. Aspiring to be an objective parameter of *international* justice – as preserving equal rules of the game for each player – and the primary tool of solidarity within the new international community, the principle of non-recognition placed itself at the basis of international legal order.

[59] We will see whether subsequent practice of the UN has modified or annulled Art. 2(7) giving birth to new customary rules. '[…] Il limite della *domestic jurisdiction* è caduto nella prassi riguardo a situazioni interne in cui siano in gioco i diritti umani nella più larga accezione di questo termine'; B. Conforti, C. Focarelli, *Le Nazioni Unite* [CEDAM, Verona, 2010] 216.

[60] This was not, however, a new idea. Since the middle of the XIX century, international law writers, moving their first steps towards a prohibition of an unlimited recourse to force, asserted that armed intervention and other measures short of war 'to be unlawful as a result of the principle of the equal sovereignty of states, a cornerstone principle of the law of nations'; A. Verdebout, 'The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis' in [2014] 1(2) *Journal of the Use of Force and International Law* 227-234. In the *Corfu Channel case*, the ICJ, even if not referring to a standard of the UN Charter (since Albania at the time was not a UN member), rejected British justification for Operation Retail (self-defence, self-protection and intervention). The Court based its judgment on the principle of sovereign equality of States, as the respect for territorial sovereignty is an essential foundation of international relations; see W. Czapliński, 'Customary International Law of the Use of Force' in [2018] 8(2) *Wroclaw Review of Law, Administration & Economics* 98. 'The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such .as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself'; ICJ, *The Corfu Channel Case (merits), Judgement of April 9th, 1949*, ICJ Reports 1949, 35.

4. Later reference documents

One of the principles of the 1970 Declaration on Friendly Relations among States, adopted by the General Assembly of the United Nations was the restatement of the prohibition of the threat or use of force in international relations. In the following paragraphs specifying the content of the prohibition, there is also the specific reference to the principle of non-recognition. It reads as follows: 'The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized *as legal.*'[61]

The obligation not to recognize 'as legal' the acquisition or occupation of territory resulting from aggression or the threat or use of force was also included in the 1970 Declaration on the Strengthening of International Security[62], the 1975 Helsinki Final Act of the Conference of Security and Co-operation in Europe[63] and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.[64] The 1974 Definition of Aggression provided in a slightly different formulation that 'No territorial acquisition or special advantage resulting from aggression is or shall be recognized *as lawful*'.[65]

This last formula has been taken up by the ILC in its 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). The ILC has extended the obligation not to recognize 'as lawful' beyond aggression and the illegal threat or use of force to all situations created by a serious breach of a *jus cogens* obligation.[66] Art. 41(2) reads as follows: 'No State shall recognize *as lawful* a situation

[61] UN General Assembly Resolution 2625 (XXV) adopted on 24 October 1970. *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (24 October 1970).*

[62] UN General Assembly Resolution 2734 (XXV) adopted on 16 December 1970, *Declaration on the Strengthening of International Security*: '[The General Assembly] *Solemnly reaffirms* that [..] no territorial acquisition resulting from the threat or use of force shall be recognized as legal [..]'.

[63] Organization for Security and Co-operation in Europe, Helsinki Final Act, adopted on 1 August 1975: 'No such occupation or acquisition will be recognized as legal'.

[64] UN General Assembly Resolution A/42/766 adopted on 18 November 1987, Annex, *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*: '[The General Assembly] Solemnly declares that [..] neither acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation'.

[65] UN General Assembly Resolution A/RES/29/3314 (XXIX) adopted on 14 December 1974, Annex, *Definition of Aggression* (emphasis added).

[66] It is to be remembered indeed, that in the '30s, though jurists were in agreement that an act in violation of a fundamental norm which affected the community rather than an individual State was void and should not be

created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation'.[67]

5. Analysis of the norms which *trigger* the application of non-recognition and related issues

5.1. Non-recognition and use of force

The sanction of non-recognition has been employed after WWII mostly in relation to the breach of the prohibition of the threat or use of force. It is to be reminded indeed that the sanction developed as a means to deal with unqualified use of force and the advantages thereof during the inter-war years; a move which finally led to the establishment of a customary rule prohibiting the threat or use of force short of war and in Art. 2(4) of the UN Charter.

Every instrument from 1945 onwards including the obligation of non-recognition, as we have seen in the section above, relates to the rule on the prohibition of the threat or use of force. Only in Art. 41(2) of the ILC Draft Articles the obligation of non-recognition has broadened its scope to refer to serious breaches of *jus cogens* obligations. The breach is to be considered 'serious' if it involves a gross and systematic failure by the responsible State to fulfil the obligation.[68] In the commentaries to the 2001 Draft Articles itself, the ILC seems to refer mostly to situations arising out of an unlawful use of force, in particular acquisitions of territory brought about by the use of force. The Articles recall the Stimson Note, as the point of formal departure of the doctrine, and the 1970 Declaration on Friendly Relations among States, whose principles have been recognized as customary law by the ICJ in the judgement *Military and Paramilitary Activities in and against Nicaragua.*[69] Then it cites the reaction of the Security Council to the 1990 Iraqi invasion of Kuwait. After the invasion, indeed, Iraq declared its intent to 'merge' with Kuwait. In response, the UN SC adopted Resolution 662 (1990) in which it decided that the annexation had

recognized, 'it was not clear which norms, apart from those of aggressive war and the slave trade were peremptory in character and carried with them the sanction of invalidity' (J. Dugard, *Recognition and the United Nations* (n 55) 134).This is why non-recognition was applied quasi-exclusively to unlawful territorial acquisitions. Lauterpacht indeed, in 1949, stressed how 'the main practical implication of the principle *ex iniuria ius non oritur* has laid in the non-recognition of conquest and other territorial changes accomplished by recourse to force contrary to such instruments as the Covenant of the League of Nations and the General Treaty for the Renunciation of War' (H. Lauterpacht, *Recognition in International Law* [Cambridge University Press, London, 1947] 425).

[67] Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) available at <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 05/03/2020

[68] *Ibid.*, 113, par. 7.

[69] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 100, par. 188.

no 'legal validity' and was to be considered 'null and void', with the body calling upon all States, international organizations, and specialized agencies not to recognize it.[70]

Another case of application of the sanction of non-recognition to an unlawful annexation is represented by what has been described as the annexation of Crimea by Russia. According to the prevailing view, on 21 March 2014, in the aftermath of an armed intervention and an illegal referendum, the Russian Federation decided to separate Crimea from Ukraine and integrate it into its own territory under a credible threat or use of force against Ukraine. While the UN SC was prevented from taking action in this matter by the Russian veto, the UN GA adopted a resolution stating that the referendum have 'no legal validity' and calling all Member States and international organizations not to 'recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum', including any attempts 'to modify Ukraine's borders through the threat or use of force or other unlawful means'.[71]

The case of the non-recognition by the Security Council with respect to the invasion of Northern Cyprus by Turkey military forces was flowing forth a violation of the rule of the prohibition of the threat or use of force as well. Here, however, the breach of the rule had as a consequence the establishment of the Turkish Republic of Northern Cyprus, that is a puppet entity.

After the Greek Cypriots fought a bloody war for independence from the British and their Turkish Cypriot allies, the 1960 Treaty of Nicosia signed by the United Kingdom, Greece, Turkey, and Cyprus, established the Republic of Cyprus as an independent entity even if with 'uncomplete statehood' and limited sovereignty.[72] This formula led to a harsh confrontation between two almost entirely different parts of the country which finally culminated in a civil war in 1963. The presence of UN Peacekeeping Forces (UNFICYP) in Cyprus from 1964 did not prevent Turkish Military forces from invading the island in 1973 and occupying a considerable part of it.[73] In response the UN GA unanimously passed Resolution 3212 (XXIX) in which the crisis was labelled as a 'threat to peace and security'. The Resolution called upon all States not to 'respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus and to refrain from all acts and interventions directed against it'.[74] The UN GA was endorsed by UN SC Resolution 365 (1974),

[70] UN Security Council Resolution 662(1990) adopted on 9 August 1990.
[71] UN General Assembly Resolution A/RES/68/262 adopted on 1 April 2014, *Territorial Integrity of Ukraine.*
[72] C. Brewin, *The European Union and Cyprus* [Eothen, Huntingdon, 200] 1-3.
[73] D. Richter, *Illegal States?* in (W. Czaplinski and A. Kleczkowska eds.), *Unrecognized Subjects in International law* [Scholars Publishing House Ltd., Warsaw, 2019] 34.
[74] UN GA Resolution 3212(XXIX) adopted on 1 November 1974, *Question of Cyprus.*

which also urged all States to implement measures contained in the two Resolutions as soon as possible.[75] However, on 13 February 1975 the separatist party declared the Northern part of the island occupied by Turkish forces as the 'Turkish Federated State of Cyprus'. The UN SC immediately adopted Resolution 367 (1975) in which however it simply regretted the unilateral decision in so far it could compromise the continuation of negotiations between the representatives of the two communities.[76] Yes, the process of separation continued and on 15 November 1983, the Assembly of the Turkish Federated State by a Declaration proclaimed a new 'Turkish Republic of Northern Cyprus', which was promptly recognized by Turkey. The SC passed Resolution 541 (1983) of 18 November 1983 which stated that the 'attempt to create a 'Turkish Republic of Northern Cyprus' was invalid as well as the declaration itself.

A. Non-recognition, the prohibition of the threat or use of force and 'progressive' developments

The scope and content of the prohibition contained in Art. 2(4) of the UN Charter should not be read in isolation but in context with Arts. 39, 51 and 53. Here the problem arises that those articles contain various terms which, though related to one another, differ considerably in their meaning: 'use or threat of force', 'threat to peace', 'breach of the peace', 'act of aggression', 'armed attack' and 'aggressive policy'. These terms are used in the Charter without receiving any further explanation. Neither legal writings nor State practice have so far undisputedly clarified their meaning.[77] To further complicate the picture, it is not entirely clear the different extent of the prohibition of the use of force under the UN Charter and general international law.[78] This uncertainty does not make it easier to analyse the relationship between the sanction of non-recognition and the use of force.

[75] UN SC Resolution 365 (1974) adopted on 13 December 1974.

[76] UN SC Resolution 367 (1975) adopted on 12 March 1975, *The situation in Cyprus*. According to Dugard it was related to the fact that both the UN SC and the GA did not take 'seriously' the claim of the of Turkish occupied Cyprus to permanent statehood, see J. Dugard, *Recognition and the United Nations* (n 55) 108. For GA Resolutions see: Resolution 3395(XXX) of 20 November 1975; Resolution 32/15 (1978) of 9 November 1978; Resolution 34/30 (1979) of 20 November 1979; Resolution 37/253 (1983) of 13 May 1983.

[77] A. Randelzhofer in (B. Simma ed.) *The Charter of the United Nations. A Commentary* (n 55) 111-112.

[78] However, it can be maintained that Art. 2(4) reflects customary international law as confirmed by the ICJ in the Nicaragua judgment and henceforth by international case-law at large. Its modification by supervening practice and opinio iuris cannot be asserted with easiness. As explained by Oliver Corten: '[..] in particular instances of the non-use of force, we are effectively led to apply the classical principles governing the establishment or the evolution of customary rules. These principles are, as is well-known, very demanding, particularly in the presence of a peremptory norm. It is surprising, then, that some scholars seem to contemplate the evolution of international law as regards the prohibition of the use of force less rigorously than in other areas, such as the law of the sea or diplomatic law. Such a position is difficult to explain in legal terms, and may convey more of a desire to legitimate certain interventionists policies in moral or political terms', O. Corten, *The Law Against War. The Prohibition on the Use of Force in Contemporary International Law* [Hart Publishing, Oxford/Portland, 2012] 49.

The notion of 'force' in the UN Charter is, accordingly to the prevailing view, limited to armed force[79] (even if we cannot say that the matter has been settled).[80] This narrow concept contained in Art. 2(4) finds however a wider counterpart if we consider the role of the Security Council according to Chapter VII of the Charter (other than, as said above, Art. 39 stipulates that '[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. Thus, in determining whether or not, in a specific case, there exists a threat to the peace, a breach of the peace, or an act of aggression, the Security Council seems to enjoy broad discretionary power.[81] This power of discretion can be exercised especially in relation to the 'threat to peace' scenario: it is such a vague and flexible hypothesis that, unlike aggression and breach of the peace, is not necessarily characterized by military operations and, more in general, by the use of military force. The concept of 'threat to peace' is broader also with respect to that of 'threat of force' as contained in Art. 2(4) of the Charter.[82] The large discretion of the Council as regard the threat to peace formula, as well as its enlargement over time, reflects also in the enlargement of the application of non-recognition to an ever-increasing set of situations. This because the common goods protected by the international community change and increase over time.

After all, in practice the Council has always invoked a threat to peace when it intended to adopt the measures under Chapter VII[83], including the sanction of non-recognition. The latter has been described in the law of the United Nations as an 'atypical' measure adopted under the Chapter, along with for instance the institution of the *ad hoc* international criminal tribunals (ICTs) in the '90s (see *infra*, par. 7).

The Declaration on Friendly Relations among States reiterates the text itself of Art. 2(4) of the Charter, except for the words 'Every State'. This would support a restrictive interpretation of the provision in the sense of armed force only. However, the declaration must be read as a whole, whatever its legal value. One must thus

[79] A. Randelzhofer (n 77) 112.

[80] G. Distefano, 'Use of Force between States: Scattered Observations' in [2013] *SSRN Electronic Journal*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230935>, 2, note 8 2.

[81] B. Conforti, C. Focarelli, *The Law and Practice of the United Nations* [Martinus Nijhoff Publishers, Leiden/Boston, 2010] 204.

[82] The purpose and the aim of introducing this notion of "threat to the peace" as a situation opening up the path to the use of Chapter VII of the Charter has clearly consisted in conferring extremely broad discretionary power on the Security Council. This is a long way from the idea of threat within the meaning of Art. 2(4), which is contemplated only as one of the particular manifestations of a policy of force conducted by one State against another'; O. Corten (n 78) 95.

[83] *Ibid.*, 207.

acknowledge that in the declaration other forms of violence or pressure are condemned, precisely in the formulation of the 'Duty not to intervene'.[84]

This consideration opens to the question whether, as maintained by some lawyers, the obligation of non-recognition completely overlaps with the rule on the prohibition of the threat or use of force or not. There seems to be room to think that the obligation of non-recognition is not strictly a 'corollary' of the said prohibition, being able to have a wider scope of application. As we have shown before, the obligation of non-recognition is strongly attached to the notions of sovereignty, territorial integrity and political independence. That means that it can be theoretically activated by a severe breach of Art. 2(1). Consider indeed that a State can be in breach of the general prohibition on the use of force even if the territorial sovereignty of another State is not breached.[85] Vice versa, a State can potentially incur in the sanction of non-recognition for having breached the sovereignty of another State, without violating the rule on the prohibition of the threat or use of force, if the intervention of that State is aimed at obtaining sovereignty powers over part or the entirety of the territory of another State. Such claim of sovereignty can take the form of a territorial annexation as well as of a puppet government without necessarily recourse to shooting.[86]

For the purpose of our analysis, it can be said that whereas the rule prohibiting the use of force in international relations refers only to the actual use of military force of a certain gravity and intent or to a clearly established threat to use military force, the obligation of non-recognition can operate in a wider sphere of application, activated by a severe violation of Art. 2(1). In this case, non-recognition serves as a threshold parameter to distinguish whether political and economic pressure, accompanied with zero or limited use of force, is part of a common and accepted phenomenon of the international arena or whether it gives rise to a violation of international law. The evidence is given by the fact that such intervention in the

[84] G. Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* [Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands, 1979] 75-76: '[..] There would be a difference, in other words, if illegal recourse to *armed force* met sanctions or measures different from those attached to the illegal recourse to *economic or political* force. But such is not the case in the Charter; and it is not the case in the declaration. Apart from the fact that the measures envisaged in Chapter VII and in other provisions of the Charter do not qualify as sanctions in a proper sense and apart from the fact that the Charter does not seem to envisage, as we shall see, any distinct prohibition of intervention, there is nothing in the declaration itself that would justify a different treatment of the transgressions in question [..] The only reasonable interpretation of the presence in the declaration of a prohibition of certain forms of economic and political pressure seems thus to be that such forms are treated—in the measure in which they are prohibited—in the same fashion as resort to force or threat of force'.

[85] G. Venturini, 'Necessity in the Law of Armed Conflict and in International Criminal Law' in [2010] 41 *Netherlands Yearbook of International Law* 45, 47.

[86] '[..] it is undisputed that any kind of political, economic, etc. [force] is likely to amount to an unlawful intervention in matters within the domestic jurisdiction of the affected State, thus breaching Article 2 (1) of the UNC', even if not violating the rule on the use of force; G. Distefano (n 80) 2, note 8.

domestic affairs of another State is aimed to influence the distribution of sovereignty within that State or to direct appropriation of sovereignty by the responsible State.

As an example of this practice, it can be cited the 2014 Crimean crisis. It is here necessary to consider another strand of scholarship tackling the 2014-2015 Crimean crisis which has considered the Russian 'intervention' in Crimea not as a violation of the rule prohibiting the threat or use of force, but as a violation of Ukrainian sovereignty.[87] These scholars maintain that the internationally prohibited use of force requires the 'actual use' of military weapons, otherwise an armed intrusion or the exercise of coercion would be more likely to be considered as a violation of sovereignty or the territorial authority of another State than as prohibited use of force.[88] On the other hand, other authors take a more eclectic approach, believing it impossible to determine strict criteria, and highlighting how in practice the threshold of the prohibited use of force can be determined by a number of factors (such as the place, the author, the target, the context, the scope etc.) which must be evaluated, and carefully balanced, on a case-by-case basis.[89] Interestingly, it must also be noted that the authorization to deploy armed forces of the Russian Federation on the territory of Ukraine given by the upper house of Parliament, on 1 March 2014, upon the request of President Putin, was characterized by some States as a 'threat to the sovereignty, independence and territorial integrity of Ukraine'.[90]

As a matter of fact, UN General Assembly Resolution 68/262 of 24 March 2014[91], adopted after the Security Council action on the Crimean referendum was blocked due to Russian veto, is illustrative of this fact. The Resolution indeed was titled as 'Territorial integrity of Ukraine'. If the preamble of the resolution referred to art. 2(4) of the UN Charter, so the obligation for States 'to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State', it also recalled UN GA Resolution 2625 (XXV) of 24 October 1970 on Friendly Relations by which 'the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force, and that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is

[87] This strand of scholarship is taken into consideration in A. Tancredi, 'The Russian annexation of the Crimea: questions relating to the use of force' in [11 May 2014] *Questions of International Law*, par. 2.

[88] See O. Dörr, 'Use of force, Prohibition of' in *Max Planck Encyclopedia of Public International Law* [OUP online ed.] par. 18-19.

[89] See O. Corten (n 78) 91-92, according to whom '[t]he greater the means used, the more the State in whose territory the action takes place will be affected… even if…there is no fighting between its armed forces and those of the intervening State' (*ibid.*, 92).

[90] See UN Security Council Verbatim Record (1 March 2014) UN Doc S/PV.7124, for the intervention of the representative of the United Kingdom (*ibid.*, 6). See also the intervention of France (*ibid.*, 7).

