# NON-RECOGNITION

*To my family*

# TABLE OF CONTENTS

## CHAPTER 3
## Non-recognition of an aspirant State and non-recognition of unlawful situations in International Law ..... 73

## INTRODUCTION

The International legal system is a peculiar and unique one. The lack of a centralised authority that could create, ascertain and enforce the law has always been its main characteristic together with the fact that customary law was one of the most important source of its own rules. Thereby, there is no wonder that international scholars had to pay attention not only to the theory but at the same time to the conducts undertaken by international actors in order to explain the functioning of this legal order.

The evolution of International Law and the emergence of new values, interests and needs determined a progressive change in the international system. State practice still plays a central role but in some circumstances the need for the protection of some values, even if not followed by a consistent practice, gained anyway a central role in International Law.

Despite this, in some situations there is still skepticism in the International Community because the lack of a univocal practice may put into question the very legal scope of some international rules and principles.

International relations showed in recent years a field where this is occuring: that is the case of non-recognition.

Non-recognition in International Law is a concept that has been spelt out for the first time in the 1930s by the U.S Secretary of State Stimson[1]. From that moment on, the so called Stimson doctrine kept on acquiring its own *locus standi* in International Law. It represented a specific device for addressing a urgent need: prevent the creation of law from unlawful situations. One cannot

[1] *[T]he American Government deems it to be its duty to notify both the Imperial Japanese Government and the Government of the Chinese Republic that it 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 soverignty , the independence, or the territorial and administrative integrity of the Republic of China… 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 […].* Excerpts from the Notes from the U.S: Secretary of State to the Chinese and Japanese Governments, january 8, 1932, reprinted in Royal Society IL, Documents on International Affairs for 1932, 262.

fail to observe that this necessity clearly was proof of the development of the International system as a legal system.

Since then, several have been the documents and instruments that called for non-recognition, also in the United Nations practice[2].

Also the International Courts[3] played a pivotal role in affirming and completing the definition of non-recognition.

Non-recognition has been invoked in contemporary State practice in several situations. The main examples can be identified in the so-called Bantustans in South Africa, the self-styled Turkish Republic of Northern Cyprus, East Timor, the Iraqi annexation of Kuwait, the construction of the wall in the Palestinian territories carried out by Israel, Southern Rhodesia, Namibia, the cases of Abkhazia and South Ossetia, the annexation of Crimea carried out by the Russian Federation and, more recently, the US embassy to Jerusalem.

Despite the fact that non-recognition as a legal tool is gaining momentum, several aspects of this concept still remain unclear and far from being defined. In particular its nature, its scope, its content and its effects.

International scholars frequently dealt with the topic of non-recognition, trying to offer a systematic framework in which insert the concept of non-recognition. The results have been quite skeptical and often the concept of non-recognition has been the object of open criticism that led to the definition of an "obligation without real substance"[4].

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[2] *"Every State has the duty to refrain from recognising any territorial acquisition by another State acting in violation of article 9",* Article 11 of the International Law Commission's 1949 Draft Declaration on the Rights and Duties of States. The Draft Declaration was adopted by the General Assembly as resolution 375 (IV) (1949).
*"No territorial acquisition resulting from the threat or use of force shall be recognised as legal"*. General Assembly Resolution 2625 (XXV) (1970), para. 10.
*"No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful"*. General Assembly Resolution on the Definition of Aggression 3314 (XXIX) (1975), art. 5, para. 3.

[3] In particular the ICJ in its 1971 *Advisory Opinion on the 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, 17

[4] Separate opinion of Judge Kooijmans, ICJ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep para 44; See Talmon, S., *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*

The motives behind this reasoning are quite clear. Non-recognition has been misinterpreted because analyzed through the lens of traditional legal scholars whose frame of reference is inevitably their national legal system. Where the legal rules have to find a precise and systematic order; where uncertainty is banned; where there is no place for grey areas. But this logical reasoning does not work for International Law. "International Law is the result of historical development[5]" as Hermann Moslers assesses in his "The International Society as a Legal Community", therefore it is flexible by nature and characterised by processes.

The legal tool of non-recognition is a clear expression of the DNA of the International Community and of its corresponding law.

Therefore the approach that must be adopted has to be different. It is necessary to start with another vision and examine International Law through the lens of the community from which it comes from. A vision whose hallmark has to be flexibility. A vision in which the terms of reference are necessarily different: space and time are categories that have a different dimension. A vision where the vital elements for the very existence of law are others. Certainty, effectiveness, for sure. But International Law remains alive only if it ensures the survival of its community offering tools aimed at guaranteeing peaceful coexistence.

The object of this work is to assess non-recognition as legal device in International Law and its aim at ensuring order in the International Community.

In this respect, in order to avoid misunderstandings, it is necessary to clarify from the outset that this work focuses on non-recognition towards an aspirant state or of unlawful situations (i.e. situations created or consolidated in breach of an applicable rule of International Law). In fact, this approach aims to

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*Substance?* in Tomuschat, C., Thouvenin, J. M., *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes,* BRILL, 2006, pp. 99-125.

[5] Mosler, H., *The international Society as a Legal Community,* in *Collected Courses of the Hague Academy of International Law*, Brill Nijhoff Publishers, Vol. 140, 1973, 1-320, at p. 17.

exclude from the analysis the issue of non-recognition of governments. The main reason behind this approach is that the latter is a concept more embedded in political rather than legal aspects.

The First Chapter is dedicated to a preliminary analysis of the concept of recognition. This is due to the fact that it appears implicit to start from what recognition is in order to better analyze the concept of non-recognition. In fact the alleged antithetical relationship of the two concepts will be verified. In other words the aim of this chapter is to highlight how the examination of recognition can shed some light on the concept of non-recognition and enhance its understanding.

The Second Chapter gives the possibility to deepen the study of two principles that played alternatively a pivotal role in the International Legal System. The reference is to the maxims *ex facto ius oritur* and *ex iniuria ius non oritur*.

These two principles can be considered as two points of reference, two cardinal points in the International Legal Order, which show which direction the law is heading to. The *ex facto ius oritur* reflects an extremely pragmatic vision and *ex iniuria ius non oritur* an idealistic vision. In this respect Anne Lagerwall clearly points out that the *ex iniuria* principle is the *raison d'être* of the non-recognition [6] and affirms also that non-recognition is one of the tools implementing the *ex iniuria* principle.

The Third Chapter goes into the analysis of non-recognition, evaluating its nature, scope, content and effects. The concept will be analyzed from different perspectives and state practice will be examined. The aim is to offer an evolutionary analysis of the concept of non-recognition that not necessarily corresponds to a chronological evolution. Therefore, the starting point is precisely the relationship between non-recognition and statehood, one of the most traditional issues of International Law. Then, the practice of non-

[6] See Lagerwall, A., *Non recognition of Jerusalem as Israel's Capital: A condition for International Law to remain a relevant framework?* In QIL, 50 (2018), 33-46 at p. 40 where she affirms: as to the principle *ex injuria ius non oritur*, it serves more as an explanation of the duty's raison d'être than a formal legal source. Non-recognition certainly constitutes one of the many expressions of the principle *ex iniuria ius non oritur*.

recognition is examined with reference always to territorial situations but in this case considered unlawful. Finally we examine the practice related to other unlawful situations.

The last Chapter will show how the evolution of the International Community deriving from new common interests has determined a temperament in the application of non-recognition. Here we want to refer to the so-called Namibia exception. The aim is to highlight, thanks to the jurisprudence that has developed from the ECJ and the EctHR, the limits that the concept of non-recognition meets when fundamental human rights are at stake. The importance of the protection of human rights in International Law, which has determined the latest evolutionary step, could not but affect non-recognition, a device that, as we said, is an indication of the stage of evolution of the law itself.

# CHAPTER 1

## Non - recognition as a concept opposite and complementary of Recognition? Framing the issue

*SUMMARY: 1. Introduction - 2. Defining Recognition in International Law - 2.1. Recognition of State: a historical perspective - 2.2. Types of recognition - 3. The theories of recognition - 3.1. The constitutive theory versus the declaratory theory - 3.2. The legal theory versus the political theory - 3.3. Tertium non datur? - 3.4. Is there a legal duty to recognize? - 4. Recognition of State. The practice of States: the First ILA Report of the Committee on the Recognition/Non-recognition of States - 5. What is the negation of non-recognition - 6. Conclusions.*

### 1. Introduction

Generally any analysis that concerns non-recognition avoids completely any reference to its opposite and affirmative concept, recognition.

Recognition has been thoroughly examined by scholars since the dawn of International Law. Usually the object of the discussion has to deal with its nature as well as its consequences. Most writers have focused their attention on the effects of such an act, creating two theories: the constitutive and the declaratory theories. Furthermore, the nature of recognition has been debated due to the fact that it is a political tool that carries legal consequences.

Recognition has been playing a crucial role in International Law because it is strictly connected to the creation of States, to the emergence of the principal actors of the International Community.

Yet, despite the contributions from several scholars, the concept of recognition still represents a grey zone: the more this field is analysed, the more it offers uncertainties rather than answers.

The aim of this first chapter is to evaluate if it is the case to reintroduce the concept of recognition in the analysis of non-recognition. In other words, if it could be constructive to take into consideration the findings of the study

concerning recognition in order to better understand the attributes and the effects of non-recognition.

Consequently, the following section exposes the definition of recognition in general terms and then, more specifically in International Law, including the historical contributions to this concept. Section 3 deals with the traditional theories of International Law concerning recognition that have examined its nature and effects. Section 4 includes an analysis of the practice of States, showing how difficult it is to square the traditional theories of recognition with the practice of States. Section 5 focuses on the opposite concept of recognition, namely if non-recognition could be considered the negation of the concept of recognition. Finally the chapter closes with concluding remarks summing up the findings.

## 2. Defining Recognition in International Law

### 2.1. Recognition of State: a historical perspective

The word *recognition* comes from the Latin verb *cognoscere*, that means to know, preceded by the prefix *re,* which means again. Thereby, the etymology of recognition seems to suggest an acknowledgement of something which was already known. If considered in these terms, this action could appear useless and worthless. But it is self-evident that if a word exists there must be a reason for its existence. The reason lays on the small prefix *re.* In fact, "to recognize" means to acknowledge something already known, but this acknowledgment occurs through different conceptual categories, through "different lenses". In this way recognition gains importance and the action of recognition acquires a specific *raison d'être*.

Recognition is an active process and should be distinguished from cognition, or the mere possession of knowledge, for example, that the entity involved complies with the basic international legal conditions. Recognition implies

both cognition of the necessary facts and an intention that, so far as the acting state is concerned, it is willing that the legal consequences attendant upon recognition should operate[1]. It is also interesting to notice that this English word shares the same etymology as its correspondent Italian, French and Spanish words.

The Cambridge dictionary as first definition of the word recognition gives the following: "agreement that something is true or legal".

The Oxford dictionary defines it as the "acknowledgement of the existence, validity, or legality of something".

Recognition and its role in International Law has been discussed for the first time by the philosopher Hegel in his Phenomenology of the spirit but in particular in its Encyclopedia of the Philosophical Sciences. It is worth noting that he considers recognition pivotal in order to affirm the existence of the individuals. In other words, he declares that only in the other oneself can acknowledge his own existence[2].

Hegel goes even beyond this reasoning. He examines in depth the role of recognition not only at the micro level, e.g. in the relation between individuals, but also at the macro level, namely in the relation between States.

He draws in fact a distinction between the "moments" of the State. According to him, the first moment is to deal with the internal configuration of the State and the internal State Law is defined. The second moment is about the State as a particular entity in relation to other particular entities. That is the external State Law[3].

Hegel assesses that the external State Law is based on International Law and that its universal principle is to presume that the States have been recognized[4].

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[1] Shaw, M. N., *International Law*, Cambdridge University Press, 2009, p. 453.

[2] Hegel, G. W. F. *Enciclopedia delle Scienze Filosofiche in compendio (1830)*, edited by Cicero, V., Rusconi Libri, 1996, §430, p. 713.

[3] *Idem*, §536, p. 841

[4] *Idem*, §547, p. 867.

It is evident that Hegel considers recognition as constitutive not only of the existence of the State in its external dimension but even of the very International legal system. He also conceives, starting from the concept of recognition as the tool to acknowledge the existence of the self, recognition as bilateral, not unilateral.

International Law has dealt with the concept of recognition since its origins. The question of recognition had the peculiar characteristic to arise in every vicissitude of State life. In fact, whenever there is an outbreak of civil war, a change of government or a transfer of territory or other important changes, the question of recognition is immediately involved[5].

Nevertheless, what has been pointed out was the fact that "the granting or refusing of these recognitions have nothing to do with recognition of State itself[6]".

Recognition had no separate place in the law of nations before the middle of the eighteenth century[7]. As Pufendorf writes in *De Iure Naturae et Gentium* (1672): "… just as a king owes his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings or states, before he may carry himself like a king and be regarded as such… It would entail an injury for the sovereignty of such a king to be called in question by a foreigner[8]".

In the middle of the eighteenth century, when recognition started to gain consideration, it was in the contest of monarch, especially elective monarchs: that is, in the context of recognition of governments.

Afterwards, at the beginning of the nineteenth century, the positivist theory started playing a pivotal role in International Law. Positivist premiss seemed

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[5] Chen, T., *The International Law of Recognition: with Special Reference to Practice in Great Britain and the United States*, Praeger Publishers, 1951, p. 13.

[6] Oppenheim, L., *International Law. A Treatise*, Longmans, Green, and co., Vol. 1, 1905, p. 113.

[7] Crawford, J., *The Creation of States in International Law*, Oxford University Press, 2006, p. 12.

[8] *Ibidem*.

to require consent either to the creation of the State or to its being subjected to International Law so far as other States were concerned[9]. As a matter of fact, during the nineteenth century there was a series of doctrines, based on the premiss of positivism. The consequence of these doctrines was that the formation and even the existence of States was a matter outside the accepted scope of International Law[10].

Such recognition is considered "a sort of juristic baptism, entailing the rights and duties of International Law[11]". As expressed in Oppenheim's *International Law*: "This State is not, by reason of its birth, a member of the Family of Nations. The formation of a new State is, as will be remembered from former statements, a matter of fact, and not of law. It is through recognition, which is a matter of law, that such new State becomes a member of the Family of Nations and subject to International Law[12]".

Bearing this in mind, it is necessary to limit the discussion to the more peculiar aspects of recognition, namely the recognition of States.

## 2.2. Types of Recognition

Recognition itself may take several forms. Recognition may be *de facto* or *de iure*. Recognition may be implied or express. It may be conditional. It may be collective. State practice draws a distinction between *de iure* and *de facto* recognition. This distinction usually comes into being in the case of governments since States can normally be recognized only *de iure*, even though there have been few cases of recognizing States *de facto.* For example, Indonesia was recognized *de facto* by several States while it was fighting for independence against the Netherlands during 1945-1949. Likewise, there are a

[9] Crawford, J., *The Creation of States,* p. 13.
[10] *Idem*, p. 14.
[11] *Idem*, p. 16.
[12] Oppenheim, L., *International Law*, p. 264.

few examples of territorial claims being given only *de facto* recognition; the United Kingdom, for example, granted only *de facto* recognition to the Soviet annexation of Estonia, Latvia and Lithuania in 1940[13].

*De iure* recognition indicates that the recognized State fulfils the requirements laid down by International Law, according to the recognizing State. *De facto* recognition means that in the opinion of the recognizing State, bearing in mind all due reservations for the future, the recognized State provisionally and temporarily fulfils the requirements in fact. As such, *de facto* recognition is provisional and transitory and could be withdrawn at any future date, despite the fact that it is usually followed by *de iure* recognition. In other words, *de facto* recognition "involves a hesitant assessment of the situation, an attitude of wait and see, to be succeeded by *de iure* recognition when the doubts are sufficiently overcome to extend formal acceptance"[14].

Choosing the type of recognition to be granted, the recognizing State has always to deal with political realities and considerations as well as its national interests.

When recognition is granted by an express statement, it should always be regarded as *de iure* recognition, unless the recognizing State provides otherwise.

When recognition is implied, the situation will be uncertain as to the intention of the recognizing State; in fact it will not be clear if it wants to grant *de iure* or *de facto* recognition.

The distinction between these two types of recognition is insubstantial, since it is a question of intention, not of a legal matter. However, it is considered that *de facto* recognition can be withdrawn while *de iure* recognition is irrevocable. In reality, in the political sense recognition of either type can

[13] Malanczuk, P., *Akehurst's Modern Introduction of International Law,* Psychology Press, 1997, p. 88.

[14] Shaw, *International Law*, p. 460.

always be withdrawn, while in the legal sense it cannot be unless a change of circumstances warrants such withdrawal.

Whatever the basis for the distinction between *de iure* and *de facto* recognition, the consequences of the two types are mostly the same. Nevertheless, there are several important differences between these two types, which are:

(a) Only the *de iure* recognized State can claim to receive property locally situated in the territory of the recognizing State.

(b) The representatives of the *de facto* recognized State or government may not be entitled to full diplomatic immunities and privileges.

(c) Only the *de iure* recognized State can represent the old State for the purposes of State succession or for giving support to any claim of its national for injury done by the recognizing State in breach of International Law.

Irrespective of the type of recognition, once the same has been granted it could be withdrawn in certain circumstances. Actually, this is more frequently done with regard to *de facto* recognition than to *de iure* recognition, because of the temporary nature of the first one.

Withdrawal of recognition remains possible in other circumstances. The loss of one of the required elements of statehood will appear in the withdrawal of recognition of a State.

Notably, we must not confuse the withdrawal of recognition with the rupture of the diplomatic relations. In State practice, the usual manner of expressing disapproval of certain actions of other governments is the interruption of diplomatic relations, since this method does not lead to the legal consequences and the problems that the withdrawal of recognition would produce.

Actually, the distinction between *de iure* and *de facto* recognition has always been a source of difficulty, and in practice most cases of recognition of States cannot be defined by either of these terms.

Recognition may be implied or express. The manner by which recognition is accomplished is of no special significance. It is crucial, however, that the act that constitutes recognition must give a clear indication of the intention to deal with the new State as such and to maintain relation with it.

Express recognition denotes the acknowledgment of the recognized State by a formal declaration. In the practice of States, this formal declaration may occur by either a formal announcement of recognition, a diplomatic note, a personal message from the Head of a State or the Minister of Foreign Affairs, or a treaty of recognition.

Recognition needs not to be explicit, i.e. in the form of an open, unambiguous and formal communication[15]. It could be implied in some circumstances[16]. There are occasions in which it may be possible to declare that in acting in a certain manner, one State does by implication recognize another State. However, because of this possibility, States may make an express statement to the effect that a particular action involving another State is by no means to be considered as inferring any recognition. This position, for instance, was kept by Arab States with regard to Israel.

Implied recognition is recognition of a State through acts other than official declarations or actions intended to concede recognition. The required actions for implied recognition must be incontrovertible, leaving no doubt of the purpose of the State performing them to recognize the State or government and to cope with it as such. There are many actions undertaken by a State in regard to an unrecognized entity. Some actions are conclusively regarded implying recognition, while others are not. Included in the first category are the formal establishment of diplomatic relations, the official congratulatory statements upon independence and the conclusion of a bilateral treaty. The actions that do not definitively imply recognition are the membership in

[15] Shaw, *International Law*, p. 462.

[16] Article 7 of the Montevideo Convention on Rights and Duties of States, 1933 provides that *"the recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognising the new state"*.

international organizations, the common participation in international conference, the maintenance of informal and unofficial contacts, the initiation of negotiations with an unrecognized State, the making of claims against an unrecognized State and the participation in multilateral treaty[17], for example the United Nations Charter. Practice shows that many of the member states or their governments are not recognized by other member states.

The political character of recognition is showed in what is defined conditional recognition. Sometimes States are recognized subject to certain conditions, generally the fulfillment of certain obligations. Examples of such conditions are: the respect and the guarantee of the rights of ethnics, national groups and minorities; the respect of religious freedoms; and the respect of the rule of law, democracy and human rights[18].

The failure to fulfill the obligations does not make void the recognition, as once given it cannot be withdrawn. The status obtained by the recognized State through the act of recognition cannot be withdrawn. The defaulting recognized State will be guilty of a breach of International Law, and this will allow the recognizing State to adopt severe diplomatic measures as a form of sanction. However, the conditional recognition of a State in process of emerging is probably revocable.

The expediency of collective recognition has often been noted. This would mount to recognition by means of an international decision, whether by an international organization or not. It would, of course, signify the importance of the International Community in its collective assertion of control over membership and because of this, it has not been warmly welcomed, nor can one foresee its general application for some time to come. The functioning of international organizations of the type of the League of Nations and the United Nations offers several occasions for recognition. Recognition by individual members of other members, or of non-members, may occur in the course of

[17] Brownlie, I., *Principles of Public International Law*, Oxford University Press, 2003, p. 93.
[18] Shaw, *International Law*, p. 465.

voting on admission to membership and considerations of complaints involving threats or breach to the peace[19]. However, it rapidly became clear that member states reserved the right to extend recognition to their own executive authorities and did not wish to delegate it to any international institution. The most that could be said is that membership of the United Nations constitutes powerful evidence of statehood. But that, of course, is not binding upon other member states that are free to refuse to recognize any other member state or government of the UN[20].

## 3. The theories of recognition

### 3.1. The constitutive theory versus the declaratory theory.

The concept of recognition in International Law debate has always been characterized by a fundamental distinction that led to the creation of two different doctrines: the constitutive theory and the declaratory theory.

The tenets of the constitutive position[21] affirm that in every legal system there must be an organ competent to determine with certainty the subjects of the system. "In the absence of an International organ competent to ascertain and authoritatively declare the presence of requirements of full international personality, States already established fulfill that function in their capacity as organs of International Law [22] ", acting individually or collectively.

[19] Brownlie, I., *Principles of Public International Law*, p. 9 4.

[20] Shaw, *International Law*, p. 466.

[21] Constitutive writers include the following: Le Normand, *Le Reconnaisance Internationale et ses Diverses Applications*; Jellinek, *Allgemeine Staatshlehre* (5th edn), 273; Anzilotti, *Corso di Diritto Internazionale* (3rd edn); Kelsen (1941) 35 AJ 605; Lauterpacht, *Recognition*; Scwarzenberger, *International Law* (3rd edn), Vol. 1, 134; Patel, *Recognition in the Law of Nations*, pp. 119-122; Jennings (1967) 121 HR 327, p. 350; Verzijl, *International Law*, Vol. 2, 587-590; Devine [1973] Acta Juridica 1, pp. 90-145. Hall, *International Law* (8th edn, 1924, Higgins ed), p. 103.

[22] Lauterpacht, H., *Recognition of States in International Law*, in *Yale Law Journal*, Vol. 53, 1944, p. 385.

Consequently, since they act in the matter as organs of the system, their determinations must have definitive legal effects[23].

The constitutive theory thus assumes recognition as "a necessary act before the recognized entity can enjoy an international personality[24]". In the constitutive view, the question of "whether or not an entity has become a State depends on the actions of existing States[25]". "Through recognition only and exclusively a State becomes an International Person and a subject of International Law[26]".

One of the principal grounds of the criticism raised against the constitutive view has been that it is offensive to considerations of ethics and humanity. Beside this kind of objection, there are other logical arguments against the constitutive view. First of all, the notion of recognition as a bilateral agreement[27], namely an agreement between the old and new States. Another objection is directed against the notion of recognition as a unilateral act[28] on the part of the recognizing State; this means that, according to this criticism, juridical effects even of a unilateral act cannot be conceived except between entities already having juridical personality. Furthermore, another criticism is due to the fact that according to the constitutive theory, "a situation is created in which a new community exists as a State for those States which have recognized it, but not for others[29]"; in other words, the situation in which one State may be recognized by some States, but not by others, is an evident

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[23] Crawford, J., *The Creation of States*, p. 20.

[24] Dixon, M., McCorquodale, R., Williams, S., *Cases and Materials in International Law,* OUP Oxford, 2011, p. 158.

[25] Grant, T., *The Recognition of States: Law and Practice in debate and Evolution,* Praeger Publishers, 1999, p. 2.

[26] Oppenheim, L., *International Law*, p. 111.

[27] Anzilotti, D., *Corso di Diritto Internazionale*, 1923; Knubben, R., *Die Subjekte des Völkerrechts*, 1928; Perassi, T., *Lezioni di Diritto Internazionale*, 1961; Heuss, A., *Aufnahme in die Völkerrechtsgemeinschaft und Völkerrechtliche Anerkennung von Staaten,* 1934; Spiropoulos, J., *Traité Théorique et Pratique de Droit international Public*, 1938.

[28] Cavaglieri, A., *Corso di Diritto Internazionale*, Casa Editrice Rondinella Alfredo, 1934, p. 213.

[29] Lauterpacht, *Recognition of States in International Law*, p. 439.

problem and thus a great deficiency of the constitutive theory[30]. Finally, it seems to be inconsistent with the principle of sovereign equality of States[31].

On the other hand, the declaratory doctrine[32] of recognition conceives recognition as a political act which is, in principle, independent of the existence of the new State as a subject of International Law. In other terms a State is a subject of international rights and duties as soon as it exists as a fact, i.e. as soon as the conditions for statehood as laid down in International Law are fulfilled[33]. A State may exist without being recognized, and if it does exist in fact, then whether or not it has been formally recognized by other States it has a right to be treated by them as a State[34].

A State is not obligated to enter into political relations with another State. Thus, recognition translates into a willingness to entertain such relations as

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[30] Vidmar, J., *Explaining the Legal Effects of Recognition*, in *International & Comparative Law Quarterly*, Vol. 61, 2012, p. 361.

[31] Cassese, A., *International Law*, OUP Oxford, 2001, p. 74.

[32] The tenets of the declaratory view, to give a representative selection, include: Ullman, *Volkerrcht,* 1908; Heilborn, *Grundbegriffe des Volkerrechts*, 1912; Nys, *Le Droit International*, 1912; De Louter, *Le Droit international Public Positif*, 1920; Erich, *La Naissance et la Reconnaissance des Etats*, 1920; Kunz, *Die Anerkennung von Staaten und Regierungen im Volkerrcht*, 1928; Jaffé, L. L., *Judicial Aspects of Foreign relations; in Particular of the Recognition of Foreign* Powers, 1933; Williams, *La Doctrine de la reconnaissance en Droit International et ses Développements Récents*, 1933; Bustamante, *Droit International Public*, 1934; Verdross, *Volkerrecht*, 1937; Brierly, *The Law of Nations*, 1942; Chen, T. C., *The International Law of Recognition: With Special reference to Practice in Great Britain and the United States*, 1951*;* Charpentier, J., *Le Reconnaissance Internationale et l'évolution du droit des gens*, 1956; Higgins, R., *the development of International Law through the Political Organs of the* UN, 1963; Davidson, JS., *Beyond recognition,* in *Northern Ireland Law Quarterly*, Vol. 32, 1981; Weston, B. H., Falk R. A. And D'Amato, A., *International Law and World Order*, 1990; Warbrick, *Aspects of Statehood and Institutionalism in Contemporary Europe;* Emanuelli, C., *Droit International* Public, 1998; Brownlie, *Principles of Public International Law*; Crawford, J., *The Creation of States,* 2006.

[33] Lauterpacht, *Recognition of States in International Law*, p. 423.

[34] Brierly, J., *The Law of Nations: an Introduction to the International Law of Peace*, Clarendon Press, 1963, p. 138.

exist only among states, such as exchanging diplomatic envoys or concluding treaties[35].

The most important and evident distinction between the two schools of thought "lies in the question whether the personality of a State exists prior to recognition, that is to say, whether the unrecognised State can be a subject of International Law, having capacity for rights and duties[36]".

Among writers, the declaratory theory has predominated during the last decades[37]. Nevertheless, there is a resurgence of the constitutive theory among scholars[38].

### 3.2. The legal theory of recognition versus the political theory

*"*The antinomy of the declaratory and constitutive doctrines, although relevant and important, does not exhaust the legal problem at issue*[39]".*

"With rare exceptions the theories on recognition have not only failed to improve the quality of thought but have deflected lawyers from the application of ordinary methods of legal analysis[40]".

Lautherpacht, in his "*Recognition of States in International Law*" suggested that the issue of recognition should be framed in a different way.

According to him, "recognition should be treated not as one of a choice between the declaratory and the constitutive character of recognition, but as one between the legal and the political, or juridical and diplomatic, view of its function[41]".

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[35] Kelsen, H., *Recognition in International Law: theoretical observations,* in *American Journal of International Law*, Vol. 35, 1941, p. 605.

[36] Chen, *Recognition of States*, p. 16.

[37] Crawford, J., *The Creation of States*, p. 25.

[38] *Infra* paragraph 4.3.

[39] Lauterpacht, *Recognition of States in International Law*, p. 455.

[40] Brownlie, I., *Recognition in Theory and in Practice,* in *British Yearbook of International Law*, Vol. 53, p. 197.

[41] Lauterpacht, *Recognition of States in International Law*, p. 456.

The author, despite being considered a supporter of the constitutive theory, rejected this kind of categorisation. In fact, what he stressed about recognition was its legal character: recognition as a legal duty. In sustaining his opinion, he tried to adapt his view with the doctrines current at that time. That is why he squared the declaratory and constitutive theories with his beliefs. In fact, he came to a definition of recognition "as declaratory of facts and as constitutive of rights[42]". What he meant about this, is that recognition is fundamental for the creation of the international personality of the State and of the rights normally associated with it. He added also that the existence of a State is a physical fact and it is of no relevance for the commencement of particular international rights and duties until by recognition has become a juridical fact. Consequently, he sustained that recognition is declaratory because it declares the existence of a physical fact but at the same time it is constitutive of legal consequences.

The opinion expressed by Lauterpacht is extremely important nowadays. In fact it offers the possibility to reconsider the role of recognition in International Law. It is a matter of fact that "neither theory of recognition satisfactorily explains modern practice[43]". Maybe that is due to the fact that the issue, according to Lauterpacht, was framed in a not convincing way.

Furthermore, this author offered an interesting explanation of the reasons that led to the success of the declaratory theory. Success that seems to be unaffected nowadays. He tried to offer a reasoning of the wide acceptance of the declaratory view despite the lack of the practice of States. Its appeal would be a reaction against the constitutive view as commonly offered; constitutive theory that incorrectly interpreted "deduces the international personality of new States from the will of those already established"[44]. According to Lauterpacht, this interpretation is not only misleading but also "offensive and

[42] Lauterpacht, *Recognition of States in International Law*, p. 455.
[43] Crawford, J., *The Creations of States*, p. 5.
[44] Lauterpacht, *Recognition of States in International Law*, p. 457.

repulsive[45]" as "it elevates the arbitrary will of States to the authority of the source not only of particular rights [...] of States, but of their very rise and existence[46]".