[91] UN General Assembly Resolution 68/262 of 27 March 2014, 'Territorial Integrity of Ukraine'.

incompatible with the purposes and principles of the Charter'.[92] While the ban on acquisition of alien territory is rightly considered as a corollary to the obligation to refrain from the threat or use of force in international relations, it is also true that the former has the obligation not to disrupt the territorial integrity or political independence of any State as a second partially autonomous pillar. This brings to the conclusion that there could be situations in which the ban on acquisition of territory may be interpreted as a ban on acquisition of 'sovereignty' even without recourse to the threat or use of force. It is interesting to observe that the dispositive part of the GA resolution refers to the commitment of States to 'the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders'[93]; and it calls States 'to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, *including* any attempts to modify Ukraine's borders through the threat or use of force *or other unlawful means*'.[94] The main object of Resolution 68/262 is indeed an illegal referendum aimed at disrupting the territorial integrity and political independence of Ukraine: 'the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol'[95]. When it comes affirming the obligation of non-recognition, reference is made to the referendum only as means to change the international status of Crimea. It calls 'all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status'.[96] It emerges here, as already said above in this work, that the principle of non-recognition as a sanction is not a corollary to the prohibition of the threat or use of force, most probably it can be interpreted as a corollary of the ban of acquisition of sovereignty which in itself maintains a certain autonomous standing with the regard to the ban on the threat or use of force. In a sense, this relationship was already clear by highlighting the 'absoluteness' of the prohibition of acquisition of territory in the inter-war years (see *supra*, par. 2).

[92] *Ibid.*, preamble.
[93] *Ibid.*, par. 1.
[94] *Ibid.*, par. 2.
[95] *Ibid.*, par. 5.
[96] *Ibid.*, par. 6.

B. … and conservative ones? Non-recognition, territorial integrity, and independence

In the 2010 Advisory Opinion on *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, the ICJ affirmed that 'the scope of the principle of territorial integrity is confined to the sphere of relations between States'.[97] Based also on this postulate, unilateral declarations of independence and secessions *per se* are not considered contrary to rules of international law.[98] While several participants had invoked resolutions of the Security Council condemning particular declarations of independence, the Court noted that 'the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character *(jus cogens)*'.[99] This fact was not found in the case of Kosovo. Furthermore, the Court excluded any direct link between the Kosovo declaration of independence and the NATO military intervention of 1999 or the UNMIK administration.[100] As we know indeed, in most cases where the SC had declared a certain declaration of independence or secession as invalid, there was a direct or indirect foreign intervention, therefore the situations were still traceable to the traditional interstate content of the principle of territorial integrity.[101] However, it must be said that the practice of the Security Council had been ambiguous in certain occasions. Dugard, affirms that the Security Council has used the principle of territorial integrity to block secession in many situations, including cases in which a minority group within a State has attempted to secede. For example, the SC has reaffirmed the territorial integrity of Somalia and thereby dismissed the secessionist aspirations of Somaliland and Puntland.[102] However, the Court indirectly pointed out that notwithstanding the *political* practice of the Security Council[103], as a matter of law declarations of independence and secession must be read

[97] ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo,* Advisory Opinion, ICJ Reports 2010, 437, par. 80.

[98] See A. Tancredi, 'Neither Authorized nor Prohibited – Secession and International Law after Kosovo, South Ossetia and Abkhazia' in [2008] 18 *Italian Yearbook of International Law* 37.

[99] *Ibid.*, 437, par. 81.

[100] A. Tancredi, 'Il parere della Corte internazionale di giustizia sulla dichiarazione d'indipendenza del Kosovo', in [2010] 4 *Rivista di diritto internazionale*, par. 8.

[101] The same is true for the cases cited by Serbia to maintain its position that not only States but also non-state groups, such as secessionist groups, must respect the principle of territorial integrity; *ibid.*, par. 9.

[102] Security Council Resolution 1766(2007) and 1772(2007). See also J. Dugard, *Dugard's International Law. A South African Perspective* [Juta, 5th edition, 2019] 153.

[103] A. Tancredi, 'Il parere della Corte internazionale di giustizia sulla dichiarazione d'indipendenza del Kosovo', (n 100) par. 9.

only in light of an interstate principle of territorial integrity and that exceptions to the principle can eventually be justified by violations of *jus cogens* norms. The Court indeed cites and thus endorses only three SC Resolutions.

The Court cited resolution 216(1965) of 12 November 1965 by which the UN Security Council decided to condemn the unilateral declaration of independence made by a racist minority in Southern Rhodesia and to call upon States 'not to recognize this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime'.[104] This case seems to be an exception to the two standards described above. Of course, there was a violation of the rules of *jus cogens* on the prohibition of racial discrimination and self-determination of peoples, but it seemed to revolve around an all-domestic situation, without foreign intervention. However, if we look closer, the SC persisted in viewing Rhodesia as Southern Rhodesia, a British colony subject to the authority of the United Kingdom, the administering power.[105] Consequently, the resolutions of the SC must be seen as a denial of the 'statehood' of an independent Rhodesia and the non-recognition of the authority purporting to act as government of that territory.[106] The particular situation in Southern Rhodesia indeed constituted a threat to international peace and security as if the 'usurpation of power' by illegal authorities in Southern Rhodesia was a sort of 'external' intervention in a non-self-governing territory administered by the UK.[107]

The ICJ in the *Kosovo* Advisory Opinion also cited Security Council resolution 541 (1983), by which the declaration of independence issued by the Turkish Cypriot authorities on 15 November 1983 in order to create the Turkish Republic of Northern Cyprus was 'legally invalid'.[108] Such denial of secession was most probably due to the fact that the 'Republic' was the consequence of Turkey's invasion and continued occupation of Cyprus and had thus been established in violation of the prohibition on the use of force contained in Art. 2(4) of the Charter.[109]

[104] UN Security Council Resolution 216(1965) of 12 November 1965.

[105] See UN Security Council Resolution 217(1965) of 20 November 1965.

[106] J. Dugard, *Recognition and the United Nations* (n 55) 94.

[107] UN Security Council Resolution 217(1965) of 20 November 1965: 'The Security Council [..] 1. Determines that the situation resulting from the proclamation of independence by the illegal authorities in Southern Rhodesia is extremely grave, that the Government of the United Kingdom of Great Britain and Northern Ireland should put an end to it and that its continuance in time constitutes a threat to international peace and security [..] 3. Condemns the usurpation of power by a racist settler minority in Southern Rhodesia and regards the declaration of independence by it as having no legal validity'. Dagmar Richter has pointed out how 'the post-colonial context seems to have influenced the decision of the UN SC here, through the perception that a "racist regime" was seeking independence in order to undermine Rhodesia's legitimate prospect of decolonisation in contradiction with the principles of the United Nations, and in breach of the principle of the right to self-determination of colonised peoples', D. Richter (n 73) 33-34.

[108] UN Security Council Resolution 541(1983) of 18 November 1983, par. 2.

[109] J. Dugard, *Recognition and the United Nations* (n 55) 110.

Finally, the Court cites Security Council resolution 787 (1992), concerning the Republika Srpska. Here the Council reaffirmed 'its call on all parties and others concerned to respect strictly the territorial integrity of the Republic of Bosnia and Herzegovina, and affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted'.[110] This was connected however to the fact that 'any taking of territory by force or any practice of "ethnic cleansing" is unlawful and unacceptable'.[111] Beside the violation of *jus cogens* norms, the Council also pointed out the activity of *external* military forces in the territory: '[The Council] *Demands* that all forms of interference from outside the Republic of Bosnia and Herzegovina, including infiltration into the country of irregular units and personnel, cease immediately [...]'.[112]

If one looks at the practice concerning referendums, the same conclusion arises. As the referendum held in Austria on April 10, 1938, where the 99.73 per cent of the population voted in favour of union with Germany was not considered a genuine expression of popular will because accompanied by the threat or use of force by Germany, the same has been applied for other contemporary cases. International law indeed does not ban the possibility for a certain nation or population to hold referendums. However, referendums held in contravention to *jus cogens* norms are to be considered invalid and ought not to be recognized. The referendum held in Crimea on 16 March 2014 is in line with this interpretation. Apart from considerations of illegality due to its incompatibility with the Ukrainian Constitution, as outlined by the Venice Commission of the Council of Europe[113], it was also illegal from an international law perspective. As already said, the referendum was considered illegal and invalid by General Assembly, which called on States not to recognize any alteration of the status of the Republic on the basis of that referendum.[114] In the heavy presence of pro-Russian troops in the arena in which the referendum took place indeed, ascertaining a genuine and free expression of people's opinion would become difficult enough to call into question the legality of the referendum process *en bloc*.[115]

[110] UN Security Council Resolution 787 (1992) of 16 November 1992, par. 3. The wording 'will not be accepted' can be interpreted extensively as to include an obligation of non-recognition by the part of the international community of the subjectivity of Republika Srpska.

[111] *Ibid.*, par. 2.

[112] *Ibid.*, par. 5.

[113] Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion no. 762/2014 on "whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 constitution is compatible with constitutional principles", adopted on 21-22 March 2014.

[114] UN General Assembly Resolution A/RES/68/262 of 1 April 2014, *Territorial Integrity of Ukraine*.

[115] M. Nikouei and M. Zamani, 'The Secession of Crimea: Where Does International Law Stands?' in [2016] 85 *Nordic Journal of International Law* 63. See also UN Human Rights Committee, CCPR General Comment No. 25:

A similar situation has occurred in relation to the so-called 'Moldovan Republic of Transdniestria'. Here, in 2006, 97 per cent of the population voted in favour of independence from Moldova and joining Russia. Ever since, a sort of *de facto* regime continues to exercise *de facto* power in Transdniestria, with the military and political support of the Russian Federation.[116] However, the UN SC seems paralyzed by the Russian veto, and it has not issued any statements. Moldova's attempt to put the withdrawal of all foreign (in particular Russian) military forces on the UN GA's agenda have failed as well.[117] In spite of this failure, the European Parliament clarified that it '[f]ully rejects the organisation and outcome of the "referendum" on independence for the Transnistrian region of Moldova and its possible accession to the Russian Federation, as this is in sharp contradiction with the internationally recognised sovereignty and territorial integrity of the Republic of Moldova and as the repressive regime in Transnistria does not allow for the free expression of the popular will.'[118] As of today, the Republic has not been recognized by any member of the UN.

From this practice, it emerges that being the obligation of non-recognition inherently attached to the principle of territorial integrity, and being the latter interpreted only in an interstate fashion, the former is prevented to have a conservative application in international law. This can be read also in this way: since the obligation of non-recognition sanctions only violations of international law, and since unilateral declarations of independence as well as referendums aiming at secession are not *per se* contrary to international law, States cannot use the obligation in order to invalidate such independentist attempts. Only declarations of independence and referendums pursued in contravention to remarkable violations of international law, and in particular violations of *jus cogens*, are to be declared legally invalid and to be subject to non-recognition.

Art. 25 (Participation in Public Affairs and the Right to Vote), The Participation in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7, par. 19: '[P]ersons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat **of** violence, compulsion, inducement or manipulative interference of any kind.'.

[116] See D. Richter (n 73) 39.

[117] UN General Assembly Resolution 72/193 of 18 August 2017, A/RES/72/193. Moldova stated in its explanatory memorandum: 'The Republic of Moldova considers the presence of these military forces to be a threat to the maintenance of international peace and security.'

[118] European Parliament Resolution on Moldova (Transnistria) 2006/2645(RSP), [2006] OJ C 313 E/427, paras. 1 and 3.

C. Art. 2(4)'s scope of application: does it apply to unrecognized entities?[119]

We have seen that Art. 2(4) refers to a threat or use of force in 'international relations'. As a consequence, it is doubtful whether the prohibition contained in the article applies to unrecognized entities.[120] Among the many questions on their status, there is indeed a further one concerning the prohibition of the use of force.

Are the entities in question actually bound to respect Art. 2(4)? If the answer is in the affirmative, does that mean that the full range of norms connected with the use of force, including the right to self-defence, may be applied to them? [121]

In accordance with Art. 2(6) of the UN Charter[122], non-recognized entities are bound by the principle of the Charter in so far it is necessary for the maintenance of international peace and security. Those principles include the ban on the use of force by themselves, but also protect them against interference and violence on the part of third states.[123] Such position principally relies on the definition of aggression appended to UN GA Resolution 3314 (XXIX). Art. 1(a) specifies that in this definition, the term 'State' is 'used without prejudice to questions of recognition or to whether a State is a member of the United Nations [...]'. It follows that recognised and unrecognised entities are prohibited from the use of force in their mutual relations.[124] But how far can we go in interpreting extensively this definition?

An illegal claim to sovereignty in international law can give rise to different scenarios, as it was demonstrated in the inter-war period. Thus, in the case of annexation, the territory concerned has effectively passed into the hands of the responsible State. It is the latter which is subject to the rule on the prohibition of use of force. Similarly, in the case of manifest creation of puppet States/governments, the recipient of the rule is still the responsible State and no questions of interpretation

[119] This question is connected to par. 8 of the present Chapter, and in particular with the issue of attributing responsibility for the illegal acts committed by an unrecognized government or on its territory. Indeed, it is important to remark that the triggering of the obligation of non-recognition does not affect the applicability of some rules of international law between unrecognized and non-recognizing entities.

[120] O. Corten (n 78) 151.

[121] A. Kleczkowska, 'Recognition and the Use of Force: How Denial of Statehood Affects International Peace and Security' in *Unrecognized Subjects in International Law* (n 73) 321.

[122] Art. 2(6) indeed reads as follows: 'The Organization shall ensure that *states which are not Members of the United Nations act in accordance with these Principles* so far as may be necessary for the maintenance of international peace and security'.

[123] W. Czapliński, *Customary International Law of the Use of Force* (n 60) 103. Furthermore, due to the right of self-determination, the territory of unrecognized entities can not be considered *terra nullius*, see C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of the New Century' in [2001] 281 *Recueil des cours Hague Academy of International law* 121.

[124] A. Kleczkowska (n 121) 325.

arise. In the case of *de facto regimes*[125], which cannot properly amount to puppet entities but which rely extensively on other powers for their survival, instead we are in front of an instance of extension of the concept of 'State' as regards the application on the prohibition of the use of force, so far as they enjoy a minimum degree of international personality.

6.2. Non-recognition and self-determination of peoples

A. External self-determination and occupations of territory

Numerous UN SC resolutions have condemned the continued Israeli occupation of the West Bank, East Jerusalem, the Gaza Strip, and the Golan Heights since the 1967 Six Day war and called for its non-recognition.[126] Some authors regard it as a *de facto* annexation.[127] The ICJ in the *Wall* Advisory Opinion of 2004 indeed, while reaffirming that all these territories remain occupied territories and Israel has continued to have the status of occupying Power[128], also states that 'the construction of the wall and its associated regime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation'.[129] In this regard, the Court recalls many times the principle of illegality

[125] The definition of de facto regimes is not universally accepted by scholars. Stefan Oeter, for instance, describes them as '[..] an intermediate phenomenon caught between factuality (i.e. the actual existence of an entity that looks like a state) and il(legality) (i.e. a legal situation in which a number of legal reasons speak against that same entity being qualified as an independent "state" in terms of international law); S. Oeter, 'De facto Regimes in International Law' in *Unrecognized Subjects in International Law* (n 73) 65.

[126] *See inter alia,* UN Security Council resolution 252 (1968) on the status of Jerusalem, UN Doc. S/RES/252 of 21 May 1968; UN Security Council, *The Situation in the Middle East on the status of Jerusalem*, UN Doc. S/RES/267 of 3 July 1969; UN Security Council resolution 298 (1971) on the status of Jerusalem, UN Doc. S/RES/298 of 25 September 1971; UN Security Council resolution 446 (1979) on establishment of a commission to examine the situation relating to settlements in the Arab territories occupied by Israel, UN Doc. S/RES/446 of 22 March 1979; UN Security Council resolution 465 (1980) on Israeli settlement policies in the occupied territories, UN Doc. S/RES/465 of 1 March 1980; Security Council resolution 478 (1980) on the status of Jerusalem, UN Doc. S/RES/478 of 20 August 1980; Security Council resolution 2334 (2016) on cessation of Israeli settlement activities in the Occupied Palestinian Territory, including East Jerusalem, UN Doc. S/RES/2334 of 23 December 2016; UN General Assembly, *Measures taken by Israel to change the status of the City of Jerusalem*, UN Doc. A/RES/2253(ES-V) of 4 July 1967; UN General Assembly, *Measures taken by Israel to change the status of the City of Jerusalem*, UN Doc. A/RES/2254(ES-V) of 14 July 1967; UN General Assembly, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, UN Doc. A/RES/31/106 of 16 December 1976; UN General Assembly, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, UN Doc. A/RES/33/113 of 18 December 1978; UN General Assembly, *Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, UN Doc. A/RES/ES-10/2 of 25 April 1997.

[127] E. Kassoti, 'The Legality under International Law of the EU's Trade Agreements covering Occupied Territories: A Comparative Study of Palestine and Western Sahara' in [2017] 3 CLEER Papers, 30.

[128] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 167, par. 78.

[129] *Ibid.*, 184, par. 121.

of acquisition of territory resulting from the threat or use of force as endorsed in international documents as well as by resolutions of the UN GA and SC.[130] Even if the territorial acquisition is casted in hypothetical terms, the Court links the violation of the prohibition of acquisition of territory by forcible means to the principle of self-determination of peoples.[131] Indeed as it was already outlined by the UN Secretary General: 'The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination'.[132] The violation of the right of self-determination of the Palestinian people seems to be the main basis upon which the Court ruled on the illegality of the construction of the wall and its associated regime, even if the Court traces also the violation of relevant provisions of international humanitarian law and of human rights instruments.[133] This has led the Court to conclude that third parties have a duty to 'not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian territory' and 'not to render aid or assistance in maintaining the situation created by such construction'.[134]

A similar situation regards the continued exercise of sovereignty by Morocco over Western Sahara. A former Spanish colony, Western Sahara has been on the UN list of non-self-governing territories since the UN began following a decolonisation policy at the end of 1963. Ever since, the organization has constantly affirmed the right of the Saharawi people to self-determination.[135] Accordingly, in its Western Sahara Advisory Opinion, the ICJ found that the Sahrawi have a right to self-determination.[136] A few days later, the UN SC explicitly reaffirmed, with respect to Western Sahara, the terms of UN GA Resolution 1514 (XV) of 14 December 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples).[137] Facing the imminent withdrawal of Spain from Sahrawi territory, and the claims to that territory subsequently put forth by Morocco and Mauretania, the Polisario Front liberation movement instigated the establishment of the Saharawi Arab Democratic Republic, which was finally proclaimed on 27 February 1976[138], and recognized by a considerable number of UN member States. Nevertheless, Morocco has persisted in

[130] See *ibid.*, paras. 86, 115, 117.
[131] *Ibid.*, 184, par. 121.
[132] *Ibid.*, 181, par. 115.
[133] *Ibid.*, paras. 123-137.
[134] *Ibid.*, 200, par. 159. It also states: '[i]t is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end'.
[135] See T. Marauhn, 'Sahara' in *Max Planck Encyclopedia of Public International Law* (n 88).
[136] ICJ, *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, paras. 64–73, 162.
[137] UN Security Council Resolution 377 (1975) of 22 October 1975.
[138] For recognition as representation of the Sahrawi people see UN General Assembly Resolution 34/37 of 21 November 1979.

exercising sovereignty over Western Sahara, *inter alia* by exploiting its natural resources. This occupation is illegal under international law, violating the jus cogens right to self-determination of Sahrawi people and being based, ultimately, on the use of force.[139] It should be said that the SC has not passed a resolution calling UN member States to not recognize the illegal occupation. The European Court of Justice (ECJ) in two judgments has remarked such illegality. In its judgement on *Front Polisario* (2016), the ECJ ruled that it is contrary to the principle of international law on the relative effect of treaties to take the view that the territory of Western Sahara comes within the scope of the EU-Moroccan Association agreement.[140] Accordingly, the Grand Chamber of the ECJ in its preliminary ruling on *Western Sahara Campaign UK* (2018) decided that the Fisheries Partnership Agreement and pertinent Protocol between the EC and the Kingdom of Morocco cannot be interpreted in such a way as to include Western Sahara.[141] If the territory was to be included within the scope of the Association Agreement, it would in direct contradiction to certain rules of general international law, particularly the principle of self-determination (art. 1 of the UN Charter) and the principle of the relative effect of treaties (art. 34 VCLT).[142] Nonetheless, in both cases the Court didn't mention a duty of non-recognition. It rather indirectly refers to it as merely another principle of international law which must be respected like any other.[143]

However, almost all States have not recognized Moroccan sovereignty over Western Sahara, with the remarkable exception of the recent US recognition.[144] It should be taken as a confirmation on the customary rule of the obligation of non-recognition.

B. Internal Self-determination and free will of the people

In the nineteenth century, the territory which was later called "Southern Rhodesia" came under British colonial rule. The territory was administered by the British South African Company until the colony obtained a limited form of self-government. Although Britain retained powers to control and regulate legislative activities in

[139] C. Symmons, 'Non-Recognition and Denial of Self-Determination in the Case of Western Sahara: Recent Developments in International Law' in [14 June 2017] *Blog of the Groningen Journal of International Law.*

[140] Case C-104/16 P *Council of the European Union v. Front populaire pour la liberation de la saguia-el-hamra et du rio de oro* [2016] ECLI:EU:C:2016:973, paras. 105–107.

[141] Case C-266/16 *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* [2018] ECLI:EU:C:2018:118, especially paras. 70–73.

[142] *Ibid.*, par. 63.

[143] D. Richter (n 73) 32.

[144] See for instance, [2021] 115(2) *American Journal of International Law*, State Diplomatic and Consular Relations, *United States Recognizes Morocco's Sovereignty Over Western Sahara*, 318-323.

Southern Rhodesia, the direct administration of the territory came to rest more and more in the hands of the British settlers. From 1923 onwards, when Southern Rhodesia was granted 'responsible government' by Britain, the white settlers consolidated their power, and they began to dominate and discriminate Africans. The introduction of the 1961 Constitution, as a result of British pressure, did not change much the situation as far as Africans were concerned. It was around this time that the United Nations became concerned with Southern Rhodesia. On 12 June 1962 the GA passed Resolution 1747 by which Southern Rhodesia constituted a Non-Self-Governing Territory under Chapter XI of the Charter.[145] On 7 May 1965 the wish for independence was explicitly supported. Prime Minister Ian Smith demanded an immediate grant of independence by Britain, which was rejected.[146] On 5 November 1965, the General Assembly called on "all States [...] not to recognize any government in Southern Rhodesia which is not representative of the majority of the people'.[147] On November 11, 1965, the minority white Government, led by Ian Smith, made a unilateral declaration of independence. The day after, even the Council pronounced itself calling 'upon all States not to recognize this illegal racist minority regime in Southern Rhodesia'.[148] This was followed by Resolution 217 of 20 November in which the SC determined that the 'continuance [of UDI] in time constitutes a threat to international peace and security' and called upon 'all States not to recognize this illegal authority and not to entertain any diplomatic or other relations with it'.[149] In 1970, the, following the UDI proclamation of the Republic of Rhodesia, the Security Council passed resolution 277 (1970) condemning 'the illegal proclamation of republican status of the Territory by the illegal regime in Southern Rhodesia' and decided that Member States 'shall refrain from recognizing this illegal regime or from rendering aid or assistance to it'.[150]

In order to gain legitimacy, the UDI planned to have elections in 1979. However, the Council promptly condemned such intention and declared that the elections and the results thereof would be 'null and void' and that 'no recognition [would] be accorded either by the United Nations or any Member State to any representatives or organ established by that process'.[151] Indeed, as specified by the Security Council in a subsequent resolution, the elections did not constitute 'a genuine exercise of the

[145] UN General Assembly Resolution 1747 (XVI) of 12 June 1962.
[146] D. Raič, *Statehood and the Law of Self-Determination* [Kluwer Law International, The Hague, 2002] 128.
[147] UN General Assembly Resolution 2022 (XX) of 5 November 1965.
[148] UN Security Council resolution 216 of 12 November 1965.
[149] UN Security Council resolution 217 of 20 November 1965.
[150] UN Security Council resolution 277 of 18 March 1970.
[151] UN Security Council resolution 445 of 8 March 1979.

people of Zimbabwe to self-determination and national independence'.[152] Only with the Constitutional Conference held in London in 1979 was the rebellion brought to an end, which lead to the resumption of constitutional authority by the United Kingdom and to the independence of the territory now known as Zimbabwe in 1980.

Also, the creation of the so-called 'Homeland States' by the South African has been analysed under the right of self-determination, or better 'internal' self-determination, namely the right of the South African population, and in particular the black majority, to freely determine its political status through representation in the government of South Africa and participation in its political decision-making process without discrimination.[153] While this case will be analysed in depth in paragraph 6.3. with respect to the prohibition of apartheid, it is here relevant to observe that when the population on a given territory is recognized to be a 'people' in the perspective of the right of self-determination, in particular when framed in a post-colonialism context (such as Southern Rhodesia) or post-colonialism assimilated context (such as South Africa)[154], the obligation of non-recognition can be applied also to *internal* self-determination.

C. Abusive policies on nationality

The case of the *apartheid* policy in South Africa shed light also on another topic related to self-determination and non-recognition, that is the role played by the conferral/denial of nationality by States.

As stated by the President of the Security Council on the occasion of the "independence" of Ciskei, the *apartheid* policy aimed at dividing and dispossessing the African people, creating 'a class of foreign people in their own country'.[155] The establishment of the Bantustans, indeed, had as its ultimate goal that to create a South Africa in which all Africans were nationals of some homeland-State and ceased to be South African nationals. *Denationalization* was used to justify the denial of civil and political rights to Africans within South Africa itself.[156] In other words, the goal was to deny Africans their right to self-determination intended as the possibility to 'freely

[152] UN Security Council resolution 448 of 30 April 1979.

[153] D. Raič (n 146) 225, 236-238.

[154] *Ibid.*, 139.

[155] UN Doc. S/14794. This statement was made at the 2315th meeting of the Security Council on 15 December 1981.

[156] J. Dugard, *Recognition and the United Nations* (n 55) 106.; *idem*, 'South Africa's Independent Homelands: An Exercise in Denationalization' in [1980] 10 *Denver Journal of International Law and Policy* 11.

determine their political status' as required by resolution 1514(XV).[157] Compulsory denationalization on grounds of race is today viewed as contrary to international law and this is another factor that has been emphasized by the SC and the GA as a reason for the non-recognition of the homeland-States.

Nationality, however, has been instrumental in an extraterritorial way too. It is the case of the policy of *passportization* pursued by Russia, in the post-Soviet area, such as in Abkhazia, South Ossetia and Transnistria[158] and most notably in Eastern Ukraine, Donetsk and Lugansk regions.[159]

Nationality is only subtly governed by international law. Nationality is indeed intended as a conception of domestic law. From the standpoint of international law, it is upon each State to decide whether and to who concede its citizenship.[160] However, the link between the citizen and the State must be characterized by a genuine and effective link.[161] Large scale extraterritorial naturalizations are not *per se* contrary to international law.[162] However, since nationality serves an alternative basis for sovereignty – other than the territorial one –, taken to its extreme it can amount to a denominator for 'the ability to establish exuberant claims on the international plane'.[163] In this case, naturalizations are illegal and they are subjected to the obligation of non-recognition.[164] Such non-recognition, that is the denial of validity to acts of naturalizations, can be either viewed as a consequences of the abusive procedure of naturalization[165] (inasmuch it is a unilateral legal act of the State; see for comparison *supra*, Chapter IV, esp. par. 2.1) or in light of the general situation on the ground, that is the breaches by the responsible State of fundamental rules of international law.[166] In this latter case, non-recognition of nationality is part of the

[157] It has already been underlined indeed that South Africa was characterized as a self-determination unit to which UN General Assembly Resolution 1514(XV) of 14 December 1960 (*Declaration on the Granting of Independence to Colonial Countries and Peoples*) applied.

[158] See for instance, T. Nagashima, 'Russia's Passportization Policy toward Unrecognized Republics' in [2017] 66(3) *Problems of Post-Communism* 186.

[159] A. Peters, 'Passportization: Risks for International Law and Stability – Part I' in [9 May 2019] *Ejil:Talk! The Blog of the European Journal of International Law.*

[160] A. Cassese, *Diritto Internazionale* [M. Frulli ed., Il Mulino, Bologna, 2021, 4th ed.] 126. See also, League of Nations, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, League of Nations, Treaty Series, vol. 179, 89, No. 4137, artt. 1-2.

[161] ICJ, *Nottebohm case (Liechtenstein v. Guatemala)*, Judgment, ICJ Reports 1955, 24.

[162] E. Fripp, 'Passportization: Risks for International Law and Stability – Response to Anne Peters', in [30 May 2019] *Ejil:Talk! The Blog of the European Journal of International Law.*

[163] L.-J. Wagner, 'Nationality as We Know it? – A note on the genuine link' in [21 September 2020] *Ejil:Talk! The Blog of the European Journal of International Law.*

[164] A. Peters, 'Passportization: Risks for International Law and Stability – Part II' in [10 May 2019] *Ejil:Talk! The Blog of the European Journal of International Law.*

[165] *Ibid.*

[166] E. Fripp (n 162).

whole sanction of non-recognition of the illegal situation at hand, resulting from the breaches of other higher norms.[167]

5.3. Non-recognition and the prohibition of apartheid

South African's policy of discrimination and segregation has been at the attention of the United Nations since its earliest days.[168] In the 1970s, however, with mounting international pressure, the *apartheid* took a step further with the creation of the so-called 'independent Homelands' by the South African government.[169] Through a policy of 'separate development', the South African government established some ten separate territorial units or homelands for different ethnic groups present in the country, in which Africans would be entitled to exercise full civil and political rights.[170] The first Homeland to gain 'independence' was Transkei on 26 October 1976. This was followed by grants to Bophuthatswana in 1977, Venda in 1979, and Ciskei in 1981.[171]

Even before the grant of independence to Transkei, the General Assembly of the United Nations had already adopted several resolutions stating that the Bantustan policy was in pursuance of *apartheid* and condemning the policy as violating the right of self-determination and as being prejudicial to the territorial integrity of South Africa.[172] Resolution 3411 D explicitly called upon 'all Governments and organizations not to accord any form of recognition' to the Bantustan homelands.[173] In 1976, in response to the grant of independence to Transkei, the GA passed resolution 31/6 A, by which it condemned the establishment of Bantustans as the attempt to consolidate the inhuman policy of *apartheid,* to destroy the territorial integrity of South Africa and to perpetuate the white minority domination over African people. Then it rejected the declaration of independence to Transkei and declared it as invalid. It finally called upon 'all Governments to deny any form of recognition to the so-called Transkei and to refrain from having any dealings with the

[167] As Brownlie stated, action of a State relating to nationality must be regarded as illegal if part and parcel of a breach of international duty; I. Brownlie, 'The Relations of Nationality in Public International Law' in [1963] 39 *British Yearbook of International Law* 284–364.

[168] See J. Dugard, 'The legal effect of United Nations Resolutions on Apartheid' [1966] 83 *South African Law Journal* 44.

[169] D. Raič (n 146) 134.

[170] J. Dugard, *Recognition and the United Nations* (n 55) 99.

[171] D. Raič (n 146) 135.

[172] UN General Assembly Resolution 2671F (XXV) of 8 December 1970; UN General Assembly Resolution 2775E (XXVI) of 29 November 1971.

[173] UN General Assembly Resolution 3411D (XXX) of 28 November 1975.

so-called independent Transkei or other Bantustans [..]'.[174] The following year, in response to the granting of independence to Bophuthatswana, the General Assembly denounced again the Bantustans and called upon States to deny any form of recognition to them.[175] The issuance of independence of Venda was followed by a statement of the President of the Security Council on behalf of the Council which declared such independence illegal and totally invalid because aimed at perpetuating the policy of apartheid. Furthermore, it called upon Governments 'to deny any form of recognition to the so-called "independent" bantustans'.[176] A similar statement was made by the President of the Council on the occasion of Ciskei's independence.[177]

5.4. Non-recognition, gross violations of fundamental human rights and principles of humanitarian law

Talmon underlined that 'there is virtually no such practice to support a duty of non-recognition with regard to situations created by serious breaches of other jus cogens norms such as the prohibitions of slavery and the slave trade, genocide, torture and other cruel, inhuman or degrading treatment, crimes against humanity, or the basic rules of international humanitarian law'.[178] However, this is not entirely true. Even if there is abundant practice with regard to the prohibition of the use of force, aggression, racial discrimination and the right of self-determination, one can find some practice as well with regard to gross violations of fundamental human rights[179] and principles of humanitarian law.

This practice concerns especially the non-recognition of governments. On the footprint of the non-recognition of credentials of the South African regime by the General Assembly[180] as a sanction against its *apartheid* policy[181], other governments have been subsequently denied recognition through the impossibility of issuing

[174] UN General Assembly Resolution 31/6 A of 26 October 1976, par. 1-3. This was upheld by the UN Security Council Resolution 402 of 22 December 1976 and Security Council Resolution 407(1977) of 25 May 1977.

[175] UN General Assembly Resolution 32/105N of 14 December 1977.

[176] And it continued 'to refrain from any dealings with them; to reject travel documents issued by them; and urges Member Governments to take effective measures to prohibit all individuals, corporations and other institutions under their jurisdiction from having any dealings with the so-called "independent" bantustants', UN Doc. S/13549. This statement was made at the 2168th meeting of the Security Council on 21 September 1979.

[177] UN Doc. S/14794. This statement was made at the 2315th meeting of the Security Council on 15 December 1981.

[178] S. Talmon (n 56) 103.

[179] See J. Dugard, *Recognition and the United Nations* (n 55) 107: 'A further ground [..] advanced for non-recognition is that the creation of the homeland-States violates a number of fundamental human rights'.

[180] See UN General Assembly Resolution A/RES/3206(XXIX) of 30 September 1974, *Credentials of representatives to the 29th session of the General Assembly.*

[181] G. Ziccardi Capaldo, 'Il Disconoscimento delle Credenziali del Sud Africa come Sanzione contro l'Apartheid' in [1985] 68 *Rivista di Diritto Internazionale* 299.

credentials inside the UN GA as a sanction for their violations of fundamental human rights – amounting to violations of *jus cogens*.[182]

Actually, as it has been underlined in the first part of this work (see *supra*, Chapter III, par. 2.2 ff.), the League of Nations had already resorted to the use of its Credential Committee as a tool for the non-recognition of serious violations of international law. In particular, the General Assembly of the League responded to the Italian annexation of Ethiopia and other German annexations and occupations of European countries by the continued issuing of credentials to governments in exile (indirect non-recognition of annexations and occupations of territories, see emblematically the issuing of credentials to the Negus, *supra*, Chapter III, par. 2.2.D). Since the end of WWII, however, annexations and occupations of territories fell consistently in numbers (see *supra*, par. 1). However, the practice of indirect non-recognition has been redirected by the UN towards sanctioning those governments that consistently violate fundamental human rights.

The UN GA's Credential Committee, notwithstanding its original technical character, has progressively understood the credential process as being not only about compliance with the General Assembly's procedural rules[183], but also the broader assessment of a government's *legality*, that is the assessment whether the latter has breached fundamental principles of law in its rise to power.[184]

It is useful to cite two extremely recent cases of practice, that of Myanmar and Afghanistan. These two new regimes have recently surged to power, whereas the previous governments still hold UN accreditation. The Taliban, indeed, have argued that the current ambassador to the UN no longer represents Afghanistan and they have nominated their own spokesperson. With regard to Myanmar, the new military junta which has seized power with a coup d'état in October 2021, has fired the current

[182] According to the present author, however, this practice must be taken separately from other cases where the UN GA Credential Committee has resorted to the denial of credentials based on legitimacy grounds, and not on legality ones; see the Conclusions to this chapter.

[183] See the 1970 Memorandum issued by the UN Legal Counsel, which said that the credential process did not involve questions of 'recognition' or 'substantive issues concerning the status of governments', *Credentials of representatives to the 25th session of the General Assembly : scope of "credentials" in rule 27 of the rules of procedure of the General Assembly: statement by the Legal Counsel submitted to the President of the General Assembly at his request*, UN General Assembly Doc. A/8160 of 11 November 1970. Also the General Assembly had stated that the 'attitude adopted by the General Assembly' on matters of representation 'shall not of itself affect the direct relations of individual member States with the State concerned', UN General Assembly Resolution A/RES/396(V) of 14 December 1950, *Recognition by the United Nations of the representation of a Member State*.

[184] Of course, one can wonder whether it would be more appropriate for the General Assembly to directly tackle the question of recognition of governments, rather than the credential process, which was not designed to provide such answers; see R. Barber, 'How Should Governments Decide Whether or not to Recognise other Governments, and can the General Assembly Help?' in [6 December 2021] *Ejil:Talk! The Blog of the European Journal of International Law*.

representative but it has not replaced him with their own.[185] Both new military governments have seriously breached fundamental human rights and principles of humanitarian law.[186] Since any decisions in the Security Council facing those violations would be leading to unsuccess due to vetoes by China and Russia, world attention has been given to the UN GA Credential Committee to 'sanction' the two regimes. And in fact, the said Committee has recommended to postpone the decision on who must be acknowledge as the official representatives of the two countries.[187] Such recommendation has then been upheld by the General Assembly with a resolution adopted by consensus on December 6, 2021.[188] As it has been observed, such a decision can be read as part of the fulfilment by States of their duty of non-recognition and cooperation to bring the illegal situation to an end, though the activity of an international organization.[189] Of course, it remains established that States have a duty not to recognize and not to cooperate with such States even in their individual international dealings.