In addition to this, another argument for the wide acceptance of the declaratory view, at that time but also at current times, is the reaction against the concept of recognition conceived as a pure and simple political act[47]. In other words, it was taken for granted that the constitutive theory considered recognition as a political act, the result of the discretion of State policy: "insofar the recognition is treated as a matter of policy and not of legal duty, it may be liable to abuse[48]".

Lauterpacht sustained that the criticism towards the constitutive theory is due not "on its being constitutive, but on its being political and arbitrary[49]".

"The traditional formulation of the constitutive theory attributes to recognition three important characteristics, namely, creativeness, arbitrariness and relativity[50]". Consequently, the declaratory view started to gain wide acceptance. This kind of approach had the advantage of not even considering the nature of recognition. In fact, once it has been asserted that it was declaratory, it was of no importance the fact that it was a legal duty or an act of policy.

Nevertheless, it can be sustained that it is not sufficient reason to reject a theory on the ground that same has some flaws and presents some difficulties in its practice. International Law does not always correspond to reasons of fairness and justice.

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[45] Lauterpacht, *Recognition of States in Internationa Law*, p. 457.
[46] *Ibidem.*
[47] "*The granting or the denial of recognition is not a matter of International Law but of international policy*", Oppenheim, *International Law*, p. 111.
[48] Lauterpacht, *Recognition of States in International Law*, p. 436.
[49] *Ibidem.*
[50] Chen, *Recognition of States*, p.46.

It is difficult to see how recognition can at the same time be a matter of legal duty and of policy, but the belief that it is an act of policy probably explains the preference for the declaratory view[51].

What has been submitted by Lauterpacht is the fact that in both constitutive and declaratory theories there is a denial of the legal nature of recognition[52]. That, according to the author, would be the real problem.

In other words, the possibility that recognition could be granted in an arbitral way is not a sufficient reason to deny its fundamental legal character.

It is evident that recognition being widely connected to statehood aspects is an act of political importance. But this element alone cannot be the only motivation for the rejection of its legal nature. In fact it can be argued that most legal acts at the international level are of "political significance and have political consequences[53]".

The view of recognition submitted by Lauterpacht therefore prevents it from being treated just as physical phenomenon "uncontrolled by a legal rule and left entirely within the precarious orbit of politics".

### 3.3. *Tertium non datur?*

It cannot be underestimated how the function and value of recognition have still remained subject to debate.

Some continental writers[54], beginning with de Visscher[55], combined the declaratory and the constitutive theories.

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[51] Lauterpacht, *Recognition of States in International Law*, p. 442.

[52] *Idem*, p. 436.

[53] *Idem*, p. 443

[54] Salmon, J., *La Reconnaissance d'état: quatre cas Mandchou Kuo, Katanga, Biafra, Rhodésie du Sud*, Armand Colin, 1971; Verhoeven, J., *La Reconnaissance internationelle dans la pratique contemporaine: les relations publiques internationales*, Pedone, 1975.

[55] Visscher, C. de, *Problèmes d'interprétation judiciaire en droit International public*, 1963; *Théories et réalités en droit International public*, Pedone, 1970.

In reply to this "*third approach"* it has been said that it shows how the dichotomy between the declaratory and the constitutive theories is insufficient to explain the complexity of the impact of recognition on the functioning of legal orders[56].

Yet, the debate still remains actual and it is interesting to notice that the constitutive aspect of recognition has gained momentum. More specifically, it is argued that "empirical research highlights the central role of recognition in the process of State creation and evidences its constitutive character"[57].

The constitutive importance of the role of recognition is highlighted by the circumstance that non-recognized entities are not treated as States, despite the degree of their effectiveness in governing a territory.

Furthermore, the Montevideo Convention[58] that formulates the basic criteria for statehood[59], even if in article 3 adopts the declaratory approach, is not

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[56] D'aspremont, J., *Report of the Sofia Conference on Recognition/Non –Recognition in International Law*, in *International Law Association (ILA) First Report*, 2012, p. 3.
Available at:
https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1009&StorageFileGuid=984c059f-2e15-4aa1-a522-554ab8ae15ae.
See also *Report of the Sydney Conference on Recognition/Non –Recognition in International Law*, in *International Law Association (ILA) Fourth (Last) Report*, 2018, p. 9 and 26.
On the issue concerning the *Declaratory/Constitutive Debate*, the Committee in its report noted: "the rise of a "third approach" based on the idea that the Constitutive/Declaratory dichotomy is insufficient to explain the complex effects of recognition. This approach views recognition as a political act which has significant legal effects in the international and domestic legal orders. This theory holds that recognition occasionally has certain constitutive effects, although these effects are generally in domestic legal systems", p. 26.

[57] Finck, F, *The State between Fact and Law: The Role of Recognition and the Conditions under which is granted in the Creation of New States*, in *Polish Yearbook of International Law*, Vol. 36, 2016, p. 52.

[58] Despite the fact that only sixteen States (Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, United States, Venezuela) have ratified it, its formulation of the elements necessary to form a State are widely employed in diplomatic practice and referred to in academic works.

[59] Article 1 of the Convention on the Rights and Duties of States, Montevideo, Uruguay, 26 December 1933: "*The State as a person of International Law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States*".

immune from ambiguities. The most criticized of the four elements of the Montevideo formula is probably the fourth criterion. More specifically it is argued that the capacity to enter into relations with other States can be interpreted in two different ways. The first would be the ability to have direct relations with other States and to develop an independent foreign policy[60].

Secondly, same can also be understood as the legal capacity to enter into relations subject to International Law with other States. In other words, through recognition, the existing States decide to put their mutual relations on the level of International Law[61]. It has also been argued that "a State cannot comply with the fourth requirement of statehood under the Montevideo Convention without recognition by some States, as it will not be able to demonstrate a capacity to enter into relations with other States[62]".

In addition, the declaratory theory is rejected because it is sustained that it is misleading to define a State as "*natural-born*[63]". This is due to the fact that a State is a legal entity and consequently statehood is a legal *status* to which rights and duties are attached[64].

Some authors support the constitutive view because they consider it the one that best reflects State practice, particularly because recognition is conceived as a "political and diplomatic weapon used to express approval or disapproval of a particular State or territorial situation[65]". According to this view, the declaratory theory is considered as an idealistic theory, less focused on State practice.

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[60] Crawford, J., *The Creation of States*, p. 62.

[61] Finck, *The Role of Recognition,* pp. 55, 56.

[62] Dugard, J., *The Secession of States and Their Recognition in the Wake of Kosovo*, Martinus Nijhoff Publishers, 2013, p. 51.

[63] Talmon, S., *The Constitutive versus the Declaratory Theory of Recognition: Tertium non Datur?,* in *British Yearbook of International Law*, Vol. 75, 2004, pp. 2-6.

[64] Finck, *The Role of Recognition,* p. 59.

[65] Turn, D., *The Stimson Doctrine of Non – Recognition: Its Historical Genesis and Influence on Contemporary International Law,* in *Chinese Journal of International Law*, Vol. 2, 2003, p. 142.

Other scholars support the constitutive approach of recognition but in doing so they reassess its legal effect[66]. Recognition is conceived as a "pre-requisite for statehood, […] conditioned on respect for some fundamental principles of law during the process of creation of the entity claiming state status[67]". In particular it is stressed that the effect of the development of the International legal system is the emergence of these conditions which govern recognition and cannot be called conditions of statehood[68]. According to this theory, the existence of legal conditions governing the recognition of statehood leads to the subjection of the statehood criteria to law. "State creation is no longer only a factual question, but also a legal question[69]". The interesting aspect of this approach is that, through the reassessment of the value of recognition in International Law, it tries to analyse the creation of State as a "dynamic operation[70]" and reaffirms the role both of fact and law in the creation of States.

Finally, there is also another interesting theory which adopts a different methodology. In fact it sustains that in some circumstances International involvement, possibly through the act of recognition, may sometimes produce rather than acknowledge the emergence of a new State. In other words, this new approach shows that, notwithstanding the wide acceptance of the declaratory view among scholars, "there exist concepts in International Law that imply or even presuppose that in some circumstances recognition could create a new State[71]".

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[66] Finck, *The Role of Recognition,* p. 52.

[67] Finck, *The Role of Recognition,* p. 59

[68] *Ibidem*.

[69] Christakis, T., *The State as a "Primary Fact": Some Thoughts on the Principle of Effectiveness*, in Kohen, M. G., *Secession: International Law Perspectives*, Cambridge University Press, 2006, p. 165.

[70] Finck, *The Role of Recognition,* p. 53.

[71] Vidmar, *Explaining the Legal Effects of Recognition*, p. 363. In particular the author sustains that "the concept of unilateral secession in International Law, at least in theory, presupposes that International recognition could create a State" p. 362; Furthermore he adds

### 3.4. Is there a legal duty to recognize?

Professor Lauterpacht expressed clearly that the legal character of recognition extricates the process of recognition from the arbitrariness of policy[72]. Only that view of recognition could introduce a principle of order into what otherwise would be a pure manifestation of power and negation of order[73]. Since recognition is the usual condition for treating a new State according to International Law, to regard it as a duty must be considered as generally conducive to better understanding between States. But the maintenance of this view is confronted with logical difficulties[74]. One question is to whom is owed that duty. It cannot be the new entity claiming recognition, since under the constitutive view it has not begun to exist. This legal duty, according to professor Lauterpacht, is owed to the community of States considered as a whole. In fact he argues that since a society cannot exist without its members, the creation of new members is a duty of a member to the society.

This standpoint has been criticized because of its scarce adherence with State practice and for its inconsistency.

However, discussion of Lauterpacht's theory often shows some ambiguities among critics. Moreover, if an entity bears the marks of statehood, other states put themselves at risk legally if they ignore the basic obligations of state relations[75].

From other authors[76], the issue is addressed in a different way. Namely they analyze if recognition carries legal or political consequences.

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that "constitutive effects of recognition are implied by […] the obligation of (collective) non - recognition", p. 362.

[72] Lauterpacht, *Recognition of States*, p. 456.

[73] *Idem*, p. 457.

[74] Chen, *Recognition of States*, p. 53.

[75] Brownlie, *Principles of Public International Law,* p. 90.

[76] Shaw, *International Law*, p. 470.

**4. Recognition of State. The practice of States: the First ILA Report of the Committee on the Recognition/Non-recognition of States**

State practice gives the opportunity to analyze where the law meets the facts. In particular it enhances the possibility to evaluate the role of recognition in International Law.

An interesting view has been offered in relation to secessionist entities, drawing the distinction between States created with the consent of parent State and States created without such consent[77].

As regards the practice of secession with the consent of the parent State, it is relevant to focus on the case of the Baltic States.

Estonia, Latvia and Lithuania were admitted to the UN on 17 September 1991. It is important to stress that the Security Council did not consider the applications for recognition made by the Baltic States until 12 September 1991, i.e. six days after the Soviet Union had agreed to recognize them[78].

The consent of the parent State was also of crucial importance in the case of Eritrea. In this circumstance, from an International Law perspective, Eritrea declared its independence with the consent of the Ethiopian central government. Thus, once obtained the Ethiopian consent and after an important majority that gave its support to the independence at a UN observed referendum, Eritrea was a State. This was confirmed by its admission to the UN on 28 May 1993[79].

Montenegro is another example of a State creation with the consent of the parent State. As a matter of fact, Article 60 of the Constitution of the State Union of Serbia and Montenegro (SUMS) provided for a mechanism for secession and even regulated the questions of state succession and international personality. According to this article, Montenegro was

[77] Vidmar, *Explaining the legal effects of recognition*, p. 362.
[78] Crawford, J., *The Creation of States*, p. 394.
[79] UNGA Res 47/230 (28 May 1993).

considered a new State while the personality of the SUMS was continued by Serbia. It is worth noting that the Constitution was adopted upon significant involvement of the EU[80].

More recently South Sudan path to independence followed from the legal regime established under the Comprehensive Peace Agreement signed on 9 January 2005. Sudan promulgated a new *interim* Constitution that defined Southern Sudan as a self-determination unit and, in principle, created a constitutional right to secession.

Therefore, these cases showed that the new State is not objected to and is only declaratorily acknowledged by international recognition when there is the consent to the secession of the parent State[81].

Different consequences are those concerning the creation of States without the consent of the parent State.

In cases of unilateral secession, the parent State continues to exist and does not consent to independence of a part of its territory. According to some scholars, "if an entity tries to emerge as a State unilaterally, the only way of doing so is through recognition. In turn, recognition may be constitutive"[82].

In such circumstances International Law is neutral: secession "is a legally neutral act the consequences of which are regulated internationally"[83].

The fact that unilateral secession is neither endorsed nor prohibited by International Law was acknowledged by the Supreme Court of Canada in the *Quebec* case: "the ultimate success of such a [unilateral] secession would be dependent on recognition by the International Community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition"[84].

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[80] Vidmar, *Explaining he legal effects of recognition*, p. 367.
[81] *Idem*, p. 370.
[82] *Idem*, p. 374.
[83] Crawford, J., *The Creation of States*, p. 375.
[84] Supreme Court of Canada, *re Secession of Quebec*, [1998] 2 S.C.R. 217, §3, Question 2.

Constitutive effects may also derive from the doctrine of remedial secession. According to this doctrine, a State that does not have a "government representing the whole people belonging to the territory without distinction as to race, creed or colour[85]" cannot call the principle of territorial integrity in order to restrict the peoples' right of self-determination to exercise this right in its internal mode.

The International Law *de lege data* does not suggest that independence would be an entitlement in any situation other than classical 'salt-water' colonialism[86]. Therefore, remedial secession in contemporary law is still unilateral secession: neither prohibited nor an entitlement. It goes without saying that when oppression is an issue, third States may find the claim to independence to be more legitimate and, consequently, are more inclined to grant recognition. For some scholars this is an example where recognition has constitutive effects[87].

These cases illustrated that both theories of recognition are difficult to square with the practice of the emergence of new States. The declaratory view is more capable of giving an explanation in clear situations, where the State parent does not claim territorial integrity. Differently, when an entity tries to come to existence as a State in opposition to the parent State, it seems that recognition could have constitutive effects. As a consequence, recognition is, in theory, capable of creating a new State but such recognition must necessarily be universal. Otherwise, the legal status of the entity will remain uncertain[88].

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[85] UNGA Res 2625 (XXV) (24 October 1970), *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*. Available at: http://www.un-documents.net/a25r2625.htm.

[86] J. Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, in *St. Antony's International Review*, Vol. 1, 2010, p. 37.

[87] Vidmar, *Explaining the legal effects of recognition*, p. 376.

[88] *Idem*, p. 381.

The following chart[89] provides information concerning the recognition of Abkhazia, Kosovo, North Korea, Palestine, South Sudan and Western Sahara. All situations in which recognition is not universal.

It is not always the case that a State lays down clearly and publicly that it recognizes (or not) another entity as a State. In many cases, national reporters informed that it was not known or it was not clear whether an entity was recognized by the State on which they were reporting. The table below summarises the findings of the Committee.

| **STATE** | **ENTITIES** | **RECOGNITION AS A STATE** |
|---|---|---|
| **Algeria** | Kosovo | No. |
| | Palestine | Yes[90]. |
| | South Sudan | Yes. |
| **Argentina** | Abkhazia | No[91]. |

[89] The information contained in the chart have been collected by the Committee on Recognition/Non-recognition of States that was established by the Executive Council in May 2009, with the purpose of examining "whether contemporary issues of secession, break-up of states and the creation of new states have changed International Law and policy with respect to recognition". In a meeting in Vienna, in January 2012, it was decided by members of the Committee who were present to request the national reports to provide information regarding the recognition of Abkhazia, Kosovo, North Korea, Palestine, South Sudan and Western Sahara. Information were provided by: Algeria, Argentina, Australia, Austria, Brazil, France, Israel, Italy, Japan, Russia, South Africa, Tanzania United Kingdom, United States. For further information see International Law Association, Sofia Conference (2012), *Recognition/ Non-recognition in International Law.*
https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1009&StorageFileGuid=984c059f-2e15-4aa1-a522-554ab8ae15ae.

[90] The following statement provides some understanding of the Algerian view on the "In this context [the situation of Palestine], the International Community, in particular the co-sponsors of the peace process, must exercise the necessary pressure on Israel to apply International Law. The Palestinian Authority and President Arafat's legitimacy must be respected." Available at: http://www.mae.dz/ma_fr/stories.php?story=11/07/04/9992569.

[91] Argentina mentions that Abkhazia's unilateral declaration of independence would violate the respect for the sovereignty and territorial integrity if the republic of Georgia, in accordance with the declaration of the president of the Security Council on 2 December 1994 (S/PRST/1994/78).

| | | |
|---|---|---|
| | Kosovo | No. |
| | Palestine | Yes. |
| **Australia**[92] | Abkhazia | No[93]. |
| | Kosovo | Yes. |
| | North Korea | Yes. |
| | Palestine | No. |
| | South Sudan | Yes. |
| | Western Sahara | No[94]. |
| **Austria**[95] | Kosovo | Yes. |

[92] Information on the recognition of Abkhazia, Kosovo, North Korea, Palestine and South Sudan by Australia was extracted from LIEW, Rick; PERT, Alison; TULLY, Stephen. Australian report.

[93] Australian national reporters informed that Australia considers Abkhazia a part of Georgia and cited - as an illustration - the following statement to Parliament by the Minister for Foreign Affairs: "Members would be aware that overnight the Russian President, President Medvedev, indicated that the Russian Federation had recognized the independence of South Ossetia and Abkhazia, often known as the separatist region of Georgia. Australia does not support such recognition. That is Australia's longstanding position. Australia recognizes the territorial sovereignty of Georgia over the provinces of South Ossetia and Abkhazia." According to the Australian national reporters, the source is: Commonwealth of Australia, House of Representatives, Parliamentary Debates, 27 August 2008, p. 6385. This information appears in extracted from LIEW, Rick; PERT, Alison; TULLY, Stephen. Australian report.

[94] Australian national reporters informed that Australia regards Western Sahara as a Non-Self-Governing Territory and cited - as an illustration - the following statement by the Minister for Foreign Affairs: "The Western Sahara was admitted to the OAU in February 1982 but its membership is disputed by Morocco and some other states. Australia does not recognize the independent State of the Western Sahara (the so-called Sahrawi Arab Democratic Republic)." According to the Australian national reporters, the statement appears in Commonwealth of Australia, House of Representatives, Parliamentary Debates, 26 May 1988 (vol 161) p.3217. This information appears in extracted from LIEW, Rick; PERT, Alison; TULLY, Stephen. Australian report.

[95] Information regarding recognition or non-recognition of Abkhazia, Kosovo, North Korea, Palestine, South Sudan and Western Sahara by Austria was extracted from the report of Gerhard Hafner. Hafner notes that "In the case of Western Sahara Austria has not made any statements regarding recognition. One of the reasons why Austria has not made statements in this context may be seen in the circumstance that Austria has adopted the role of an 'honest broker' following UN SC Res 1871 (2009) on the situation in Western Somalia, which inter

| | | |
|---|---|---|
| | North Korea | Yes[96]. |
| | Palestine | Partial subject of International Law[97] |
| | South Sudan | Yes[98]. |
| **Brazil** | Abkhazia | No. |
| | Kosovo | No[99]. |

alia 'welcomed the parties' agreement to hold small, informal talks in preparation for a fifth round of negotiations. Having provided good offices to the parties, Austria explained that '[d]uring the informal talks Austria focused deliberately on its role as honest broker and bridge-builder and created an appropriate environment to relaunch the deadlocked UN negotiation process for a peaceful solution of the conflict'". He also notes that "In the case of Abkhazia, Austria has not made any statements regarding recognition". Extracted from HAFNER, Gerhard. Austrian report.

[96] "At least since the common communiqué about the establishment of diplomatic relations and the exchange of diplomatic representatives of 1974 it can be assumed that Austria has recognized North Korea as a state". Extracted from HAFNER, Gerhard. Austrian report.

[97] "Austrian practice has been to recognize partial subject of International Law, as in the case of the Palestine Liberation Organization ('PLO'). Thus, in 1980, the Austrian Minister of Foreign Affairs explained in this context that while the PLO could not be recognized by Austria in the classical sense, i.e. as a State or government, the PLO could be recognized as a representative of the Palestinian people. This was not seen to be equal to the recognition of the PLO as a state or government. Moreover, since 1980, the head of the Palestinian mission in Austria was accredited to the Austrian Federal Government, and not to the Federal President, as would have been the case for a head of a diplomatic mission. In this case, it was also emphasized that the recognition by Austria was only of
declaratory character, since the PLO was a partial subject of International Law even before any act of recognition. On 31 October 2011, the General Conference of UNESCO admitted Palestine as a member state pursuant to Article II (2) of the UNESCO Constitution. Austria was among the 107 states that voted in favour of its admission. Moreover, as of 1 December 2011, the head of the Palestine mission in Austria was accredited to the Federal President, and not to the Federal Government, as previously". Extracted from HAFNER, Gerhard. Austrian report.

[98] "On 9 July 2011, the Austrian ambassador accredited to Ethiopia on a special mission personally delivered a letter of recognition to the Minister of Foreign Affairs of South Sudan at the time. The letter was signed by the Austrian Minister of Foreign Affairs and stated that Austria 'recognizes South Sudan as an independent and sovereign member of the community of States' and proposed the establishment of diplomatic relations". Extracted from HAFNER, Gerhard. Austrian report.

[99] In an interview in 2008, the Minister for Foreign Affairs of Brazil, Celso Amorim, explained Brazil's position regarding the recognition of Kosovo: "The latest United Nations resolution concerning the situation in Kosovo defended the territorial integrity of what came

| | | |
|---|---|---|
| | North Korea | Yes[100]. |
| | Palestine | Yes[101]. |
| | South Sudan | Yes[102]. |
| | Western Sahara | No[103]. |

to be Serbia, which at the time was still in fact Yugoslavia. This was ignored by this unilateral declaration. This is something which is happening without the participation of [the] United Nations - indeed it ignores a United Nations resolution - and we do not find this to be a good precedent. On the other hand, it is clear that on the street the great majority of the people of Kosovo actually want this. But you have to balance these questions because if we are to seek - if each ethnic group or each culture, or each language or even each dialect were to seek - to create our own nation-state, this would be a recipe for anarchy in international relations. So how do you balance the need for more democracy in international relations with respect for the territorial integrity of States? This is a great challenge. The case of Kosovo is complex and Brazil has not recognized Kosovo´s independence because it feels that the Security Council's decision has not been completely respected". See BRAZIL, Brazilian Foreign Policy Handbook: positions adopted by Brazil in 2008-2009. Brasilia: FUNAG, 2010, pp. 90-91.

[100] Diplomatic relations between Brazil and North Korea were established in March 2001 and the North Korean Embassy in Brasilia was installed in January 2005. Installation of a Brazilian Embassy in North Korea was authorized in September 2008. See BRAZIL, Brazilian Foreign Policy Handbook: positions adopted by Brazil in 2008-2009. Brasilia: FUNAG, 2010, p. 112.

[101] The following extract from a speech delivered by the Minister of Foreign Relations of Brazil at the time (CelsoAmorim) provides an understanding of the Brazilian position concerning Palestine: "As long as the Palestinian problem remains unsolved, none of the other problems in the region will be solved. It is clear that we cannot hope for the Palestinian problem to be solved so that others, such as dialogue or peace in Lebanon, may arise. However, we know that the deep-seated solution to the problems of the Middle East lie with the Palestinian people. In this situation it is recognized worldwide - and we are happy to see that leaders in all parts of the world recognize the need for a Palestinian State, that they condemn the occupation of Palestinian territories and at the same time see the solution as being the one proposed by the Arab League: the recognition of two states, along with the problems and questions concerning Israel". In BRAZIL, Brazilian Foreign Policy Handbook: positions adopted by Brazil in 2008-2009. Brasilia: FUNAG, 2010, p. 150.

[102] On the occasion of the Proclamation of the Republic of Sudan, on 9 July 2011, in Juba, the Brazilian Government established diplomatic relations with the new country by means of a "Joint Communiqué". The document is available at http://www.itamaraty.gov.br/sala-de-imprensa/notas-a-imprensa/estabelecimento-de-relacoes-diplomaticas-coma-republica-do-sudao-do-sul.

[103] With regard to the situation in Western Sahara, President Lula reiterated the Brazilian support for the decisions of the United Nations Security Council to reach a negotiated political settlement, by means of dialogue between the parties involved in the dispute. Joint

| | | |
|---|---|---|
| **France** | Abkhazia | No. |
| | Kosovo | Yes. |
| | North Korea | No[104]. |
| | Palestine | No. |
| | South Sudan | Yes. |
| | Western Sahara | Yes. |
| **Israel[105]** | Kosovo | No[106]. |
| | Palestine | No[107]. |
| | South Sudan | Yes[108]. |

Communiqué of the visit to Brazil by the King of Morocco, Mohammed VI - Brasilia, November 26, 2004. In BRAZIL, Brazilian Foreign Policy Handbook. Brasilia: FUNAG, 2008, p. 178.

[104] France does not recognize the State of North Korea, due to three issues: nuclear issues, hostility in the relation with South Korea, and the position of North Korea in relation to humanitarian law and human rights. Nonetheless, France maintains contact with North Korea, through the General Delegation of the Democratic People's Republic of Korea established in France since 1968. See: http://www.diplomatie.gouv.fr/fr/enjeux-internationaux/defenseet-securite/crises-et-conflits/coree-du-nord/la-france-et-la-coree-du-nord/.

[105] Information regarding recognition or non-recognition of Kosovo, Palestine and South Sudan by Israel was extracted from RONEN, Yael. Israeli report.

[106] Israel's minister of foreign affairs, regarding the recognition of Kosovo, has stated that "it is impossible to impose peace... We have our experience in our own region, and I think that the best way to resolve the problems and to bring about a comprehensive solution is direct talks between both sides. We are monitoring the situation between Serbia and Kosovo, and we really hope that in the future, in the next few years, you will achieve a really comprehensive and peaceful solution". Available at: http://www.mfa.gov.il/MFA/About+the+Ministry/Foreign_Minister/Speeches/Press_conference_FM_Liberman_Belgrade_16_Sep_2009.htm. Cited in RONEN, Yael. Israeli report. This statement was made in a visit to Serbia, in 2009.

[107] For a detailed analysis of the non-recognition of Palestine by Israel see RONEN, Yael. Israeli report. For the official position of Israel, see: "http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/A+Unilateral+Palestinian+Declaration+of+Statehood-.htm.

[108] South Sudan was quickly recognized by Israel. According to the prime minister of Israel "South Sudan was established after long negotiations and with the agreement of all parties involved and the International Community. Israel was among the first countries to recognize South Sudan, less than 24 hours after it was declared... I hope that everyone will see that this

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|---|---|---|
| **Italy**[109] | Abkhazia | No.[110] |
| | Kosovo | Yes.[111] |
| | North Korea | Yes[112]. |
| | Palestine | No[113]. |

is the way to establish a state - through direct negotiations and not via unilateral measures". Available at: http://www.mfa.gov.il/MFA/Government/Communiques/2011/PM_Netanyahu_meets_South_Sudan_President_22-Sep-2011.htm. > This document was cited in RONEN, Yael. Israeli report.

[109] Information regarding recognition or non-recognition of Abkhazia, Kosovo, North Korea, Palestine, South Sudan and Western Sahara by Italy was extracted from the report of Monica Lugato and Enrico Milani.

[110] "Italy does not recognize Abkhazia. Moreover, it holds recognition by third States without justification in International Law, apparently in contrast with the territorial integrity of Georgia. In the debate held at the Security Council on 28 August 2008 (UN doc. S/PV.5969) the Italian representative held that the 'Russian Government's decision [to recognise Abkhazia] has no basis in International Law' and that 'Georgia's territorial integrity is an uncontestable principle, as numerous United Nations resolutions have underlined'". Extracted from LUGATO, Monica; MILANI, Enrico. Italian report.

[111] "Italy recognized Kosovo on 21 February 2008 'in linea con le Conclusioni del Consiglio del 18 febbraio scorso' (transl.: 'in line with the Council's conclusions of 18 February') declaring itself ready to entertain diplomatic relations". Extracted from LUGATO, Monica; MILANI, Enrico. Italian report.

[112] In 2000 Italy was the first G-7 country to establish diplomatic relations with Pyongyang. Strictly speaking, the letter of 4 January 2000 is an act of implied recognition as it never mentions express recognition of North Korea. It is also an agreement in the form of an exchange of letters, not a unilateral act. It talks about the 'desire to establish diplomatic relations and to exchange Ambassadors at the earliest possible time'. Moreover, it states that 'diplomatic relations between the two countries will be based on International Law, as reflected respectively in the Vienna Convention on Diplomatic Relations of 1961 and in the Vienna Convention on Consular Relations of 1963. While expressing satisfaction at this important development, in their relations the Italian Republic and the People's Democratic Republic of Korea are committed to promoting them on the basis of the principles of mutual respect, sovereignty, equality, as enshrined in the Charter of the United Nations'". Extracted from LUGATO, Monica; MILANI, Enrico. Italian report.

[113] "In 1985 the Court of Cassation (Judgment n. 1981, 28 June 1985), in criminal proceedings brought against Yasser Arafat and Kalaf Salah, did not uphold the position of the defence according to which criminal prosecution in Italy would be barred by the sovereign immunities enjoyed by the two Palestinian leaders on account of the PLO being equated to a State: Transl.: 'It is generally accepted that International Law recognises as States only those fully independent entities exercising governmental power and authority over a stable community residing on a given territory; so that it is a generally recognised

| | | |
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| | South Sudan | Yes |
| | Western Sahara | No[114]. |
| **Japan[115]** | Abkhazia | No[116]. |
| | Kosovo | Yes[117]. |
| | North Korea | No[118]. |

principle that statehood requires the three elements of population, government and territory and that the population element and the governmental machinery must relate to the very same territorial basis. As a result of that, the PLO cannot be considered a sovereign entity equating to a State, since – as it has been correctly observed by the lower jurisdiction and by the Prosecutor during the oral pleadings – the requirement of territorial sovereignty is lacking and forms of control over refugee camps, with the consent and under the sovereignty of the host State, cannot represent a substitute for that' ". Extracted from LUGATO, Monica; MILANI, Enrico. Italian report.

[114] Information on the recognition of Abkhazia, Kosovo, North Korea, Palestine and South Sudan by Japan was extracted from HAMAMOTO, Shotaro. Japanese Supplementary report.

[115] Information on the recognition of Abkhazia, Kosovo, North Korea, Palestine and South Sudan by Japan was extracted from HAMAMOTO, Shotaro. Japanese Supplementary report.