Another evidence of the fact that even gross violations of human rights and international humanitarian principles are subjected to the sanction of non-recognition comes from the ICJ Advisory Opinion on the *Wall* case. Here, the Court stresses that Israel has breached not only the rule on the prohibition on the use of force and the right of self-determination of the Palestinian people, but also some principles of humanitarian law and many human rights obligations.[190] On this basis, the Court then

[185] V. Engström, 'Credentials and the Politics of Representation: What's in it for the UN?' in [11 October 2021] *Ejil:Talk! The Blog of the European Journal of International Law.*

[186] The Myanmar military junta has unlawfully detained thousands of civilians and has tortured and killed political prisoners in prison; it has carried out illegal airstrikes on civilian villages and towns killing hundreds more, resulting in over one million displaced people seeking refuge. Let's not forget that the former Myanmar government was *also* widely condemned by the international community for not preventing the widespread ethnic cleansing campaign against the Rohingya minority. The Taliban military offences as well have been marked by a relentless campaign of direct targeting of civilians, civil society and journalists, summary executions, assassination of human rights defenders, arbitrary detention, mass executions of civilians, and unlawful restrictions on the human rights of women and girls.

[187] According to UN General Assembly Resolution 396(V) of 14 December 1950, *Recognition by the United Nations of the representation of a Member State*, which said that in the event that one or more competing authorities claim at once to represent a member state, the question is to be decided 'in light of the Purposes and Principles of the Charter and the circumstances of each case'. See also UN document A/76/550.

[188] See UN General Assembly Resolution A/RES/76/16 of 6 December 2021.

[189] 'According to the International Law Commission (ILC), states have an obligation to cooperate to end serious breaches of peremptory norms of international law. It is reasonably well established that the prohibition of crimes against humanity is a peremptory norm, as are the basic rules of international humanitarian law. As such, if states have reason to believe that the Taliban are seriously breaching those norms, they are obliged to cooperate to bring those breaches to an end. International law provides scarce guidance regarding precisely what states are obliged to do to fulfil their obligation to cooperate, however the ILC has said that "where an international organisation has discretion to act, the obligation to cooperate imposes a duty on the members of that international organisation to act with a view to the organisation exercising that discretion in a manner to bring to an end the breach of a peremptory norm of international law"', R. Barber, 'Will the Taliban Represent Afghanistan at the UN General Assembly?', in [1 September 2021] *Ejil:Talk! The Blog of the European Journal of International Law.*

[190] ICJ, *Legal Consequences of the Construction of a Wall* (n 128), par. 121, 122 and 134.

states: 'Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem'.[191]

That being said, a problem with human rights law and humanitarian law remains. Such problem seems to be connected to the fact that it is more difficult in these cases to ascertain when the seriousness threshold required by Art. 40 ARSIWA is accomplished.[192]

In the two scenarios cited above, revolutionary governments[193] and other territorial situations (where large-scale violations take place), this problem does not arise. However, one can wonder whether even occasional act of torture, for instance, can amount to 'a gross or systematic failure by the responsible State to fulfil the [*jus cogens*] obligation'.[194]

6. The polyhedric existence of non-recognition as an enforcement tool

6.1. The custom relating to non-recognition as an enforcement tool

As it was underlined at the end of the second chapter to this work, the sanction of non-recognition was to be regarded as a custom even at the end of WWII. The sanction of non-recognition, or the wider principle of non-recognition in its primitive form, reflected the rule as developed through treaty instruments like the Covenant of the League of Nations and the Treaty of Paris. There was no discrepancy.

With the establishment of a 'new' international order in 1945, the United Nations has continued to play a pivotal role in the advancing of the obligation of non-recognition. As we have seen, an obligation not to recognize serious violations of international law was inherent in the Charter of the organization, as it was implicit in Art. 10 of the Covenant of the League of Nations. Since its early days, the UN has used this instrument towards States that violated imperative obligations of international law. Operationally, it has done so through the incorporation of the

[191] *Ibid.*, par. 159. How it has been noted elsewhere in this work, the Court refers here to obligations of fundamental importance which have also *erga omnes* character. For a deepening of the shift towards the concept of '*higher norms*' see also the final chapter to this work.

[192] For a differentiation between two 'classes' of jus cogens norms see *supra*, Chapter V, par. 3.

[193] Note that a different situation occurs when the wrongdoing government is a well-established and already recognized one. Here, States of the international community usually do not resort to non-recognition. They preferably resort to economic or diplomatic sanctions.

[194] Art. 40(2) ARSIWA.

custom of the sanction of non-recognition in Art. 41 of the Charter. The sanction of non-recognition is indeed referred to as an 'atypical' measure of Art. 41, which is about measures not involving the use of armed force.[195]

Apart from the specificity of being a measure that can be adopted by an international organization – particularly relating to procedural aspects but also to aspects of international responsibility and aspects of content and objectivity[196], that will be analysed below in this chapter – it does not seem that the core of the custom as incorporated in the UN system differ from the custom in general international law.[197]

Notwithstanding, in the enforcement context the custom on non-recognition has a dual nature: on the one hand it can be a collective measure (of an international organization) and on the other a secondary rule of international law. This is to say that the custom of non-recognition as an enforcement tool can be interpreted both as a sanction or an automatic obligation arising from the violation of primary peremptory rules of international law (as envisaged in ARSIWA).[198]

6.2. The obligation of non-recognition: a collective obligation or an accumulation of single conducts?

A question that has been posed is whether non-recognition is a collective obligation or not. A collective obligation is an obligation directed to a group of agents, the States, so that the group as a whole is obliged to fulfil it.

According to some authors, the terminology 'collective obligation' indicates that the determination of the occurrence of the illegal act takes the form of a decision by a

[195] See J. Dugard, *Recognition and the United Nations* (n 55) 137. He refers generically to Chapter VII, because as it will be shown below the instrument of non-recognition in the enforcement of the law function involves also a precautionary dimension (related to Chapter VI of the Charter of the UN).

[196] As to the different degree of objectivity implied in the two customs see also *supra*, Chapter V, par. 2.

[197] Authors do not agree on the customary status of the sanction of non-recognition. Pert, for instance, is not persuaded that it is a custom, even if she has to admit that the ICJ in the *Nicaragua* judgement of 1986 has stated that the 1970 Friendly Relations Declaration (and thus also the instrument of non-recognition) constitutes customary international law, and that the same Court in the 2004 Wall Advisory Opinion infers a duty of non-recognition. '[..] it is not stated when, in the Court's view, this customary rule came into being: in 1945 with the UN Charter, in 1970 with the Friendly Relations Declaration, or in (or by) 1986 with the Court's judgment in *Nicaragua.* The implication is 1970, but it is far from clear'; A. Pert, 'The "Duty" of Non-Recognition in Contemporary International Law: Issues and Uncertainties' in *Sydney Law School Research Paper No. 13/96*, 2013, 12. Our view on that has been made clear in the text. Other authors maintain the customary nature of the enforcement instrument of non-recognition, see J. Dugard, *Recognition and the United Nations* (n 55) 135-136 (importantly he still cites as a legal basis for the sanction of non-recognition also the principle of *ex iniuria ius non oritur.* However, it seems that Dugard too agrees to the fact that the sanction of non-recognition originates and is part of a more general principle of law, see *infra*, Chapter VII, par. 1). According to him, resolutions of the UN SC and GA are only declarative of an already existing obligation under general international law.

[198] As it was, to a certain extent, already in the inter-war period, see *supra*, Chapter III.

'collective' organ of an international organization, such as the United Nations. However, they underlined that although under these circumstances the determination of the violation of international law bears a 'collective' character, the obligation of non-recognition is borne by the individual (member) states.[199] Other authors, instead, support a presumption towards the collective nature of the obligation, linking their argument inevitably to the question of the non-self-executing character of the obligation itself (see *infra*, par. 7).[200]

If one the one hand, the final wording of Art. 41 ARSIWA: '[n]o State shall recognize as lawful a situation created by a serious breach [of an obligation arising under a peremptory norm of general international law]'[201], seems to go in the direction of the *individual* character of the obligation, it is true that many times during the preparatory works of the Draft Articles, great relevance has been given to the role of collective forums.[202]

In our view, unfettered by the fact that the obligation of non-recognition was determined in a collective forum or not, since that determination, the obligation of (the sanction) of non-recognition is to be fulfilled both *individually and collectively* by States.[203]

What can be add is this slight differentiation. When the decision about the application of the obligation of non-recognition is taken within an international organization, and in particular the UN, the 'collective' character of the obligation is reinforced by the collective procedure through which it has been adopted.[204] However, each State maintain its individual obligation to fulfil it independently. When the obligation is adopted without an authoritative decision by such an organization, it can be referred to as an obligation which is realized as a 'decentralized enforcement measure' in the fulfilment of community interests.[205] In this latter sense,

[199] D. Raič (n 146) 108.

[200] A. Pert (n 197) 12 ff.

[201] ILC, ARSIWA (n 67) art. 41.

[202] See ILC, Document A/CN.4/354 and Add.l and 2., *Third report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special* Rapporteur, in *Yearbook of the International Law Commission*, Vol. II, Part I, Documents of the thirty-four session, 45.

[203] See J. Crawford (n 11) 123: "When the illegality invoked is substantial, and in particular when it involves a norm of jus cogens, States have a duty under customary international law, *individually and collectively*, not to recognize the act as legal'.

[204] H. Lauterpacht, T. Chen and J. Dugard saw in the 'collectivization' of (non)-recognition the solution to arbitrariness in this field of international law. However, it must be remembered that the organs of the UN are political organs and they as well can be used to boost effective power.

[205] Cf. B. Simma, 'From Bilateralism to Community Interests in International Law' [1994] 250 *Collected Courses of the Hague Academy of International Law* 217.

the collective dimension of the obligation is realized through what can be called an '*accumulation*' of single conducts.[206]

6.3. (*continues*) The self-executing character of non-recognition

The self-executing[207] character of the obligation is related to whether the obligation should be preceded by a finding by a competent United Nations organ (or by the International Court of Justice) that a serious violation of peremptory norms had been committed.[208]

In chapters IV and V of this work, it has been shown that non-recognition is also an instrument of ascertainment whether a serious violation of fundamental norms of international law has occurred. There is thus a sort of overlap between the determination of illegality and the triggering of the instrument of non-recognition, so as that the latter is in itself an objective parameter of the existence of the violation. As a consequence, the obligation of non-recognition is necessarily self-executing.

This is illustrated by the fact that the absence of a 'collective' determination of the occurrence of a breach of a fundamental rule of international does not mean that States are freed from the obligation not to recognize the illegal act or its results.[209] The fact that the two moments, of determination of the illegality and the adoption of non-recognition, in a collective forum such as the UN, can be distinguished from a procedural perspective, this does not mean that they are separated 'ontologically'. In other words, the first determination is not a necessary prerequisite for the latter being triggered.[210] Of course, it must be remined that a collective determination by the UN can be helpful to distinguish between the cases in which non-recognition is a faculty or it is a act governed by international law (see *supra*, Chapter I, par. 2.1.B).

Furthermore, previously in this work, it has been shown that the 1996 Draft Articles on the Responsibility of States placed primary responsibility for ascertaining whether a 'crime' had been committed upon the injured State, by claiming reparation,

[206] See Q. Wright, 'Some thoughts about recognition' in [1950] 44(3) *The American Journal of International Law* 558, even if referring to general recognition, he similarly said: 'General recognition may be affected by the accumulation of individual recognitions and the manifestation of acquiescence through the passage of time, or by collective action of a sufficient number of States in an international conference or organization'.

[207] Here the term self-executing is used as a synonym of 'automatic', and it has nothing to do with the notion of self-executing norms in the relationship between domestic law and international law. We stick to this terminology in the context of non-recognition because in the academic debate the subject has been frequently presented in this way.

[208] A. Pert (n 197)12.

[209] D. Raič (n 146) 108.

[210] As it has been shown in Chapter IV of this work, the declaration of illegality may automatically imply that the obligation of non-recognition is triggered. In the ICJ Advisory Opinion on *Namibia* (n 11), the Court states that notwithstanding the lack of any reference to non-recognition in SC Resolution 276 (1970), the very fact that the situation is declared illegal and invalid, it directly implies an attitude of non-recognition by the part of the international community.

and on the other States, exactly by way of non-recognition. It is true that in some reports by Special Rapporteurs it has been advocated the need for an authoritative determination either by the UN or the ICJ (similarly as it was envisaged by Art. 66 of the 1966 Vienna Convention on the Law of Treaties)[211], but they were discarded. The final wording of Art. 41 ARSIWA ('No State shall recognize as lawful') implies that the obligation of non-recognition exists regardless of a (collective) determination that such a breach has occurred.[212]

The obligation and content of non-recognition do not depend upon any action by the appropriate political organs of the United Nations. A decision by a competent organ of the United Nations may establish legal certainty as to the existence of a serious breach of a *jus cogens* obligation. But, in the absence of such a decision, States may make their own determination at their own risk. That the obligation arises directly under customary international law is also shown by the fact that, in several cases, the call for non-recognition has been contained in a non-binding resolution of the General Assembly or in a statement of the President of the Security Council, which do not create any obligation.[213]

Indeed, if old practice about the sanction of non-recognition was still closely related to a previous determination by the UN SC, recent practice, such as the annexation of Crimea by Russia or the US transfer of embassy to Jerusalem are indicative of an obligation not to recognize which exists and arises for States under general international law and which is implemented without any pronouncement by the UN SC.[214]

[211] See ILC, Document A/CN.4/354 and Add.l and 2., *Third report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special* Rapporteur, in *Yearbook of the International Law Commission*, Vol. II, Part I, Documents of the thirty-four session, 45, para. 140-141.

[212] This emerges also from ILA, Committee on Recognition/Non-recognition in International Law, *Washington Conference Report*, 2014, 26; ILA, Committee on Recognition/Non-recognition in International Law, *Sidney Conference Report*, 2018, 27. See also Judge Dissenting Opinion to ICJ, *Case Concerning East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 263, par. 125: '[..] the obligation not to recognize a situation created by the unlawful use of force does not arise only as a result of a decision by the Security Council ordering non-recognition. The rule is self-executory'. *Contra* see Judge Higgins Separate Opinion in ICJ, *Israeli Wall Adivisory Opinion* (n 127) 216, par. 38. Authors have usually underlined that the Court decision in the East Timor case ('The Court notes that the argument of Portugal under consideration rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far', at 103), as evidence of the need for an authoritative determination by the UN. However, as it will be shown below in this work, it is related to what can be called a 'double standard' used by the Court in establishing responsibility – and to the problem of the *Monetary Gold* principle, as already said in Chapter V.

[213] S. Talmon (n 56) 113.

[214] M. Arcari, 'The UN SC, Unrecognised Subjects and the Obligation of Non-recognition in International Law' in *Unrecognized Subjects* (n 73) 236.

6.4. Non-recognition as a precautionary measure

The evidence of the fact that not only resolutions of the GA, but also resolutions of the SC concerning non-recognition are only declarative of an already existing obligation under general international law, is provided by the uncertain framing of the said measure within the Charter. It has been underlined previously that the obligation of non-recognition is incorporated in Art. 41 of the Charter, as an atypical measure not involving the use of force. However, from the analysis of the various resolutions rendered by the SC, it emerges a differentiated language and juridical force of the measure.[215]

What is very peculiar of the obligation of non-recognition as incorporated in the sub-system of international law represented by the UN, is that non-recognition is not only *a posteriori* instrument of enforcement of the law[216], but also a precautionary measure, according to Chapter VI of the Charter.[217] This means that the organs of the Organization can trigger the obligation of non-recognition prior to the authoritative determination that a relevant rule of international law has been breached or that a certain situation constitutes a threat to international peace and security.[218]

[215] Consider, for instance, UN SC Resolution 277(1970) of 18 March 1970:
'The Security Council [..]
Reaffirming that the present situation in Southern Rhodesia constitutes *a threat to international peace and security* [..]
Acting under Chapter VII [..]
2. *Decides* that Member States shall *refrain from recognizing this illegal regime* or from rendering any assistance to it;
3. Calls upon Member States to take appropriate measures, at the national level, to ensure that any act performed by officials and institutions of the illegal regime in Southern *Rhodesia shall not be accorded any recognition*, official or otherwise, including judicial notice, by the competent organs of their State' (emphasis added). Here there is a clear reference to a threat to peace and security (art. 39), to Chapter VII of the Charter, and to the verb 'decide' (art. 25, binding nature). However, in other occasions, the resolution has been less clear on that. See, for instance, UN SC Resolution 216(1965) of 12 November 1965:
'The Security Council
1. Decides to condemn the unilateral declaration of independence made by a racist minority in Southern Rhodesia;
2. *Decides to call upon* all States not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime'. Here there is no reference to a threat to peace and security according to Art. 39, nor the reference to Chapter VII. However, the verb 'decide' is used, which can lead to interpret the resolution as binding under chapter VII.

[216] See ILC, Document A/CN.4/354 and Add.1 and 2., *Third report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special* Rapporteur, in *Yearbook of the International Law Commission*, Vol. II, Part I, Documents of the thirty-four session, 45.

[217] In general international law, it is always used *ex post facto*. As regard the principle of non-recognition in the law-making function, different considerations apply; see Chapter IV of this work.

[218] See for instance, UN SC Resolution 541(1983) of 18 November 1983, about the non-recognition of the declaration of independence by the Turkish Cypriot authorities:
'The Security Council [..]
Concerned at the declaration by the Turkish Cypriot authorities issued on 15 November 1983 which purports to create an independent State in northern Cyprus, [..]

7. The content of non-recognition

7.1. Non-recognition de facto, de jure, as legal

It has been shown that the obligation of non-recognition was to be interpreted as to encompass only a *de jure* dimension, and not the *de facto* dimension.[219] This materialized in a number of conducts and intercourses still allowed between recognizing States and non-recognized entities (or situations). However, this settlement of the law was not without critics, as other scholars and statemen argued that the sanction of non-recognition should not concede any distinction between *de jure* and *de facto* recognition.[220]

The first point to ascertain here is indeed how to determine the substance of the modern obligation of non-recognition considering its formulation in international documents.

During the years 1963-1970 the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States dealt with the question of the non-recognition of territorial acquisition resulting from the threat or use of force. The Non-aligned countries and the Latin American States submitted their position in favour of an unqualified obligation of non-recognition (i.e. encompassing both *de jure* and *de facto* recognition). They opposed the formulation proposed by the Western countries of an obligation 'not to recognize *as legal*'. On the other hand, indeed, Western countries pointed out that it was difficult, as a strictly legal proposition, to deny the *de facto* existence of specific situations resulting from the illegal use of force. The view of the Western States finally prevailed[221]; paragraph 10 of the first principle of the Declaration on Friendly Relations, adopted by the UN

Considering, therefore, that the attempt to create a "Turkish Republic of Northern Cyprus" is invalid, and will contribute to a worsening of the situation in Cyprus, [..]
4. Requests the Secretary-General to pursue his mission of *good offices*, in order to achieve the earliest possible progress towards a just and lasting settlement in Cyprus;
5. Calls upon the parties to co-operate fully with the Secretary-General in his mission of good offices; [..]
7. *Calls upon* all States not to recognize any Cypriot State other than the Republic of Cyprus' (emphasis added).
Here there is no reference to the determination to a threat to international peace and security according to art. 39 of the Charter, and no reference to the verb 'decide' linked to Art. 25 of the Charter. It is in the context of the recall to good offices by the UN Secretary General. Thus, it can be said that non-recognition is a precautionary measure under Chapter VI of the Charter.

[219] See *supra*, Chapter I, par. 2.1.G.

[220] See *supra*, Chapter III, par. 1.5.

[221] For a detailed account of the discussion within the Special Committee see S. Talmon (n 56) 108-110.

GA in 1970, indeed read as follows: 'no territorial acquisition resulting from the threat of use of force shall be recognized as legal'.[222]

A compromise on the content of the obligation of non-recognition was also found in the case of the 1974 Declaration on Aggression, which provides in Art. 5(3) that 'no territorial acquisition or special advantage resulting from aggression shall be recognized as lawful'.[223] The replacement of the word 'legal' with 'lawful' did not represent a substantive change; since most of the delegate pointed out that the article should be read in line with the relevant provision on non-recognition in the Friendly Relations Declaration.[224]

However, the purely formal view of the obligation of non-recognition underlying the Friendly Relations declaration and the Definition of Aggression, was not confirmed by the ICJ in several cases as well as by State practice – which will be analysed below. This is reflected in the commentary to the 2001 ARSIWA in which it is explained that Art. 41 'not only refers to the formal recognition of these situations, but also prohibits acts which imply such recognition'.[225] The reference to implied recognition[226] further opens to a very wide range of behaviours which are banned in so far as they can imply the recognition of the illegal situation.

7.2. The content of non-recognition based on the norms breached and the context of its application

The content of non-recognition as an enforcement tool is not a purely formal declaration of illegality of a given situation, rather it involves a wide range of 'active abstention(s)'.[227] However, it is true that the idea of giving importance to the factual existence of (especially territorial) situations has remained in the principle, and it is visible in many aspects: 1) the illegal act or situation is not deemed to be 'null and void' *ab initio* (as it is in the law-making sphere), non-recognition playing here a 'status

[222] See UN General Assembly, *Friendly Relations Declaration*, cit. Hans Blix, who may be regarded as the father of the term 'non-recognition as legal', explained its meaning in his Hague Academy lectures in 1970: 'no formal admission may be made of the legality of a forcible territorial acquisition as described. This would appear to allow States to determine for themselves – in the absence of any collective action by the United Nations – to what extent they would allow practical co-operation and courtesies without any formal admission of the legality of the situation'; H. Blix, 'Contemporary Aspects of Recognition' in [1970-II] 130 *Recueil des Cours* 664-665.

[223] UN General Assembly, *Definition of Aggression* (n 65).

[224] See GAOR, 29th Session, Supp. No. 19 (A/9619), 1974, 24 (USA); 26 (Yugoslavia). See also the Report of the Special Committee on the Question of Defining Aggression, UN Doc. A/9411, 10 December 1973, 13, par. 29.

[225] Report of the International Law Commission, 53rd Session, GAOR, 56th Session, Supp. No. 10 (A/56/10), 2001, 287, par. 5.

[226] See *supra*, Chapter I, par. 2.1.D.

[227] S. Talmon (n 56)112.

(or claim) denying effect'[228]; 2) some rules of international law continue to apply in the relationship between the unrecognized (territorial) situation and non-recognizing States[229]; 3) the obligation of non-recognition as an enforcement tool in not an 'open-ended' obligation and is flexible in its application during time as long as the situation of fact evolves.

The content of the sanction of non-recognition is really varied and it depends on the primary norms breached, on the factual situation on the ground when illegality is committed (and in particular on who is the recipient of the obligation), and on the context of its application (inside or outside the UN; or adopted by the ICJ or other international and regional tribunals).

To start with the second point, it has been underlined that the obligation of non-recognition is more efficient where 'the object of non-recognition is not merely a factual situation but, at the same time, an asserted legal status such as statehood, or a claim to title to territory arising from the factual situation'[230]; and that 'what appears to be decisive is not the character of the particular peremptory norm but rather the extent to which an unlawful situation flowing from a violation of a peremptory norm results in a legal claim to status or rights by the responsible state'.[231]

These assertions by contemporary scholars highlight how the principle of non-recognition as an enforcement tool seems to apply – effectively – where there is an underlying claim to title to territory or status by the State who has violated such obligations. They conclude that 'non-recognition can operate only in cases of a factual situation that also takes the form of a legal claim (to statehood, territorial sovereignty, governmental capacity, etc.) intended to have *erga omnes* effect. To the extent that factual situations entail such claims, the obligation of non-recognition does have real substance'.[232] This position must be generally accepted. Not by chance, nearly all the cases cited in the Commentary to the 2001 ARSIWA refer to attempted acquisitions of sovereignty over territory.

However, it must be said that this is a false problem. Indeed, virtually all cases can be reported to a (territorial) asserted claim or status by the responsible actor. Consider, for instance, that the construction of the Wall in the Palestinian Territory has been accompanied, by the part of the ICJ, by the phrase '[and] its associated regime', thus equating it to a territorial claim by Israel. Furthermore, it must be noted

[228] See *infra*, Chapter VII, par. 2.
[229] See *supra*, par. 6.1.C.
[230] S. Talmon (n 56) 107.
[231] M. Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation', in (J. Crawford, A. Pellet, S. Olleson eds.) *The Law of International Responsibility* [Oxford University Press, New York, 2010] 686.
[232] S. Talmon (n 56) 125.

that whereas revolutionary governments are already included as recipient of the sanction of non-recognition, nothing impedes in principle that already established and recognized governments or entities be included as well, designing a particular content of the obligation in such cases (such as denying them sovereign immunity in the State of the forum for acts deemed to be in violation of *jus cogens* norms[233]).

In the *Namibia* advisory opinion, the Court is said to have established the minimum requirements of the obligation of non-recognition. According to the ICJ, States were under an obligation not to recognize the legality and validity of South Africa's continued presence in Namibia. They were also under an obligation of non-assistance.[234] Among the dealings the Court considered inconsistent with the declaration of illegality and invalidity was entering into treaty relations with South Africa where it purported to act on behalf of or concerning Namibia; sending diplomatic, consular or special missions to South Africa that included Namibia in their jurisdiction; and entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which might entrench authority over the Territory.[235] Thus it emerges that when the recipient of the rule is an entity exercising authority over a territory, it must be denied as a minimum treaty relations, economic relations and diplomatic and consular relations. The Court, however, adds that States must refrain not only from express endorsement of the legality of the impugned act but also from any conduct that would imply recognition of legality.[236] Furthermore, the Court says that 'the precise determination of the acts permitted or allowed – what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied – is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter'.[237]

These last specifications are indeed in line with the fact that the Court wants to establish only the basic content of the obligation of non-recognition. However, the

[233] See *supra*, Chapter V, par. 2.1. The Special Rapporteur Riphagen cited immunities under general international law as an example of a legal consequence that may be ignored if the factual situation giving rise to that immunity was created in violation of international law; see S. Talmon (n 56) 116. It can be argued indeed any property, claim or rights predicated on acts of genocide, torture and other violations of fundamental human rights are to be denied any legal effect by other States. Thus, the general legal consequences of acts of State under international law, such as the personal and functional immunity of State officials from the jurisdiction of foreign courts or State immunity, may be denied if the acts in question constitute genocide or other serious breaches of jus cogens obligations. However, for the moment the ICJ does not agree on this development of the law; see ICJ, *Arrest Warrant of 11 August 2000*, Judgment, ICJ Reports 2002; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012.

[234] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in* Namibia (n 11) 54, par. 119.

[235] *Ibid.*, 55, parr. 122-124.

[236] *Ibid.*, 55, par. 121.

[237] *Ibid.*, 55, par. 120.

referral to the UN organs is not indicative of the fact that only those organs can determine what are the additional measures to be adopted under the guise of the obligation of non-recognition – maintaining however a primacy in terms of efficacy. Here it was justified by the fact the occupation of Namibia by South African had been declared illegal and invalid by the UN Security Council, so the matter would continue to be treated in the UN. This is confirmed by the fact that Art. 41 ARSIWA in par. 3 similarly provides that '[t]his article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law'[238]; and such provision does not refer to the UN organs.

In this general framework applicable to nearly all situations dealing with territorial claims, we have then to differentiate between different situations, that is the form of this illegal claim: to statehood, to governmental capacity, to territorial sovereignty etc. As regards claims to statehood, for instance, it can be said that illegal entities are to be deprived of the competences and privileges inherent in statehood, both at the international and national level.[239] If the claim is an illegal occupation of territory, is arguable that, subject to humanitarian considerations and the interests of the civilian population in the occupied territory, these rights are to be denied to an aggressor. States may, for example, refuse to recognize and enforce laws enacted by the aggressor for the occupied territory or may deny recognition to title to property even if the acquisition of property was within the 1907 Hague Regulations on Land Warfare. The aggressor may also be denied the customary international law privilege that belligerents are not responsible for damages caused to subjects of neutral States by military operations in accordance with the laws of war. If the claim regards acquisition of territory, the extension of the territorial scope of existing treaties and the right to conclude treaties for the acquired territory is precluded; it may also have an effect on voting and other rights. As regards claims to governmental capacity, it has been shown how it may imply, for instance, the non-recognition of credential in international organizations.

The obligation of non-recognition as adopted by the United Nations organs, has been 'filled' with many differing measures. What it is important to underlying is that, while in the League of Nations the 'peaceful' sanction of non-recognition was

[238] In the commentary to the 2001 ARSIWA Art. 41(3) it is said that: '[..] The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches', see (n 67).

[239] See S. Talmon (n 56) 116-17.

intended as separate with regard to the 'real' sanctioning system (economic measures), in the UN there is usually a integration between non-recognition and economic measures.[240] Surely, what can be said is that non-recognition is intended as the 'first' measure in order for other measures to be applied to the contested situation.

In this way, the UN organs (especially the SC) have expanded a lot the substance of the obligation of non-recognition, specifying its content according to the situation at hand.[241]

The content of the obligation of non-recognition has to be considered also in relation to the specific norms of international law which are breached. Apart from the recipient of the rule, and the context in which the sanction is adopted, the primary norm breached – which it has been shown trigger the obligation itself – can determine too which are the consequences of the measure of non-recognition.[242]

7.3. The content of the of non-recognition, the obligation of non-assistance, and the obligation of cooperation

Another problem which arises when dealing with the content of the obligation of non-recognition is its relationship with the obligation not to 'render aid or assistance in maintaining' an unlawful situation. If it is true that the two obligations are treated separately in Art. 41(2) ARSIWA, the same Commentary to the Articles says that '[i]n some respects, the prohibition contained in paragraph 2 may be seen as a logical

[240] Consider, for instance, UN Security Council Resolution 277(1970) of 18 March 1970 on Southern Rhodesia. Here non-recognition is associated with other measures under Art. 41 of the UN Charter. In other words, it is highly difficult to separate the content of non-recognition from the specific measures subsequently spelled out in the resolution:
'The Security Council [..]
Reaffirming that the present situation in Southern Rhodesia constitutes a threat to international peace and security [..]
Acting under Chapter VII [..]
2. Decides that Member States shall *refrain from recognizing this illegal regime* or *from rendering any assistance to it*;
3. Calls upon Member States *to take appropriate measures, at the national level, to ensure that any act performed by officials and institutions of the illegal regime in Southern Rhodesia shall not be accorded any recognition*, official or otherwise, including judicial notice, by the competent organs of their State; [..]
9. Decides, in accordance with Article 41 of the Charter and in furthering the objective of ending the rebellion, that Member States shall:
(a) Immediately sever all diplomatic, consular, trade, military and other relations that they may have with the illegal regime in Southern Rhodesia, and terminate any representation that they may maintain in the Territory;
(b) Immediately interrupt any existing means of transportation to and from Southern Rhodesia [..]' (emphasis added).

[241] It would be almost impossible here to recollect all the specific measures of non-recognition adopted by the Security Council and by the General Assembly. For a detailed analysis see J. Dugard, *Recognition and the United Nations* (n 55) 81-117.

[242] See, for instance, T. Moerenhout, 'The Consequence of the UN Resolution on Israeli Settlements for the EU: Stop Trade with Settlements', in [4 April 2017] *Ejil:Talk! The Blog of the European Journal of International Law.*

extension of the duty of non-recognition'.[243] In other words, it is highly difficult to concretely separate measures which are banned under the first or the second obligation. The ILC suggests that their scope of application differs inasmuch as the obligation of non-assistance include actions 'which would not imply recognition of the situation created by serious breaches in the sense of Art. 40'.[244] This uncertain separation, if it is not very relevant in the issuing of the measures in response of violations, may however gain relevance once one has to attribute international responsibility for an alleged breach of the obligation of non-recognition by an unlawful recognition.

The relation between the obligation of non-recognition and the obligation of co-operation is important as well. The fact that the latter is positioned in par. 1 of Art. 41 ARSIWA let us suppose from the beginning that between the two obligations are not so closely intertwined as it was with the obligation of non-assistance. Art. 41(1) reads as follows: 'States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40'.[245] According to some authors, the obligation of co-operation regards only third States and injured State(s), but not the responsible State[246]; differently from the obligation of non-recognition which applies also to the responsible State.[247] The operation of the obligation of cooperation opens up many questions.[248] It will be taken here into consideration one these problems: that is the temporal element of the obligation. It has been pointed out that Art. 41(2) of the ILC Articles on State Responsibility is problematic in that it contains no reference to time-frames. Is non-recognition an open-ended obligation that only comes to an end with the successful establishment of the *status quo ante*? It is definitely not a short-term measure. Non-recognition of Rhodesia lasted for 15 years, while non-recognition of South Africa's illegal occupation of Namibia went on for twenty years. The Turkish Republic of Northern Cyprus has not been recognized for the last 22 years, the international community has refused recognition of the Israeli annexation of the Syrian Golan and East Jerusalem for twenty-five years, and the non-recognition

[243] ILC, ARSIWA (n 67), 115, par. 12.
[244] *Ibid.*
[245] *Ibid.*, 113.
[246] S. Talmon (n 56) 124.
[247] It is confirmed by the Commentary to 2001 ARSIWA (n 67) 115, par. 9: 'Under article 41, paragraph 2, no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently, the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement'.
[248] For further information see S. Talmon (n 56) 124 ff.

of the illegal incorporation of the Baltic States into the Soviet Union lasted for 51 years. In all cases since 1945, collective non- recognition has ended only with the establishment of the status quo ante. However, the duty of non-recognition does not operate in a vacuum, divorced from the factual situation on the ground and the responses of the international community to that situation. The aim of the obligation of non-recognition is to find a durable and stable solution to a certain illegal situation. Taken this in mind, it may happen that the initial regime provided under the obligation of non-recognition be revised by the international community – also through the UN Security Council.[249] It may also happen that the situation did not return to the *status quo ante*. In this sense, it can be said that the modern obligation of non-recognition is certainly more inclined to the 'justice' pole than to the 'order' pole of the pendulum of the international system[250]; however, there are still margins for it to accommodate equitable solutions that do not reflect the situation prior to the illegal act.[251] In other words, the maintenance of legality is not a rigid postulation.

7.4. Limitations to the content of non-recognition

Finally, it has to be cited the fact that the application of the obligation of non-recognition encounters some limitations. The most important one is the so-called 'Namibia exception doctrine', elaborated by the ICJ in the *Namibia* advisory opinion. In paragraph 125, the Court states that: '[i]n general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia if any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of

[249] M. Arcari, 'The UN SC, Unrecognised Subjects and the Obligation of Non-recognition in International Law' (n 214) 239-240.

[250] Compare with the obligation of non-recognition in the inter-war years, see *supra*, Chapter III, par. 4.4.

[251] It has been shown in Chapter III that in the period until 1945, the obligation of non-recognition was the other side of the coin of peaceful settlement of disputes. in that period non-recognition was considered as a means of diplomatic dispute resolution. Stimson placed great reliance on non-recognition in conjunction with the practice of consultation, capable of transforming the Pact from a simply inspiring declaration to an instrument for the peaceful settlement of disputes. Indeed, the US government exduded both the sanction of armed force and the economic boycott to respond to violations of the Pact. Non-recognition was conceived as a moral sanction preferable to any other coercive means as far as they would have been acts of war themselves. The logic of pacific settlement of disputes was inherent also in the obligation of non-recognition as formulated by the League. In its resolution of March 11, 1932, the Assembly stated that the provisions of the Covenant and of the Pact of Paris, at least in so far as 'the principles governing international relations and the peaceful settlement of disputes' were concerned, they were in full harmony. As a consequence, it may be fully coherent if the situation did not return to the situation ex ante. In this light, the principle of cooperation (as well as the precautionary dimension of the obligation inside the UN system) can be seen as a legacy of that setting. Nowadays, however, cooperation is left in a secondary position and prominence is given to the restoration of legality.

births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory'.[252]

It has been shown before that some rules of international law, such as the ban on the threat or use of force continue to apply in the relation between non-recognizing States and the non-recognized entity (or situation). This is due to the maintenance of international peace and security. One can appreciate here that third States have also to exclude from the sanction of non-recognition certain domestic acts which deal with the private sphere of individuals.[253] By way of extension, it can be said that third States must apply the sanction of non-recognition respecting human rights of the people living in that territory/situation.[254] There is a risk, however, implicit in conceding exceptions to the obligation of non-recognition, that is that of emptying of meaning the sanction itself.[255]

8. The obligation of non-recognition and international responsibility

There are three aspects of international responsibility which emerge in relation to the obligation of non-recognition: 1) responsibility for the illegal acts perpetrated in a unrecognized territorial situation; 2) responsibility for an act of recognition contrary to the obligation of non-recognition; and 3) (by way of extension) responsibility for an act of recognition contrary to *jus cogens* obligations.[256]

As regards the first aspect, it must be noted that when the illegal situation is realized by interference of another State (territorial acquisition, occupation, puppet State or government, *de facto* regime, 'heterodirect' secession), the responsibility will be of this last State and not of the entity eventually governing – formally – the territorial situation at hand. This is well illustrated by the jurisprudence of the European Court of Human Rights (ECtHR) as regards notably the Republic of Northern Cyprus. Here, responsibility for acts of the illegal regime were attributed to Turkey.[257] When however, there is no external action of third States, the responsibility

[252] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in* Namibia (n 11), par. 125.

[253] See also ECHR, *Loizidou v. Turkey* (App. No. 15318/89), Grand Chamber Judgment, 18 December 1996, par. 96.

[254] See M. Mancini, *Statualità e non riconoscimento nel diritto internazionale* [Giappichelli Editore, Torino, 2020] 208-2019.

[255] See A. Lagerwall, 'Is the Duty Not to Recognise "States" Created Unlawfully Challenged by States' Practice and ECHR Case Law?' in *Unrecognized Subjects in International Law* (n 73) 276 ff.

[256] Finally, it must be remembered that also premature recognition is an unlawful recognition. While this is not the focus of our analysis, based on legality, some reflections can be found in Chapter I and Chapter VIII. See also W. Czaplinski, 'State Responsibility for Unlawful Recognition', in *Unrecognized Subjects in International Law* (n 73)148 ff.