[116] It is pointed out in the Japanese Supplementary report that Japan has recognized neither South Ossetia nor Abkhazia and that the Japanese Government underlines the relevance of Georgia's territorial integrity. Once of the documents cited in the Japanese report is the Statement by Mr. Masahiko Koumura, Minister for Foreign Affairs, on Russia's Recognition of the Independence of South Ossetia and Abkhazia, August 27, 2008. http://www.mofa.go.jp/announce/announce/2008/8/1182958_1040.html>, which reads as follows: "1. Japan has supported consistently a peaceful resolution of this issue based on Georgia's territorial integrity. It is regrettable that while international efforts are in progress for a peaceful resolution of the issue, yesterday Russia unilaterally recognized the independence of South Ossetia and Abkhazia, which is inconsistent with these international efforts. 2. Japan calls on Russia not to take unilateral actions, as it is of the view that to achieve true regional stability, the issues surrounding Georgia should be peacefully solved based on the six-principle ceasefire agreement. Japan strongly hopes that Russia will take responsible actions as a G8 member".

[117] The national reporters from Japan noted that though Japan explicitly recognized Kosovo, it was "unfortunately difficult to find an official document or statement that would indicate the reasons or considerations that lead Japan to recognize Kosovo as an independent State". The Japanese report cites the following document (among others): "On March 18, Japan recognized the Republic of Kosovo as an independent state. As the Government of the Republic of Kosovo has made its intention clear that it will run the country pursuant to the 'Comprehensive Proposal for the Kosovo Status Settlement' made by the U.N. Special Envoy, Japan expects that Kosovo's independence will contribute to the long-lasting stability of the region".
Available at: http://www.mofa.go.jp/announce/announce/2008/3/0318.html.

| | | |
|---|---|---|
| | Palestine | No[119]. |
| | South Sudan | Yes[120]. |
| | Western Sahara | No. |
| **Russia**[121] | Abkhazia | Yes. |
| | Kosovo | No. |
| | North Korea | Yes[122]. |
| | Palestine | No[123]. |

[118] As indicated in documents cited in the Supplementary report from Japan, the Japanese government regards the DPRK as an "unrecognized State". (see Chief Cabinet Secretary, Committee on Judicial Affairs, House of Councillors, June 2, 1966); whereas Japan considers that North Korea fulfills all the conditions of statehood, it repeatedly emphasizes that the DPRK has not been recognized by Japan as a State. As noted above, the main official argument against the recognition of DPRK is that "Japan also takes into account whether the entity has the will and the capacity to observe International Law". See the statement by Junichiro Koizumi, Prime Minister, Written Answer No. 322, House of Representatives, 164th Sess., June 16, 2006.
http://www.shugiin.go.jp/index.nsf/html/index_shitsumon.htm [in Japanese, translated by the national reporter]

[119] It is stated, in the Japanese Supplementary report, that "Japan is in favor of the independence of Palestine but has not recognized it as a State. It is to be noted that the Foreign Minister considers that the question whether to recognize Palestine as a State does not depend only on International Law. The Japanese Government has also recognized the Palestine 'nationality' since 2007".

[120] Japan has explicitly recognized South Sudan. See the Statement by the Minister for Foreign Affairs of Japan on the Independence of the Republic of South Sudan, July 9, 2011, available at: http://www.mofa.go.jp/announce/announce/2011/7/0709_01.html and cited in the Japanese Supplementary report.

[121] Information on the recognition of Abkhazia, Kosovo and North Korea, Palestine and South Sudan by Russia was extracted from KREMNEV, Petr. Russian report. Information on Kosovo was extracted from th Written Statement by the Russian Federation presented to the ICJ in the Kosovo case and available at: http://www.icjcij.org/. Last viewed on March, 2nd, 2012.

[122] "The USSR recognized Democratic People's Republic of Korea (North Korea) and established diplomatic relations with it as early as 1948. Russian Federation established diplomatic relations with Republic of Korea (South Korea) in 1991. Both Korean states are members of UN since 17.09.1991". Extracted from KREMNEV, Petr. Russian report.

[123] "Russia recognizes Palestine as *the nation which may realize its right to self-determination but not as sovereign and independent state*". Extracted from KREMNEV, Petr. Russian report.

| | | |
|---|---|---|
| | South Sudan | Yes. |
| | Western Sahara | No[124]. |
| **South Africa[125]** | Abkhazia | No. |
| | Palestine | Yes. |
| | South Sudan | Yes. |
| | Western Sahara | Yes. |
| **Tanzania[126]** | Palestine | No[127]. |
| | South Sudan | Yes[128]. |
| **United Kingdom** | Abkhazia (and South Ossetia) | No[129]. |
| | Kosovo | Yes[130]. |

[124] The current position of the Russian Federation is to regard Western Sahara as *non- self-governing territory*. See KREMNEV, Petr. Russian report.

[125] Information regarding recognition or non-recognition of Abkhazia, Palestine, South Sudan and Western Sahara by South Africa was extracted from SCHOLTZ, South African Report.

[126] Information on the recognition of Palestine and South Sudan was extracted from KAMANGA, Khoti. Tanzanian report.

[127] The Tanzanian national reporter noted that "Recognition of the Sahrawi Government, however is an exception to this general practice and so too, is recognition of the Palestine Liberation Organisation (PLO) under Yassir Arafat, and subsequently, the Palestinian Authority (PA)". In KAMANGA, Khoti. Tanzanian report.

[128] "It was further emphasized that the act of recognizing a State/Government is often done by way of a congratulatory message to the newly sworn in authorities and the example of the Government of South Sudan was given. A congratulatory message was delivered to Juba the day after Salva Kiir took the solemn oath of office". In KAMANGA, Khoti. Tanzanian report.

[129] "The United Kingdom does not recognize these two entities. In a written statement to Parliament in February 2009 a Foreign and Commonwealth Office Minister of State said: '…Russia's use of disproportionate force and its violation of Georgia's sovereignty and territorial integrity had no justification. Russia's actions were in defiance of successive United Nations Security Council Resolutions…The general criteria we apply for recognition of an independent state remain as described in the written answer dated 16 November 1989 by then Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs. We consider that South Ossetia and Abkhazia have not met these criteria'". Extracted from ILYAS, Daud. British report.

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|---|---|---|
| | North Korea | Yes. |
| | Palestine | No[131]. |
| | South Sudan | Yes[132]. |
| | Western Sahara | No[133]. |

[130] The UK recognized Kosovo as a State the day after Kosovo's declaration of independence on 17 February 2008. An annex to the statement of the UK representative in the Security Council debate on the declaration of independence by Kosovo on 18 February 2008 explained that: "Kosovo is a special case as a consequence of the violent and non-consensual break-up of Yugoslavia, and in particular the humanitarian crisis which led to the conflict in 1999, the long period of international administration, and the final status process called for in UNSCR 1244. Recognition of its independence, which is a matter for individual States to decide, is not therefore a precedent for any other situation." Extracted from HAPPOLD, Matthew. British report. The national reporter cited the following source: Annex to statement in the Security Council, 18 February 2008, 'Kosovo: Legal Issues', reproduced at UKMIL [2008] 79 BYIL 607.

[131] The UK did not recognize Palestine as a State following the Palestinian National Council's proclamation of the State of Palestine on 15 November 1988. Responding to the Palestinian application for membership of the United Nations, on 9 November 2011 the UK Foreign Secretary made the following statement to the House of Commons: "The UK judges that the Palestinian Authority largely fulfils criteria for UN membership, including statehood as far as the reality of the situation in the Occupied Palestinian Territories allows, but its ability to function effectively as a State would be impeded by that situation. A negotiated end to the occupation is the best way to allow Palestinian aspirations to be met in reality and on the ground. We will not vote against the application because of the progress the Palestinian leadership has made towards meeting the criteria. But nor can we vote for it while our primary objective remains a return to negotiations through the Quartet process and the success of those negotiations. For these reasons in common with France and in consultation with our European partners, the United Kingdom will abstain on any vote on full Palestinian membership of the UN. We reserve the right to recognize a Palestinian state bilaterally at a moment of our choosing and when it can best help bring about peace." Extracted from HAPPOLD, Matthew. British report. The document cited is available at: http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=689368882 .

[132] "The United Kingdom recognises the new Republic of South Sudan. The Secretary of State for Foreign and Commonwealth Affairs represented the UK at the Independence Ceremony in the capital Juba on 9 July 2011. In his speech at the ceremony he said: '…In Britain we are proud to be among the first nations in the world to recognise the new Republic of South Sudan…We look forward to South Sudan taking its place as a full member of the United Nations…' The British ambassador to South Sudan took up his appointment in Juba on 9 July". Extracted from ILYAS, Daud. British report.

[133] "The United Kingdom regards the political status of Western Sahara as undetermined. It recognises neither the 'Saharan Arab Democratic Republic' as a State, nor Moroccan sovereignty over Western Sahara". Extracted from HAPPOLD, Matthew. British report. The

| | | |
|---|---|---|
| **United States**[134] | Abkhazia | No[135]. |
| | Kosovo | Yes[136]. |
| | Palestine | No |
| | South Sudan | Yes. |
| | Western Sahara | No. |

national reporter cited the following source: HC Debs., vol. 313, col. 339, 3 June 1998; reproduced in UKMIL [1998] 69 BYIL 478.

[134] Information on the recognition of Abkhazia, Kosovo, Palestine and South Sudan by the United States was extracted from BORGEN, MCGUINNESS and ROTH. U.S. report.

[135] The following statement - made by the Chargé d'Affaires of the United States Mission to the OSCE, Kyle Scott, on 4, 2009, in the wake of Russia's recognition of South Ossetia and Abkhazia as states cited in the U.S. response, provides a brief summary of the U.S. position: "Clearly, however, the United States and Russia have markedly different views on the situation in Georgia. The United States stands with most countries in condemning Russia's recognition of the "independence" of the separatist regions of South Ossetia and Abkhazia, and strongly supports the sovereignty, independence, and territorial integrity of Georgia within its internationally recognized borders. We remain committed to long-term conflict resolution and seek to establish peace throughout Georgia." U.S. national reporters cite the following source: Secretary of State Condoleezza Rice, Remarks after the Meeting of the North Atlantic Council at the Level of Foreign Ministers (Aug 19, 2008), available at http://2001-2009.state.gov/secretary/rm/2008/08/108557.htm (last visited Feb. 27, 2012). According to the U.S. national reporters, "the U.S. has consistently maintained that there is no framework for assessing the status of South Ossetia and Abkhazia. Consequently, the issue is not so much their declarations of independence, but rather Russia's role as an external actor". In BORGEN, MCGUINNESS and ROTH. U.S. report.

[136] "The day after the declaration of independence by Kosovo, Secretary of State Condoleezza Rice announced that the US recognized Kosovo as an independent state and further explained: 'The unusual combination of factors found in the Kosovo situation — including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration — are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today'". Extracted from BORGEN, MCGUINNESS and ROTH. U.S. report.

## 5. What is the negation of recognition?

Previously it has been discussed the concept, nature and consequences of recognition. Yet, there is an aspect that still remains unclear. Recognition is a tool that carries several ambiguities and one of them is also what we mean by its opposite significance. Non-recognition, if we follow the logics, should be the negation of recognition. Consequently, non-recognition should have the same nature and carry the same consequences of recognition. This would mean that if recognition has not a binding nature, the same would apply to its contrary meaning. Furthermore, if recognition is constitutive or declaratory, non-recognition would share the same nature. That is easier said than done. Non-recognition is a concept that still needs to be understood and analyzed. Compared to recognition, which is a concept examined thoroughly by scholars, non-recognition has become object of debate quite recently.

From the outset, it can be assessed that when the analysis in International Law concerns non-recognition, the concept of recognition seems to disappear, as if it was a concept completely out of topic. One of the reasons could be that it is effectively a concept that has nothing to deal with non-recognition. Another reason could be instead that, as recognition still brings several uncertainties and ambiguities, it is better to analyse non-recognition separately from recognition in order to avoid to the former the same uncertainties that concerns the latter.

Undoubtedly, there are cases in which non-recognition just means the negation of recognition. This happens when an entity, that claims to be a State, is declared to be not recognized by third States. But in this case, it is the verb “to recognize” which is constructed in its negative form and not the noun recognition.

## 6. Conclusions

On the whole question of the relation between recognition and non-recognition, the analysis of the nature and consequences of the concept of recognition offers an interesting starting point for consideration.

The debate concerning the constitutive and the declaratory theories could be constructive if considered not as exclusionary theories, but doctrines that together can explain the practice of States. In this case, the study of recognition could be a pivotal element in deepening the analysis of non-recognition and could be considered consistent with it.

Furthermore, another aspect that could play a crucial role in the discussion on non-recognition in International Law is the legal aspect of recognition.

If the discussed legal nature of recognition keeps on gaining ground, it will be an essential element in the investigation and understanding of the nature of non-recognition.

## CHAPTER 2

### *Ex factis ius oritur* and *ex iniuria ius non oritur.*

*SUMMARY: 1. Introduction - 2. The role of effectiveness in International Law - 2.1. "Different Faces" of the principle of effectiveness - 2.1.1. Normative Kraft des Faktischen - 2.1.2. Ex factis ius oritur 2.2. Effectiveness between legality and legitimacy - 2.3. The crisis of the principle of effectiveness - 3. The necessity of an International Public Order in International Law - 3.1. The consequence of International Public Order in International Law: ius cogens - 3.2. The consequence of International Public Order in International Law: the principle ex iniuria ius non oritur - 4. Conclusions.*

## 1. Introduction

Any legal system is deeply affected by the society underpinning it. As the maxim quotes: *ibi societas ibi ius*. This happens with a greater impact in the international order given the peculiar nature of its organization. It is important to refer to this concept for the issue in question because it is precisely from the nature and stage of evolution of the International Community that the stage of evolution of the law itself depends. It is no coincidence that several writers have focused their attention on this [1]and on the consequent change in the hierarchy of interests, values and of the principles aimed at their defense. A striking case in this sense is the relationship of International Law with two principles: the *ex factis ius oritur* and the *ex iniuria ius non oritur*.

The aim of this chapter is precisely to underline how these two principles have played and continue to play a fundamental role in International Law, especially with reference to the issue of non-recognition. And that they respond to specific needs.

[1] See also Gaja, G., *The Protection of General Interests in the International Community*, in *Collected Courses of the Hague Academy of International Law*, Brill Nijhoff Publishers, Vol. 364, 2013, pp. 9-185; Simma, B., *From Bilateralism to Community Interest in International Law*, in *Collected Courses of the Hague Academy of International Law*, Brill Nijhoff Publishers, Vol. 250, 1994, pp. 219-384.

Therefore, the following section focuses on the role of effectiveness in International Law, in particular of its meanings, *Normative Kraft des Faktischen* but above all *ex factis ius oritur*. The section then concludes by highlighting how this principle has been questioned recently. Section 3 addresses the need also in International Law for an International Public Order. Concerning this, two important consequences are analysed in detail: the acceptance of the category of *ius cogens* and of the *ex iniuria ius non oritur* principle as a "closing norm" aimed at ensuring the respect and the survival of the international order. Above all, it is emphasized that non-recognition is the device that makes this principle effective and ensured. The chapter then concludes by indicating how at present there is not a prevalence of one principle over the other but a balance between the two[2].

## 2. The role of effectiveness in International Law

"We must not confuse the pathology of law with law itself[3]."

Public International Law is made of its own system of rules and principles differing from the national legal order of a specific State[4].

Consequently, Public International Law may be susceptible to the existence of particular *de facto* situations involving an interaction between the law and specific facts: that means that the *de facto* situation determines the gradual appearance of a legal right once it has been resolutely established and therefore it has gained effectiveness[5].

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[2] See *infra* Chapter 4.

[3] Akehurst, M. B., *A Modern Introduction to International Law*, Unwin Hyman, 1984, p. 7.

[4] Broms, B., *Subjects: Entitlement in the International Legal System*, in Macdonald, R. St. J., Johnston, M. D., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, Martinus Nijhoff Publishers, 1983, p. 384.

[5] Kreijen, G., *State Failure, Sovereignty and Effectiveness, Legal Lessons from the Decolonization of Sub-Saharan Africa*, Martinus Nijhoff Publishers, 2004, p. 179.

Such peculiar feature is a direct result of the decentralized nature of Public International Law. The latter has not an institutional structure but rather only few general courts lacking in a centralized system of enforcement. This certainly constitutes an element of instrumental weakness which refers to the law's normative effectiveness[67].

As defined by Krüber, this "particular proximity to reality" (Wirclichkeitsnähe)[8] is partially justified within Public International Law since the lack of central enforcement organs and centralization determine a system which may be defined as horizontal (contrary to the vertical national order)[9].

Domestic constitutions, the totality of the legal acts dealing with various forms of internal judicial relations, and primarily the enforcement mechanisms have determined the majestic development of domestic legal systems[10].

State authority and the principle of the separation of powers are tied by the same purpose to guarantee the functioning of national institutions: "By contrast, in the International Community no State or group of States has managed to hold the lasting power required to impose its will on the whole world community. Power is fragmented and dispersed. [...] The relations between the States comprising the International Community remain largely *horizontal*. No *vertical* structure has as yet crystallized, as is instead the rule within the domestic systems of States[11]."

The above mentioned "particular proximity to reality" of Public International Law may be compared with the structural capabilities of a national legal system.

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[6] Haljan, D., *Separating Powers: International Law before National Courts*, Springer Science & Business Media, 2012, p. 22.

[7] Kreijen, *State Failure, Sovereignty and Effectiveness*, p. 198.

[8] Krüger, H., *Das Prinzip der Effektivität, oder: Über die besondere Wirklichkeitsnähe des Völkerrechts*, in *D. S. Constantopoulos et al. (Hrsg.), Grundprobleme des Internationalen Rechts, FS für J. Spiropoulos*, 1957, p. 265.

[9] Kreijen, *State Failure, Sovereignty and Effectiveness*, p. 11.

[10] Turmanidze, S., *Staus of De Facto State in Public International Law. A Legal Appraisal of the Principle of Effectiveness*, Hamburg, 2010, p. 20.

[11] Cassese, *International Law*, p. 5.

A fundamental requirement for Krüger is the "statelessness of the international legal order" (Unstaatlichkeit), since a central authority which can effectively enforce each decision on the international level does not exist.[12] The author has noted that the emergence of particular forms of self-help within Public International Law is connected with this statelessness of the international legal system; public International Law is indeed considered a vulnerable system whose realization depends on the interests of single powers.[13]

Other scholars[14] have similarly argued that the effectiveness of Public International Law is deeply influenced by its social origin which has always been devoid of a central authority, and that a legal system provided with a central enforcement mechanism guarantees a higher degree of independence of the law[15].

Whereas this circumstance is verifiable within domestic legal systems, the situation with respect to Public International Law seems to be quite different.

Therefore, an essential question spontaneously arises: is it the confrontation with the existence of *de facto* situations such an arduous issue for International Law? Factual situations are sources of legal rights under Public International Law; in this sense the answer to the question may be positive and will determine that facts automatically influence and create the law[16].

An opposite view to the concept of automatic law-creating influence of facts is supported by Anzilotti, which has endorsed that a legally relevant fact is any fact from which a legal order gives rise to certain effects, such as rights and duties[17]. Those effects are allocated by a national system, and it is the legal

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[12] Kreijen, *State Failure, Sovereignty and Effectiveness*, p. 179.

[13] Kreijen, *State Failure, Sovereignty and Effectiveness*, p. 225.

[14] Huber, M., *Die soziologischen Grundlagen des Völkerrechts, Internationalrechtliche Abhandlungen (H. Kraus (Hrsg.)), zweite Abhandlung,* 1928, p. 10; Krieger, H., *Das Effektivitätsprinzip im Völkerrecht, Schriften zum Völkerrecht*, 2000, p. 29.

[15] Kreijen, *State Failure, Sovereignty and Effectiveness*, p. 180.

[16] Turmanidze, S., *Staus of De Facto State in Public International Law. A Legal Appraisal of the Principle of Effectiveness*, Hamburg, 2010, p. 21.

[17] Turmanidze, S., *Staus of De Facto State in Public International Law. A Legal Appraisal of the Principle of Effectiveness*, Hamburg, 2010, p. 22.

order the source of them, not facts; it cannot be affirmed that facts are the origin of those duties and rights just because of their mere existence[18].

This latter assertion is also valid with respect to Public International Law, since its functions are based on its own rules and principles. Thus, facts have to be validated by international legal rules before they can operate as sources of duties and rights under Public International Law[19].

International Law rules depend on very different circumstances. These circumstances are facts which are relevant under International Law and facts with which norms of International Law deal to establish the emergence and the extinction of certain rights and duties on individuals[20].

An interesting view is offered by Kelsen, who has described Public International Law as a primitive legal order still fixed at the stage of decentralization; concerning the relationship between law and facts he affirmed that: "The effectiveness of the legal order - it must be stressed - is only the condition of the validity, not the validity itself. If the science of law has to represent the validity of the legal order – that is, the specific meaning with which the legal order addresses itself to the individuals subject to it; it can only state that according to a certain legal order under the condition that a certain delict determined by the legal order has been committed, a certain sanction determined by that legal order ought to take place[21]."

[18] See Anzilotti, D., *Corso di diritto internazionale*, Athenaeum, 1927, reprinted in *Opere di Dionisio Anzilotti*, Vol. 1, CEDAM, 1964.

[19] Turmanidze, S., *Status of De Facto State in Public International Law. A Legal Appraisal of the Principle of Effectiveness*, Hamburg, 2010, p. 22.

[20] Anzilotti, D., *Corso di diritto internazionale*, p. 252.

[21] Kelsen, H., *Pure Theory of Law*, University of California Press, 1967, p. 78.

## 2.1. "Different Faces" of the Principle of Effectiveness

### 2.1.1 Normative Kraft des Faktischen

It is important at this stage to address the following manifestations of the principle of effectiveness, i.e. its "many faces": normative Kraft des Faktischen and ex *factis ius oritur*[22]. These notions are interrelated and express the very essence of the argument favouring the law-creating influence of facts. It is worth noting that normative Kraft des Faktischen has to be regarded as a more general notion in comparison with others, as if it were their theoretical foundation.

The first author to conceptualize the principle of effectiveness is Jellinek, although the principle in question was never explicitly expressed in his studies[23]. Jellinek based his approach concerning the normative force of factual situations on psychological sources. He states that "a human being considers different manifestations during a lifetime not just as pure facts, but also as some kind of criteria of assessment of deviation from the usual behaviour"[24].

The author proceeds to the psychological sources of law and offers the notion described as "normative Kraft des Faktischen" ("normative force of the factual"). On this point Jellinek gave interesting opinions with regard to the force of factual situations; he asserts that normative Kraft des Faktischen is important not only in the sense of the origin of legal norms, but also with regard to their existence[25].

In order to give an example, Jellinek explains the protection of ownership. If we consider a situation in which exists a *de facto* State, it would mean the following: "the *de facto* territorial unit is a fact, if it has been firmly

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[22] See for a full analysis: Turmanidze, S., *Status of De Facto State in Public International Law. A Legal Appraisal of the Principle of Effectiveness*, Hamburg, 2010.
[23] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 25.
[24] *Ibidem*.
[25] Taekema, S., Klink, B., de Been, W., *Facts and Norms in Law: Interdisciplinary Reflections on Legal Method,* Edward Elgar Publishing, 2016, p. 208.

established after some period of time, its factual existence becomes the basis of an assertion that this social order has to be regarded as a legitimate one, and the alteration of the *status quo* must be based on the right which would override that entitlement"[26].

The theory of the normative force of factual situations is justified by the author by reference "to the transformation of the purely factual power of a State into its legal authority"[27].

That being said, the theory of normative Kraft des Faktischen has been criticized for two main reasons. The first one relates to the fact that "the transformation of the notion of is (Sein) into the world of ought (Sollen) is impossible as these manifestations represent two completely different spheres"[28].

The second puts into question the morality of the concept. The idea behind this reasoning is that if a purely factual situation has to be considered, at the same time, "as a norm in respect of the behaviour of a human being, it will be possible to demand obedience to a tyrannical authority, because this latter represents a fact the existence of which is undeniable, and this fact must be 'respected'"[29].

According to Boldt, it would be a mistake to regard Jellinek's conception of legality as merely authoritative[30]. In fact he sustains that Jellinek "demands that a legal norm, in order to acquire validity, should also possess a motivating force aiming at the will of an addressee of that norm"[31].

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[26] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 26.
[27] *Ibidem*.
[28] *Ibidem.*
[29] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 27.
[30] Boldt, Staat, Recht und Politik bei Georg Jellinek, in: A. Anter (Hrsg.), Die normative Kraft des Faktischen, Das Staatsverständnis Georg Jellineks, Staatsverständnisse, (R. Voigt (Hrsg.)), Bd. 6, 1. Aufl., Baden-Baden, 2004, p. 24.
[31] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 27.

As a consequence any law is well-founded on a "conviction of those addressees that the law is valid as such, i.e. the law or respective legislative authority has to be recognized"[32]. It is not necessary fot this recognition to be acquired immediately but can be developed on the basis of habituation. Normative Kraft des Faktischen was not conceived by Jellinek as an isolated concept that could "serve as an autonomous source of legal rights, i.e. the law-creating influence of facts on the basis of their mere existence has been rejected"[33]. Consequently, it would be misleading to affirm that Jellinek based his concept of law exclusively on the notion of power. In fact it would mean to ignore the fact that this writer considered the concept of legitimacy a necessary requirement for the validity of law.

### 2.1.2. *Ex factis ius oritur*

The second "face" of the principle of effectiveness is the notion of *ex factis ius oritur*. This concept implies the alleged law-creating influence of facts, i.e. a factual situation is considered a source of law. In the context of a firmly established factual situation *ex factis ius oritur* acquires importance on the basis of which respective facts gain "normative force and serve as a sound foundation of the 'newly emerged' law"[34]. According to Balekjian, *ex factis ius oritur* is relevant to the International legal order in general because of the *sui generis* nature of Public International Law.[35]

It has been underlined that while Public International Law works as a regulatory mechanism in the International Community of States, it does not govern all the problems concerning respective developments and manifestations[36] within that community *ab initio* by normative means[37].

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[32] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 28.
[33] *Ibidem.*
[34] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 34.
[35] Fleur, J., *International Legal Personality,* Routledge, 2017*,* p. 389.
[36] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 34.

This is precisely the reason why the notion of *ex factis ius oritur* has "acquired distinction" on the international plane. The significance of the concept in question is related to the issue of alleged law-creating influence of facts illegal in origin[38].

*Ex factis ius oritur* is based on the assertion that facts can serve as sources of law because of their mere existence. Therefore the self-evident normative force of facts is under discussion again. As Turmanidze explains, *ex factis ius oritur* has two dimensions: "the first one is positive and describes the situation in which respective facts exist in accordance with the rules of Public International Law, the second dimension is negative and refers to the factual situation which is illegal in origin"[39].

Following the definition of *ex factis ius oritur*, in the context of the emergence and existence of a *de facto* State, this means that the *de facto* State is a fact; furthermore its purpose is to obtain a place in the International Community of States. In fact a *de facto* State's goal is sovereignty as constitutional independence[40]. For this reason a *de facto* State tries to represent itself as a sovereign State and not as a challenger to the States system[41]. The emergence of a *de facto* State is sometimes related to serious breaches of fundamental norms of public International Law. What is important to emphasize is that the above mentioned negative dimension of *ex factis ius oritur*, denotes an alleged possibility that the *de facto* situation, which is firmly established, could become a legal one, despite the illegality of its origins[42].

From the considerations discussed above, it is clear the importance of the law-fact interaction with regard to the concept of *ex factis ius oritur*, as Kreijen

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[37]. Fleur, J., *International Legal Personality,* Routledge, 2017*,* p. 389.

[38] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 34.

[39] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 35.

[40] *Ibidem.*

[41] Pegg, S., *International Society and the De Facto State*, Ashgate, 1998, p. 231.

[42] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 35.

puts it: "[...] the principle *ex factis ius oritur* is based on the simple notion that certain legal consequences attach to particular facts."[43]

In this respect it is the notion of factual situations illegally originated, which causes special interest in the context of those "particular facts".

Concerning the link between the concept of *ex factis ius oritur* and facts illegal in origin, Marek refers to the "normal and healthy meaning of the requirement of effectiveness for a normative system"[44] and, after that, proceeds to its "[...] pathological meaning: not in the sense of the effectiveness of law, but of the effectiveness of law-creating illegal facts as against the norm. This is precisely the current meaning of the principle *ex factis ius oritur*[45]".

Also Chen analyzes the concept of *ex factis ius oritur* especially in the light of the recognition of new States and governments and the acts or situations illegal in origin[46]. This author sustains that the principle *ex factis ius oritur* has to be regarded as the only criterion of legality[47].

In dealing with the issue of factual situations illegal in origin, Chen offers the manifestation of the "pathological meaning" of the principle of effectiveness, i.e. *ex factis ius oritur*[48]. In fact he states that: "in the case of illegal acts or situations, the principle only sets a lower limit, leaving the injured State discretion to accord recognition, even when the possession of the wrongdoer may still be precarious. The waiver of a right or the changing of law through quasi-legislation is a free act. When done prior to the legislation through other means, such as prescription, it confers rights on the wrongdoer, and is therefore constitutive in effect."[49]

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[43] Kreijen, *State Failure, Sovereignty and Effectiveness*, p. 175.

[44] Marek, K., *Identity and Continuity of States in Public International Law*, Librairie Droz, 1968, p. 564.

[45] *Ibidem.*

[46] Chen, *The International Law of Recognition*, p. 413.

[47] "[...] legal quality should not be denied to the actual possessor, as soon as his possession is secured, but no sooner.", *Ibidem*.

[48] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 36.

[49] Chen, *The International Law of Recognition*, p. 413.

What is evident from Chen's assertions is that *ex factis ius oritur* governs the process of recognition of new States and governments and is applicable to the state of affairs which is illegal in origin. Consequently "a link has been established between the concept in question and Public International Law on the basis of these problematic issues"[50].

Another contribution comes from Lauterpacht who explains how the concept of *ex factis ius oritur* is strictly related to the nature of law, as such: "Law is a product of social reality. It cannot lag for long behind facts."[51]

He clarifies the notion of *ex factis ius oritur* as follows: "[...] while law, so long as it is valid, is unaffected by a violation of its rules, its continuous breach, when allowed to remain triumphant, ultimately affects the validity of the law."[52]

Also in this case an alleged law-creating influence of facts illegal in origin is under discussion and it implies the negative aspect of *ex factis ius oritur*[53].