[257] See for instance, ECHR, *Loizidou v. Turkey* (n 253) par. 44.

will be of the same entity/authority governing the territory/over the situation in question.[258]

As regards the second aspect, that is responsibility for an act of recognition contrary to the obligation of non-recognition, it must be said that acts of recognition of the illegal situation, upon which there is an obligation of non-recognition, by third States, are to be understood as 'offshoots' of the main violation of a peremptory or solidarity rule: in other words, as there is an obligation not to recognize an illegal situation created as a result of the violation of a fundamental rule, the violation of this obligation of non-recognition produces, in turn, an illegal situation which requires, as such, not to be recognized by any State because contrary not only to the obligation itself, but also to the aforementioned fundamental rules.[259]

It is relevant to cite the recent US transfer of Embassy from Tel Aviv to Jerusalem. This action by the United States has been interpreted by the international community as implying the recognition of Jerusalem as Israel's capital (and thus Israeli sovereignty over the city, which instead has a special *status* since 1947).[260] Resolution ES-10/19 of 22 December 2017 by the UN GA read as follows: [The General Assembly] 1. Affirms that any decisions and actions which purport to have altered the character, status or

[258] As it was for the Namibia's authorities for instance.

[259] See W. Czaplinski, 'State Responsibility for Unlawful Recognition' (n 256)157.

[260] Although the international community has not reacted to the proclamation of West Jerusalem as the capital of Israel in 1950, there are doubts about the acquisition of Israeli sovereignty over this part of the city; in other words, it seems that this is a provisional arrangement which is to be viewed in light of the peace plan for the creation of two independent States (see UN Security Council, *The situation in the Middle East, including the Palestinian question*, UN Doc. S/PV.8138 of 18 December 2017. This is the same position maintained by Palestine in its Application instituting proceedings against the United States before the ICJ: ICJ, Application instituting proceedings of 28 September 2018, *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*). Even accepting the opinion that West Jerusalem is part of Israeli territory and that the Green Line constitutes the border of that territory (cf. *Legal Consequences of the Construction of a Wall* (n 128) 167, par. 78), it has been underlined that the US Embassy is located in the "no man's land" right across the armistice line of 1948 (see D. Hughes, 'The United States Embassy in Jerusalem: Does location matter?' in [2018] *Questions of International Law* 23 ss.). Furthermore, and above all, the question was raised regarding the possibility that the transfer of the Embassy by the US (and then by the other states to follow) could imply a recognition of Israeli sovereignty over the entire city, and not just over West Jerusalem (V. Kattan, 'Why US Recognition of Jerusalem Could Be Contrary to International Law' in [2018] *Journal of Palestine Studies* 72). In this sense, such actions could compromise the final status of the city and the solution of the Israeli-Palestinian conflict. In resolution 476/1980 the Security Council states that all measures that alter the geographical, demographic and historical status of Jerusalem are 'null and void' (UN Security Council resolution 476 (1980) *[on the status of Jerusalem]*, UN Doc. S/RES/476 of 30 June 1980). In the same sense also the response of the Security Council in 1980 to the promulgation of the Basic Law, according to which Jerusalem was to be considered 'complete and united, the capital of Israel'. In resolution 478/1980, the Council in fact does not recognize the Basic Law and all other actions by Israel that aimed to change the status of the Holy City, and urged States that have transferred diplomatic missions there to withdraw them (*Security Council resolution 478 (1980) [on the status of Jerusalem]*, UN Doc. S/RES/478 of 20 August 1980). The resolution does not specify in which part of the city diplomatic missions should not be established. Likewise, States that voted in favour of the 2017 General Assembly resolution did not question the positioning of the US embassy, whether east or west of the city, because according to them in any case this action was a form of recognition of a situation contrary to international law or others, even more specifically, such as a violation of the obligation of non-recognition (see M. Pertile, S. Faccio, 'What we talk about when we talk about Jerusalem: The duty of non-recognition and the prospects for peace after the US embassy's relocation to the Holy City' in [2020] *Leiden Journal of International Law* 628 ss.).

demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded in compliance with relevant resolutions of the Security Council, and in this regard calls upon all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to Council resolution 478(1980); 2. Demands that all States comply with Security Council resolutions regarding the Holy City of Jerusalem, and not recognize any actions or measures contrary to those resolutions'.[261] Thus, the GA on the one hand declared US transfer of Embassy as a violation of international law, and (implicitly as a violation of the obligation of non-recognition – as also underlined by many States during the debate), on the other it extends the sanction of non-recognition to the US act of recognition.

The responsibility regime, triggered by the breach of the obligation, entails that third States are entitled to request the immediate cessation of the wrongful act (i.e. the revocation of the recognition previously granted), the non-repetition insurance and the reparation of the damage in favour of the Injured state (or of the injured population). Furthermore, the customary rule of *estoppel* will not apply: any act of recognition, therefore, will be revocable. In such cases, the revocation of the previously granted recognition will have retroactive effects, as pointed out by some authors: '[f]or, what is null and void (...) must be invalid from its inception; this means that by virtue of the declaration the effects of the previously granted recognition are deleted "nunc pro tunc"'.[262]

It is necessary to introduce a distinction in the matter of international responsibility for violation of the obligation of non-recognition. The violation, in fact, can be direct or indirect.[263] A direct violation is an express declaration or a concluding act in favour of *de jure* recognition. As regards the concluding act, such as the transfer of the Embassy to Jerusalem, the difficulty of establishing whether or not this constitutes an implicit or tacit recognition of the illegal situation could arise.

In our opinion, it is advisable to adopt the approach advanced by Lauterpacht according to which:'(r)ecognition is primarily and essentially a matter of intention. Intention can be replaced by questionable inferences from conduct'.[264] It is the international community, also through the political bodies of the UN, that usually establish whether there is a specific intention to recognize the illegal situation and

[261] UN General Assembly Resolution A/RES/ES-10/19 of 22 December 2017, *Status of Jerusalem.* This resolution has been adopted after the veto placed by the United States in the Security Council had precluded the adoption of a draft resolution put forward by Egypt (however, obtaining 14 votes in favour).

[262] R. Langer (n 4) 114.

[263] A. Pert (n 197) 19 ss.

[264] H. Lauterpacht (n 66) 371.

therefore to endorse a violation of general international law, which in this specific case prohibits the acquisition of territories through the use of force and the denial of the principle of self-determination of peoples.

In this case, moreover, the recognition implemented through the transfer of an Embassy by the United States directly violates the resolutions of the Security Council aimed at preventing the transfer of Embassies and other acts that could compromise the *status* of the city of Jerusalem; this was also stated by the majority of states in the General Assembly in the resolution of December 22, 2017. It must therefore be assumed that a similar situation could occur with regard to other states that have actually transferred their Embassies to Jerusalem.

Finally, from the previous cases of application of the obligation of non-recognition by the political bodies of the UN and the ICJ, it is clear that the content of the obligation itself provides for the prohibition from including 'dans la juridiction d'une mission diplomatique un territoire annexé illégalement'.[265]

We now deal with the *justiciability* of a direct violation of the obligation of non-recognition before the ICJ. It should be noted that in no relevant sentence for the purposes of the obligation of non-recognition the Court has expressed itself regarding the circumstances necessary to establish when the obligation was violated or the consequences arising from the aforementioned violation. Bringing a third State to court for breach of the obligation would first of all entail the risk that the Court decides not to rule, in accordance with the well-known principle established in the *Monetary Gold* case. In our case, this would imply that the Court ruled on the legality or otherwise of Israel's claims of sovereignty over the city of Jerusalem, which would not, in principle, be a party to the dispute. This is an hypothesis that in our opinion could materialize for the ICJ in considering the request of proceedings lodged by Palestine against the United States for violation of the Vienna Convention on Diplomatic Relations of 1961.[266]

In the *East Timor* case, the Court applied the *Monetary Gold* principle by virtue of, *inter alia*, that the *erga omnes* character of a rule and the rule on consent to jurisdiction are two different things.[267] In the same judgment, however, a door is left open. The Court, in fact, rejected one of the arguments advanced by Portugal according to which the *Monetary Gold* standard should not be applied to the present

[265] E. Castellarin (n 267) 50.

[266] ICJ, *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* (n 260).

[267] «The *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*», ICJ, *Case Concerning East Timor* (n 212) 102, par. 29.

case since the resolutions of the UN GA and SC had already ruled on the issue of use of force by Indonesia in East Timor and its illegal presence in the country, therefore the Court should simply take such decisions as an established fact, as a given. Nonetheless, the Court then specified that '[..] the argument of Portugal under consideration rests on the premise that the United Nations resolutions, and in particular those of the Security Council can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory [..] The Court is not persuaded, however, that the relevant resolutions went so far'.[268] Beyond the critical issues inherent in the Court's statement, it should be noted that the UN resolutions on the situation in East Timor do not make explicit reference to an obligation of non-recognition of Indonesian sovereignty.[269]

The question then is: if the Court had found a pre-existing obligation of non-recognition for the Australian State, how would the decision have been oriented? Or again, given the difference between the resolutions concerning East Timor on the one hand and Palestine on the other, is there room for action for the Court to decide differently? Would the declaration of illegality by the UN political bodies of the Israeli occupation be sufficient to prevent the application of the *Monetary Gold* principle? On the other hand, neither the ICJ, nor the UN resolutions, nor the Draft articles on the responsibility of states, nor the Declaration on friendly relations between states have ever definitively clarified which is the 'forum' or which actors appointed to sanction a situation of illegality for the purpose of applying non-recognition. If the indications lean towards the recognition of the pre-eminent role of the political bodies of the UN (and the ruling on *East Timor* seems to confirm this), it is also true that the majority of scholars today is oriented towards the self-executing character of the obligation for its existence in general international law (in particular as a secondary norm in the regime of international liability) and not only in the framework of the United Nations system.[270] It seems to us that the intermediate way is the correct interpretation of practice: there is an obligation of non-recognition in general international law, but the resolutions of the Security Council and the General Assembly, although declarative of a pre-existing norm, are essential since 'provide certainty by substituting for the decision of an individual State a collective

[268] ICJ, *East Timor* (n 209), par. 31.

[269] See for instance, UN General Assembly, *Question of East Timor*, UN Doc. A/RES/32/34 of 28 November 1977: '[The General Assembly] *rejects* the claim that East Timor has been incorporated into Indonesia, inasmuch as the people of the Territory have not been able to exercise freely their right to self-determination and independence'.

[270] See *inter alia*, M. Arcari, 'The UN, Unrecognized Subjects and the Obligation of Non-Recognition in International Law' (n 60) 236; E. Castellarin (n 267) 49-52.

determination of illegality and nullity'.[271] In particular, a *double standard* emerges: while the obligation of non-recognition arises from general international law without the need for specific UN resolutions, the determination of the United Nations regarding the validity of the latter, seems the necessary prerequisite in order to establish the responsibility of third States, at least for a ruling by the International Court of Justice.

On the basis of this reasoning, it is possible to put forward the hypothesis that in the event that the United States (or Kosovo, Guatemala and the Czech Republic which have followed suit) were brought to trial before the ICJ for violation of United Nations resolutions establishing the obligation of non-recognition, the Court could rule on the point and likely condemn these States for violation of the obligation of non-recognition and indirectly the peremptory norms underneath. However, it should be noted that there is only one case currently relevant before the ICJ: the aforementioned case lodged by Palestine itself against the United States for violation of the Vienna Convention on Diplomatic Relations of 1961. The jurisdictional basis of the dispute is precisely the Convention of Vienna in 1961, according to which – Palestine points out – the diplomatic mission must be strictly established in the *territory* of the receiving State; however, the relevance of 'other rules of general international law' to which the Convention refers, including rights reiterated by the Court's Advisory Opinion of 9 July 2004' is also recalled.[272] In our opinion, the Court could consider the obligation of non-recognition as sanctioned by the political bodies of the UN and / or by the ICJ itself in the Opinion on the *Wall* case and – without necessarily having to rule on the lawfulness of the Israeli conduct – condemn the US for violation of the obligation of non-recognition and indirectly therefore for violation of the peremptory rules from which this obligation arose.

We now come to the circumstance in which the violation of the obligation occurs indirectly, that is through a treaty (of commerce, of exploitation of resources, etc.) concerning the illegal territorial situation. Concluding a treaty that produces effects on a territory in which sovereignty has been acquired illegally is equivalent to a recognition of the same illegal situation by the contracting parties. The aforementioned ruling of the ICJ on East Timor is again relevant. In that case, the Court did not contest the Australian Foreign Minister's statement by which the recognition of a treaty-making power to Indonesia with respect to the territory in

[271] J. Dugard, *Recognition and the United Nations* (n 55) 135. See also T-C. Chen, *The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States* [Stevens & Sons Limited, London, 1951] 420 ss; according to him, the UN resolutions make an already existing illegal situation 'objective' - and therefore declarable.

[272] ICJ, *Relocation of the United States Embassy to Jerusalem* (n 260) 16, par. 50.

question is equivalent to a *de jure* recognition of the incorporation of East Timor by Indonesia. It therefore seems that the Court shares the hypothesis that recognizing that a State can conclude treaties relating to the territory over which it exercises sovereignty illegally is equivalent to *de jure* recognition of the illegal situation.[273]

Even in the event of an indirect violation, therefore, the State is subject to international responsibility. As with direct violations, it is appropriate to question the possibility of invoking the indirect violation of the obligation of non-recognition before an international court. In the case relating to East Timor, Portugal argued that 'Australia, in negotiating and concluding the 1989 Treaty, in initiating performance of the Treaty, in taking internal legislative measures for its application, and in continuing to negotiate with Indonesia, has acted unlawfully, in that it has infringed the rights of the people of East Timor [..]'.[274] Australia, on the other hand, replied that the Court did not have jurisdiction over the validity of the 1989 treaty between Australia and Indonesia, as this would inevitably lead the ICJ to rule on the lawfulness of the Indonesian conduct. In response, Portugal attempted a separation between the Australia-East Timor and Australia-Indonesia relationships. While the Court had no jurisdiction in the second case, in the first it did, since the Court could rule on Australia's objective conduct in having negotiated and applied the 1989 treaty; a completely separate issue from that of the lawfulness of Indonesian conduct.[275] Although the Court rejected Portugal's request on the basis of the *Monetary Gold* principle, the Portuguese argument would have been relevant in the event that the Court had found the existence of an obligation of non-recognition for Australia. As reiterated by Judge Weeramantry in his dissenting opinion: 'What the Court [would be] invited to consider [..] is not the unlawfulness of the bilateral treaty, but the unlawfulness of the Respondent's unilateral actions which went into the making of that treaty'.[276] It therefore seems possible to hypothesize that the ICJ could have ruled on Australian responsibility for having concluded a treaty with Indonesia, without the validity of the treaty and therefore the conduct of the latter being party in the dispute.

What follows pertains to the possibility that the treaty itself is declared invalid. Given that an action contrary to the obligation of non-recognition also consists in a violation of the primary rule and not only of the obligation itself, art. 53 of the Vienna Convention on the Law of Treaties of 1969 comes to relevance. Since the primary rule

[273] ICJ, *Case Concerning East Timor* (n 212) 98, par. 17.

[274] *Ibid.*, par. 19.

[275] '[..] Portugal contends [..] that its Application is concerned exclusively with the *objective* conduct of Australia, which consists in having negotiated, concluded and initiated performance of the 1989 treaty with Indonesia, and that this question is perfectly separable from any question relating to the lawfulness of the conduct of Indonesia», *ibid.*, par. 25.

[276] *Ibid.*, *Dissenting opinion* of judge Weeramantry, 173-74, par. (v).

violated in the case of illegal territorial acquisitions is almost always a jus cogens rule – while the obligation of non-recognition is not a jus cogens rule – the treaty would be void as it is contrary to peremptory rules. At the same time, however, it was emphasized that 'it is hard to regard a treaty provision recognizing sovereignty as being in direct conflict with the duty to refrain from acts of aggression or the duty not to impede the exercise of the right to self-determination'.[277] In our opinion, this would be a question that the interpreter should resolve, in light of the different circumstances on a case-by-case basis. As it is known, however, art. 66 (a) of the Vienna Convention has never been used in practice. Third States, however, may still apply the principle of non-recognition to the treaty in question, declaring it 'null and void'.[278]

Finally, it should be emphasized that the ICJ in the East Timor case mentioned, among the aspects it would have considered in order to pronounce on the validity of the 1989 Treaty, the fact that 'several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory'.[279] In the case of the occupied Palestinian territories, however, the practice shows a tendency on the part of third States to conclude treaties with Israel, specifying that the territorial scope of application of these treaties confined to the Israeli territory as defined by international law, therefore certainly not to the Gaza Strip, the West Bank and East Jerusalem. The jurisprudence of the Court of Justice of the European Union (CJEU) has, on several occasions, restricted the scope of application of preferential tariff regimes with its commercial partners who illegally exercised sovereignty over certain territories, including Israel.[280]

It must also be reminded that the obligation of non-recognition is not incumbent only on third States but also on the responsible State, if present, ie. the State that breaching *jus cogens* rules seeks an appropriation of sovereignty in alien territory. For this reason, the responsible State, when different from the recipient of the rule, is under an obligation not to recognize the illegal situation created by its violations of *jus cogens*.[281] Its acts of recognition thus will be unlawful, and the State will be

[277] A. Pert (n 197) 20.

[278] A. Gianelli, 'Absolute Invalidity of Treaties and Their Non-Recognition by Third States', in Enzo Cannizzaro (ed. by) *The Law of Treaties Beyond the Vienna Convention* [Oxford University Press, Oxford, 2011] 331-349.

[279] ICJ, *Case Concerning East Timor* (n 212) 104, par. 32.

[280] See specifically on Israel, although the Court finally resolved the case on the basis of the pacta tertiis principle, CJEU, judgment of 25 February 2010, C-386/08, Brita GmbH v. Hauptzollamt Hamburg-Hafen, par. 52; subsequently, in 2018, the Court made explicit the violation of peremptory rules at the basis of an illegal extension of the territorial scope of application of a treaty with regard to Western Sahara, v. CJEU, judgment of 27 February 2018, 266/16, Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs, par. 63, 71.

[281] 'Under article 41, paragraph 2, no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State

subjected to international responsibility. It may suffice to mention the recent recognition by Russia of the Donetsk People's Republic and the Luhansk People's Republic in Eastern Ukraine[282], which in turn, exactly as in the US case on Jerusalem, produces an illegal situation that must not be recognized by third States.[283]

Finally, it has to be analysed the responsibility for an act of recognition contrary to *jus cogens* obligations. It is an extension of the second aspect. It has indeed already been shown that an act of recognition is not only contrary to the obligation of non-recognition but also a violation of the primary rules at the basis of the original application of the sanction of non-recognition.[284] Furthermore, it has been shown that non-recognition is an automatic 'consequence' of the breach of a fundamental rule of international law, and it must always be taken as 'implicit' as soon as illegality is established.

9. Non-recognition and international subjectivity

It is important to refer here to the fact many scholars have reconducted the obligation of non-recognition to a theory of new criteria of statehood based on legality. They maintain that modern international law does not require new entities to rely only on traditional requirements of statehood to be recognized (or according to the constitutive theory of recognition, to exist as a State in international law). New entities must also conform to new criteria based on legality.[285]

However, as the structure of this work has shown, it is correct to affirm that the obligation of non-recognition is triggered by violations of fundamental norms of international law, and it can affect very diverse unlawful situations. This is also

has sought to consolidate the situation it has created by its own "recognition". Evidently, the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement', ILC, ARSIWA (n 67), 115, par. 9. As it can be read from this paragraph of the Commentary to the Draft Articles, also the recipient of the rule, that can be the injured State until a puppet entity or others forms of indirect institutionalized control are established there, is under an obligation not to recognize the situation. For a comparison with the inter-war period, and in particular the Austrian situation, see *supra*, Chapter III, par. 4.10.

[282] Reuters, ‚Extracts from Putin speech on Ukraine', 21 February 2022, available at <https://www.reuters.com/world/europe/extracts-putins-speech-ukraine-2022-02-21/>

[283] D. Desierto, 'Non-recognition', in [22 February 2022] *Ejil:Talk! The Blog of the European Journal of International Law.*

[284] W. Czaplinski, *State Responsibility for Unlawful Recognition* (n 256) 155-56.

[285] J. Crawford (n 11) 84-85, 105-106; D. Raič (n 146) 89 ff; C. N. Okeke, *Controversial Subjects of Contemporary international Law* [Rotterdam University Press, Rotterdam, 1974] 88. For a criticism of this theory see J. Dugard, *Recognition and the United Nations* (n 55) 129 ff. It is not assumed here, however, that the theory is impossible to apply for a 'intertemporal problem' (see D. J. Devine, The Requirements of Statehood Re-examined' in [1971] 34 *Modern Law Review* 410) but because the ratio of application of the obligation of non-recognition is different, as shown below in the text.

confirmed by the fact that UN political bodies in their resolutions sometimes do not clearly refer to 'new States', they interchangeably use terms like 'regime' or 'authority'.[286]

On the other hand, it is important to analyse the question of international subjectivity, insofar as it is a crosscutting aspect of the obligation of non-recognition. In other words, international subjectivity is relevant when the international community and organs of international organizations have to identify the 'recipient' of the obligation of non-recognition; taking in mind that the recipient purported new State may be different from the responsible State, as highlighted above.

When the recipient subject of the obligation of non-recognition is an alleged new State, the consequences of non-recognition may acquire specific characteristics with respect to other situations. In this case, in particular, international law may negate the rights and privileges of statehood to the entity in question.[287]

At the end of Chapter III, it has been highlighted that the application of the obligation of non-recognition unveiled a sort of 'pyramid structure', that is the obligation was applied mainly where there was a foreign intervention and claim of sovereignty over a given territory by a foreign State. It has been shown in this chapter that that is not anymore the case, as domestic situations as well may be object of the sanction of non-recognition by the international community when these situations violate fundamental rules of international law – overcoming also the original provisions of the UN Charter.[288] However, it is still true that the international community in applying the sanction of non-recognition searches for different levels of 'recipients' of the rule in a descending manner (depending on availability): so firstly, States and then governments, finally any other 'recipients' *sui generis*, such as non-state actors.[289]

[286] Cf. J. Dugard, *Recognition and the United Nations* (n 55).

[287] S. Talmon (n 56) 117.

[288] See *supra*, par. 4.

[289] It will not be tackled here the issue of non-recognition of non-State actors, which is left to further analyses. According to Władysław Czapliński: 'If recognition is the source of international legal personality of non-state actors, it should imply the obligation not to recognize those entities, the establishing and activities of which are unlawful. We should deny a priori any effects of such acts. Such an approach is particularly important when armed groups claiming recognition invoke the right to self-determination; as such situations constitute a threat to the territorial integrity of the state concerned', W. Czapliński, 'Recognition and International Legal Personality of Non-State Actors', in [2016] 1 *Pécs Journal of International and European Law* 14. However, the position of Stefan Oeter seems to be the correct one, also in light of what the ICJ has said in the Kosovo Advisory Opinion (see *supra*, par. 6.1.B): 'There will always exist some cause for secession, otherwise a secessionist movement could not mobilize enough public support to become politically relevant. Whether such cause justifies separation, however, is not a matter to be judged by the outside world. Accordingly, traditional doctrine has dealt with phenomena of secession as a mere factual issue not governed as such by international law'. He continues by saying that practice of non-recognition of non-state actors claiming secession or independence is merely declaratory, unless there are violations of fundamental rules of international law, such as armed intervention by third States, here the obligation of non-recognition applies (S. Oeter,

The period until the end of the second World War was characterized by an attempt to set out precise criteria for the constitution of a State or a government and their recognition as international legal subjects. This happened also in reaction to a trend of the '20s and '30s in which States showed a detachment from effectiveness.[290] The Montevideo Convention on the Rights and Duties of States of 1933 – which it is still considered the most authoritative legal source on the subject of statehood – at Article 1 listed the qualifications necessary for a State to be considered an international person: a) a permanent population, b) a defined territory, c) government and d) capacity to enter into relations with other states.[291] Still today, '[t]he Montevideo criteria still provide the basic framework for assessing whether an entity meets the key characteristics of a State [..] While other possible attributes of statehood have been discussed by jurists, they are best understood not as additions to the criteria of statehood, but as "preconditions for recognition of statehood" *by a particular State or group of States*.'[292] Furthermore, the non-recognition of a State because of lack of traditional requirements of statehood must be taken separate from an obligation of non-recognition for violation of fundamental rules of international law.[293]

9.1. Non-recognition and governmental capacity

Throughout this work, the question of recognition of governments has been tackled. It has been said that while recognition of 'revolutionary' governments (even in the circumstance of 'duality of government') for violations of fundamental rules of international law is a more consistent practice, non-recognition of established

'Recognition and Non-Recognition with regard to Secession', in (Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushiv eds.) *Self-determination and Secession in International Law* [Oxford University Press, 2014] 51 ff). An example of non-state actors which have not been recognized by the international community, because identified as a threat to international peace and security, and because they seriously breached fundamental rules of international law, is the ISIS/ISIL armed group; see M. Longobardo, 'The Self-Proclaimed Statehood of the Islamic State between 2014 and 2017 and International Law', in [2017] 33 *Anuario Español de Derecho Internacional* 225-227. For the case in which non-state actors claim to be or to become new government of the State, we must be careful to distinguish between political or legal (non)recognition, one based on legitimacy, the other on legality. Legality means that the other States can apply the obligation of non-recognition to those non-state actors which have violated fundamental norms of international law. On the other hand, recognition of rebels may constitute unlawful interference in the internal affairs of a State (see E. Milano, 'Recognition (and Non-recognition) of Non-State Actors', in *Unrecognized Subjects* (n 73)15 ff). Cf. *infra*, Chapter VII, par. 3.

[290] See *supra*, Chapter II.

[291] Montevideo Convention on the Rights and Duties of States, Montevideo, December 26, 1933 available at UiO Faculty of Law website <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml> (accessed 07 September 2019).

[292] See ILA's Committee on Recognition/Non-Recognition, *Sidney Conference, Fourth (final) report*, 2018, 8-9 (emphasis added).

[293] *Ibid.*, 10-14. While the first remains political in nature, it may give rise to international responsibility in case of premature recognition. The second, instead, it is a legal obligation of the international community. This analysis is strongly connected to the relationship between effectiveness, legality and legitimacy, see *infra*, Chapter VII, par. 3.

governments is still an hypothetical occurrence. States, indeed, prefer to apply economic or diplomatic sanctions in such cases.[294] Elsewhere in this work, it has been argued indeed that it should be a logical application of the law that old as new governments be affected equally by the obligation of non-recognition, so that recognition previously granted may be lawfully withdrawn, without running into inter-temporal problems. However, even the possibility that States do not recognize sovereign immunity to those governments (which have seriously breached fundamental rules of international law) is still a development of law that has to occur. As a matter of fact, it must be acknowledged that such a development in the law of non-recognition would lead to considerable risks of abuse by States and to international dis-order. Further analyses by scholars should demonstrate how this logical extension of the scope of the obligation will not carry out these risks, highlighting eventual safeguards.

[294] See for instance, the recent European Union (EU) Global Human Rights Sanctions Regime, established on 7 December 2020, which enables the EU to target individuals, entities and bodies – including state and non-state actors – responsible for, involved in or associated with serious human rights violations and abuses worldwide. Among the measures adopted: The violations targeted today include the large-scale arbitrary detentions of, in particular, Uyghurs in Xinjiang in China, repression in the Democratic People's Republic of Korea, extrajudicial killings and enforced disappearances in Libya, torture and repression against LGBTI persons and political opponents in Chechnya in Russia, and torture, extrajudicial, summary or arbitrary executions and killings in South Sudan and Eritrea. *Council Implementing Regulation (EU) 2021/478 of 22 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses*, ST/6935/2021/INIT, *OJ L 99I* , 22/3/2021.

PART III

AN ATTEMPT TO SYTEMATIZE THE PRINCIPLE OF NON-RECOGNITION IN INTERNATIONAL LAW. ITS CONTEMPORARY STATUS AND FUTURE DEVELOPMENTS

CHAPTER VII

A Theory of the Principle of Non-Recognition

1. The principle of non-recognition and customary rules

This work has been entitled 'The Principle of Non-Recognition in International Law'. This choice has been inspired from the beginning from the intuition that non-recognition has developed beyond traditional theoretical frameworks, and has progressively become a principle of international law. The author believes that the analysis conducted in the preceding sections constitutes an adequate basis for this assertion.

Since the inter-war period till nowadays, some scholars have traced (one of) the legal bas(e)s of non-recognition in the principle of *ex iniuria ius non oritur*, that is a general principle of law recognized by civilized nations according to Art. 38(c) of the Statute of the ICJ.[1] However, another interpretation has been accepted here, which sees in the *ex iniuria* principle the *raison d'être* of non-recognition and not its legal basis.[2] Another principle common to civilized nations as *raison d'etre* of non-recognition can be identified also in the principle of legality. However, the principle of non-recognition in itself can be characterized as a *principle of international law.*

The ILC has as a topic 'under consideration' the study of 'general principles of law'. The ILC distinguishes between principles formed within national legal systems and principles formed within the international legal system. Here it is argued that the principle of non-recognition is of this second type of general principles. According to the 2020 Second Report on general principles of law: 'What is required is determining the existence of a principle that is recognized by the community of nations by ascertaining that a principle: is widely acknowledged in treaties and other international instruments; underlies general rules of conventional or customary international law; or is inherent in the basic features and fundamental requirements

[1] *Statute of the International Court of Justice*, art. 38(c): '[The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:] the general principles of law recognized by civilized nations', available at https://www.icj-cij.org/en/statute (accessed 20/01/2022).

[2] A. Lagerwall, 'The non-recognition of Jerusalem as Israel's capital: A condition for international law to remain relevant?' [2018] Zoom-in 50 *Questions of International Law* 39.

of the international legal system'.[3] It can be said that as regards the principle of non-recognition all these forms of 'recognition' coexist.

Firstly, it has been shown that the principle of non-recognition has been widely incorporated into treaties and other international instruments, such as General Assembly and Security Council resolutions. Secondly, the principle of non-recognition underlies general rules of customary international law; in such case the nature of the principle derives from the general acceptance of the rules which it underlies. It has been shown that the principle of non-recognition gives rise to – at least – three different customary rules according to three functions of international law: law-making, ascertainment and enforcement of the law, each one with its own peculiar characteristics. Finally, the principle of non-recognition can be identified by ascertaining that it is inherent in the basic features and fundamental requirements of the international legal system, which is a creation of the community of nations. The principle of non-recognition indeed is fundamental for the 'the maintenance of international law' as a valid world-ordering legal system.[4] The object of the principle of non-recognition is to preserve the authority, the integrity and the legal character of international law.[5]

It must be recalled, as said at the beginning of this work, that all the three customary rules of non-recognition are strictly intertwined since the principle of non-recognition experiences a sort of circularity in the international legal order.[6] Furthermore, some considerations made with regard to non-recognition in the application of the law, shall be extended to the other two customary rules of non-recognition. They indeed are to be fulfilled both individually and collectively. The collective dimension can be given both by a decision of an organ of the UN, or by an accumulation of single State conducts.

There are as well some differences among the three rules which originate from the specific function of the international legal order in which they operate. Probably the most important one relates to the different significance of the concept of 'validity', and it will be analysed below.

Finally, there are some characteristics of the customary rules of non-recognition which derive from the nature of the principle of non-recognition: that is the fact that they are not *jus cogens* rules, but they have *erga omnes* status.

[3] ILC, *Second Report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, International Law Association Seventy-second session, Geneva, 27 April–5 June and 6 July–7 August 2020, A/CN.4/741, 36 ff.

[4] H. Lauterpacht, *Recognition in international law*, Cambridge University Press, London, 1947, p. 435.

[5] D. Raic, *Statehood and the Law of Self-Determination* [Kluwer Law International, The Hague, The Netherlands, 2002] 111.

[6] See *supra*, Chapter I, par. 3.2.

It has already been said that the principle of non-recognition cannot be a *jus cogens* principle. This for the very reason that international law must be flexible enough to accommodate changes through violation of the law.[7] The *jus cogens* character of the principle of non-recognition would constitute an unduly high limit to changes of the law informed by the evolving legitimacy arguments arising in the international community.

Especially from the *Wall* advisory opinion rendered by the ICJ, authors have advanced the idea the principle of non-recognition may have *erga omnes* status. The Court indeed referred to the *erga omnes* character of the obligations involved to explain the collective commitment of third States not to recognize the legal effects of the situation created through the breach of such obligations.[8] It is maintained here that it is a very likely conclusion, and it is demonstrated by the fact that case law in this respect is rather scant, as there are few precedents in which States have acted in open defiance to their obligation of non-recognition, by performing acts which may have the effect of consolidating the illegal situation created, for example, by an aggression. And even when this has happened, those acts have been condemned by the international community, as the already mentioned controversy over the US embassy in Jerusalem.[9] The principle of non-recognition indeed, as already said elsewhere, pertains to States acting as an organ of the international community to further community interests.[10]

[7] It is also demonstrated by practice, since some illegal situations have been 'accepted' in whole or in part by the international community (cfr. *infra*, Chapter VI, par. 7.3.). Moreover, some authors, like Pertile, point out that recent practice shows a trend towards preferring negotiations at the expense of the obligation of non-recognition to resolve or accommodate illegal situations; see M. Pertile, 'Bisogna davvero essere pazienti con il diritto internazionale? Considerazioni attorno a «Broken – A Palestinian Journey through International Law', in *Sidiblog*, 11 February 2021, available at http://www.sidiblog.org/2021/02/11/bisogna-davvero-essere-pazienti-con-il-diritto-internazionale-considerazioni-attorno-a-broken-a-palestinian-journey-through-international-law/ (accessed 10/05/2022).

[8] M. Arcari, 'The relocation of the US embassy to Jerusalem and the obligation of non-recognition in international law', in [31 May 2018] *Questions of International Law* 7. *Contra* see Dissenting Opinion of Judge Higgins to the ICJ Wall Advisory Opinion, par. 38: 'That an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of "erga omnes". It follows from a finding of an unlawful situation by the Security Council, in accordance with Articles 24 and 25 of the Charter entails "decisions [that] are consequently binding on all States Members of the United Nations, which are thus under obligation to accept"'.

[9] See also the US Government decision to grant visas for entrance into US territory to members of the Southern Rhodesian racist regime, which between the 1960s and 1970s was the target of the United Nations action explicitly calling for non-recognition. The US decision was ultimately condemned by UN Security Council Resolution 437 (1978). On this case law see Antonello Tancredi, *La secessione nel diritto internazionale* [CEDAM, 2000] 797-799. Cf. the practice before 1945, where States did not condemn the violation of the obligation of non-recognition by the part of other States, see *supra*, Chapter III, par. 4.11.

[10] It is interesting to report what Paolo Picone says about the *erga omnes* concept: '[The ICJ, in the Barcelona Traction case] recognizes that [States] have functional powers (or if one prefers, collective rights) to be managed on behalf of the international community as a whole. The international community, with its inorganic nature, cannot in fact use its own bodies to further the values and goods that directly related to it (or that it intends to directly protect); rather, for this purpose, it must necessarily avail itself of the activity carried out by States acting *uti universi* (in a perspective, so to speak, of the classic 'dédoublement fonctionnel'), as keepers of the international legal order'; see P.

2. Questions relating to validity

It is to be noted that whereas in domestic systems, there are different juridical categories related to 'validity', which are clearly distinguishable one from another: nullity, annullability and non-existence, and the related concept of efficacy, of an act between private individuals[11]; in international law it seems that those concepts are usually conflated or interchangeably used. However, in international law too, the denial of legal consequences of an act or situation which does not respect fundamental coordinates of the system can assume different forms, or so to say, can have a different 'juridical force', depending on whether we are dealing with law-making or law enforcement. Whereas in law-making non-recognition has a '*nullifying effect*', in law enforcement it has a '*status-denying effect*'[12]; as to the abusive withdrawals from fundamental treaties it is more appropriate to talk about suspension of efficacy.

Even if the language of UN resolutions still pertains to the concepts of 'nullity' and 'voidness', a factual situation cannot be declared *null and void* ('nul et non avenu' in French) in proper terms inasmuch as the unlawful act giving rise to a factual situation will be always more likely to produce some of its desired effects.[13] It is for this very reason, for example, that in applying the sanction of non-recognition, a middle course between the outlawing of the unlawful situation of fact and the adverse effects on the people living on the concerned territories has been established ('Namibia exception' doctrine).

3. Legality, legitimacy and effectiveness

Before the establishment of the League of Nations, the birth and "entry" into the law of nations of some non-Christian and/or non-European States (to name a few, from the United States with the Declaration of Independence of 1776, the Spanish colonies in Latin-America claiming independence between 1808 and 1829, to the reunification of Italy and Germany[14]) was accomplished through the rejection of a political conception of non-recognition. Such policy of non-recognition, called 'theory of

Picone, 'The distinction between Jus Cogens and Obligations Erga Omnes', in (E. Cannizzaro ed.) *The Law of Treaties Beyond the Vienna Convention,* [Oxford University Press, 2011] 415.

[11] As to the Italian private law, see A. Torrente and P. Schlesinger, *Manuale di diritto privato* (F. Anelli, C. Granelli eds.) [Milan, Giuffré, 2009] 601-607.

[12] A. Cassese, *International Law* [2nd edn, Oxford University Press 2005] 374.

[13] D. Richter, 'Illegal States?' in (Wladislaw Czaplinski and Agata Kleczkowska eds.), *Unrecognized Subjects in International law* [Scholars Publishing House Ltd., Warsaw, 2019] 27.

[14] R. Bierzaneck, 'La non-reconnaissance et le droit international contemporain', [1962] 8 *Annuaire français de droit international* 122.

monarchical illegitimacy', was upheld by the European monarchical States who used the 'legitimacy of origin' test to arrest the revolutionary strains in their colonies overseas, keeping them outside the close circle of *civilized* Nations. Conversely, the US supported the idea that effectiveness alone should be the test to register the birth of new States and governments.[15] This latter trend finally took precedence, and it was then predominant throughout the XIX century and the first part of the XX. It was also at the basis of the 1933 Montevideo Convention on the Rights and Duties of States[16] and the related declaratory theory of recognition of States and governments. At a closer look, while apparently rejecting any kind of legitimacy arguments, the US position relied on a particular kind of legitimacy, one which originates in effective power. Indeed, effectiveness itself has an inherent legitimacy dimension and it is indispensable to international order.[17] Consider, for example, the 'will of the people' test for granting recognition to a new territorial entity. It has been interpreted as an effectiveness criterion, in so far as the revolutionary party in power it is the direct expression of the intention of the people to change regime.[18] On the other hand, the test has been seen also as a synonym of respect of domestic norms and procedures by which the people can *effectively* express their opinion.[19] It is thus clear that tests based on effectiveness have legitimacy bias in itself. However, they continue to serve the international legal order as a more stable basis than purely legitimacy tests, which are less objective and 'politically' motivated.