With regard to the position held by Kelsen in relation to effectiveness and its relevance to Public International Law, he mentions the notion of *ex iniuria ius oritur* as follows: "The admission, then, that States may, and do, 'recognize' that illegal acts once effecting a firmly established situation give rise to new legal rights and duties is the admission of *ex iniuria ius oritur* in International Law, and it is the principle of effectiveness that is applied"[54].

According to this author, the problematic issue of factual situations illegally originated lies on the idea of *ex iniuria ius oritur*; in fact it can be affirmed that the latter represents "the expression, or manifestation, of the negative dimension of the concept described as *ex factis ius oritur"*[55].

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[50] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 36.
[51] Lauterpacht, *Recognition in International Law*, pp. 426-427.
[52] *Ibidem.*
[53] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 37.
[54] Kelsen, H., *Principles of International Law*, revised and edited by Tucker R. W., Holt, Rinehart and Winston, 1966, p. 425.
[55] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 37.

The notion of *ex iniuria ius oritur* is crucial to Public International Law because of the nature of the International legal system and of its peculiar features. Kelsen proceeds to the issue of the creation of new rights and obligations on the basis of illegal acts. The writer concludes that the extent to which the acts are allowed to produce legal effects within the realm of a particular legal order "[...] must largely depend upon the stage of procedural development reached by this order."[56] If the respective legal system is a highly developed one, the notion of effectiveness in the sense of *ex iniuria ius oritur* is of less importance[57].

In a decentralized legal order which lacks effective collective procedures and functions on the basis of self-help, things are quite different: "Here there is a high degree of uncertainty that the law will be effectively applied and enforced, particularly in the event of serious breaches. In this situation, the principle of effectiveness, so far as this principle admits the operation of *ex iniuria ius oritur*, may have a very considerable scope."[58]

Therefore the decentralized nature of the international legal order has been regarded as fundamental in the context of a law-creating influence of facts[59].

## 2.2. Effectiveness between legality and legitimacy

Effectiveness considered as the adaptation of the law to realities and status quo was regarded as one of the pivotal principles of the international legal system until the 1970s[60].

Like all systems of law, International Law is based upon social reality. This means that there could be some incoherencies between what the norms

[56] Kelsen, *Principles of International Law*, p. 426.
[57] *Idem,* pp. 425-426.
[58] *Idem* p. 426.
[59] Turmanidze, S., *Status of De Facto State in Public International Law*, p. 38.
[60] Milano, E., *Unlawful Territorial Situations in International Law. Reconciling Effectiveness, Legality and Legitimacy*, p. 3, 2005.

prescript and the conduct undertaken by subjects that are under the obligation to follow the legal prescription.

Nevertheless, the validity of law, like the validity of grammar, is not dependent upon actual observance in any particular case.

This does not mean that a continuous breach of the law with impunity may not eventually undermine its validity. In fact, "a continuous toleration of breaches of law by society is an indication that the law no longer corresponds with social facts and that a law which sanctions the rights originating in illegality is in the making"[61]. This does not imply, however, 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[62]. After every important international upheaval there occurs a shift of political, economic and social balance, with the result that new legal principles must evolve and new legal orders have to be introduced to suit the new social reality. An example of international quasi-legislation may be said to have taken place, in so far as it purports to readjust the legal relations between members of the international society. The readjusted legal relations would then receive the protection of the society, despite the fact that the new situation may have resulted from a derogation of rights protected by the pre-existing legal order.

Essentially, this truth reflects the International Law's "lack of institutional and executive machinery to guarantee the enforcement of legal rules", consequently fostering reliance on "established facts as decisive for the determination of legal title"[63].

It was generally accepted that the prominent role of the principle of effectiveness was due to a conception of International Law as a law of coordination of sovereign nations trying to maximise their self-interest. The

[61] Chen, *The International Law of recognition*, p. 420.

[62] Lauterpacht, *Recognition of States in International Law*, p. 426; Goebel, *Recognition Policy of the United States,* pp. 47-48.

[63] Kreijen, G., *State Failure, Sovereignty and Effectiveness,* p. 175.

lack of centralised enforcement mechanisms was also considered one of the main reasons why the principle of effectiveness played such a strong role. At present times, it is impossible to deny the simple fact that effectiveness is no longer a 'fundamental' or 'dominant' principle of the international legal system; however, it is also impossible to deny the enduring importance and relevance of the concept of effectiveness.

According to Milano it is proposed a reconciliation between effectiveness and the principles of legality. The former is presented as a device that "can transform factual situations into law, if complemented and boosted by a process of 'legitimation' of originally unlawful […] situations"[64].

In the same way, the inherent ambivalence of effectiveness as a juristic concept on the borderline between norm and social reality can be reconciled, by using the concept of legitimacy. In fact, legitimacy may represent the key to reconciling an effectiveness that is in violation of International Law and the creation of new laws in illegal situation[65].

Accepting the definition offered by Milano, we can define legitimacy: "as the subjective perception that a certain rule, conduct or situation corresponds to the normative values of a certain society and therefore ought to be obeyed, justified or recognised"[66].

The hypothesis of the author is that while general recognition is the process through which unlawful situations can gradually become lawful, the legitimacy of the underlying claim or the legitimacy conferred by an authoritative body is the discursive tool used by occupying powers to attract recognition of the unlawful territorial situation.

In fact it is sustained that: "the ambivalence of the concept of legitimacy and the fact that, while building on the fundamental principles of the International Community, it goes beyond positive international legality, show how

[64] Milano, *Unlawful territorial situations*, p. 3.
[65] Milano, *Unlawful territorial situations*, p. 17.
[66] *Ibidem*.

legitimacy can be a very 'efficient' complement to effective power by providing, compared to legality, for less objective and less transparent criteria of power recognition in International Law"[67]. This latter affirmation adds some interesting insights to the often stated dual relation between legality and legitimacy, where the former reinforces the latter, and vice versa. "Legitimacy can work beyond the positive norms to allow a recognition of an originally unlawful situation by the legal system"[68].

In the transformation of this formally illegal situation to one of law, the normative force of fact is of the greatest importance[69]. Although the legal order may be violated, this violation is self-healing by virtue of the two great motive forces, the normative power of facts and the transformation into political reality of abstract legal principles[70].

### 2.3. The crisis of the principle of effectiveness

The role of the principle of effectiveness is seriously challenged in current times.

This is possibly due to the perception that International Law had reached a stage of development where its function was no longer to accept social reality as it is, following a positivist approach, but rather to promote and occasionally impose common values and normative standards of international justice, under a jusnaturalistic approach.

As Enrico Milano holds, the danger of relying upon an exclusively positivist approach is that it creates the intolerable situation wherein an international actor is able to secure for itself a legal right or benefit, such as international

[67] *Ibidem.*
[68] *Ibidem.*
[69] Goebel, *Recognition Policy of the United States*, p. 48.
[70] *Idem*, p. 51.

recognition, through an action that is commonly understood to be illicit, thereby violating the ancient Roman maxim of *ex iniuria ius non oritur*[71].

The contrast between natural law and positive law[72], which derives from the contrast between the doctrines that have taken the name of jusnaturalism and juspositivism is helpful in understanding the development of International Law. It can explain the predominance of a certain principle in a determinate historical period.

In fact the contrast between justnaturalists and juspositivists becomes particularly intense in times of transition from an old to a new legal order. On the one hand, it is empirically observable that the new law arises from a fact; on the other, the old order is de-legitimized despite the fact of also having the cause of its legitimacy in a preceding fact. This purely factual legitimation would lead to irreconcilable aporia according to the natural lawyers. This can be resolved through a conception of law not only valid and effective but also good and fair. In fact it may happen that the old legal system, although it has been habitually obeyed and considered valid and effective for a certain period,

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[71] Milano, *Unlawful territorial situations*, p. 3.

[72] It is a contrast that can now be defined in this way. By natural law we mean that current of legal thought which, even if interpreted in different ways, has constantly presented these two characteristics: 1) both natural law and positive law exist; 2) natural law is axiologically superior to positive law.

By juridical positivism we mean that current of legal theory which does not admit the existence of a natural right alongside positive law and maintains that there is no other law than positive law. While natural law asserts the existence of both types of laws but in different degrees, legal positivism affirms not only the superiority, but the exclusivity of positive law. Jusnaturalism is dualistic, juspositivism is monistic.

The difference between jusnaturalism and juspositivism is not only in the two adjectives, natural and positive, but also in the definition of the term “law”.

Jusnaturalism gives a persuasive definition, a definition that foresees a judgment of value, for which 'law' is the set of fair and good norms that rule, or should rule, the coexistence of men, and if these norms are not good or fair do not deserve to be considered law. According to juspositivism, on the other hand, it is law all those norms that rule, in fact, regardless of their moral quality, a specific historical society. A term of value such as "good" or "fair" is not an element of the definition. It is the validity of the norms that rule a society in fact what makes them “law”. In other words it is the conformity of these norms to a constitution, written or unwritten.

can no longer be considered in the same way in all those cases in which the universal principles of natural law have not been respected. From this point of view, the old law can no longer be considered law, just as the new law can be considered not yet law, waiting for the legitimation by facts to be in some way supported by the legitimation according by value.

On the other hand, juspositivists affirm that one thing is moral judgment, another thing is the legal judgment[73].

It is to be understood that according to juspositivism, Law in the proper meaning is only the set of rules of a valid and effective system. Consequently natural law is not, according to this definition, law in the proper sense. At best it can be considered a law in progress, which expresses the moral need that a norm becomes valid and effective.

### 3. The necessity of an International Public Order in International Law

The dichotomy between jusnaturalism and juspositivism, as explained above gives the opportunity also to deal with another important concept which is the role of public order/public policy in Public International Law. It is said that without public policy there cannot be a legal system[74].

The concept of public order is strictly related to the values and moral which constitute the core of the corresponding legal community. On the one hand, it is similar to the definition of law given by the jusnaturalists, on the other hand it lacks the requirement of immutability. Public order in fact develops together with the underlying legal system. And as international society changes in the

[73] Furthermore, if it is true that one does not exclude the other, it is equally true that the persuasive definition of law given by jusnaturalists leads equally to a serious aporia. That is for example the fact of not explaining what actually happens in the courts practice where the judge decides according to law in the sense of what the law is, and not according to what the law ought to be.

[74] Orakhelashvili, A., *Peremptory Norms of the International Community: A Reply to William E. Conklin*, in *European Journal of International Law*, Vol. 23, 2012, p. 868.

course of history so the legal community formed by this society must adapt itself to these changes[75]. Natural law, instead, is considered as an immanent and immutable law, which precedes the very existence of a society and resists even after its peril.

The necessity of international public law finds the same rationale of the national public policy. In other words a proper International Public Order which, in a manner similar to the operation of national public policies in national legal systems, is needed in order to protect the fundamental interests of the International Community. Here the term community is to be conceived as expressed by Simma "the element which distinguishes a 'community' from its components is a 'higher unity', as it were, the representation and priorization of common interests as against the egoistic interests of individuals. A mere "society" (Gesellschaft) on the contrary, does not presuppose more than factual contacts among a number of individuals[76]".

Also Mosler in "The International society as a Legal Community", states that "in any legal community there must be a minimum of uniformity which is indispensable in maintaining the community. This uniformity may relate to legal values which are considered to be the goal of the community or it may be

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[75] Mosler, H., *The international Society as a Legal Community,* in *Collected Courses of the Hague Academy of International Law*, Brill Nijhoff Publishers, Vol. 140, 1973, 1-320, at p. 36.

[76] Simma, *From Bilateralism to Community Interest in International Law*, p. 245. For some studies on the topic of International Community see Abi-Saab, G., *La 'Communauté internationale' saisie par le droit: essai de radioscopie juridique,* in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber*, Vol 1, 1998, 81-108; Lukashuk, I. I., *The Law of the International Community*, in UN (ed.), *International Law on the Eve of the Twenty-first Century. Views from the International Law Commission*, 1997, pp. 51-68; Mosler, *The international Society as a Legal Community*; Simma, B., Paulus, A. L., *The International Community: Facing the Challenge of Globalization*, in *European Journal of International Law*, Vol. 9, 1998, pp. 266-277; Tomuschat, C., *Obligations Arising for States without or against Their Will*, , in *Collected Courses of the Hague Academy of International Law*, Vol. 241, 1993, 195-374, at 219-236; Tomuschat, C., *International Law: Ensuring the Survival of Mankind on the Eve of a new Century: General Course on Public International Law*, in *Collected Courses of the Hague Academy of International Law*, Vol. 281, 1999, 9-438, at pp. 72-90.

found in legal principles which represent the duty of all members to realise. It may relate to legal rules which are binding within the community. The whole of this minimum can be called a common public order […]. The International Community cannot dispense with this minimum of principles and rules as without them it would cease to exist[77].

In the domain of Public International Law, the existence of public order has been affirmed unambiguously. A minimum core of norms and principles safeguarding certain higher interest from being frustrated.

According to Mcnair "It is difficult to imagine any society, whether of individuals or of States, whose law sets no limit whatever to freedom of contract. In every civilised community there are some rules of law and some principles of morality which individuals are not permitted by law to ignore or to modify by their agreements. The maxim *modus et conventio vincunt legem* does not apply to imperative provisions of the law or of public policy; *pacta quae contra leges constitutionesque vel contra bonos mores fiunt, nullam vim habere, indubidati juris est;* and *conventio juri publico non derogat*. The society of States – which acknowledges obedience to the rules of International Law – forms no exception to the principles stated above"[78]. This statement refers to a legal necessity, to something indispensable for a legal order such as is assumed to exist in International Law. These are 'imperative provisions of the law or of public policy' producing exceptional legal effects. McNair refers interchangeably to public policy and imperative law.

Judge Moreno-Quintana suggested in the *Guardianship of Infants* case that there is a proper public policy: "International Public Order operates within the limits of system of Public International Law, when it lays down certain principles such as the general principles of the law of nations and the fundamental rights of States, respect for which is indispensable to the legal coexistence of the political units which make up the International Community.

[77] Mosler, *The International Society as a Legal Community*, p. 33.

[78] McNair, B. A. D., *The Law of Treaties,* Clarendon Press, 1961, pp. 213-214.

[…] These principles we are all quite familiar with them because they are very limited – and these rights, too, have a peremptory character and universal scope"[79].

International Public Order is thus a body of rules deriving from International Law as such[80], and govern the relations between States. As Jaenicke points out it is something more than national public orders, even as national public orders can overlap in substance. Its character and scope are shaped by the system of International Law[81].

### 3.1 The consequence of International Public Order in International Law*: ius cogens*

Arguably peremptory norms are not the only element of International Public Order. The latter could also include foundational principles of International Law such as sovereign equality[82]. In fact Mosler points out that undoubtedly there is a close connection between "*ius cogens* and public order of the International Community, but the two are not identical[83]".

Moreover, as the same author underlines, the concept of ius cogens has a stricter meaning than that of public order. The latter in fact has rules that apply not only to the members of the International Community acting as contracting parties but that are binding also in other relevant legal situations[84]. In addition to this, the public order of the International Community is conceived as

[79] Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Separate opinion of Judge Moreno Quintana), *ICJ Reports*, 1958, pp. 106-107. Available at: https://www.icj-cij.org/files/case-related/33/033-19581128-JUD-01-03-EN.pdf.

[80] Jaenicke, G., *International Public Order*, in *Encyclopedia of Public International Law*, Vol. 7, 1967, p. 80; Virally, M., *Réflexions sur le jus cogens*, in *Annuaire français de droit International,* Vol. 12, 1966, pp. 5-29, at p. 8.

[81] Jaenicke, *International Public Order*, p. 81.

[82] *Ibidem*.

[83] Mosler, *The International Society as a Legal Community*, p. 35.

[84] *Ibidem.*

"detailed rules whose sum are not the same at all points of history. They can differ according to circumstances and needs[85]."

The link between public policy and *ius cogens* was admitted before the adoption of article 53 of the Vienna Convention. Jenks considered that nothing in the nature of Public International Law precluded recourse to the concept of proper international public policy. It can have the effect of *ius cogens* precluding the consent of parties to agreements or wrongs inconsistent with international public policy, but also serve as a climate of interpretation of the intention of the parties to the treaties[86]. Rolin has viewed the International Law standard of the voidness of immoral treaties as an aspect of public order in International Law. He made reference to doctrinal writings from the eighteenth century onwards emphasizing that treaties and costumes shall not have an immoral object and content[87]. Similar conclusions were suggested by Van der Meersch.

As Dugard suggests, *ius cogens* inevitably reflects public policy[88]. Meron affirms that the underlying concepts of *ius cogens* and International Public Order are the same: both operate in an absolute way and are non-derogable[89].

According to Jaenicke, International Public Order is possible only if *ius cogens* is accepted; in outlawing conflicting treaties, *ius cogens* operate as public order[90].

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[85] *Idem*, p. 34.

[86] Jenks, C. W., *The Prospects of International Adjudication,* Stevens, 1964, pp. 457-458.

[87] Rolin, H., *Vers un ordre public réellement international,* in *Hommage d'une génération des Juristes au President Basdevant,* 1961, pp. 451-454.

[88] Dugard, J., *Recognition and the United Nations,* Cambridge University Press, 1987, p. 149.

[89] Meron, T., *Human Rights Law-Making in the United Nations. A Critique of Instruments and Process*, Oxford University Press, 1986, p. 198; Dupuy, P. M., *L'unité de l'ordre juridique international: cours général de droit international public*, Martinus Nijhoff Publishers, 2003, pp. 282-283.

[90] Jaenicke, *International Public Order,* p. 96; Ford, C. A., *Adjudicating Jus Cogens,* in *Wisconsin International Law Journal,* Vol. 13, 1994, p. 147; Sudre, F., *Existe-t-il un ordre public Européen?,* in Tavernier, P., *Quelle Europe pour les droits de l'homme?,* 1966, pp. 41-42.

The history of Article 53 of the Vienna Convention demonstrates that it refers to International Public Order.

Lauterpacht as a Special Rapporteur of the International Law Commision on the law of treaties, in his first report (A/CN.4/63) shows the difference between norms which consist in *ius dispositivum* and norms which he calls "*overriding principles of International Law*", principles which constitute an International Public Order [91]. Also the reports of other two Special Rapporteurs, Sir Fitzmaurice[92] and Sir Waldlock deal with the concept of public order and its relation with the concept of *ius cogens*.

In particular Special Rapporteur Lauterpacht linked the illegality of the object of treaties to violations of International Public Order[93], and Special Rapporteur Waldock also emphasized that voiding treaties for their object in contradiction with a peremptory norm "presupposes the existence of an International Public Order containing rules having the character of *ius cogens*[94]".

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[91] In the *Report on the Law of Treaties* (Document: A/CN.4/63, Extract from the Yearbook of the International Law Commission: 1953, Vol. 2, p. 155) by Mr. H. Lauterpacht, Special Rapporteur, it is sustained that: "*It would thus appear that the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary International Law pure and simple, but inconsistency with such overriding principles of International Law which may be regarded as constituting principles of international public policy (ordre international public). These principles need not necessarily have crystallized in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply by virtue of Article 38 (3) of its Statute*". Available at: http://legal.un.org/ilc/documentation/english/a_cn4_63.pdf.

The same concept of International Public Order is expressed by Professor Dupuy in *L'unité de l'ordre juridique international*, p. 280.

[92] *Third Report on the Law of Treaties* by Mr. G.G. Fitzmaurice, Special Rapporteur, Document: A/CN.4/115 and Corr.1, Extract from the Yearbook of the International Law Commission: 1958, Vol. 2; Fourth report on the Law of Treaties by Mr. G. G. Fitzmaurice, Special Rapporteur, Document: A/CN.4/120, Extract from the Yearbook of the International Law Commission: 1959, Vol. 2. Available at: http://legal.un.org/ilc/guide/1_1.shtml.

[93] *Yearbook of the International Law Commission*, Vol. 2, 1954, pp. 154-155. Available at: http://legal.un.org/ilc/publications/yearbooks/.

[94] *Yearbook of the International Law Commission*, Vol. 2, 1963, p. 52.

They come to the conclusion that the existence of imperative norms is the consequence of an International Public Order which, even if it is developing, exists for all States. Therefore, States have to comply with its contents, otherwise they breach values and principles of the community and put into risk the collective security and interests of the entire system.

At the time when the Vienna Convention was drafted, the concept of *ius cogens* was essentially associated with International Public Order[95], and at the Vienna Conference, the latter notion was preferred by some delegations to that of *ius cogens*. In fact the concept of public order was accepted by the totality of the International Law Commission during the meetings of 1963, made of 25 members[96].

The concept of *ius cogens* had existed in International Law for a long time, even if in inchoate form. There were, however, profound differences of opinion as to the reasons for its existence and the foundations on which it rested; some based it on positive law, others on natural law, while yet others attributed to it a higher or even divine origin. But on one point there was general agreement - namely, that the concept of *ius cogens* expressed some higher social need[97].

As a matter of fact, the existence of an International Community, different from the States which constitute it, is an unquestionable truth. Consequently, the ascertainment of this communitarian entity, far from being a simple philosophical concept, paved the way to the creation of a legal reality entitled

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[95] *Yearbook of the International Law Commission,* Vol. 1, 1963, p. 63. (Yasseen), 65 (Pal), 66 (Bartos).

[96] *Annuaire de la Commission du Droitt International (ACDI)*, Vol. I, 1963, "*Compte rendu analytique de la 683e séance", M. Yassen: "La question se pose immédiatement de savoir s'il y (...) a un ordre public international auquel les Etats ne peuvent pas déroger par des accords particuliers. Pour sa part, répond à cette question par l'affirmative"; Igualmente Tabibi respalda la afirmación del RE Waldock y declaraque: "(...) si imparfait que soit l'ordre juridique international, la thèse selon laquelle il n'y aurait pas en dernière analyse d'ordre juridique international — c'est-à-dire de règle à laquelle les Etats ne puissent à leur gré déroger — est de moins en moins soutenable* ",

[97] ACDI, *Compte rendu analytique de la 685e séance,* Vol. 1, 1963, p. 73.

of duties and rights. In this way some authors bound the concept of *ius cogens* to the fulfilment of the interests of the International Community as a whole[98]. Therefore, the existence of an International Community considered as a whole and the concept of public order, which derives from it, implied the creation of supreme principles of justice. Those principles are strictly related to the duties of the States towards the International Community: "*L'ordre public doit comporter un système de droit dans lequel la reconnaissance du principe plus élevé de justice se substituerait au sens de l'obligation fondée sur la simple opportunité (...) entre un simple rapport entre d'une part soi-même et 'un autre' et, d'autre part, un ensemble complexe de rapports entre soi-même et 'd'autres' ; bref entre une obligation perçue par l'individu et les obligations plus larges définies par la communauté dans une perspective plus impartiale*"[99].

It is important to highlight the qualitative change from the Westfalian perspective to the concept of International Public Order of the contemporary international system. It was evident that the concepts of public order and of *ius cogens* were not new[100]and relied on higher social needs and on a superior order. The concept of an International Community, which laid on shared values and interests had to overcome the pure classical contractualistic vision of International Law of the great powers and direct itself towards the creation

[98] ACDI, *Compte rendu analytique de la 684e séance*, Vol. 1, 1963, p. 3: "*s'ils veulent se conformer à ces règles impératives et respecter les intérêts, non seulement des Etats tiers mais encore de la communauté internationale dans son ensemble*".

[99] ACDI, *Compte rendu analytique de la 683e séance*, Vol. 1, 1963, p. 4: "*L'ordre public doit comporter un système de droit dans lequel la reconnaissance du principe plus élevé de justice se substituerait au sens de l'obligation fondée sur la simple opportunité. On parviendrait ainsi à assurer la transition entre une obligation immédiatement perçue parce qu'elle est d'une nécessité évidente et une obligation continue qui s'exprimerait en des principes établis*".

[100] ACDI, *Compte rendu analytique de la 685e séance*, Vol. 1, 1963, p. 3.

of a more universal and social vision and to the establishment of a new order whose aim should be "*du principe plus élevé de justice*"[101].

Besides all the questions that the concept of *ius cogens* carries, and that would require an in-depth analysis, it is evident that an international social phenomenon exists in which resides the concept of *ius cogens*. It would make no sense to deny the reality of a legal concept for the simple reason of its contradictions with the logics that are felt necessary to apply to the system[102]. The dynamic of law is spontaneous and the international norms emerge notwithstanding its institutional flaws or precariousness. Organization is outside normativism and the normative and constructive rules of International Law are independent from any social organization. Consequently, the indetermination or absence of authority established for the recognition of imperative rules could not be a valid argument in support of their non-existence. In the same way, the argument that the nature of *ius cogens* conflicts with the current international normative system, - horizontal and non-hierarchical - stems from a formal contingency and is extrinsic to International Law; they are not material and intrinsic criteria that justify a real discordance between the *ius cogens* and International Law. Assessing that *ius cogens* is extraneous to the international system is to ignore its dynamic character, and to confuse the current state of International Law with International Law itself.

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[101] ACDI, *Compte rendu analytique de la 684e séance*, Vol. 1, 1963, p. 78: "(...*) Or, à l'heure actuelle, le droit international s'est universalisé et socialisé. Il existe aujourd'hui au moins trois grandes conceptions du monde qu'il faut coordonner pour réaliser une coexistence pacifique sans laquelle l'humanité n'aurait pas d'avenir. L'autonomie de la volonté des Etats doit être limitée grâce à la notion de jus cogens. Même si la Commission accepte que tous les traités déjà conclus et contraires au jus cogens actuel soient nuls, le droit international ne s'en trouvera pas bouleversé pour autant. Ce que les Etats perdent d'un côté est compensé de l'autre. On ne saurait en tous cas permettre que l'égoïsme de l'intérêt national détruise le bien commun international. Igualmente para Yassen, estas réglas "expriment les exigences de la vie internationale, en saisissent les tendances et sont à ce titre habilitées à se prononcer sur la valeur des règles préexistantes".*

[102] Dupuy, *L'unité de l'ordre juridique international*, p. 271.

*Ius cogens* is a normative category whose norms are becoming "positivised" because of a social constraint of the International Community that seeks to transcend the classic international bilateralist concept towards a concept of public order that involves the recognition of the highest principles of justice, founded on interests and common values of the International Community as a whole.

As for the definition of public order, the more accurate is that of Mr Bartos, member of the International Law Commission in the 685th session in which he affirms: "International Public Order was merely the superstructure of the International Community which resulted from the evolution of international society. It was the minimum of rules of conduct necessary to make orderly international relations possible"[103]. Mr De Luna, another member of the International Law Commission, considered public order as that minimum of rules that the International Community regards as essential for its existence, whose character expresses the moral, economic and sociological absolute imperative needs. Consequently, their violation jeopardizes the stability of the entire community they come from. It is a minimum of norms considered essential by the International Community for its existence[104].

### 3.2. The consequence of International Public Order in International Law: the principle *ex iniuria ius non oritur*

From the above follows that affirming the existence of a public order in International Public Law helped in some ways explaining the category of *ius*

[103] ACDI, *Compte rendu analytique de la 685e séance*, Vol. 1, 1963, p. 83: "(…) *l'ordre public international n'est rien d'autre que la superstructure de la communauté internationale et se forme avec l'évolution de la société internationale. Il constitue, à son avis, le minimum de règles de conduite nécessaires pour que les relations internationales ordonnées soient possibles*".

[104] ACDI, *Compte rendu analytique de la 685e séance,* Vol. 1, 1963, p.82*: "(...) le minimum juridique que la communauté internationale, à une certaine époque, croit essentiel à son existence*".

*cogens* in International Law. In fact, during the discussions in the International Law Commission concerning the law of international treaties, the concept of public order and *ius cogens* were strictly interrelated.

In addition to this, the existence of an International Public Order gave the possibility to explain the existence of another important principle: *ex iniuria ius non oritur*. This principle appears to be in clear opposition to the *ex factis ius oritur* which, as we affirmed above, relies on effectiveness. The principle *ex iniuria* instead finds its roots in the concepts of justice, fairness and means that from injustice cannot emerge law.

More specifically it means that acts contrary to International Law cannot become a source of legal rights for a wrongdoer.

From the above, it emerges how this principle aims at protecting and ensuring the interests and values that constitute the International Public Order. As a matter of fact, affirming the existence of supreme principles and common values is not sufficient in order to ensure their respect and validity.

Professor Jessup also relates his concept of "a Modern Law of nations", upon the principle that "there must be basic recognition of the interest which the whole international society has in the observance of its law. Breaches of the law must no longer be considered the concern only of the State directly and primarily affected. There must be something equivalent to the national conception of criminal law, in which the community as such brings its combined power to bear upon the violator of those parts of the law which are necessary to the preservation of public law"[105].

In addition to this it is important to underline that the concept of public order and of the specular mechanism aimed at its protection, *ex iniuria ius non oritur*, applies not only in relation to norms of *ius cogens*. As Jaenicke affirms peremptory norms are not the only element of International Public Order.[106] In

[105] Jessup, P. C., *A Modern Law of Nations*: *an Introduction*, The Macmillan & Co., 1948, p. 2.

[106] Jaenicke, *International Public Order*, p. 315.

fact this mechanism operates towards all kind of violation of international norms. Consequently, *ex iniuria* can be considered the tool that the international system has created in order to safeguard its own development and existence.

As Mosler stated, "the public order of the International Community, however, consists of principles and rules the enforcement of which is of such vital importance to the International Community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force. The reason for this follows simply from logic: the law *cannot recognise* any act, either by one member or by several members in concert, as being legally valid if such act is directed against the very foundation of law"[107].

It is worth noting, with regard to the object of this work, that in several occasions the principle of *ex iniuria* and the obligation of non-recognition are interchangeably used. Some authors in fact sustain that non-recognition has been conceived as a condition for an international legal order to exist[108]. More specifically Sir Lauterpacht is the first to link the principle of non-recognition to International Public Order. He considered that it is an "instrument for maintaining and, indirectly, enforcing International Law and morality". Therefore "from the jurisprudential point of view the acceptance of the policy or of the obligation of non-recognition is of interest as a vindication of the legal character of International Law against the law-creating effect of fact. In a society in which the enforcement of the law is in a rudimentary stage there is a natural tendency for breaches of the law to be regarded, for the sole reason of their successful assertion, as a source of legal right. Non-recognition obviates that danger to a large extent"[109].

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[107] Mosler, *The International Society as a Legal Community*, p. 34.

[108] Kohen, M., *Possession contestée et souveraineté territorial*, Presses Universitaires de France, 1997, p. 157.

[109] Lauterpacht, H., *International Law: Volume 1, The General Works: Being the Collected Papers of Hersch Lauterpacht*, Cambridge University Press, 1970, p. 347; Lauterpacht, H., *Recognition in International Law*, Cambridge University Press, 1947, p. 427.