As we already said, non-recognition of the consequences of serious violations of fundamental rules of international law has nothing to do with international subjectivity *per se*, thus it does not question that statehood is a 'pre-juridical' fact of the international order, that is something that the international order takes for given.

[15] 'In a word, the United States maintained that the true test of a government's title to recognition is not the theoretical legitimacy of its origin, but the mere fact of its existence as the apparent exponent of the popular will. This principle, though it necessarily found little support in Europe in 1793, has proved to be of the highest practical value; for not only has it continued to guide the course of the United States, but it has also become the generally accepted rule of international conduct', J. Bassett Moore, *A hundred years of American diplomacy* [Saratoga Springs, August 30, 1900] 6. See also J. Crawford, *The creation of States in international law*, [2nd edition, Clarendon Press, Oxford, 2006] 16.

[16] Montevideo Convention on the Rights and Duties of States, 1933, *League of Nations Treaty Series*, Vol. CLXV, 1936, 19.

[17] A. Tancredi, 'Lo Stato nel diritto internazionale fra effettività e legalità/legittimità', in *Ars Interpretandi. Annuario di Ermeneutica Giuridica*, vol. XVI [Carocci Editore, Roma, 2011] 146-47.

[18] Cf. *Ibid.*

[19] Not by chance the US was the first then to disown the doctrine of effectiveness at the beginning of the XX century with the doctrine of 'Constitutional Legitimacy' (or Tobar Doctrine or Wilsonian Constitutionalism); see G. Weeks, 'Almost Jeffersonian: U.S. Recognition Policy toward Latin America' [September 2001] 31(3) *Presidential Studies Quarterly* 494, 95; E. Dickinson, 'The Recognition of Russia' [December 1931] 30(2) *Michigan Law Review* 196. See also Additional Convention to the General Treaty of Peace and Amity, signed at Washington, 17 September 1907, reproduced in [January-April 1908] 2(1/2) *American Journal of International Law* 229-230; and General Treaty of Peace and Amity, reproduced in [April 1923] 17(2) *American Journal of International Law* 17-122.

It is not about replacing a model of legitimacy with another; non-recognition is strongly attached to legality, to the normativity of the law.

Each kind of legitimacy can influence legality, from time to time one prevailing on the other and viceversa. So, when scholars talk about 'effectiveness without statehood', they often neglect that the entity in question probably lack external independence, which is a fully-fledged traditional 'effectiveness-based' requisite of statehood.[20] When scholars talk about 'statehood without effectiveness', instead, they do not underline enough the fact that the *fictio iuris* of international personality is politically motivated or upheld usually by a group of States belonging to the same political, economic and cultural area (see, for example, the conditional recognition by members of the European Community with regard to new States arising from the dismemberment of the ex-Yugoslavia).

To sum up, both 'category' of practice (which are however indicative and not exhaustive) pertain to some kind of legitimacy. In the first category, it is the legitimacy of effectiveness; in the second one, it may be the legitimacy of democracy.

Non-recognition, on the contrary, applies a normative paradigm irrespective of whether the *situation* is effective or not, or whether it is legitimate according to 'external' values.[21] What is not ignored, instead, is the 'factual' dimension of effectiveness (this is indeed also a pre-juridical concept itself) and for this very reason, the principle of non-recognition comes to terms in many ways with the effective existence of situations of fact.[22]

This is shown also by the practice of (non)-recognition of governments. Recognition of governments has historically fluctuated between three different doctrinal approaches, based respectively on legality, legitimacy, and effectiveness. Still nowadays, notwithstanding the formal stance of most States not to recognize governments, in practice it can be observed the coexistence and sometimes the conflation between these approaches in the conduct of States.[23]

However, it is important to distinguish between them since the choice of one or the other has strong repercussions on global security and questions the role of

[20] See *inter alia*, ILA's Committee on Recognition/Non-Recognition, *Sidney Conference, Fourth (final) report*, 2018, 6.

[21] Of course, legality has its own legitimacy dimension, otherwise it could not exist. The legitimacy of legality originates however from very specific socially accepted values which are raised to the rank of law. In this sense 'external values' refer to those values not (yet) protected by law. Cf. D. Bodansky, 'The Concept of Legitimacy in International Law', in [November 2007] *University of Georgia School of Law, Research Paper Series*, No. 07-013.

[22] Consider, for instance, the distinction between *de jure* and *de facto* non-recognition; or the Namibia exception doctrine.

[23] D. Akande, 'Recognition of Libyan National Transitional Council as Government of Libya', in [23 July 2011] *EJIL:Talk! The Blog of the European Journal of International Law*, especially when 'two or more groups compete for control of State institutions and States seek to support one or the other competitor [..]', E. Milano, 'Recognition (and Non-recognition) of Non-state Actors', in *Unrecognized Subjects in International Law* (n 13) 14.

international law in the future. What we maintain is that the legitimacy criterion is not sufficient to justify an act of recognition that is overtly contrary to a rule of international law, such as the obligation not to intervene in the internal affairs of a State. Thus, we should still stick to the effectiveness approach, that revolves around the presumption of legality of an effective government exercising authority over a territory and a population. However, the legality approach can overturn the effectiveness one if it does respect some conditions. We take into consideration four recent cases of practice: the recognition of the Transitional National Council (TNC) in Libya, the recognition of the government led by the President of the National Assembly Guaidó in Venezuela, the recognition of the military government in Myanmar and the recognition of the Taliban government in Afghanistan.

It emerges that as regards the 2011 Libyan situation, if we consider the acts of recognition of the TNC, as acts short of recognition of a government[24], they amounted to an unlawful intervention in the internal affairs of a State.[25] Other authors have thus maintained that forms of support to the rebels were legally adopted in light of UN SC Resolutions 1970 and 1973 (2011).[26] However, this opens the question whether UN organs can take position in front of a duality of government, or they can only refuse to recognize the government in force which massively violates human rights. The legality approach indeed, at the present stage of international law, allows only an 'abstention' obligation, that is the duty of non-recognition of grave breaches of *jus cogens* obligations. Since the UN itself, along with many western countries[27], formally proceeded to recognize the TNC as the Libyan government, it can be said that it was an unlawful recognition. Similar considerations apply to the situation in Venezuela. The recognition of Juan Guaidó, President of the National Assembly, as the head of the new legitimate government, can be considered a violation of the obligation not to intervene in the internal affairs of another State.[28] However, if the international community would limit itself not to recognize Maduro's government as legal, it is not clear whether the legality approach too could apply. Indeed, democracy is not at the present stage of international law a jus cogens obligation; its violation does not carry with it the sanction of invalidity. To be true, there has been some cases of practice, as regards for instance Cote d'Ivoire and Honduras, but those possible exceptions deal

[24] For a discussion of these declarations see S. Talmon, 'Recognition of the Libyan National Transitional Council', [2011] 38(1) *University of Oxford Legal Research Paper Series* 3.

[25] D. Akande, 'Which Entity is the Government of Libya and Why does it Matter?', in [16 June 2011] *Ejil:Talk! The Blog of the European Journal of International Law.*

[26] This scholarly position is mentioned in A. Cassese, *Diritto Internazionale* (Micaela Frulli ed.) [Il Mulino, 2021]162.

[27] *Fourth Meeting of the Libya Contact Group Chair's Statement*, 15 July 2011, Istanbul.

[28] G. Puma, 'The principle of non-intervention in the face of the Venezuelan crisis', in [31 March 2021] *Questions of International Law* 22.

with circumstances where the international community chose to recognise an authority not in effective control, but which was constitutionally legitimate as demonstrated by winning an election.[29] Since Juan Guaidó did not win an election but proclaimed himself unilaterally as the new legitimate representative of the country, those acts of recognition can be considered unlawful. The cases of Myanmar and Afghanistan are different from those described above since there is not a doubtful territorial control. The international community, as well as UN organs, are moving steps in the direction of not recognizing them as legal. This legality approach is justified by the fact that both have seriously breached *jus cogens* obligations. This analysis offers the opportunity to reflect about the global security implications of these approaches, and more generally to what has been described as a 'turn to ethics' in international law.[30] The legitimacy approach, indeed, engages at present values and principles which are not universally accepted, and thus neither part of *jus cogens*, such as the principle of democracy. The risk is thus to undermine the authority of international law as an effective world-ordering paradigm and to trigger more political and social unrest.[31]

In conclusion, it seems to us that a point should be particularly stressed. The principle of non-recognition is an instrument of international law to, in a way, handle the very complicated relationship between legality, legitimacy and effectiveness. Effectiveness is still the first instrument of international law to assess whether claims can give rise to rights and titles. However, effectiveness finds a limit in legality, in the specific sense that effective situations established contrary to fundamental rules of international law could not be incorporated into law, so they are not recognized. Legitimacy is a much broader concept with respect to effectiveness and legality, and as said, it encompasses these last two as well. As a consequence, on the one hand, there is the risk of abuse of the legitimacy discourse for actions against international law (both legal and effective situations), being opportunistically used by states as self-assigned labels to vindicate selfish goals. On the other hand, it must be said that appeals for legitimacy to challenge legality (and effectiveness) are sometimes necessary, and international law needs some degree of flexibility to remain relevant.[32] However, as already underlined elsewhere in this work, legitimacy must pass through

[29] M. Frulli, 'Il rigetto delle credenziali di governi non democratici da parte dell'Assemblea Generale dell'ONU: uno strumento di tutela della democrazia?', in [2004] *Diritto Pubblico Comparato ed Europeo*; D. Akande, 'Recognition of Libyan National Transitional Council as Government of Libya' (n 23).

[30] See *supra*, Chapter V, par. 3.

[31] On the other hand, however, it has been underlined how the legality approach can be detrimental to human rights of the people living on the territory of the unrecognized government, not so differently with respect to what the effectiveness-based approach does.

[32] V. Popovski and N. Turner, 'Legality and Legitimacy in International Order', in *United Nations University Policy Brief*, November 5, 2008, 1-2.

general recognition to break the old rule and replace it, in this way it can challenge effectiveness as well (see *supra*, Chapter IV). This not however, a solution in itself, since in the ultimate analysis, general recognition (that is instrumental to change, but also *to create* the law upstream) is the result of a certain 'politics' of international law, that is a certain equilibrium of forces in the international arena, at a particular moment in time.

4. Future prospects

4.1. Towards the concept of 'higher norms'

In the *Wall* advisory opinion, the ICJ seemed to derive the application of the obligation of non-recognition from the *erga omnes* character of some international obligations, such as the right to self-determination of peoples and principles of humanitarian law.[33] It is not entirely clear whether the reference made by the Court should be interpreted as the intention to include in the application of the obligation of non-recognition the wider category of *erga omnes* obligations or whether the Court wanted only to underline the non-reciprocal character of the *jus cogens* obligations involved.

In Chapter V the idea has already been advanced that the principle of non-recognition may be extended towards the concept of 'higher norms' of international law, a notion that could comprehend *jus cogens* obligations, *erga omnes* obligations (and what in the past was referred to as 'crimes of States').[34] However, it has been recalled the fact that *erga omnes* obligations and *jus cogens* obligations maintain a different ratio in international law. Whereas every norm of *jus cogens* has *erga omnes* status[35], the reversal is not true, and the concept of 'erga omnes' obligations can lead to a considerable widening of the scope of application of the principle of non-

[33] ICJ, *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, 67, par. 155.

[34] See *supra*, Chapter V, par. 2.

[35] Such a position was adopted by Rapporteur Giorgio Gaja in Article C (later eliminated) of the the *Projet de résolution* of the *Institut de Droit International* in 2005 on 'Les droits et les obligations erga omnes en droit international', which stated that 'les règles du jus cogens imposent des oblgations erga omnes' ; see article C of the project, [2005] 71(II) *Annuaire de l'Institut de Droit International, Session de Cracovie*, 86.

recognition.[36] While this seems to be the direction of development of the principle[37], practice is still too scarce to conclude on this point.

It is possible that a different 'layer' of application of the principle be formed with regard to obligations *erga omnes* (which are not peremptory in character). For instance, it is highly improbable that the principle of non-recognition can play the same role in law-making it plays with regard to *jus cogens* obligations. While it is more probable that the principle be applied to ascertainment and enforcement functions for serious violations of *erga omnes* obligations.[38] Even in this case, however, there can be problems related to a lesser degree of objectivity of *erga omnes* obligations and thus to the certainty of the law.[39]

4.2. International law dealing with unlawfulness

A further step in the application of the principle has been suggested too. It relates to the fact that 'ARSIWA mentions the obligation not to recognise illegal situations as one of the consequences of a serious violation of *jus cogens* standards. This, however, narrows the real significance of the obligation not to recognise illegal situations. there are no grounds for the effects of the *ex iniuria ius non oritur* principle, which undoubtedly has the status of a general rule of law, to be limited to the most serious infringements of standards of fundamental importance to the international community'.[40] Some scholars, which find the legal source of the obligation of non-recognition in the principle *ex iniuria*, tend to enlarge the application of non-recognition to every illegal situation in international law. They thus interpret the

[36] According to Picone: '[..] the rules which impose obligations erga omnes perform not only the function of protecting absolute and 'supreme' values of the international community [..] but also the wider role of making it possible, through the collective action of States, to protect goods and values that might otherwise be ineligible for protection', P. Picone, 'The distinction between Jus Cogens and Obligations Erga Omnes' (n 10) 415. According to other authors, it can even be the case that all international norms, and not only those of a peremptory character, would be likely to produce, in the event of a serious breach, a possible reaction on the part of all States; see M. Byers, 'Conceptualising the relationship between *Jus Cogens* and *Erga Omnes* rules', in [1997] 66 *Nordic Journal of International Law* 211, 229 ff.

[37] M. Arcari, 'The relocation of the US embassy to Jerusalem and the obligation of non-recognition in international law' (n 8) 7.

[38] According to some authors, indeed, a careful reading of the 2001 Draft Articles on the Responsibility of States, indeed, may hide such orientation: '[..] there is clear evidence to suggest that, even in the final text of the draft, the possibility for everyone to invoke the responsibility of the State offender is not set out as an independent and additional sanction opposable only to 'international crimes'; but that it will continue to represent, in line with the viewpoint adopted during the whole negotiations, a direct and connatural consequence of the nature of the very primary rules violated, which impose obligations erga omnes', P. Picone, 'The distinction between Jus Cogens and Obligations Erga Omnes' (n 10) 419.

[39] T-C. Chen, *International Law of Recognition*, *International Law of Recognition* [Stevens & Sons Limited, London, 1951] 425 ff.

[40] W. Czapliński, 'State Responsibility for Unlawful Recognition', in *Unrecognized Subjects in International Law* (n 13) 152.

principle of non-recognition as an instrument of international law for dealing with unlawfulness.

Firstly, it has to be said that this is not supported by the practice of States. Furthermore, this approach conflates the principle of non-recognition with the *ex iniuria* principle and with the principle of legality. The latter are only the *raison d'être* of the principle of non-recognition not its legal bases. The principles of *ex iniuria* and of legality have a much broader scope of application in themselves and can be vindicated in a large number of ways in contexts of minor violations of international law without recurring to the principle of non-recognition. States indeed are at present willing to act as an organ of the international community with functional powers (such as non-recognition) only in presence of serious violations of 'fundamental' norms of international law, with all the problems already highlighted in this work.

4.3. Reconciling the Law of Recognition

It is worth mentioning the perspective of 'reconciliation' of the Law of Recognition. This pertains to the possibility to establish an obligation to recognize when specific elements are met. The obligation of recognition would be the exact flipside of the obligation of non-recognition. The affirmation of a positive obligation to recognize as a means to enforce fundamental values would thus bring to unity the whole Law of Recognition. Such obligation or principle – even if not yet sufficiently established – can be traced for instance in the recognition of non-state actors which can not be comprehended under the umbrella of NLMs.[41] This would signify that recognition, currently based only on effectiveness or legitimacy (such as the democratic principle), be accorded to precise legality standards. Furthermore, this development would require that States be entitled to 'positive' obligations and not only to negative ones, since the aim will be that of 'promoting' fundamental values of the international community and not that of responding to violations of the latter.[42]

Finally, it is interesting to note that a positive obligation to recognize and the obligation not to recognize would have a different temporal reach in international law. It has been shown that non-recognition unfolds its action basically in the present (also as a precautionary measure) and in the future (to keep legality intact over time). It is true that sometimes it has a retroactive application, subsequently invalidating an illegal situation already formed in the past. But the delay in invoking invalidity and

[41] E. Milano, 'Recognition (and Non-recognition) of Non-state Actors' in (Wladislaw Czaplinski and Agata Kleczkowska eds.) *Unrecognized Subjects in International Law* (n 13) 17.

[42] Such a prospect opens up many problems too, like the higher risk of instrumentality, that are left to further analyses.

non-recognition must in any case be circumscribed to a limited period of time, so that acquiescence and prescription do not take over. Thus, when referring to the past, non-recognition shows its limits. Consider also that there is little point in not recognizing an illegal situation of the past that has already ceased to exist. Even its inter-temporal application presents problems, it is difficult for example not to recognize a government already recognized that has committed serious crimes, when instead it can be done for the revolutionary government that came to power through similar actions.

Recognition, on the other hand, can have a intertemporal application, that is, it can also look to the past, determining the illegality of acts or situations that are placed in an excessively distant time frame even for a retroactive application of non-recognition.[43] Recognizing the existence of a past offense also produces effects in the present because it could determine the responsibility of the State author of the offense (when it still exists) or in any case a form of assessment and reparation (even without responsibility) for the victims or their descendants.[44]

[43] See for instance the recent US recognition of the Armenian Genocide, N. Longmire-Kulis, 'Recognizing the Armenian Genocide Marks a Historic Turning Point in American Foreign Policy', in *Just Security*, 25 April 2021, available at https://www.justsecurity.org/75881/recognizing-the-armenian-genocide-marks-an-historic-turning-point-in-american-foreign-policy/ (accessed 31/01/2022); E. Pistoia, 'Dal 24 aprile 1915 al 24 aprile 2021: il riconoscimento del genocidio armeno da parte del presidente Biden nel diritto internazionale', in *Sidiblog*, 14 May 2021, available at http://www.sidiblog.org/2021/05/14/dal-24-aprile-1915-al-24-aprile-2021-il-riconoscimento-del-genocidio-armeno-da-parte-del-presidente-biden-nel-diritto-internazionale/ (accessed 31/01/2022).

[44] Cf. A. von Arnauld, 'How To Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality', in [2021] 32(2) *The European Journal of International Law* 401. Of course other problems could come into play such as the non-retroactivity of the law that are left to further analyses.

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