It is evident from this passage that here the concept of *ex iniuria* and non-recognition are used as synonyms. Even if it is better to underline that the two concepts overlap but do not carry the same meaning. In the sense that non-recognition is a means to enforce the principle of *ex iniuria*. In fact, non-recognition constitutes one of its many expressions of the principle[110]. Therefore, non-recognition is a tool aimed at ensuring the protection of International Public Order in virtue of the principle *ex iniuria ius non oritur*. A public order which reflects the development of the underlying International Community.

## 4. Conclusions

Effectiveness has been elaborated as a conceptual device that captures the inter-relation between social reality and law and explains the influence of the former over the latter. The doctrinal debate on effectiveness has been mainly a positivist affair characterised by the dialectic between sociological and normativist approaches to the question of the relation between reality and legal norms. As expressed by some authors, the systematic conceptualisation of effectiveness has been mainly a continental European doctrinal project situated within the 20th century positivism. Differently, in the last three decades there was a dramatic decrease in the attention that International Lawyers have reserved to effectiveness. That has occurred as a result of the development of the emergence of the principles that constitute the so called International Public Order, that have spread the feeling amongst International Lawyers that the role of effectiveness was no more fundamental to the operation and understanding of their discipline.

Interestingly, after many years of neglect, the concept has received renewed

[110] Lagerwall, A., Kolb, R., Corten, O., *Le principe ex iniuria ius non oritur*, Bruylant, 2016, pp. 141-159; Ronen, *Transition from Illegal Regimes under International Law*, p. 5.

attention[111].

Effectiveness is that legal device situated on the borderline between the norm and social reality that allows the mutual adaptation and unification. For example, the position exposed by Kreijen holds efficacy and effectiveness as measures of the validity of a specific legal norm.

Another writer, Milano, recalls that the vocation of effectiveness is "its capacity to create new law from situations created as a result of violations of International Law"[112].

According to Kreijen the principle *ex factis ius oritur* often prevails – or indeed should prevail, according to the advocates of sociological positivism – over the principle *ex iniuria ius non oritur* in International Law, because of the decentralised nature and the deficient system of enforcement and sanction of this latter[113].

At the same time *ex factis ius oritur* challenges the project of global legalism, which in turn asserts external International Community values that are meant to form the peer review basis for the application of *ex iniuria ius non oritur*.

In ideal situations, the two principles balance each other, with the *ex iniuria* principle serving "as a bulwark against injustice", and the *ex factis* principle safeguarding against disorder. However, the elusive search for equilibrium remains problematic[114]. Yael Ronen explored the fundamental tension between the two principles and ultimately concluded that non-recognition as a means of enforcement of the *ex iniuria* principle was "weak" and "limited"

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[111] Juste Ruiz, J., *Derecho Internacional Publico*, 1994; Miele, A., *La comunità internazionale*, Giappichelli, 2000; Cassese, *International Law*; Di Stefano, G., *L'ordre international entre légalité et effectivité,* Pedone, 2002; Kreijen, G., *State Failure, Sovereignty and Effectiveness*.

[112] Milano, *Unlawful Territorial Situations*, p. 53.

[113] Kreijen, *State Failure, Sovereignty and Effectiveness*, p. 174 -178.

[114] Kreijen, *State failure, Sovereignty and Effectiveness*, p. 176

and that violations of International Law can produce legally valid outcomes beneficial to the wrongdoer[115].

[115] Ronen, Y., *Transition from illegal regimes under International Law*, p. 320

# CHAPTER 3

## Non-recognition of an aspirant State and of unlawful situations in International Law

*SUMMARY: 1. Introduction - 2. Statehood and lawful territorial situations - 2.1. Statehood in contemporary International Law - 2.2. Normative standards and unlawful territorial situations - 3. The legal concept of non-recognition of an aspirant State - 3.1. The duty of non-recognition of an aspirant State - 3.2. State practice - 3.2.1. Manchukuo - 3.2.2. Bantustans - 3.2.3. Turkish Republic of Northern Cyprus - 3.3. The scope, content and effects of the duty of non-recognition of an aspirant State - 4. The ILC 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts - 5. Non-recognition of unlawful territorial situations - 5.1. State practice - 5.1.1. Palestine - 5.1.2. East Timor - 5.1.3. Kuwait - 5.1.4. Abkhazia and South Ossetia - 5.1.5. Crimea - 6. Non-recognition of other unlawful situations - 6.1. State practice - 6.1.1. South Rhodesia - 6.1.2. Namibia - 6.1.3. Wall advisory opinion - 6.1.4. The US Embassy to Jerusalem - 7. The legal nature of non-recognition of unlawful situations - 7.1. Non-recognition as a primary obligation - 7.2. Non-recognition as a secondary obligation - 7.3. Is the obligation self-executing? – 7.4. Non-recognition as a sanction - 7.4.1. Two faces of the same coin? - 7.5. The consequences of breaching the duty of non-recognition - 7.5.1. The problem of implied recognition - 8. Conclusions.*

### 1. Introduction

The concept of non-recognition, as we have seen in the previous chapter, is one of the expressions of the principle *ex iniuria ius non oritur*.

It meets the requirements of legitimacy and of protection of International Public Order.

The aim of this chapter is to analyse the concept of the obligation of non-recognition. In doing so, we will not try to define a single and systematic framework, but we will try to answer the different questions that this topic presents by offering its evolutionary analysis. Therefore, the following section focuses on the concept of statehood, which first saw the application of non-recognition. This is not a case, being statehood a typical concept of traditional

International Law. Section 3 then examines the non-recognition with reference to entities that lack the traditional requirements of statehood and analyses state practice in order to deduce the content and effects of non-recognition. Section 4 adds another element to the question, the 2001 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts which spells out non-recognition as a consequence of a serious breach of obligations under peremptory norms of general International Law. Section 5 evaluates the relationship between non-recognition and unlawful territorial situations and examines state practice in this regard. Section 6 focuses instead on the relationship between non-recognition and other unlawful situations and the related state practice. As a consequence of the above case law analysis, section 7 tries to sum up the findings assessing the nature of this obligation. Section 8 considers another aspect of non-recognition, often confused with the obligation of non-recognition, which is its sanctioning nature. Section 10 highlights the difficulty that non-recognition meets with reference to implied recognition. Finally the chapter closes with concluding remarks summing up the findings.

## 2. Statehood and lawful territorial situations

### 2.1. Statehood in contemporary International Law

As stated by Crawford, modern doctrine and practice has shifted its attention to issues of statehood and status independent of recognition[1]. Different criteria have been suggested for statehood, but no definition has been generally agreed upon yet. As a matter of fact, any attempt of codification concerning recognition has been rejected. One of the most relevant legal formulations of statehood appears in Article I of the Montevideo Convention on the Rights and Duties of States (1933). According to the Montevideo Convention, the

[1] Crawford, J., *The Creation of States*, p. 37.

State as a *person* of International Law should possess the following qualifications: (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with other States.

Doctrine and jurisprudence have elaborated on the concise requirements in great detail and it would be beyond the scope of this work to dwell further on the matter. After all, it is not so much the interpretation of the criteria that is important, but the mere fact that the criteria have been accepted as the normative starting point on state recognition, not only by legal scholars and lawyers, but also, and more importantly, by States themselves[2].

Despite the fact that only sixteen States[3] have ratified the Montevideo Convention (1933), its formulation of the elements necessary to form a State are widely employed in diplomatic practice and referred to in academic works. Though the Montevideo criterion of what constitutes a State is frequently invoked in international practice (or perhaps because it is employed so often), it is not immune to criticism or even skepticism. D'Aspremont, in his reply to the ILA Committee, referred to the Montevideo criterion as "Montevideo

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[2] The US State Department, for example, declared in 1976 that the USAwould decide on matters of recognition based on the establishment of certain facts, including 'effective control over a clearly-defined territory and population; an organized governmental administration of that territory; and a capacity to act effectively to conduct foreign relations and to fulfil international obligations'. See. E.McDowell, 'Contemporary Practice of the United States Relating to International Law', (1977) 71 AJIL 337. See also, in relation to Canada, J. Beesley and C. Bourne (eds.), 'Canadian Practice in International Law during 1971 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs', (1972) 10 CYIL 287, at 308–9.

On a similar note, the British Foreign Office justified the non-recognition of Bophuthatswana as follows: 'The normal criteria which the Government apply for recognition of a state are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in their external relations'; see G.Marston (ed.), 'United Kingdom Materials on International Law', (1986) 57 BYIL 507.

[3] The sixteen States that are a party to the Montevideo Convention are Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, United States and Venezuela. Further information about the Montevido treaty can be found at <http://www.oas.org/juridico/english/sigs/a-40.html >. Access on March 2nd, 2011.

illusion" and stated that he is strongly against "the idea that International Law authoritatively defines what Statehood is". In his work on recognition, Thomas Grant informs that some have "argued that the Convention is of limited law-making force and therefore, regardless of the quality of its content, has little normative reach". Additionally, the Montevideo Convention has been called "over-inclusive", for authors who believe it contains elements which are not "essential to statehood"[4]. "In short", writes Grant, "there has arisen a body of scholarly opinion that calls into question past reliance on the Montevideo Convention as an authoritative pronouncement on the characteristics of the State"[5].

The most criticized of the four elements of the Montevideo formula is probably the "capacity to enter into relations with other States"[6].

There are different grounds for objection. It may be said that such capacity "is, in effect, a consequence, rather than a condition of statehood"[7]. One may also argue that such capacity is not exclusive of States and, therefore, not particularly useful to distinguishing States from other entities[8]. International

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[4] Grant, T., *Defining Statehood: The Montevideo Convention and its Discontents,* in *Columbia Journal of Transnational Law*, Vol. 37, pp. 403-457, 1998, at p. 434.

[5] *Ibidem*.

[6] Roth offers the following explanation for such element: "The reference in Article 1 to "the capacity to enter into relations with other states" thus appears to have been intended, not as conditioning statehood on the entity's reception by other states, but as excluding entities whose international relations were confessedly subordinate to another state – i.e., units of federal states (e.g., Michigan, Tasmania) and territories that have full internal self-governance but are dependent in external affairs (e.g.,"associated statehood" arrangements, such as the relationship of the Cook Islands to New Zealand)". In Roth, B., *Secession, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine,* in *Melbourne Journal of International Law*, Vol. 11, pp. 1-47, 2010, at p. 7.

[7] Detter Delupis, I., *The international legal order*, Ashgate Publishing Company, 1994, p. 43. James Crawford observes that "Capacity to enter into relations with States at the international level is no longer, if it ever was, an exclusive State prerogative. True, States preeminently possess that capacity, but this is a consequence of statehood, not a criterion for it - and it is not constant but depends on the situation of particular States." In Crawford, J., *The Creation of States,* p. 61.

[8] Grant, T., *Defining Statehood,* p. 435. Grant argues that "*Even if capacity were unique to states, the better view seems to be that, though capacity results from statehood, it is not an*

Organizations and, in some cases, even sub-unities of a State, such as provinces[9], länder or "state members of a federation", may also conclude treaties.

Notwithstanding the skepticism and criticism, there is wide acceptance of these criteria[10] and of the fact that they are based on the principle of effectiveness[11].

In addition to these elements, the criterion of independence, even if not referred to in the Montevideo Convention, is considered as the central criterion for statehood. In the Island of Palmas arbitration, Judge Huber states: "*Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries, and, as a corollary, the development of International Law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations[12]*".

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*element in a state's creation*".

[9] Coté, C. E., *La réception du droit international en droit canadien*, in *Supreme Court Law Review*, Vol. 52, 2010, pp. 483-567.

[10] In this regard the Committee in the *Report of the Sydney Conference on Recognition/Non – Recognition in International Law*, in *International Law Association (ILA) Fourth (Last)* , 2018, at p. 26 affirms that: "Although critiqued for being either over or under-inclusive, the Montevideo criteria nonetheless continue to provide the basic framework for assessing whether an entity meets the key characteristics of a State. While the Montevideo Convention provides the terms under discussion, those terms are not applied as a mechanistic, bright-line test".

[11] Crawford, J., *The Creation of States,* p. 97. See also Cancado Trinidade, A. A. *States As Subjects Of International Law and The Expansion Of International Legal Personality,* in *International Law for Humankind*, in *Recueil des Cou*rs, Martinus Nijhoff Publishers, Vol. 316, 2006, pp. 203-219. Available at <http://www.nijhoffonline.nl/ >.

[12] *Reports of International Arbitral Awards, Island of Palmas case (Netherlands, USA),* 4 April 1928, Vol.2, pp. 829-871, at p. 838.

## 2.2. Normative standards and unlawful territorial situations

As noted above, the Montevideo formula and some other analogous conceptions of statehood are essentially based on the principle of effectiveness.

With the caveat that there are competing views of what effectiveness means, it may be understood as the "effective control of an independent government" over a "permanent population" and a "defined territory".[13]

Whereas some believe that the Montevideo formula is "over-inclusive", others have suggested additional criteria such as self-determination, democracy, minority rights and constitutional legitimacy[14].

There are other examples of States demanding the fulfillment of certain conditions. On December 16, 1991, the EC held a meeting in which a set of guidelines for recognition was adopted. The criteria to be ascertained include respect for the provisions of the Charter of the United Nations, for the rule of law, democracy and human rights, guarantees for the rights of ethnic and national groups and minorities, respect for the inviolability of all frontiers, acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability and commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes[15].

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[13] Roth, B., *Secession, Coups and the International Rule of Law,* p. 7. Orakhelashvili presents a similar notion: *"As part of the factual criteria of statehood, effectivité refers to the effective exercise of state authority over the relevant territory."* in Orakhelashvili, A., *Statehood, Recognition and the United Nations System,* p. 9.

[14] For a discussion, see Grant, T., *The recognition of states*, Praeger, 1999, esp. chapter 4.

[15] The full text of the EC Guidelines reads: "*Declaration on the `Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991).*
In compliance with the European Council's request, Ministers have assessed developments in Eastern Europe and the Soviet Union with a view to elaborating an approach regarding relations with new states.
In this connection they have adopted the following guidelines on the formal recognition of new states in Eastern Europe and in the Soviet Union: The Community and its Member

Nevertheless, Grant affirms that "professed commitment to the December 16 Guidelines did not (...) translate into practice uniformly"[16].

The notion that "a State is a matter of fact" ensues from an "equation of effectiveness with statehood"[17].

However, practice has demonstrated the inaccuracy of such notion[18]. There have been cases of effective entities which were not regarded as States as well as non-effective entities which were considered States[19].

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States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

Therefore, they adopt a common position on the process of recognition of these new States, which requires:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights.
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE.
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement.
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability.
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

The Community and its Member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighboring States.

The commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations. It could be laid down in agreements".

[16] Grant, *The Recognition of states*, p. 95.

[17] Crawford, J., *The Creation of States*, p. 97.

[18] "As independent criteria for statehood, 'permanent population' and 'defined territory' merely beg the question, since virtually all statehood claims, whether or not accepted in the international legal order, characteristically include sufficiently precise claims on behalf of a permanent population to a defined territory. What matters in the Montevideo Convention context is that the 'permanent population' and 'defined territory' be united by some common and distinguishing pattern of effective governance. Thus, if taken as the legal standard for international personality, the Montevideo criteria would confer sovereign rights, obligations,

One explanation is that International Law regulates statehood on a basis other than effectiveness[20].

Such view is expressed, for instance, by Cançado Trindade: "The preconditions for statehood in International Law were well captured by the 1933 Montevideo Convention on the Rights and Duties of States, comprising a population, a defined territory, a normative system and the capacity to enter into relations with other States. Such factual preconditions, as pointed out by classical doctrine, ensued essentially from the principle of effectiveness, though modern doctrine goes beyond this latter"[21].

As expressed by Crawford, effectiveness remains undoubtedly the dominant general principle and it is consistent with this that there should exist exceptions based on other fundamental principles[22].

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powers, and immunities on any territorially-coherent political community found under the long-term effective control of an independent government. However, such a standard falls far short of capturing the essence of traditional recognition practice". In ROTH, B. Secession, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine. Melbourne Journal of International Law, v. 11, p. 1-47, 2010, at p. 7.

[19] Rhodesia and the Turkish Republic of Northern Cyprus are examples of the former, whereas entities unlawfully annexed in the period of 1936 to 1940 (Ethiopia, Austria or Poland) are illustrative of the latter. See Crawford, J., *The Creation of States*, p. 97. Roth reminds us that in some cases, new states have been recognized without a central government ever having established effective control throughout the territory. He cites, as examples, the Democratic Republic of the Congo, in 1960, and Angola, in 1975. In Roth, B., *Secession, Coups and the International Rule of Law*, p. 7.

[20] See Crawford, J., *The Creation of States*, p. 97. Note, also, that Vladimir-Djuro Degan, in his course delivered at the Hague Academy of International Law took the view that the "State is a question of fact": "La doctrine du droit international est à juste titre unanime pour reconnaître que la création d'un Etat est une question de fait, échappant aux règles ordinaires du droit. Ce n'est donc pas en principe un processus juridique réglementé, ni par le droit interne de l'Etat prédécesseur, ni par le droit international". In Degan, V., *Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe),* in *Recueil des Cours*, Martinus Nijhoff Publishers, Vol. 279, 2007, p. 197-374, at p. 227. Available at <http://www.nijhoffonline.nl >. However, he later conceded that such "matter of fact" could be legally limited: *"Acte discrétionnaire et politique, la reconnaissance peut quand même être limitée par certaines obligations juridiques ou par certains engagements politiques". Ibidem*, p. 249.

[21] In Cancado Trinidade, *States as Subjects Of International Law,* p. 205.

[22] Crawford, J., *The Creation of States*, p. 98.

According to the latter author, the concept and development of *ius cogens* in the Vienna Convention confirms this conclusion as well as state practice does. Peremptory and non-derogable norms cannot be violated by State creation more than can be by treaty - making[23]. Article 53 and 64 of the Vienna Convention were not supposed to have direct application to situations relating the creation of States. Their importance is fairly indirect, by emphasis on the centrality and performance of certain basic rules[24].

One should note the fundamental difference from the Montevideo requirements: whereas the latter base recognition in essence on the effectiveness of an entity, the duty of non-recognition envisages the nullity of the consequences that a grave violation of International Law might have regardless of the effectiveness of the entity emerging from such a violation[25].

The blurred relationship between the traditional Montevideo requirements and a new generation of criteria for recognition, such as respect for human rights, minority protection, and democracy, originates from the field of tension between statehood as a factual given and statehood as amoral engagement. The Montevideo requirements only deal with the presence or lack of certain attributes of statehood. In so doing, they ignore the entity's internal organization or the way those attributes have been acquired, save for a rather marginal control on whether or not such violations as apartheid or aggression have occurred in the process of state formation. In this view, statehood and recognition are, in essence, amoral[26]. In contrast, the new criteria are

[23] *Idem*, p.107.

[24] Bokor-Szego, H., *New States and International Law,* Akadémiai Kiadó, 1970, pp. 66-75.

[25] Ryngaert, C., Sobrie, S., Rec*ognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia,* in *Leiden Journal of International Law*, Vol. 24, 2011, p. 473.

[26] Rich, R., *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, in European Journal of International Law, Vol. 4, 1993, p. 64.

predicated upon a value system; as such, they have a considerable moral dimension[27].

## 3. The legal concept of non-recognition of an aspirant State

### 3.1. The duty of non-recognition of an aspirant State

The problem of non-recognition is usually connected with the creation of States. In fact, the issue raises when an entity to be recognized does not meet the criteria for statehood. Consequently it is of great importance to understand which criteria are to be considered as the required elements for statehood and which ones are instead the required elements for recognition.

There is among authors agreement on the fact that there is a duty of non-recognition when the bases of statehood are not met by the aspirant State. After all, the principle of effectiveness on which those criteria are based plays an abiding key role in the functioning of the decentralized International Community of states[28]. Entities that are unable to assume the rights and duties that come with statehood cannot be admitted to the International Community[29].

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[27] Chinkin, C., *International Law and Human Rights*, in Evans, T., *Human Rights 50 Years On: A Reappraisal,* Manchester University Press,1998, pp. 106-107; Wouters, J., De Meester, B., Ryngaert, C., *Democracy and International Law*, in *Netherland Yearbook of International Law*, Vol. 34, 2003, p. 158.

[28] Kreijen, *State Failure, Sovereignty and Effectiveness*, p. 13: "Because centralized coercion and compulsory adjudication are essentially lacking in the international legal order, this order must almost entirely rely on the factual ability of its subjects to provide the implementation and enforcement of its norms. To put it another way, to endow entities, which do not possess the factual ability to act in accordance with the normative requirements of a decentralized legal order – i.e., to confer on them the legal capacity to be the bearers of rights and duties under the order, while merely presuming their factual capacity – is to put at risk the functioning of that order*"'*.

[29] Hillgruber, C., *The Admission of New States to the International Community*, in *European Journal of International Law*, 1998, Vol. 9, p. 499.

Treating an unqualified entity as a State is an improper interference in the internal affairs of the parent State[30]. In this case it is important to underline that there must be an effective and proper parent State. In fact the situation offers different grey zones in cases in which an entity affirms to be a State after having being illegally occupied by foreign occupation[31].

The principle of effectiveness therefore constitutes a vital threshold[32].

As a corollary, a concept related to non-recognition of States is "premature recognition." James Brierly had written "it is impossible to determine by fixed rules the moment at which other states may justly grant recognition of independence to a new state; it can only be said that so long as a real struggle is proceeding, recognition is premature, whilst, on the other hand, mere persistence by the old state in a struggle which has obviously become hopeless is not a sufficient cause for withholding it"[33] .

Another important author on this subject, Lauterpacht, states that "it is contrary to International Law to grant premature recognition"[34] . He sustains that "it is generally agreed that premature recognition is more than an unfriendly act; it is an act of intervention and an international delinquency"[35].

Lauterpacht adds also another element in the discussion. According to him, "premature recognition is a wrong not only because, in denying the sovereignty of the parent State actively engaged in asserting its authority, it amounts to unlawful intervention. It is a wrong because it constitutes an abuse of the power of recognition"[36] .

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[30] Lauterpacht, H. *Recognition of States in International Law*, in *Yale Law Journal*, Vol. 53, p. 390.

[31] Is this the case of Palestine or of western Sahara, it is difficult to argue that the occupying powers are the "parent state".

[32] Ryngaert, Sobrie, Rec*ognition of States,* p. 488.

[33] Brierly, J., *The Law of Nations,* p. 138.

[34] Lauterpacht, *Recognition*, p. 391.

[35] *Ibidem.*

[36] *Idem*, p. 392.

It is not a case that this author is one of the most influential champions of the constitutive doctrine of recognition, or more correctly, of its legal character. Consequently, he aims for a correct use of recognition, pointing out which are its misuses and abuses.

In fact he stresses how a premature recognition would qualify as an independent State an entity "which is not, in law, independent and which does not therefore fulfill the essential conditions of statehood"[37]. In this case, recognition would be an act "which an international tribunal would declare not only to constitute a wrong but probably also be in itself invalid"[38] .

Other authors focus their attention on the same situation and describe how effectiveness plays the "sole criterion of legality" and therefore "legal quality should not be denied to the actual possessor, as soon as his possession is secured, *but not sooner*"[39].

In this case the author explicitly deals with the concept of non-recognition drawing the difference between what he conceives as non-recognition following a situation which does not violate International Law, and consequently its lawfulness is not subject to scrutiny by the International Community; and a situation which violates International Law and therefore the States, being themselves interested parties, would necessarily claim the right to satisfy themselves of the legality of the fact or situation in question[40].

Situations that would amount to premature recognition show a relative likelihood of non-recognition. Recognition may be a political choice, but it is one that exists within a legal context. In this case, we can see that non-recognition seems to be more likely when recognition would be premature.

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[37] *Ibidem*, p. 392.

[38] *Idem*, p. 393; see, also, Ijalaye, D. A., *Was Biafra At Any Time a State in International Law?,* in American Journal of International Law, Vol. 65, 1971, p. 559.

[39] Chen, *The International Law of recognition,* p. 413.

[40] Chen, *The International Law of recognition,* p. 413.

### 3.2. State practice

#### 3.2.1. Manchukuo

That being said, it can be considered that the origins of the duty of non-recognition was associated with the so-called Stimson doctrine, formulated in connection with the establishment of the State of Manchukuo following the aggression of Japan against China.

The intervention elicited to the now-famous response from Henry Stimson, the United States Secretary of State, who in a note to the Japanese and Chinese governments stated that the United States 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 the international policy relative to China, commonly known as the 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, to which treaty both China and Japan, as well as the United States, are parties[41].

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 acknowledged that the Stimson note did not establish a legal obligation not to recognize forcible acquisitions of

[41] US Department of State, Note of 7 January 1932, 3, Foreign Relations of the United States, Diplomatic Papers, 1932: The Far East, at 8-9, available at http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUSidx?type=turn&entity=FRUS.FRUS1932vO3.p0112&id=FRUS.FRUS1932vO3&isize=M.

territory[42].

Two months after the Stimson statement, the Assembly of the League of Nations resolved that Chinese sovereignty over Manchuria should be respected and that Manchukuo should not be recognized as a State: "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 ... or to the Pact of Paris[43]".

To the extent that this resolution is relied on in the literature as evidence of a duty of non-recognition, it should be noted that like all resolutions of the League Assembly it was not binding on member states and had a purely political, exhortatory effect[44]. The United Kingdom clearly thought it of little legal or practical value, the Foreign Minister noting for example that he would "hesitate very much, whatever may be the rights and wrongs of the origin of Manchukuo, to pledge the British Government for all eternity never to recognize the new State if it becomes definitely established, notwithstanding its illegitimate origin[45]".

The example of Manchukuo shows also how non-recognition follows with equal cogency from the absence of one of the essential conditions of statehood, namely independence. In fact the decisive question governing the matter was whether Manchukuo was independent of the State which had detached that province from China[46].

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[42] Brownlie, I., *International Law and the Use of Force by States,* Clarendon Press, 1963, p. 418.

[43] League of Nations Assembly Resolution of March 11, 1932, supra note 21, at 87-88.

[44] See, e.g., Brierly, J. L., *The Meaning and Effect of the Resolution of the League Assembly of March 11, 1932*, in *British Yearbook of International Law*, Vol. 159, 1935; Smith, H. A., *The Binding Force of League Resolutions*, in *British Yearbook of International Law*, Vol. 157, 1935.

[45] U.K. Cabinet, *The Lytton Report, Japan and The League of Nations*, Doc CP404(32) (Nov. 19,1932), Nat'l Archives Catalogue Ref. CAB 24/235, available at http://filestore.nationalarchives.gov.uk/pdfs/small/cab-24-235-CP-404-1.pdf (last visited Dec. 17, 2013).

[46] Lauterpacht, *Recognition of States*, p. 429.

### 3.2.2. Bantustans

The UN dealt with the procedure adopted in South Africa in relation to the black "homelands" or so-called Bantustans erected by legislation of the South African Parliament between 1976 and 1982. There were four of these homelands - the Republics of Transkei, Ciskei, Bophuthatswana and Venda - and they were created as part of the policy of apartheid that had been introduced in South Africa by the National Party administration of Prime Minister Hendrik Verwoerd in 1948. Basically, the idea of the homelands was to carve out of South African territory pieces of land under supposedly independent black administration and then to encourage as many black South Africans as possible to go and live in those entities, thereby leaving the rest of South Africa (by far the larger and better part of it) for the white minority: in effect, this was in furtherance of the policy of segregation implicit in the Afrikaans word "apartheid". The UN reaction to the proclamation of all four Bantustans is illustrated by its reaction to Transkei, the first to be created: the General Assembly passed Resolution 31/6 (1976) in which it declared the independence of Transkei to be "invalid" and called upon all States "to deny any form of recognition to the so-called independent Transkei and to refrain from having any dealings with the so-called independent Transkei or other Bantustans".

The resolution was adopted by 134 votes in favour and 0 against, with 1 abstention (the US, which expressly agreed that Transkei should not be recognised but thought that the resolution went too far in other respects). The overwhelming vote in favour of non-recognition of Transkei was to be mirrored in subsequent resolutions dealing with the other Bantustans and the actual refusal of any State in the world (except South Africa) to recognise any of the Bantustans can be viewed as strong evidence of *opinion juris* in relation to non-recognition of entities created in violation of International Law.

Therefore the non-recognition of the Bantustans can be justified by reference to the requirement of independence as a condition of statehood in International

Law. This requirement is stated in Article 1 of the 1933 Montevideo Convention on Rights and Duties of States[47] as the "capacity to enter into relations with other States"; it has generally been interpreted as meaning that a State must be not only legally independent of the authority of any other State, but also factually independent of such authority: "If a community, after having become detached from the parent State, were to become, legally or actually, a satellite of another State, it would not be fulfilling the primary condition of independence and would not accordingly be entitled to recognition as a State"[48].

This aspect of statehood was also mentioned by the British Foreign Secretary as a reason for not recognising Bophuthatswana, when he alluded to its very heavy economic dependence on South Africa which precluded it from being considered sufficiently "independent" in terms of the Montevideo criterion[49].

### 3.2.3. Turkish Republic of Northern Cyprus

A much more appropriate contemporary analogy for the case of Manchukuo is the erection of the Turkish Republic of Northern Cyprus in Turkish-occupied northern-Cyprus essentially a puppet State under Turkish influence, a State that would not exist but for the presence of the Turkish army.

Cyprus was invaded by the Turkish armed forces in 1974 to forestall an anticipated enosis or unification of the island with Greece, at the instigation of nationalist Greek Cypriots. Some 36% of the island - the northern third - was occupied by the Turkish army and administered by a so-called Turkish Federated State of Cyprus, which did not, nevertheless, actually proclaim independence. In 1983, however, following the breakdown of talks on a

[47] 28 AJIL Supp. 75.

[48] Lauterpacht, *Recognition*, p. 409. In fact cited Manchukuo as an example of just such an entity.

[49] Hansard (H.G. Debs), 12 November 1986, vol. 105, col. 100. It should be recalled that Manchukuo's economy was controlled by the Japanese.

resolution of the situation on the island, the Turkish administered area unilaterally declared independence under the name of the TRNC. That the TRNC was at all able to declare independence and remain outside the *de facto* control of the Republic of Cyprus was and remains due to the presence of more than 30,000 Turkish troops in northern Cyprus, heavily armed and on a permanent state of high alert, and also to the entity's very heavy economic dependence on Turkey, which remains the only State formally to have recognised it, although Pakistan has had direct dealings with it in defiance of the UN's wishes. Security Council Resolution 541 (1983), passed immediately after the declaration of the TRNC, characterised the act as a "purported secession of part of the Republic of Cyprus", declared it "legally invalid" and called upon all States "not to recognise any Cypriot State other than the Republic of Cyprus"; these statements were reiterated the following year in response to Turkey's exchange of "ambassadors" with the TRNC[50]. Judicial note of the situation of the TRNC has also been taken by the European Court of Human Rights, to the effect that, "[…] the International Community does not regard the 'TRNC' as a State under International Law […]"[51]. The approach taken by these international organisations and courts in regard to the TRNC had been considered by one commentator, before these statements were made, as a matter of International Law in the following terms: " […] where a State illegally intervenes in and foments the secession of a part of a metropolitan State, other States are under the same duty of non-recognition as in the case of illegal annexation of territory. An entity created in violation of the rules relating to the use of force in such circumstances will not be regarded as a State[52]".

[50] Security Council Resolution 550 (1984).
[51] ECtHR, *Loizidou v. Turkey*, Application no. 15318/89, Judgment of 18 December 1996, §44.
[52] Crawford, J., *The Creation of States*, p. 118.

### 3.3. The scope, content and effects of the duty of non-recognition of an aspirant State

Non-recognition in connection with new States, as anticipated in the previous paragraph, is a question of different nature from the one that will be discussed in paragraph 5. If a State does not in fact exist, "recognition cannot be accorded, not because of the illegality of the origin, but because the 'fact' of existence is farcical"[53] .

Therefore, the obligations arising from this duty are difficult to enumerate.

An entity can proclaim its statehood as loudly as it likes; it will only be a State if recognised as such, for only then will it be able to participate in the life of the International Community. The paradox of such entities is that in fact they crave recognition, as they are unable fully to participate in international relations without it.

Since a State is a mere fact, a measure of non-recognition cannot delete its existence[54]. This measure can only be operative on a juridical level: the legal system cannot create the facts of the real social life[55]. Only another fact, like war or a dissolution, can reach this effect.

Certainly, on a political level, the effectiveness of the non-recognized entity will be weakened - and this is one of the aims of non-recognition: weaken, and eliminate, when it is possible, the effectiveness of an unlawful situation or of an entity unlawfully created. But some authors argue that who believes that through non-recognition will prevent the unlawful creation of a State or its entrenchment, misunderstands fact with law[56].

Consequently, what could be affirmed is that non-recognition of an entity

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[53] Chen, *The Doctrine of non-Recognition*, p. 429.

[54] Devine, D. J., *The Status of Rhodesia*, University of Cape Town, 1973, p. 148; O' Connel, D. P., *International Law*, Stevens and Sons, 1970, p. 432; Jennings, R., Watts, A., *Oppenheim's International Law*, Oxford University Press, p. 198.

[55] Giuliano, M., *I diritti e gli obblighi,* CEDAM, 1956, p. 27.

[56] O' Connel, *International Law,* p. 432. See also Verhoeven, *La reconnaissance internationale*, Pedone, 1975, p. 715: *"... l'existence étatique comme telle demeure un fait préalable au droit et à la légalité qu'il enserre"*.

which does not meet the required criteria of statehood has a declaratory nature. In fact in this circumstance non-recognition does not produce other effects, it only acknowledges a factual situation[57].

What is important to understand is whether non-recognition denies to the entity - object of the measure - the legal capacity (therefore its abstract suitability to be the addressee of international norms), the capacity to act (i.e. carrying out valid acts) or only materially the possibility to act[58].

It can be the case of an independent and effective entity, equipped with the material capacity to enter into legal relationship with other States (as required by the fourth criterion of the Montevideo Convention in order to be considered "The State as a *person* of International Law") but which cannot materially implement this capacity. This can happen because it is isolated by the International Community. In this hypothesis the material capacity to act would be limited and consequently also its legal situation, not its personality.

According to some authors, the fourth criterion of the Montevideo Convention, spells out exclusively the quality of independence and effectiveness that a State has to possess in order to be considered an autonomous imputation centre of legal situations, both active and passive, and therefore a "person of International Law". The circumstance that a State can actually activate its abstract legal capacity, carrying out acts productive of valid effects, is subdued to the circumstance that this entity can materially enter into legal relationship with other states[59]. If this does not happen, because the entity in question is not recognized by the International

[57] This conslusion does not want to simplify the situation on a factual ground. In fact most of the cases show how it is diffucult to understand if the entity object of non –recognition in fact meets the required criteria or instead it does not (e.g. Manchukuo, TRNC).

[58] See Quadri, R., on the distinction between capacity to act and the mere possibility, in *Diritto internazionale pubblico*, Liguori, 1989, p. 461.

[59] *Restatement of the Law (Third)*, *Foreign Relations Law of the United States;* paragraph 201 spell out that a State, in addition to possess a territory, a population and a government, it is an entity *"... that engages in, or has the capacity to engage in, formal relations with other such entities"*.

Community or by part of it, it does not prevent the entity from being equipped of a quality which could remain totally or partially at a potential level. Moreover, this non-recognition could be a consequence of the unlawful creation of the state or more simply the effect of a discretional and political choice undertaken by other states which consider this entity as an enemy[60].

As previously stated, the aim of non-recognition is to isolate socially, and therefore legally, the new entity, preventing it from entering into relation with the other states.

Consequently the logical sequence: *de facto* (internal) statehood, external statehood, whole personality should be interrupted because effectiveness, the guiding principle of this sequence, ceases towards the implantation of criteria of legitimacy.

## 4. The ILC 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts

The Articles of the International Law Commission (ILC) on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility) provide in Art. 41(2) that "no State shall recognize as lawful a situation created by a serious breach" of an obligation arising under a peremptory norm of general International Law[61]. A peremptory norm of general International Law (*ius cogens*) is defined as a norm which is 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[62].

[60] Tancredi, *La secessione nel diritto internazionale,* p. 754.

[61] General Assembly Resolution 56/83 (2001), 12 December 2001, Annex. The General Assembly took note of the articles and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action (ibid., para. 3).

[62] Vienna Convention on the Law of Treaties (VCLT), 23 May 1969 (1155 UNTS 331), Art.

The ILC identified as *ius cogens* the prohibition of aggression and the illegal use of force, the prohibitions against slavery and the slave trade, genocide and racial discrimination and apartheid, the prohibition against torture, the basic rules of international humanitarian law and the right of self-determination[63]. The following norms have been added to these: the prohibition of cruel, inhuman or degrading treatment [64] and crimes against humanity, the prohibition of piracy, and the principle of permanent sovereignty over natural resources[65]. The German Constitutional Court considered even the 'basic rules for the protection of the environment' as forming part of *ius cogens*[66].

In its Articles on State Responsibility, the ILC has extended the obligation "not to recognize as lawful" beyond aggression and the illegal use of force to all situations created by a serious breach of a *ius cogens* obligation.

While there is some State practice with regard to the non-recognition of situations created by a serious breach of the right of self-determination of peoples and the prohibition of racial discrimination (the prohibition of apartheid)[67], there is virtually no such practice to support a duty of non-recognition with regard to situations created by serious breaches of other *ius cogens* norms such as the prohibitions of slavery and the slave trade, genocide, torture and other cruel, inhuman or degrading treatment, crimes against

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[63] Report of the International Law Commission, 53rd Session, GAOR, 56th Session, Supp. No. 10 (A/56/10), 2001, pp. 283-284, paras. 4,5.

[64] German Federal Constitutional Court, 2nd Chamber, Order of 24 June 2003, 2 BvR685/03, BVerfGE 108, p. 129, at para. 67.

[65] See e.g. Brownlie, I., *Principles of Public International Law*, Oxford University Press, 2003, p. 489.

[66] Order of the German Federal Constitutional Court of 26 October 2004, 2 BvR 955/00, Deutsches Verwaltungsblatt 2005, pp. 175-183, at p. 178 (translation supplied).

[67] But see the statement made on behalf of Australia in the East Timor case: *"Australia denies that States are under an automatic obligation, under general International Law, not to recognize or deal with a State which controls and administers a territory whose people are entitled to self-determination. There is no automatic obligation of non-recognition or non dealing, even though that State may be denying the people the right to self-determination"* (CR 95/14, 16 February 1995, p. 36, para. 5 (James Crawford)).

humanity, or the basic rules of international humanitarian law. In view of the lack of State practice, it has rightly been questioned whether customary International Law knows of a general duty of non-recognition of all situations created by a serious breach of *ius cogens*[68].

## 5. Non-recognition of unlawful territorial situations

The problem of non-recognition as discussed in section 3 is connected with the creation of States. Once dealt with the issue of an entity that does not meet the criteria of statehood, it is necessary to focus on the hypothesis of a State created in violation of International Law. In fact it is true that non-recognition concerned entities unlawfully originated but the same can be said as for unlawful territorial situations[69].

In other words, the problem is to understand what happens when there is such a violation of International Law that creates an objective illegality and invalidity.

In this case non-recognition is said to "bar the legality" of the act or situation in question, unless otherwise legalised[70].

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[68] Order of the German Federal Constitutional Court of 26 October 2004, 2 BvR 955/00, Separate Opinion of Lübbe-Wolff, available at <http://www.bundesverfassungsgericht.de>. See also Dawidowicz, M., *The Obligation of Non-Recognition of an Unlawful Situation* in Crawford, J., Pellet, A., Olleson, S., *The Law of International Responsibility,* Oxford University Press, 2010, p. 683; Talmon, S., *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 Tomuschat, C., Thouvenin, J. M., *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes,* BRILL, 2006, pp. 99-125. In particular at p. 117 the author asks: *"what are the legal effects that can be denied by other States arising from factual situations created by acts of slavery, genocide, crimes against humanity, racial discrimination, torture, the violation of the basic rules of international humanitarian law and other norms of jus cogens?".*

[69] *Idem,* p. 179.

[70] See letter from Secretary Stimson to Senator Borah, February 24, 1933, quoted in Wright, The Stimson Note of January 7, 1932, 26 A. J. I. L., 1932, 342, at p. 343.

In fact, in case of an alleged serious violation of International Law, foreign States, being themselves interested parties, would necessarily claim the right to satisfy themselves of the legality of the act or situation in question before treating it as valid. Otherwise recognition may have the effect of creating or conferring rights previously non-existent[71].

Before dealing with the concept of non-recognition, it is important to recall the practice of states concerning unlawful territorial situation. The aim is to better understand the logics that underpin International Law and evaluate more accurately the nature, origin, scope and content of this duty.

### 5.1. State practice

#### 5.1.1. Palestine

The application of the non-recognition of territorial annexations made through the use of military force was particularly affirmed during the Israeli occupation of the Palestinian territories in 1967. On that occasion, more than once, and with particular reference to invalidity of every unilateral act aimed at changing the *status* of Jerusalem[72], or to annex the Syrian territories occupied in the Golan Heights to Israel[73], the organs of the United Nations affirmed the illegitimacy and invalidity of any measure aimed at consolidating or delaying the illegitimate situation, in some resolutions expressly asking for non-recognition. In response, for example, to the approval by the Israeli Parliament of a law declaring the modification of the status of Jerusalem, the Security Council - with Resolution 478 (1980) of 20 August 1980 - stated that

[71] Chen, *The Doctrine of non-Recognition,* p. 413.

[72] see General Assembly Resolutions 2253 (ES-V) of July 4th 1967, 2254 (ES-V) of July 14th 1967, ES-7/2 of July 29th 1980, 35/169E of December 15th 1980, 36/120E; see Security Council Resolutions 252 (1968), May 21st 1968, 267 (1969) of July 3rd 1969, 298 (1971)of September 25th 1971, 446 (1979) of April 22nd 1979, 465 (1980) of March 1st 1980, 476 (1980) of June 30th 1980, 478 (1980) of August 20th 1980.

[73] See Security Council Resolution 497 (1981) adopted on December 17th 1981 and Resolution ES-9/1 adopted by General Assembly on December 5th 1982.

this provision was "not to recognize the 'basic law' and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem"[74] also requesting to states that had established diplomatic missions in Jerusalem to arrange for their withdrawal. The same considerations were shared by the General Assembly in resolutions 36 / 120E of 10 December 1981, 37 / 123C of 16 December 1982, 39 / 146C of 14 December 1984. (

### 5.1.2. East Timor

In this case[75] the issue concerned Australia's recognition of the Indonesian occupation of East Timor in the 1989 Timor Gap Treaty. Already in January 1978 Australia had recognised *de facto* that East Timor's incorporation into Indonesia (which had been effected by means of an invasion of the territory, a former Portuguese colony, by the Indonesian armed forces in 1975). The Australian Foreign Minister, citing the "reality with which we must come to terms", stated that, "the [Australian] Government has decided that although it remains critical of the means by which integration was brought about it would be unreasonable to continue to refuse to recognize *de facto* that East Timor is part of Indonesia[76]". In March 1986 the Australian Minister for Resources and Energy stated that, "It is our understanding that there is no binding international legal obligation not to recognise the acquisition of territory that was acquired by force" [77]. In February 1991 Portugal had instituted proceedings in the International Court of Justice against Australia[78] with respect to a treaty which the latter had concluded with Indonesia for exploitation of natural resources in the East Timor. Portugal affirmed that

[74] Security Council Resolution , 478 (1980) of August 20th 1980, §5.
[75] Case concerning East Timor, *Portugal v Australia* (hereinafter: "*East Timor*"), ICJ Reports 1995, §90.
[76] *Ibidem.*
[77] *Idem,* Dissenting Opinion of Judge Skubiszewski, §263.
[78] Pursuant to their respective acceptances of compulsory jurisdiction under Article 36.2 of the International Court of Justice Statute

Australia had violated the rights of East Timor to self-determination and to permanent sovereignty over its natural resources by concluding the treaty and acting to implement it. Furthermore Portugal maintained that Australia contravened Security Council Resolutions 384 and 389[79]. Australia challenged the jurisdiction of the court, arguing that in order to decide on Portugal's application the court would have to determine the rights and obligations of Indonesia concerning East Timor. This was something the court could not do without Indonesia's consent to the proceedings[80]. In a majority decision, the ICJ accepted Australia's objection and ruled that it had no jurisdiction to hear the case. This approach was firmly characterised as illegal by Judge Skubiszewski, who argued in his dissenting opinion that what had originally been a policy of non-recognition had been transformed into an obligation. Although Judge Skubiszewski's analysis is weakened by his omission of any supporting evidence, he maintained that non-recognition was a non-binding principle of International Law already before World War I and that it was actually Stimson's doctrine that helped make it a legal obligation: this interpretation of the history is probably incorrect. However, he went on to say in a much more compelling passage: "The rule […] of non-recognition now constitutes part of general International Law. The rule may be said to be

[79] ICJ, *East Timor*, §19.

[80] See for an in-depth analysis of the proceedings and the ruling: Bello Hippler, J., and Bekker, P. H. F., *east Timor (Port. V. Austl)* (1996), 90, *American journal of International Law* 94-98; Clark, R. S., *Timor Gap: The Legality of the "Treaty on The Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia"*, in Carey P. and Bentley G. C. (eds.), *East Timor at the Crossroads: The Forging of a Nation,* London, 1995; Clark, R. S., *Obligation of Third States in the Face of Illegality – Ruminations Inspired by the Weeramantry Dissent in the Case Concerning East Timor*, in Anghie, A., Sturgess, G., *Legal Visions of the 21st Century: Essays in Honour of judge Christopher Weeramantry*, Martinus Nijhoff Publishers, 1998; Crawford, J., *The General Assembly, the International Court and Self-Determination*, in Crawford, J., *International Law as an Open System*, Cameron May, 2002; Drew, C., *The East Timor Story: International Law on Trial,* in *European Journal of International Law,* Vol. 12, 2001, p. 651; Pummell, B. J., *The Timor Gap: Who Decides Who is in Control*, in *Denver Journal of International Law and Policy,* Vol. 26, 1998, p. 655.

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 (*ius cogens*). But that is a future development which is uncertain and has still to happen [...]. Contrary to what has been asserted [...] the obligation not to recognize a situation created by the unlawful use of force does not arise only as a result of a decision of the Security Council ordering non-recognition. The rule is self-executory[81]".

Judge Skubiszewski's view was that the discretionary nature of non-recognition

had been altered by the Charter's prohibition of the threat or use of force; although this is laudable from an International Lawyer's perspective, it has to be said that -again- the Judge did not support his interpretation with any evidence, except the Declaration on Friendly Relations[82].

### 5.1.3. Kuwait

Kuwait illustrates what might be described as the more classical application of the doctrine of non-recognition, in that the territorial change was brought about following an unlawful use of force in violation of Article 2(4) of the Charter.

In this case, it was not the purported creation of a new "State" that was objectionable, but rather the incorporation of one State wholesale into the territory of another. The Iraqi invasion of Kuwait in August 1990 was followed almost immediately by a formal declaration of the annexation of

[81] Case concerning East Timor, *Portugal v Australia*, ICJ Reports 1995, Dissenting Opinion of Judge Skubiszewski, §262-263.

[82] General Assembly Resolution 2625 (XXV) (1970), §10. The resolution was adopted without a vote, which if anything gives it more force as evidence of customary International Law than Resolution 375. See also Murphy, J. F., *Force and Arms*, in Schachter, O., Joyner, C. C., *United Nations Legal Order*, Cambdridge University Press, Vol. 1, 1995, pp. 283-284.

Kuwait and its incorporation into Iraq as the latter's "19th province". The Security Council reacted very quickly to the annexation by passing Resolution 662, which condemned what it called the "merger" of Kuwait into Iraq and declared it "null and void", calling upon all States not to recognise the validity of the annexation. The Iraqi annexation of Kuwait, which did not last very long as Iraqi occupation forces were evicted during Operation Desert Storm in early 1991, was indeed never recognised by any State. The situation involving an illegal use of force was similar to those of Northern Cyprus and Manchukuo, but the doctrine of non-recognition was invoked against the forcible incorporation of the victim State into the territory of the aggressor. The Iraq-Kuwait episode therefore demonstrates that the contemporary doctrine of non-recognition applies not only to situations where a puppet State is created as a nominally independent entity (thereby raising questions of statehood and recognition) but also to situations where there is no new entity but simply the illegal extinction of an old one.

### 5.1.4. Abkhazia and South Ossetia

After the 2008 Georgian-Russian war and subsequent Russian military occupation of Abkhazia and South Ossetia, the Russian president signed decrees on the recognition of Abkhazia's and South Ossetia's independence and the establishment of diplomatic relations with them[83].

Before Russian occupation, the unrecognized Republic of Abkhazia and the unrecognized Republic of South Ossetia did not completely control their respectively claimed territories. In fact Russian military bases were established in Abkhazia and South Ossetia. Moreover, Russia does not allow the European Union Monitoring Mission to enter either Abkhazia or South Ossetia. Russia has signed agreements with the *de facto* civilian

[83] Information available on the official web portal of the President of Russia, at: http://www.kremlin.ru/eng/text/news/2008/08/205754.shtml

administrations of both territories to integrate them militarily and economically into Russia.

Abkhazia lacks substantive recognition by the International Community, and that is why it has to be regarded as a *de facto* state. Abkhazia is recognized as a state by one major power of the day, the Russian Federation, but others have not followed Russia's steps in this regard. Georgia, the "mother state" which Abkhazia was seeking to leave, has not recognized Abkhazia and it cannot be said that there were no objections from Georgia to other states recognizing Abkhazia. On 28 August 2008, the Georgian parliament adopted the resolution, in which it resolved:

"1. To declare the Russian armed forces, including the so-called peacekeeping forces, currently deployed on the territory of Georgia, as occupying military units.

2. To declare the Autonomous Republic of Abkhazia and the former Autonomous Region of South Ossetia as territories occupied by the Russian Federation.

6. To entrust the executive authorities of Georgia with the task of breaking off the diplomatic relations with the Russian Federation[84]".

Thus, on 2 September 2008, Envoy Extraordinary and Plenipotentiary of the Russian Federation to Georgia received two notes from the Ministry of Foreign Affairs of Georgia indicating termination by Georgia of the Protocol of 2 July 1992 on the establishment of diplomatic relations between the then Republic of Georgia and the Russian Federation. The second document notified the Russian side that Georgia would maintain consular relations with the Russian Federation[85].

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[84] Resolution of the Parliament of Georgia N243 on the Occupation of the Georgian Territories by the Russian Federation (28 August 2008), §1, 2, 6, available on the official website of the Parliament of Georgia, at:
http://www.parliament.ge/index.php?lang_id=ENG&sec_id=98&info_id=20047

[85] See information for the Press issued by the Press and Information Department of the Ministry of Foreign Affairs of Georgia on 2 September 2008, available on the official

As in respect of Nicaragua, it has to be stressed that in connection with the recognition by the latter of the independence of Abkhazia and South Ossetia on 2 September 2008, the Georgian government adopted a decision to terminate the Protocol of 19 September 1994 on the establishment of diplomatic relations between the two countries, and the Ministry of Foreign Affairs of Georgia transmitted an official note on the termination of diplomatic relations between the two states to the Mission of the Republic of Nicaragua to the UN[86]. Abkhazia does not meet the criterion, according to which, the recognition by a majority of countries in the UN General Assembly is required. Abkhazia and South Ossetia have been recognized by the Russian Federation, the Republic of Nicaragua, the Bolivarian Republic of Venezuela and Nauru[87].

Neither can it be asserted that Abkhazia participates in global and regional international organizations[88]. It has to be noted at this point that the genuineness of the secessionist aspirations in Abkhazia and South Ossetia has been regarded as a problematic issue because "the trend of *de facto* annexation of the secessionist entities to Russia remained predominant[89]". Not only did the Russian Federation impose a discriminatory visa regime, on the basis of which, residents of Abkhazia and South Ossetia were privileged from the visa

website of the MFA of Georgia, at: http://mfa.gov.ge/index.php?lang_id=ENG&sec_id=30&info_id=7853

[86] Information on the termination of diplomatic relations between Georgia and the Republic of Nicaragua issued by the Press and Information Department of the Ministry of Foreign Affairs of Georgia on 28 November 2008, available on the official website of the MFA of Georgia, at: http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=30&info_id=8467

[87] Venezuela Recognizes Abkhazia, S. Ossetia [10 September 2009], available on the website of the Civil Georgia (Daily News Online), at: http://www.civil.ge/eng/article.php?id=21449&search

[88] According to the information available on the website of the Ministry of Foreign Affairs of the Republic of Abkhazia, Abkhazia's international organization participation encompasses the Unrepresented Nations and Peoples Organization (UNPO) and the Community for Democracy and Rights of the Peoples:
http://www.mfaabkhazia.org/blok_poleznaya_informaciya/obwaya_informaciy/

[89] See Popescu, N., *Europe's Unrecognised Neighbours: The EU in Abkhazia and South Ossetia,* CEPS Working Document No. 260 / March 2007, p. 22.

requirement in contrast to the rest of Georgia, but Moscow began to extend Russian citizenship *en masse* to the population of these two territorial entities. This process was followed by a claim to defend the interests of Russian citizens abroad, the staffing of government officers with Russian security service personnel and discussions of annexation by Russia of the two regions[90].

### 5.1.5. Crimea

Non-recognition practice concerning the recent situation in Crimea has been quite significant, yet so far limited to the non-recognition of the referendum held on 16 March 2014 and of the ensuing annexation by Russia[91]. At the present early stage, it has not extended to the avoidance of implied forms of recognition. In this latter respect one may only mention reports concerning the decision of the European Organisation for the Safety of Air Navigation (Eurocontrol), acting in cooperation with the International Civil Aviation (ICAO) and the European Safety Aviation Authority (EASA), recommending to international operators that they avoid flying into Crimean airports and through Crimea Airspace and not recognising the provision of air navigation services other than from Ukrainian official authorities[92]. As far as the non-

[90] Cornell, S. E., Frederick Starr, S., *The Caucasus: A Challenge for Europe*, Central Asia-Caucasus Institute & Silk Road Studies Program, Silk Road Paper, June 2006, pp. 55-56.

[91] See Milano, E. *Reactions to Russia's Annexation of Crimea and the Legal Consequences Deriving from Grave Breaches of Peremptory Norms,* in Czakpinski, W., Debski, S., Tarnogòrski R., Wierczynska, K., *The Case of Crimea's Annexation Under International Law*, Warsaw, 2017, pp. 201-223; Arcari, M., *International Reactions to the Crimea Annexation under the Law of State Responsibility: "Collective Countermeasures and" and Beyond?* in in Czakpinski, W., Debski, S., Tarnogòrski R., Wierczynska, K., *The Case of Crimea's Annexation Under International Law*, Scholar, 2017, pp. 223-237.

[92] European air traffic regulator suspends flights to Crimea, 2 April 2014, <http://en.itar-tass.com/russia/726248>, accessed 29 April 2014. See ICAO State Letter (2 April 2014) Doc.EUR/NAT 14-0243.TEC (FOL/CUP), www.public.cfmu.eurocontrol.int/PUBPORTAL/gateway/spec/PORTAL.18.0.0.4.49/_res/140243Simferopol.pdf.

recognition of the referendum and of Russia's annexation is concerned, the relevant practice is predominantly, but not exclusively, originating from Western countries and organizations. In a statement issued on 12 March 2014, the G-7 leaders have declared that. "[…] such referendum would have no legal effect. Given the lack of adequate preparation and the intimidating presence of Russian troops, it would also be a deeply flawed process which would have no moral force. For all these reasons, we would not recognize the outcome"[93]. According to the joint statement issued by the President of European Commission, Josè Barroso, and the President of the European Council, Herman Van Rompuy, on 16 March 2014 "the European Union considers the holding of the referendum on the future status of the territory of Ukraine as contrary to the Ukrainian Constitution and International Law. The referendum is illegal and illegitimate and its outcome will not be recognised[94]" On the same day and on a similar tone, the White House has declared that "[the] referendum is contrary to Ukraine's constitution, and the International Community will not recognize the results of a poll administered under threats of violence and intimidation from a Russian military intervention that violates International Law"[95]. NATO's Secretary-General, Anders Rasmussen, on 19 March, stated that "Crimea's annexation is illegal and illegitimate, and NATO Allies will not recognize it[96]". At the level of the United Nations, the draft resolution concerning the referendum in Crimea and presented by 41 countries

[93] Statement of G-7 Leaders on Ukraine (12 March 2014). Available at: www.whitehouse.gov/the-press-office/2014/03/12/statement-g-7-leaders-ukraine.

[94] Joint statement on Crimea by the President of the European Council, Herman Van Rompuy, and the President of the European Commission, José Manuel Barroso (16 March 2014). Available at: <http://ec.europa.eu/commission_20102014/president/news/archives/2014/03/20140317_1_n.htm>, accessed 29 April 2014.

[95] White House, Statement by the Press Secretary on Ukraine (16 March 2014). Available at: <www.whitehouse.gov/the-press-office/2014/03/16/statement-press-secretary-ukraine>, accessed 29 April 2014.

[96] NATO Secretary General condemns moves to incorporate Crimea into Russian Federation', 18 March 2014. Available at: <www.nato.int/cps/en/natolive/news_108100.htm>, accessed 29 April 2014

(predominantly Western countries) for approval by the Security Council at the meeting of 15 March was vetoed by Russia, with only China abstaining in the vote[97]. The resolution reaffirmed in the preamble that 'no acquisition of territory resulting from the threat or use of force shall be recognised as legal'; it declared that the referendum could "not have legal validity" and could "not form the basis for any alteration of the status of Crimea"; and it "call[ed] upon all States, international organizations and specialized agencies not to recognise any alteration of the status of Crimea on the basis of this referendum and to refrain from any action or dealing that might be interpreted as recognising such altered status". During the meetings of the Security Council of 15 and 19 March calls for the non-recognition of the results of the referendum and of the prospective annexation by Russia were voiced by the delegations of France, the United Kingdom, Lithuania, Australia, Jordan, Ukraine and Luxembourg. On 24 March, the UN General Assembly approved a draft resolution proposed by Poland, Lithuania, Germany, Canada, Ukraine and Costa Rica, with 100 votes in favour, 11 against and 58 abstentions, titled "Territorial integrity of Ukraine". Paras. 5 and 6 of the operative part of the resolution reiterate, in almost identical words, the determinations made in the draft Security Council resolution vetoed by Russia a few days earlier; it includes the call for non-recognition of "any alteration of the status of the Autonomous Republic of Crimea and of the city of Sevastopol" and to avoid "any action or dealing that might be interpreted as recognizing such altered status[98]". The delegations of the EU, Norway, Georgia, Turkey, Liechtenstein in their statements have expressly referred to the need for non-recognition of the outcome of the referendum and of Russia's annexation of Crimea[99].

[97] UNSC Draft Resolution, UN Doc S/2014/189; UNSC Verbatim Record (15 March 2014) UN Doc S/PV.7138.
[98] UNGA Res 68/262 (24 March 2014).
[99] UNGA Verbatim Record (24 March 2014) UN Doc A/68/PV.80.

## 6. Non-recognition of other unlawful situations

So far we have analysed two specific cases: the hypothesis of an entity which does not meet the requirements of statehood and the one concerning unlawful territorial acquisitions.

Therefore, it is necessary to examine the cases in which non-recognition is related to other unlawful situations.

### 6.1. State practice

#### 6.1.1. South Rhodesia

Another example of the use of non-recognition can be identified in the South Rhodesia case, which run the gamut from a unilateral declaration of independence in violation of the principle of self-determination.

In fact in the case of the British colony of Southern Rhodesia, a white minority regime under Prime Minister Ian Smith unilaterally declared independence (under the name of Rhodesia) in November 1965. One day later, the Security Council passed Resolution 216 (1965), in which it condemned the unilateral declaration of independence by the "racist minority" and called upon all States "not to recognise this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance". No State recognized Rhodesia until the advent of black majority rule in 1980, when it became the independent State of Zimbabwe; between 1965 and 1980, it was generally regarded as a *de iure* British colony that was under the *de facto* administration of an unrecognised regime, having illegally purported to declare independence[100].

The basis of the UN's attitude to Rhodesia may have been partly influenced by

[100] See *Adams v. Adams*, 1971 Probate Div. 188, in which an English court refused to recognise the validity of a divorce decree granted by a Rhodesian judge appointed by the Smith administration. But see also the ICJ's suggestion, in the Namibia Advisory Opinion, that the invalidity of official acts of a regime subject to non-recognition "cannot be extended 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 Reports 1971, §56.

Britain's insistence that the unilateral declaration of independence was illegal as a matter of British constitutional law, but the main context in which the case was undoubtedly seen was that of the decolonization process, wherein the right of self-determination of peoples was accorded paramount importance. The general condemnation of the Smith regime as racist for denying the majority black population any say in the running of the country was a major factor in the mandating and securing of international non-recognition for the regime, as made clear in General Assembly Resolution 2379 (1968), which referred explicitly to the UN's demand for a government based on majority rule in Southern Rhodesia[101].

### 6.1.2. Namibia

The use of non-recognition in situations other than straightforward acquisitions of territory received judicial approval from the ICJ in 1971 in the *Advisory Opinion on the Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1980)* applied the doctrine of non-recognition. In this case the subject of the Advisory Opinion was the former German colony of South West Africa, which had been under South African administration since 1920, initially as a Mandate of the League of Nations. After the dissolution of the League in 1946, South Africa continued to administer South West Africa but did not place it under Trusteeship system provided for under the UN Charter as a successor to the League's Mandate system. The progressive implementation by South Africa of the policy of apartheid in South West Africa had led to a series of resolutions by both the General Assembly and the Security Council, as well as a legal challenge in the ICJ by Ethiopia and Liberia, in which the legality of the South African administration in South West Africa was contested. The most important of the

[101] This was contained in General Assembly Resolution 1514 (XX) (1966).

UN resolutions were those of the General Assembly stating that the South African Mandate in South West Africa was terminated[102], and of the Security Council declaring the continued presence of the South African authorities in South West Africa to be illegal and requiring all States "to refrain from any dealings with the government of South Africa[103]".

In its Advisory Opinion, the ICJ confirmed that Security Council resolutions were binding on all UN Member States and that all Member States were therefore under an obligation to refrain from recognising South Africa in any capacity in which the latter purported to represent South West Africa[104] .

The Court emphasized the general applicability of the duty of non-recognition in the following terms: "In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of International Law […][105]"

The obligation in respect of the particular case at hand was perhaps rather unhelpfully framed by the Court in terms of a duty to recognise the illegality of the South African presence in South West Africa rather than a duty not to recognise or to refrain from recognising the legality of the situation there. In particular in the Advisory Opinion at paragraph 119 the Court expressed that: "The member States of the United Nations are, for the reasons given in paragraph 115 above, under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance

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[102] South West Africa Cases (Second Phase), ICJ Reports 1966, 3. Although the ICJ censured South Africa's policies in South West Africa, it also held that Ethiopia and Liberia did not have *locus standi* to bring the case.

[103] Security Council Resolution 276 (1970).

[104] 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 of 21 June 1971 (hereinafter: *"Namibia Advisory Opinion"*), §126.

[105] *Ibidem*.

to South Africa with reference to its occupation of Namibia, subject to paragraph 125 below[106]". In so doing, the court expressed the positive and negative content of the duty of non-recognition.

In particular, concerning the negative obligation, the Court stated at paragraphs 122, 123, 124: "For the reasons given above, and subject to the observations contained in paragraph 125 below, member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, Member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental cooperation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.

Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.

The restraints which are implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of paragraph 5 of resolution 276 (1970) impose upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa

[106] ICJ, *Namibia Advisory Opinion*, 1971, §122.

on behalf of or concerning Namibia which may entrench its authority over the Territory[107]".

Arguably the ICJ's wording converts the duty from one of non-recognition (which could be passive such as a simple refusal to have anything to do with the objectionable entity) to one of active recognition, albeit of a negative attitude (such as official statement refusing to recognise, as opposed to simply not recognising)[108]. The general meaning is clear insofar as the duty of non-recognition of a "situation" maintained in violation of International Law is an obligation *erga omnes*, and that such situations can extend to those not involving outright conquest or annexation of territory.

Thus the overall effect of the Advisory Opinion is to endorse the Stimson Doctrine, despite the fact that it does not expressly identify it as such, whilst also reinforcing its essence: the principle of non-recognition has metamorphosed into a judicially sanctioned duty in the case of any situation which is the result of a violation of International Law, whether that situation entails the incorporation of territory by an existing entity or the creation of a new territorial entity; and moreover, it is stated to be a duty *erga omnes*.

### 6.1.3. Wall Advisory Opinion

The Court advised that the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, were contrary to International Law. It held that Israel had violated certain obligations *erga omnes* including the obligation to respect the right of the Palestinian people to self-determination, certain rules of humanitarian law applicable in armed conflict which are fundamental to the respect of the human person and

[107] *Idem,* §122, 123, 124.

[108] Turns, D., *The Stimson Doctrine of Non-recognition: its Historical Genesis and Influence on Contemporary International Law,* in *Chinese Journal of International Law,* Vol. 2, pp. 105-141, at p. 132.

elementary considerations of humanity, and Art. 1 common to the four Geneva Conventions[109]. The Court then stated: "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. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction[110]".

It is important to underline here the reasoning of the Court. In fact it asserted that it is mainly the *erga omnes* nature of the obligations involved which gives an explanation of the collective commitment of third States not to recognize the legal effects of the situation created through the breach of such obligations. It is to say, as Arcari explains, that: "when all States are required not to recognize the legal effects of territorial acquisitions carried out through the use of force, it is primarily the *erga omnes* nature of the prohibition of aggression that comes to the forefront[111]"

### 6.1.4. The US Embassy to Jerusalem

The United States recognised Jerusalem as the capital of the State of Israel on December 6, 2017[112]. By this act they violated their obligation to acknowledge

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[109] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 2004, (hereinafter: "*Wall in the Occupied Palestinian Territory*"), §155-158. Available at http://www.icj-cij.org.

[110] *Wall in the Occupied Palestinian Territory*, §159. See also the written statement by France to the ICJ, dated 30 January: *"Since it is internationally wrongful, the act of constructing the wall on the Occupied Palestinian Territory also entails legal consequences for third States and international organizations. Inter alia, they are under an obligation not to recognize as lawful the situation created by the route taken by this wall".*

[111] Arcari, M., *The Relocation of the US Embassy to Jerusalem and the Obligation of Non-recognition in International Law*, in QIL, 50, (2018) 1-13, p. 7.

[112] See for a full analysis: Hughes, D., *The US embassy in Jerusalem: Does location matter?,* in *Questions of International Law*, Vol. 50, 2018, pp. 15-32; Arcari, M., *The Relocation of*

that the eastern part of the city has been unlawfully occupied since 1967 and that such an occupation precludes Israel from claiming sovereignty on the city[113]. Consequently, in so doing they endorsed Israel's claim to exercise sovereignty over the city and contravened International Law[114] even if "the United States continues to take no position on any final status issues" and "is not taking a position on boundaries or borders"[115]. It was stressed that "the foreign policy of the United States is grounded in principled realism, which begins with an honest acknowledgment of plain facts[116]" and therefore no legal justification was given[117]. This argument, as Lagerwall clearly assesses, is "reminiscent of the skeptical stance which has sometimes been adopted towards non-recognition since its emergence as a legal obligation"[118]. It goes without saying that among scholars[119] there were some concerns about the risk that it would "unduly divorce International Law from the reality and practice of States"[120].

In 1980 Israel enacted a law affirming that Jerusalem, "complete and united", was its capital city[121]. Consequently the Security Council condemned the decision as a violation of International Law, deciding "not to recognise the

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*the US Embassy*, pp. 1-13; Lagerwall, A., *Non-recognition of Jerusalem as Israel's Capital,* pp. 33-46.

[113] UN Doc S/RES/476 (1980) (30 June 1980) para 3; UN Doc S/RES/478 (1980) (20 August 1980), §2, 4.

[114] Lagerwall, A., *Non-recognition of Jerusalem as Israel's Capital,* p. 33.

[115] Proclamation 9683 of 6 December 2017, *Recognizing Jerusalem as the Capital of the State of Israel Relocating the United States Embassy to Israel to Jerusalem, Federal Register,* Vol. 82, n. 236 (11 December 2017) 58331; See also, Statement by the United States before the Security Council, UN Doc S/PV.8128 (8 December 2017), §11.

[116] Proclamation 9683 (n 2), *Ibidem*. See also, Statement by the United States before the Security Council, UN Doc S/PV.8128 (n 2) 11 and UN Doc S/PV.8139 (18 December 2017) §4.

[117] Lagerwall, A., *Non-recognition of Jerusalem as Israel's Capital*, p. 33.

[118] *Ibidem*.

[119] Visscher, C., *De l'effectivité dans les rapports interétatiques* in *Théories et réalités en droit international public,* Pedone, 1970, p. 319; Rousseau, *Le conflit italo-éthiopien (suite et fin*, in *Revue Générale de Droit International Public*, Vol. 45, 1938, pp. 83-123.

[120] Lagerwall, A., *Non-recognition of Jerusalem as Israel's Capital*, p. 34.

[121] Basic Law: Jerusalem, capital of Israel, 1980, unofficial translation available at <www.knesset.gov.il/laws/special/eng/basic10_eng.htm

'basic law' and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem", and called upon those States that had diplomatic missions at Jerusalem "to withdraw such missions from the Holy City"[122]. As a result the majority of the States had removed their embassies from Jerusalem; the last to do so were Costa Rica and El Salvador in 2006[123]. In 2016 the Security Council emphasized that "the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under International Law" and called upon all States "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967"[124]. The General Assembly on December 21, 2017 (a few weeks after the US recogniton), called upon all States "to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to Council resolution 478 (1980)"[125]. It is important to underline that the words used were the same as the ones of a draft resolution submitted to the Security Council which was not adopted because of the negative vote of the United States[126]. This veto lead the General Assembly to act upon the powers conferred by Resolution 377 A Uniting for Peace[127].

For the present analysis it is worth noting that on these occasions, States affirmed "that they felt bound by such a duty not to recognise Jerusalem as Israel's capital and not to establish their diplomatic premises in the city"[128]. Many of them emphasized that they did not recognise "Israel's annexation of

[122] UN Doc S/RES/478 (1980) (20 August 1980) paras 2 and 4

[123] El Salvador to Move Embassy From Jerusalem to Tel Aviv' *Haaretz* (25 August 2006).

[124] UN Doc S/RES/2334 (2016) (23 December 2016) paras 1 and 4.

[125] UN Doc A/RES/ES-10/19 (2017) (21 December 2017) para 1. The resolution was adopted by 128 against 9, with 35 abstentions.

[126] Lagerwall, A., *Non-recognition of Jerusalem as Israel's Capital*, p. 36.

[127] Draft resolution submitted by Egypt, UN Doc S/2017/1060 (18 December 2017); See the debates in the Security Council and the result of the vote: UN Doc S/PV.8139 (n 3) 3: Bolivia, China, Egypt, Ethiopia, France, Italy, Japan, Kazakhstan, Russia, Senegal, Sweden, Ukraine, United Kingdom, Uruguay voting in favour, United States voting against.

[128] Lagerwall, A., *Non-recognition of Jerusalem as Israel's Capital*, p. 37.

East Jerusalem", which they considered "part of occupied territory"[129]. They also specified that their embassies were in Tel Aviv and that they would remain there[130]. As Lagerwall expresses: "their statements seem to confirm that non-recognition is an obligation pertaining to general International Law, an obligation that thus exists irrespective of any resolution adopted by the United Nations characterising the situation in question as unlawful and/or calling upon States not to recognise it[131]". The US recognition was considered by many States a breach of "International Law and Security Council resolutions"[132]. Others evoked "unilateral decisions that are at odds with International Law" or "contrary to International Law"[133] without mentioning explicitly Security Council resolutions[134]. France reasserted its "collective commitment to International Law, including the resolutions of the Council, on the essential question of the status of Jerusalem"[135]. Non-recognition certainly constitutes one of the many expressions of the principle *ex iniuria ius non*

[129] Communication of the coordinating bureau of the non-aligned movement (NAM) on violations and provocations regarding the status of Jerusalem (5 December 2017) para 1; Resolution 8221 adopted by the extraordinary session of the Council of the League of Arab States at Ministerial Level (9 December 2017) Preamble, UN Doc A/72653-S/2017/1046 (15 December 2017) 2-3; Statements made before the Security Council by Sweden (4), Egypt (5), United Kingdom (6), France (7), Bolivia (9), UN Doc S/PV.8128 (n 2); Statements made before the Security Council by Bolivia, UN Doc S/PV.8138 (18 December 2017) 8; Statements made before the General Assembly, 10th emergency special session, by Yemen (2), Turkey (5), Pakistan (10), Indonesia (11), Maldives (12), Syria (12), Bangladesh (13), Cuba (14), Iran (14), Malaysia (15), North Korea (16), South Africa (16) UN Doc A/ES-10/PV.37 (21 December 2017).

[130] Statements made before the Security Council by United Kingdom (6), Italy (10) UN Doc S/PV.8128 (n 2); Statement made before the General Assembly, 10th emergency special session, by Canada UN Doc A/ES-10/PV. 37 (n 21) at 20.

[131] Lagerwall, A., *The Non-recognition of Jerusalem as Israel's Capital*, p. 37.

[132] Resolution 8221 adopted by the extraordinary session of the Council of the League of Arab States at Ministerial Level (n 21) para 1; Statements before the Security Council by Sweden (4), Palestine (16) UN Doc S/PV.8128 (n 2); Statements before the Security Council by Egypt, UN Doc S/PV.8139 (n 3) 2.

[133] Statements made before the Security Council by Egypt (5) and Bolivia (8), UN Doc S/PV.8128 (n 2).

[134] Lagerwall, A., *Non-recognition of Jerusalem as Israel's Capital*, p. 37.

[135] Statements made before the Security Council by France, UN Doc S/PV.8128 (n 2) 7; See also during the same debates, Russia (14) and Jordan (19)

*oritur*. This does not only provide an insight as to the reason why States should not recognise a situation created in violation of imperative norms of International Law. As Lagerwall points out it "proves helpful in indicating what exactly constitutes the object of non-recognition: it is the legal claim (*ius)* based on the violation of International Law (*ex iniuria*) that is null and void and should thus not be recognised"[136]. With respect to Jerusalem, what should not be recognised is primarily the claim made by Israel that it enjoys sovereignty over Jerusalem and that Jerusalem is its capital. But as Lagerwall well expresses "non-recognition also applies to the claim made by the United States that Israel enjoys sovereignty on Jerusalem and that Jerusalem is its capital as this claim also stems from a violation of International Law"[137]. In this case in fact "non-recognition applies not only to the legal claims made by the perpetrator of the wrongful act but also to the claims made by third States, as long as these claims also find their root in the unlawful situation"[138].

**7. The legal nature of non-recognition of unlawful situations**

First of all, the International Community dealt with the case of territorial acquisitions obtained by force. State agreed not to recognize such territorial acquisitions. In fact, prior to 1945 a policy of non-recognition was supported by several Latin or Inter-American documents but in varying terms – some mandatory and some not – and in instruments of non-binding nature.

The argument in favour of the thesis that non-recognition is a binding duty is usually made in literature to the International Community's response to the creation of Manchukuo in 1931. Members of the League of Nations were satisfied that the putative state of Manchukuo had been created through the forcible intervention of Japan in Manchuria.

[136] Lagerwall, A., *Non-recognition of Jerusalem as Israel's Capital*, p. 39.
[137] Lagerwall, A., *Non-recognition of Jerusalem as Israel's Capital*, p. 40.
[138] *Ibidem*.

The same can be said in the Namibia advisory opinion. In this case the Court was asked by the Security Council to identify the legal consequences arising from the adoption by the Security Council of resolution 276. This resolution declared South Africa's continued presence in Namibia illegal and called upon States to refrain from any dealings with south Africa concerning Namibia[139]. In determining the consequences for third States of the declaration of illegality of South Africa's presence in Namibia, the Court relied on norms of general International Law in order to precisely identify the obligations incumbent upon non-member States of the UN.

### 7.1. Non-recognition as a primary obligation

A first doctrinal strand concerning non-recognition, so called "normativist[140]", considers it as a primary obligation. That definition is given because the obligation of non-recognition would arise from the objective illegality and invalidity of a given situation created in violation of International Law.

This view is also supported by the separate opinion of Judge Higgins in the advisory opinion *Legality of the Wall*. According to the British Judge "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*'"[141].

From the perspective of the source of the legal obligation one can maintain that the obligation derives from the general principle *ex iniuria ius non oritur*. This idea was expressed by Sir Lauterpacht: "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

[139] ICJ, *Namibia Advisory Opinion*, §16.

[140] Milano, E., *The non-recognition of Russia's annexation of Crimea,* in *Questions of International Law*, Vol. 1, 2014, pp. 35-55.

[141] *Wall in the Occupied Palestinian Territory*, Separate Opinion Judge Higgins, §38.

denial of its legal character. International Law does not and cannot form an exception to that imperative alternative[142]".

Another way to explain non-recognition as a primary obligation is to derive it from the *erga omnes* nature of certain subjective rights of State.

As Milano points out in the case of Russia's annexation of Crimea, Ukraine has a right "to see its territorial integrity respected, not only against forcible actions aimed at undermining it such as the Russian intervention in support of Crimea's separatist, but also against other types of actions aiming at undermining its territorial integrity, such as the recognition of the new *status quo"*[143].

This is clearly expressed in the 1970 general Assembly Declaration on friendly Relations, which spells out that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal". Also, according to the Declaration on the Strengthening of International Security adopted by the General Assembly in 1970 can be found the same concept. And also the Definition of aggression adopted in 1974 by UNGA says that "[n]o territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful[144]".

The fact that also the right of self-determination enjoys the same character (i.e. *erga omnes*) is confirmed by the wording of common Article 1 of the International Covenant for Civil and Political Rights and of the International Covenant for Economic, Social and Cultural Rights which states that "[t]he State parties to the present Covenant[s], including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect the right, in conformity with the provisions of the Charter". In the General Comment No. 12 of the Human Rights Committee it has been added that

[142] Lauterpacht, *Recognition*, p. 421.

[143] E. Milano, *The non-recognition of Russia's annexation of Crimea,* p. 36.

[144] UNGA Res 3314 (XXIX) (14 December 1974), art 6, §3.

"[t]he obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination"[145]. One can therefore maintain that any violation of the principle of self-determination will inescapably be accompanied by the duty not to recognize its legal validity and effects. As referred to above, this was the approach taken by the ICJ in the 2004 Wall Advisory Opinion[146].

### 7.2. Non-recognition as a secondary obligation

A duty of non-recognition shall arise also when the situation is the result of a "gross violation of obligations deriving from a peremptory norm" of International Law[147]. The International Law Commission in the 2001 Draft articles decided to introduce the notion of "serious violations of peremptory norms of International Law" in order to spell out an aggravated regime of State responsibility. Among the consequences of the responsibility arising out of grave breaches of peremptory norms, for example the prohibition of aggression or the obligation to respect the rights of self-determination of peoples, Article 41 (2) provides for the obligation for States not to "recognize as lawful a situation created by a serious violation" of a peremptory norm, together with the additional obligation not to render aid or assistance in maintaining that situation[148].

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[145] UNCHR, *General Comment no. 12: The Right to Self-determination of Peoples* in *Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, 13 March 1984, §6.

[146] *Wall in the Occupied Palestinian Territory,* §200.

[147] Articles 40 and 41, 2001 ILC Articles on State Responsibility with Commentary, in Report of the International Law Commission Fifty-third Session UN Doc A/56/10, pp. 277-292.

[148] ILC Articles on State Responsibility with Commentary, n. 25.

This kind of approach is also defined the "communitarian" approach[149]. It makes a distinction between violations in general and violations that, because of their gravity and because of the "public interest" underlying the affected norms, require a coordinated effort by the International Community in rendering ineffective the results deriving from the violation of International Law[150]. In this sense, it is a secondary obligation that applies notwithstanding the specific content of the primary norm which has been violated[151]; it is also less reliant on the position of the injured State, whose waiver or recognition "cannot preclude the International Community interest in ensuring a just and appropriate settlement[152]".

### 7.3. Is the obligation self-executing?

The issue of the requirement needed to trigger an obligation of non-recognition was considered by the ILC in its work on state responsibility. When first introduced in 1982 as a response to international crimes, the then Special Rapporteur's introduction and commentary to the provision on non-recognition clearly assumed that the obligation would be preceded by a finding by a competent United Nations organ, embodying the agreement of "the International Community as a whole" that an international crime had been committed[153]. The commentary further noted that usually the relevant UN organ would also determine the particular legal consequences entailed by the international crime[154]. It added that the notion of an international crime implied that individual states would still be obliged to act in such a way as not

[149] Milano, *The non-recognition of Russia's annexation of Crimea,* p. 45.
[150] *Ibidem*.
[151] *Idem,* p. 46.
[152] ILC Articles on State Responsibility with Commentary, in Report of the International Law Commission Fifty-third Session UN Doc A756/10 289-290.
[153] Third Report of the Special Rapporteur, at 48, Commentary §5, p. 49, Commentary §14-15.
[154] *Idem* at p. 48, Commentary, §5-6.

to condone the crime, but that this did not require, or indeed entitle, individual states to make their own judgment of the situation: that would instead be done by the International Community as a whole acting within the UN which would identify the wrongful act as a crime[155]. The commentary treated such unilateral action with caution, noting that "[a] single State cannot take upon itself the role of 'policeman' of the International Community[156]". Far from discussing such responses as a duty, the commentary concluded that individual states might have the right to take measures amounting to the withdrawal of support "at least pending a decision of the competent organ of the United Nations[157]".

There was no discussion in the ILC commentary as to whether the obligation was self-executing, but the cited instances of support for the obligation were themselves supporting a prior, authoritative findings by an impartial organ of the world community, thereby suggesting that in fact such a finding is necessary to activate the obligation[158]. This would seem to be confirmed by the ILC's rather opaque comment that "[c]ollective recognition would seem to be a prerequisite for any concerted community response against such breaches[159]".

Over the ensuing years, non-recognition became more firmly entrenched in ILC drafts but whether it was a self-executing obligation, or required "activat[ion] by a prior, authoritative finding by an impartial organ of the world community" that the crime - particularly that of aggression - had been committed, remained an open question[160]. Such questions continued to be

[155] *Idem* at p. 49, Commentary, §14.
[156] *Idem* at p. 45, Commentary, §140.
[157] *Idem* at p. 45, Commentary, §141.
[158] See, e.g., Report of the International Law Commission, 48th Sess., May 6-July 26, 1996, in Year Book of International Law Commission Vol. 1, art. 53, Commentary §2 (citing several Security Council resolutions – which have their own force under Article 25 of the UN Charter).
[159] Draft Articles on Responsibility of States for Internationally Wrongful Acts, §8.
[160] Sixth Report on State Responsibility by G. Arangio-Ruiz, Special Rapporteur, Vol. 2,

raised in the Sixth Committee of the General Assembly following final adoption of the draft articles by the ILC in 2001, with China expressing concern that it was unclear "who should judge whether an internationally wrongful act constituted a serious breach": if this were left to individual states, they might arrive at different conclusions and "here was a need to clarify whether, in cases involving a threat to international peace and security, for example, obligations under the draft article could arise only after the Security Council resolution had been adopted[161]". Mongolia raised the same concern, as did Sierra Leone, who would "welcome language that would prevent the assessment of the seriousness of a breach from being an arbitrary determination[162]". India commented that the chapter containing this article was "more akin to progressive development than to codification[163]".

As is apparent from the above account of the ILC's works, several states doubted that non-recognition was a self-executing obligation and the issue was not resolved in that forum. Jurists have taken differing views. In his dissenting opinion in the East Timor case, Judge Skubiszewski stated, without elaboration, that "the rule is self-executory[164]". Judge Higgins on the other hand appeared to take the contrary view in the Israeli Wall case, stating that the duty of non-recognition flowed from a binding decision of a competent organ of the United Nations, such as the Security Council or the Court, suggesting that she would require such a binding decision before such an obligation were imposed on third states[165].

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1994, in Year Book of International Law Commission, §11.

[161] U.N. G.A. Sixth Committee Summary Record, 11th mtg., §58, U.N. Doc. A/C.6/56/SR.11 (Nov. 7, 2001).

[162] U.N. G.A. Sixth Committee Summary Record, 14th mtg., §3, 54, U.N. Doc. A/C.6/56/SR.14 (Nov. 13, 2001).

[163] Idem, §39.

[164] Case concerning East Timor, *Portugal v Australia*, ICJ Reports 1995, §125, Dissenting opinion of Judge Skubiszewski, arguing that the "policy" of non-recognition originated before the First World War and started to be transformed into an obligation in the 1930s, although he does not say when this transformation was completed. Id. at 262.

[165] *Wall in the Occupied Palestinian Territory,* §216.

This was the argument put expressly by Australia in the East Timor case: "[t]here can be no obligation on other States to respond in a particular way to an illegal situation brought about by another State unless there has been a collective decision to that effect[166]". The Court implicitly agreed: "[T]he Court is not required in this case to pronounce on the question of the use of force by Indonesia in East Timor or upon the lawfulness of its presence in the Territory […]. 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 […]. [T]he effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor[167]".

The Court held that it could not make such a determination in the absence of Indonesia as a party to the case[168].

However, if a self-executing duty of non-recognition had existed, then Australia would have already been under that duty and the Court would surely have acknowledged this: the Court had already recited as fact the "intervention" in East Timor by Indonesian armed forces[169]. The Court could therefore have confirmed that Australia was under a duty not to treat Indonesia in a way that acknowledged the latter's sovereignty over East Timor. Thus the Court itself was not prepared to apply automatic non-recognition, apparently requiring instead a full inquiry as to the legality or otherwise of the particular

[166] Counter-Memorial of Australia, East Timor (*Portugal v Australia*), 1 June 1992, §365. Available at http://www.ij-cij.org/docket/files/84/6837.pdf.
[167] ICJ, *East Timor*, pp. 103, 105.
[168] *Idem*, p. 105.
[169] *Idem*, p. 96.

situation. At the very least, this silence suggests that even the most apparently obvious cases of aggression require inquiry and evidence before they can be pronounced illegal.

This is precisely why there is a need for some definitive pronouncement by an impartial and authoritative - preferably UN body - on the facts and legality of the situation. Such independent enquiry is especially necessary where the consequences for a recognizing state may be significant, as considered below.

### 7.4. Non-recognition as a sanction

There is another approach related to non-recognition.

In a legal system, such as the international one, lacking procedural mechanisms of authoritative, impartial and legally binding determinations, one is left with the different reactions of States and international organizations to wrongful acts. Hence, non-recognition should be construed as a social sanction aiming at the isolation of the wrongdoer, that international actors undertake in order to induce a cessation of the illegal conduct. In other words, in a decentralized legal system such as that of International Law one can hardly envisage a form of 'objectively' illegal or invalid situation. The illegality is determined and enforced by each and every State, individually or collectively through international organizations, which may decide to sanction such illegality *inter alia* by deciding not to recognise any legal effects deriving from that situation.

Under one version of the latter theory non-recognition as such is not mandatory under any rule of International Law; it is simply the result of the free choice of the State or a group of States. Of course, a policy of non-recognition may be adopted by the Security Council and, if sanctioned through recourse to its Ch. VII powers, the policy may become binding upon States. As a matter of fact, Art. 41 of the UN Charter itself, that is the provision that together with Art. 25 may provide the legal basis for the adoption of such kind

of measures, exemplifies the measures not involving the use of force that the Security Council may decide with specific reference to a wrongdoing State, by referring to the severance of diplomatic and economic relations: non-recognition is one of the tools in order to achieve the international isolation of wrongdoing State.

This view was adopted by the Australian Government in the *East Timor* proceedings before the ICJ " Australia denies that States are under an automatic obligation under general International Law not to recognise or deal with a State which controls and administers a territory whose people are entitled to self-determination. There is non-automatic obligation of non-recognition or non- dealing, even though that State may be denying the people the right to self-determination[170]".

Other authors instead consider that non-recognition is not a consequence of the objective illegality and invalidity of the situation, but the means by which such illegality and invalidity is sanctioned and enforced[171].

### 7.4.1. Two faces of the same coin?

Critics of the doctrine of non-recognition are at their strongest when they contend that non-recognition alone, supported by other sanctions, is ineffective. In other words, non-recognition forms the basic condition for the

[170] CR 95/14, 16 February 1995 at 36, ICJ, *East Timor*, §5 (J. Crawford), www.icj-cij.org/docket/files/84/5327.pdf. See also Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law: Issues and Uncertainties An International Law Perspective on Taipei's Current Framework for Cross-Strait Relations,* in *Chinese (Taiwan) Yearbook of International Law and Affairs*, Vol. 30, 2012. Australia's position on non – recognition, together with the practice originating from other States concerning unrecognised entities, is described in the *Report of the Washington Conference on Recognition/Non – Recognition in International Law*, in *International Law Association (ILA) Second (Interim) Report*, 2014.

[171] See also Tancredi, A., *A normative approach 'Due process' in the creation of States through Secession,* in Kohen, M. G., *Secession International Law Perspective*, Cambridge University Press, 2006, pp. 171-207.

application of other sanctions. The function of non-recognition is to hold the legal situation in suspense, pending a definitive settlement which may result either in the restoration in fact of the *status quo ante*, or in the adjustment of law to the changes situation of facts.

There is also another approach which makes the following distinction[172].

On the one hand non-recognition is seen as a measure that follows the ascertainment of an unlawful situation (usually centralized assessment in the bodies of the United Nations), act declaring that a particular occurrence, unlawfully produced, will not cause the legal consequences normally connected to it. Through this act the International Community, denying its acquiescence before the violation of law and therefore preventing the consumption of the prescription process, prevent the normal operation of the principle of effectiveness[173]. Effectiveness does not heal illegitimacy. For this reason, the unlawful fact can not be used as a title against third parties[174].

On the other hand, however, if directed against new entities whose creation process has resulted in violation of some general principles, this measure also expresses a sanctioning nature against this entity[175]. For this reason, the new *de facto* subject, isolated from the International Community, is unable to enter into normal legal relations with the affiliates because he is considered incapable of carrying out valid acts[176].

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[172] Tancredi, *A normative approach 'Due process' in the creation of States through Secession,* pp. 749-750.

[173] Visscher, C., *Théorie et réalités*, Pedone, 1955, p. 325. According this author the effect of non-recognition is "imprimer à l'illegalité un caractère objectif et une portée universelle".

[174] Gowlland-Debbas, V., *Collective Responses*, Martinus Nijhoff Publishers, 1990, pp. 276-278.

[175] According to Ziccardi Capaldo, non-recognition is a measure that sanctions unlawful situations and not States or entities. Ziccardi Cataldo, *Le situazioni territoriali illegittime*, Naples, 1977, p. 48.

[176] Concerning the sanctioning character of non-recognition, see: MiddleBush, F. A., *Non-Recognition as a Sanction of International Law*, in *American Society of International Law at its annual meeting*, 1933, p. 40 ff.; Herz, H., *Le problème de la naissance de l'Etat*, in *Recueil des Cours*, Martinus Nijhoff Publishers, 1936, p. 587; Marek, *Identity and Continuity*, p. 558; Ziccardi Capaldo, *Le situazioni territoriali illegittime*, 1977, p. 99 ff.;

That being said, these two measures of non-recognition can be jointly applied[177], the case of TRNC is a clear example. In this case, the two measures under discussion (the verification of the unlawfulness of the situation and the sanction against the unlawful entity arisen), succeeded each other with a time span of almost 10 years, having been adopted the first at the time of the Turkish intervention in the northern part of the island (1974), and the second when independence was declared by secession of the North Cypriot Republic (1983), when the possibility of reaching a confederal solution of the crisis failed.

### 7.5. The consequences of breaching the duty of non-recognition

The question of the consequences that derive from a breach of the duty of non-recognition has not been addressed by the ICJ, and the topic has not received attention in the literature until recently. In this regard it is worth mentioning the analysys conducted by Alison Pert[178]. In accordance with the established rules of State responsibility, as the author points out, it is "safe to assume that

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Lattanzi, F., *Sanzioni Internazionali*, in *Enciclopedia del Diritto*, Vol. 41, 1989, p. 558; Frowein, J. A., *Non-Recognition*, in *Max Planck Encyclopedia of Public International Law*, 1997, p. 628; Dugard, *Recognition*, p. 135. Among the authors who deny the sanctioning character of non-recognition: Cereti, C., *Il non riconoscimento come pretesa sanzione,* in *Scritti giuridici in onore di Santi Romano,* Vol. 2, 1940, p. 149 ff. According to the author, accepting the fact that International Law provides for norms establishing the legitimacy of the the creation of a State would mean falling into the legitimism betrayed by the current positive law (p. 157). Critics towards the concept of non-recognition as a sanction are also: Visscher, *Théories et réalités*, p. 325. According to this author: *"[...] il est inexacte et dangereux d'assimiler une déclaration [la non-reconnaissance] de ce genre à une sanction"*. Against the sanctioning character of non-recognition are also Lauterpacht, *Recognition*, pp. 434-435; Wehberg, H., *L'interdiction du recours à la force. Le principe et les problèmes qui se posent*, in *RdC*, 1951, p. 7 ff., p.103; Kunz, *Sanctions in International Law*, in *American Journal of International Law*, Vol. 54, 1960, p. 324 ff; Castañeda, *Legal Effects of United nations resolutions*, Columbia University Press, 1969, p. 190; Verhoeven, *La reconnaissance internationale*, pp. 767-773.

[177] Tancredi, *La secession nel diritto internazionale*, p. 748

[178] See Arcari, M., *The Relocation of the US Embassy to Jerusalem*; Lagerwall, A., *Non-recognition of Jerusalem as Israel's Capital*.

any breach of the duty will engage that State's responsibility and require it to cease the wrongful conduct - that is, withdraw its recognition"[179].

Other consequences will depend on the particular factual and legal situation[180].

Therefore it will be followed the scheme offered by this writer.

A. Territorial Acquisition - Direct Breach of Duty

As Pert states: "the most likely practical example of an illegal situation is where a State claims title to territory it has seized by force". In fact once the duty of non-recognition comes to existence, there are two ways in which it can be breached. There could be a direct breach deriving from another State expressly recognizing the new sovereignty, or indirectly, for example by entering into treaties applying to or concerning the seized territory[181]. In the former case, the "recognizing State's responsibility is engaged immediately and is under a continuing obligation to cease its own wrongful conduct by withdrawing that recognition"[182].

According to the author additional or more peculiar remedies would have to be sought through the UN (Security Council or General Assembly) or through a competent international jurisdictional organ such as the ICJ.

In this last case it would be at the initiative of the injured State, if any, or of a third State to establish both jurisdiction and standing to bring the complaint: for this it would have to demonstrate that the recognizing State had itself violated a duty owed (or a right opposable) *erga omnes*[183].

In answering the question whether the duty not to recognize an illegal

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[179] Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law, p.* 67.

[180] *Ibidem.*

[181] Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law,* p. 67.

[182] *Ibidem.*

[183] The ICJ implicitly accepted this in the East Timor Case, although the summary of the judgment says the opposite: *"The Court rejects Portugal's additional argument that the rights which Australia allegedly breached were rights erga omnes and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner"..*

situation is owed *erga omnes*, the writer analyses the character of *ius cogens* stating that it seems well accepted that *ius cogens* norms are opposable *erga omnes*[184] . She continues her reasoning by affirming that since an act of aggression is a contravention of a *ius cogens* prohibition, and would be opposable *erga omnes*, "any State, subject to issues of jurisdiction, could complain before a competent international court or tribunal"[185]. However, what remains unclear is the related duty not to recognize the consequences of aggression. In this respect it could be sustained "that the duty to refrain from aggression logically entails a right on the part of the lawful sovereign (if any) not to be subjected to aggression, that this right is opposable *erga omnes*, and that the act of recognition infringes this right and is therefore actionable by any member of the International Community"[186]. This analysis offers some concerns because it merges the duty of non-recognition and the prohibition of aggression, and it confers to the former the *status* of *ius cogens*. Consequently the preferable view, as Pert states, "is that the mere recognition, after the fact, of title to territory seized by force is a breach only of the duty of non-recognition, which is not of a *ius cogens* nature; the act of recognition is not a breach of the prohibition on aggression itself"[187].

On this matter it is interesting to recall the Recognition of the US Embassy to Jerusalem. It indeed offers the possibility to analyze the consequences of a direct breach of the obligation of non-recognition.

As expressed by Arcari in the case at hand "the strong reaction prompted in the UN membership by the US decision to relocate the embassy to Jerusalem seems to add some fuel to the conclusion that, above and beyond the *erga omnes* character of the basic substantive obligation whose violation originated non-recognition, the latter obligation may also be deemed to share the same

[184] See, e.g., *Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Kooijmans, §231.
[185] Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law,* p. 67.
[186] Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law,* p. 68.
[187] *Ibidem.*

character"[188]. So it seems from the recent practice that the obligation of non-recognition could be invoked by third parties.

In addition to this, it is important to add that non-recognition nowadays is perceived as a factor of political stability, as an obligation whose violation may increase tension on the ground[189]. Therefore its violations can cause "considerable impact on the ground[190]"

B. Territorial Acquisition - Effect on Treaties Constituting Recognition

The East Timor case dealt directly with the legality of a treaty violating the duty of non-recognition[191]. In fact Australia had entered into a treaty with Indonesia for the mutual exploitation of the maritime resources of, *inter alia*, East Timor [192]. More specifically the treaty expressly acknowledged Indonesian sovereignty over East Timor "even though this sovereignty was contested due to Indonesia's seizure of the former Portuguese colony in 1975 and its alleged denial of the East Timorese people's right to self-determination"[193]. Therefore the question was if the validity of that treaty could be challenged.

On this matter the Vienna Convention on the Law of Treaties (VCLT) sets out that the validity of a treaty can be challenged only on the grounds specified in the VCLT, and in this case only one would seem applicable: where the treaty

[188] Arcari, M., *The Relocation of the US Embassy*, p. 7.

[189] As Nickolay Mladenov, Special Coordinator for the Middle East Peace Process, explained before the Security Council, "since 6 December, in the wake of the decision of the United States to recognize Jerusalem as the capital of Israel, the situation has become more tense, with an increase in incidents, notably rockets fired from Gaza and clashes between Palestinians and Israeli security forces". Statement by Mladenov before the Security Council, UN Doc S/PV.8138, (18 December 2017), 3.

[190] Lagerwall, A., *The Non-recognition of Jerusalem as Israel's Capital*, p. 44.

[191] Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law,* p. 68.

[192] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an area between the Indonesian Province of East Timor and Northern Australia, Dec. 11, 1989, 1991.

[193] Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law,* p. 68.

conflicts with a peremptory norm of general International Law (Article 53)[194]. As the author states: "the relevant peremptory norm is the prohibition of aggression, and whether a treaty recognizing title to seized territory 'conflicts with' this norm is debatable"[195]. It is difficult to consider a treaty provision recognizing sovereignty as being in direct conflict with the duty to abstain from acts of aggression. A breach of that duty would appear, in the case of a treaty, "an agreement to commit an act of aggression"[196]. Thus Pert concludes: "that the result would seem to be that such a treaty is not void and remains in force for both parties, even though its performance would violate other international obligations of the parties"[197].

C. Territorial Acquisition - Indirect Breach of Duty

As clearly expressed by the author, the duty of non-recognition may also be violated indirectly, such as through entering into a treaty applying to or concerning the seized territory, or through giving aid and assistance in maintaining the unlawful situation[198]. The latter could take any forms from offering financial or technical support in relation to the seized territory, to an agreement on exploitation of the resources of the territory. Once a State undertakes these activities in breach of the duty of non-recognition, according to Pert the consequences are identical to the ones in the case of direct breach discussed above "for both treaty and non-treaty forms of assistance: the State is obliged to cease the aid and assistance but any treaty would not be void"[199].

D. Gross or Systematic Breaches of a *Ius Cogens* Obligation

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[194] Vienna Convention on the Law of Treaties, art. 53.

[195] Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law,* p. 68.

[196] See, e.g., Draft Articles on the Law of Treaties, Commentary on article 50, §3, Report of the International Law Commission, 18th Session, May 4-July 19, 1996, Year Book of International Law Commission, Vol. 2, 187, 248.

[197] Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law,* p. 68.

[198] Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law,* p. 69.

[199] *Ibidem*.

In addition to claims to title arising from territorial acquisition, other cases concerning a systematic breach of *ius cogens* are likely to remain rare. However, as Pert asserts, they might include "breaches of the right to self-determination, or the imposition within a state of systematic racial discrimination, or the tolerance or fostering of slavery"[200]. Also in this case, an express statement of support or treaties providing assistance in maintaining the unlawful situation would breach another State's duty not to recognize the lawfulness of such situations. As a result, the recognizing State is forced to cease its wrongful conduct i.e. its recognition or support but, a treaty between it and the primary wrongdoer, will be valid unless it conflicts directly with the peremptory norm. In fact Pert underlines that "an agreement to engage in or promote slavery or systematic racial discrimination would be void, as would be a treaty, for example, providing for military assistance for the purpose of suppressing a population entitled to self-determination"[201]. In this respect the ILC put it in its commentary to what became Article 53 of the VCLT, "contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate[202]"

E. Remedies for Violation of the Duty of Non-Recognition

From the analysis offered by Pert, as she clearly points out, it it is difficult "to see to whom, and for what, any reparation would be awarded by a competent international court or tribunal"[203]. But it is at least possible in theory that a finding of breach might result in an order to make financial or other reparation to an injured state (e.g., the previous sovereign in the case of seizure of

[200] Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law,* p. 69.
[201] *Ibidem*.
[202] See, e.g., Draft Articles on the Law of Treaties, Commentary on article 50, para (3), Rep. of the International Law Commission, 18th Session, May 4-July 19, 1996, [1966] 2 Y.B. International Law Commission 187, 248.
[203] Pert, A., *The "Duty" of Non-Recognition in Contemporary International Law,* p. 69.

### 7.5.1. The problem of implied recognition

The concept of implied recognition is difficult to reconcile with an understanding of the obligation of non-recognition as precluding only the formal admission of legality[204]. The obligation of non-recognition of the legality of a certain situation thus amounts to a "duty of active abstention"[205].

In this respect non-recognition practice in cases of Rhodesia, the South African presence in Namibia, the Bantustans States in South Africa, the Turkish Republic of Northern Cyprus and the Iraqi annexation of Kuwait show that the International Community considers the obligation of non-recognition as amounting to more than the prohibition of a formal admission of legality[206]. It is necessary that States refrain from any action implying recognition of the legality of the situation in question[207].

The ICJ in the Namibia advisory opinion considered that the duty of non-recognition excluded not only the formal admission of the legality of a situation, but any acts or dealings that "could imply a recognition" that the situation was legal[208]. The passage from the Namibia opinion which is usually cited in evidence for the proposition that the precise obligations of non-recognition must, in order to exist, be invoked by the appropriate political organs of the United Nations acting within their authority under the Charter, does not concern the obligation of non-recognition but generally the appropriate measures to be taken by the United Nations and its member States

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[204] Brownlie, *International Law and the Use of Force by States*, p. 420.

[205] See the Report of the International Law Commission, 53rd Session, GAOR, 56th Session, Supp.No. 10 (A/56/10), 2001, p. 287, §4 where the ILLC talks about a "duty of abstention".

[206] 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,* p 112.

[207] See Security Council Resolution 662 (1990), 9 August 1990, where the Council called upon "all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation"

[208] ICJ, *Namibia Advisory Opinion*, p. 16.

to bring the illegal situation to an end[209].

The obligations set out in the resolutions of the United Nations organs are not always very precise. In Resolution 276 (1970), which lies at the heart of the Namibia opinion, the Security Council had called upon all States, in rather general terms, to refrain from any dealings with the Government of South Africa which were inconsistent with the Council's declaration that the continued presence of the South Africans authorities in Namibia was illegal, and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia were illegal and invalid.

## 8. Conclusions

As we have tried to examine, the obligation of non-recognition follows, more than other issues, the evolution of International Law. In this respect, in fact, it has been assessed how at first it is addressed to issues related to statehood, a subject that lies at the heart of International Law. Then it is examined how it is related to unlawful territorial situations where it is true that sovereignty still plays a crucial role but the introduction of the term *unlawful* highlights the evolution of the international system and therefore of non-recognition itself. Finally the climax is reached when it is analyzed the application of non-recognition to unlawful situations that not necessarily stem from a violation of an obligation of a *ius congens* norm. Following this path we have tried to understand the changeability of non-recognition as to nature, scope, content and effects. Mutability is necessary precisely in order to better ensure the application of the principle *ex iniuria ius on oritur.*

[209] The Court addressed the determination of *"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"*.

# CHAPTER 4

## Non-recognition and the protection of fundamental rights

*SUMMARY: 1. Introduction - 2. The precedent: "The Namibia exception" - 3. The ECtHR jurisprudence - 3.1. Loizidou v. Turkey - 3.2. Cyprus v. Turkey - 3.3. Foka v. Turkey - 3.4. Protopapa v. Turkey - 3.5. Demopoulos and Others v. Turkey - 3.6. Güzelyurtlu and Others v. Turkey - 4. The ECJ jurisprudence - 4.1. Cyprus - 4.1.1. The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others - 4.1.2. Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams - 4.2. Israel and Palestine - 4.2.1. Brita GmbH v. Hauptzollamt Hamburg-Hafen - 4.3. The Western Sahara and Front Polisario - 4.3.1. Council of the European Union v. Front Populaire pour la Libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario) - 4.3.2. Western Sahara Campaign UK, The Queen v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs - 4.3.2.1. Opinion of Advocate General Wathelet - 4.3.2.2. ECJ ruling - 5. Conclusions.*

### 1. Introduction

Since the main purpose of non-recognition is to preserve international peace and order and maintain the invalidity of the non-recognized entity created in violation of a peremptory norm of International Law, difficulties in finding an equilibrium between non-recognition and the need to protect human rights often occur.

The concept offered in the so called "Namibia exception" may be considered as an attempt to find such balance.

Non-recognition represents itself a temporary measure adopted by the International Community maintaining the invalidity of an illegal regime. However, often entities object of a non-recognition measure continue to exist for a long time creating gaps between law and practice. For these reasons, the Namibia exception admits the necessity to somehow recognize the existence of these entities and the possibility that in certain circumstances their acts may have legal implications.

The fact that an entity is object of a non-recognition measure does not preclude that it is bound by the obligation to respect and protect human rights when such

entity exercises substantial control over a territory and its population, or that it is at least responsible under customary humanitarian law towards the people living in the territory which is illegally under its control.

Indeed, the increasing number of protectable rights has inevitably influenced the application of non-recognition and the eventual derogations to it.

International Law through the Namibia exception has consequently provided for a derogation to the general principle of non-recognition considering the possibility to confer legal effectiveness to those practices implemented by the non-recognized entity which may have consequences on human rights.

An expression of this approach is represented by the *ex factis ius oritur* principle, which imposes that acts of a non-recognized entity may have legal consequences even though the entity performing them is unlawful, then operating contrary to the non-recognition rule and to the *ex iniuria ius non oritur* principle entailing the invalidity of the acts of the illegal regime as well.[1]

An equilibrium between these two principles may be found in the Namibia Advisory Opinion[2], in which the International Court of Justice (hereinafter:

[1] Crawford, J., *British Year Book of International Law 2008,* 2008, p. 232.

[2] After World War I Namibia (ex South-West Africa) was entrusted to South Africa "as Mandatories on behalf of the League" as provided for in art. 22 of the Covenant of the League of Nations. After World War II South Africa believed that with the extinction of the League of Nations the country was devoid of international control and refused to allow the independence of Namibia or even to submit it to the trustee administration or under the control of the United Nations, in this way realizing a substantial annexation. The continued denial of independence is the most fundamental violation of human rights in Namibia. The people of Namibia also suffer from the military conflict which began in mid-1966 between the South West Africa People's Organization (SWAPO) and the combined forces of the South African Defense Force.

The General Assembly of the United Nations had resolutely and repeatedly opposed to the South-African presumption which was also condemned by the ICJ within several advisory opinions requested from the Assembly. Viewing the violations of the obligations of South Africa as a Mandatory power and as a Member of the United Nations, through resolution 2145 of 27 October 1966, the General Assembly of the UN decided to put an end to the mandate of the South Africa and to declare the independence of Namibia. With resolution 2248 of 19 May 1967, the General Assembly established the competent organ to provisionally govern the Namibian territory, the United Nations Council for Namibia. The Security Council encouraged by the General Assembly, adopted a series of resolutions as well, to condemn the South African occupation of the Namibian territory, such as resolution 276 of 30 January 1970, providing sanctions against South Africa and asking the ICJ an advisory opinion on the

"ICJ") asserted that a domestic act is invalid if the illegal regime carries it out at the detriment of the inhabitants of the territory.

For this reason, the invalidity of official acts of South Africa's Government implemented on behalf of or concerning Namibia after the termination of the Mandate cannot be extended to acts such as "registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory".[3]

Indeed, the jurisprudence of the European Court of Human Rights (hereinafter: "ECtHR") and of the European Court of Justice (hereinafter: "ECJ") depends on the Namibia exception and on the assertions made by the ICJ in paragraph 125 of the Namibia Advisory Opinion.

Therefore, this Chapter will analyze the case-law of these European Courts with the purpose to verify how actually that balance between the *ex factis ius oritur* and the *ex iniuria ius non oritur* principles applies from the Namibia Advisory Opinion until today. An interesting issue which will be addressed is to check if the ECtHR jurisprudence complies with this principle, being the Court the body that should primarily defend human rights.

## 2. The precedent of "The Namibia exception"

As previously mentioned, the Namibia exception tries to balance the legality principle with the one of effectiveness. In paragraph 125 of the Namibia Advisory Opinion may be found a competent definition of non-recognition.

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legal basis of the General Assembly's resolutions which terminated South Africa's mandate and established the United Nations Council for Namibia.

In the 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 of 21 June 1971 (hereinafter: *"Namibia Advisory Opinion"*), the Court was asked by the Security Council to identify the legal consequences of the adoption of resolution No. 276 which *inter alia* declared South Africa's continued presence in Namibia illegal and called upon States to refrain from any kind of relations with South Africa concerning Namibia.

[3] ICJ, *Namibia Advisory Opinion*, §125. Available at: https://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf.

In this ruling the ICJ defined the internal acts of South Africa with respect to or involving Namibia in saying that: "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. 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 births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory".[4]

The approach designated in this statement could be traced back to the "state necessity" or "implied mandate" doctrines.

According to these theories, the law as well as any administrative and jurisdictional acts of the illegal entity *de facto* stealing the control to the legitimate entity must be considered valid and binding upon the subjects under its control as long as this is the expression of an implied mandate allowed to the settler necessary to avoid a judicial *vacuum* and the following anarchic status, as to maintain stability and order within the territory.

This doctrine was supported by classic scholars as Grotius in saying that the period during which the settler has the control and power over the territory "[...] the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that the one to whom the sovereignty actually belongs, whether people, or king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law and suppression of the utter confusion which would result from the subversion of laws and suppression of the courts".[5]

The tendency based on the "state necessity", inaugurated by the Supreme Court of the United Stated in the period succeeding the secession war, has been

[4] ICJ, *Namibia Advisory Opinion*, §125.

[5] Grotius, H., *De Jure Belli ac Pacis,* in *Scott*, B., *The Classic of International Law*, 1964, p. 159.

adopted by the English Courts[6] and, at the international level, by the ICJ Namibia Advisory Opinion, as in the following years by the ECtHR.

At the beginning of its formulation this doctrine, also called "private law exception", was thought in order to alleviate undue hardship and difficulties in the private sphere.[7]

One of the first cases implementing the principle is *Texas v. White* of 1868 in which the US Supreme Court asserted that, independently of the non-recognition of the Confederate States during the Civil War, "acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and 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".[8]

Concerning the validity of internal acts, various interpretations have been proposed to the Namibia exception to precisely define which acts fall within the scope of the exception.

One of them is found in the Namibia Advisory Opinion itself in Judge de Castro's dissenting opinion, that suggested a distinction between private and public acts: the acts of *de facto* authorities dealing with acts and rights of private persons (validity of entries in the civil registries and in the land registry,

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[6] E.g. See *Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd*, in which Lord Denning argued that Courts had always looked at the internal effects of recognition and not at the external ones and that, on the contrary, they must "see what is the law which is in fact effective and enforced in that territory, and to give such effect to it". The litigation before English courts in this case dealt with property deprivation by the illegal authorities of the TRNC; this brought to evaluations of private International Law in relation to title to property, the law of the place where the property was situated. The Court of Appeal did not address the public International Law issue of the legality of the TRNC's status, which was antecedent to those private law questions, and the Namibia two parameters were not addressed either. Instead, Lord Denning was content to observe that the Northern Turkish Administration was substantially effective and that was enough for its laws to be recognized internationally. On this point see Crawford, J., *British Year Book of International Law 2008*, 2008, p. 231 ff.

[7] Tancredi, A., *La secessione nel diritto internazionale*, 2001, p. 783 ff.

[8] US Supreme Court, *Texas v. White*, 74 U.S. 700, 1868, §16. Available at: https://supreme.justia.com/cases/federal/us/74/700/.

validity of marriages, validity of judgments of the civil courts, etc.) should be regarded as valid; at the same time, other States should not consider valid any acts and transitions made by the Namibian authorities concerning public property, concession, etc.

In this situation, States will not be able to exercise protection of their nationals in response to any acquisition of this kind.[9]

A second interpretation is given by Judge Onyeama, who offers the "entrenchment - routine test", asserting that the invalidity of acts carried out by the illegal regime involves only those acts "which may entrench its authority over the Territory". Consequently, ordinary acts of day-by-day activity should fall within the validating scope of the exception.[10]

The test was employed by the Court to refer to the consolidation of the factual regime's control rather than to the formal status of the territory, already denied to it.

According to Ronen, Judge Onyeama's test implies, for instance, that nationality granted under the illegal authority does not fall within the scope of the exception, since it represents a strong supportive expression of the regime.[11] This concept results questionable with respect to the residence status, which barely can entrench a regime. However, if the purpose of granting residence is to change the demographic character of the territory to consolidate the illegal authority and being residence simpler to guarantee compared to nationality, it may constitute a threat to the occupied territory's identity.[12]

Another interpretation supports a combined application of the two above-mentioned approaches offered by Judge de Castro and Judge Onyeama. In fact, since the majority of acts able to entrench a regime belongs to the public sphere, the distinction between public and private acts shall not be treated as an independent criterion. Rather, it shall be subordinate to the entrenchment test

[9] Separate Opinion of Judge De Castro, §7. Available at: https://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-07-EN.pdf.

[10] ICJ, *Namibia Advisory Opinion*, §123-124.

[11] Ronen, Y., *Status of Settlers Implanted by Illegal Territorial Regimes*, 2008, p. 194 ff.

[12] Ronen, Y., *Transition from Illegal Regimes under International Law*, 2011, pp. 188-189.

and be used as an additional parameter to evaluate the impact of certain act on the regime's entrenchment.[13]

Finally, according to the last interpretation of paragraph 125, the exception shall be read literally. In fact, since there is not a formal qualification of the obligation of non-recognition, any act should be recognized, directly or indirectly, regardless of how much it entrenches the regime.[14]

On this point Judge Ammoun affirms that the Namibia Advisory Opinion shall be interpreted following the General Assembly's aim to: "to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia […]"[15], then considering any interaction with South Africa as entrenching the authority.

However, Judge Ammoun foresees the possibility that the recognition of an act may be provided if it is aimed at preventing the detriment of the population.

This last reading favors a more flexible implementation of the exception, suggesting that every case needs to be evaluated separately, taking into account the specific circumstances that caused it in order to precisely determine if the act concerned may disadvantage the inhabitants of the territory. In other words,

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[13] This approach is also shared by domestic courts such as in the case *Caglar v. Billingham* of 1996, in which the UK Special Commission reviewed the tax appeal of the TRNC representative in London and asserted that: "'The courts may acknowledge the existence of an unrecognized foreign government in the context of the enforcement of laws relating to commercial obligations or matters of private law between individuals or matters of routine administration such as the registration of births, marriages or deaths".. "However, the courts will not acknowledge the existence of an unrecognised state if to do so would involve them in acting inconsistently with the foreign policy or diplomatic stance of this country".

Generally, English court's tendency was to deny exceptions to non-recognition, however in some cases this possibility was suggested by individual judges, as in the *Carl Zeiss Stiftung v Rayner& Keeler Ltd* case of 1967 reporting that: "'where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned… the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question". Equally, in *Gur Corporation v Trust Bank of Africa Ltd* of 1987 it was noted that "'it is one thing to treat a state or government as being 'without the law', but quite another to treat the inhabitants of its territory as "outlaws" who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences".

[14] Ronen, Y., *Transition from Illegal Regimes under International Law*, 2011, p. 85.

[15] ICJ, *Namibia Advisory Opinion*, §119.

this approach expresses a case by case analysis which, unlike the previous exegesis, does not try to establish a preliminary *formula* for the classification of the acts that fall within the exception.

The weakness of this approach is that the discretion of single states' or of their organs may entail an abuse of power or jeopardize the consistency of International Law.

## 3. The ECtHR jurisprudence.

The wide interpretation of the Namibia exception described in the previous paragraph, and the resulting possibility to involve positive measures aimed at protecting human rights of the population under the control of the illegal regime, has found expression in the ECtHR jurisprudence.[16]

This is particularly evident in the cases dealing with the Turkish Republic of Northern Cyprus (hereinafter: "TRNC").[17]

The applications made by Greek Cypriots before the ECtHR have been a few, and they mainly concerned the unlawfulness in recognizing validity to acts and local remedies issued by an entity which cannot be defined as effective due to several circumstances: the 1974 Cyprus invasion by Turkey and the

[16] Ronen, Y., *Transition from Illegal Regimes under International Law*, 2011, p. 91. See Gross, A., *The Writing on the Wall: Rethinking the International Law of Occupation*, 2017, p. 79; Crawford, J., *British Year Book of International Law 2008,* 2009, p. 218-219.

[17] In 1974, Turkey invaded Cyprus and a Turkish Federated State of Cyprus was established in the part of the island controlled by Turkey; the island was de facto divided into a Greek-Cypriot south area and a Turkish-Cypriot north area. In the northern area the TRNC has been established, recognized only by Turkey. Responding to this new situation, the Security Council adopted a non-binding resolution calling upon all States not to recognize any Cypriot State other than the Republic of Cyprus and another non-binding resolution that condemned Turkey's exchange of ambassadors with the new State and again called on all States not to recognize the purported State. The Republic of Cyprus is recognized as a statehood entity by International Law and by the community of States and, although it represents *de iure* Cyprus in its entirety, it nevertheless controls only *de facto* the south of the island.
Despite the failure of the negotiations, supported by the UN and the EU, the Republic of Cyprus joined the European Union in 2004. Through a separate Protocol to the Act of Accession, the application of the acquis communautaire for the areas of the island over which the Republic of Cyprus has no sovereign power has been suspended.
During the division of the country, the escape and expulsion of a huge number of people belonging to both populations took place. Many refugees claim ownership of land they had been forced to abandon.. The lands abandoned by Greek Cypriots in the TRNC are considered as property of Turkey, and the TRNC authorities have transferred many of these lands to private individuals.

establishment of a Turkish Federated State of Cyprus in the part of the island controlled by Turkey; the illegal presence and exercise of control of Turkey in Northern Cyprus; the problem of the qualification of the relationship between the TRCN and Turkey.

### 3.1. Loizidou v. Turkey

In the *Loizidou v. Turkey* case of 1995[18], the Court ignored the issue of the entrenchment of the regime and refused to recognize the validity of article 159 of the TRNC Constitution[19] legitimating the requisition of the whole real estate

[18] The *Loizidou case* concerns application against the Republic of Turkey lodged with the European Commission of Human Rights on 22 July 1989 and referred to the ECtHR by the government of the Republic of Cyprus in November 1993. The case dealt with important issues of International Law such as the validity of restrictions to human rights treaties, the effects of State recognition, extraterritorial jurisdiction, and State responsibility.
The applicant was a Cypriot national of Greek origin from Kyrenia in Northern Cyprus who had moved to Nicosia after her marriage in 1972. She was the owner of several plots of land in Kyrenia and maintained that on one plot she had started to have flats built, one of which was intended as a home for her family. She contended that since the invasion of Turkish forces in 1974, she had been prevented from returning to Kyrenia and using her property.
Before the Commission, the applicant claimed that the refusal of access to her property constituted a violation of Art. 1 Protocol No 1 (right to property), Art. 8 (private and family life) of the Convention. She also claimed the violation of Art. 3 (prohibition of torture) and 5 (right to liberty and security) due to her arrest and detention by the Turkish police after the participation in a demonstration in Northern Cyprus.

[19] Article 159 §1 letrs. (a)(b) of the TRNC Constitution disposed that: "(1) (a) All immovable properties registered in the name of the Government of Cyprus before the l6th of August 1960 and all immovable properties transferred to the Government of Cyprus after the l6th of August 1960; roads, waters, water resources, ports, harbours and shores, docks and piers, lakes, riverbeds, and lakebeds, historical cities, buildings, ruins and castles and the sites thereof, natural resources and underground resources, forests, defence buildings and installations, green areas and parks belonging to the public; village roads and rural pathways open to the public; and buildings used for public services; (b) All immovable properties, buildings and installations which were found abandoned on l3th February, 1975 when the Turkish Federated State of Cyprus was proclaimed or which were considered by law as abandoned or not being owned after the abovementioned date, or which should have been in the possession or control of the public even though their ownership had not yet been determined; ..

properties located in the North of Cyprus and abandoned since the Turkish Federate State of Cyprus was proclaimed.[20]

The ECtHR specifically invoked the Namibia exception in affirming that "International Law recognizes the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the territory", considering worthless in that specific case to develop a theory on the validity of administrative and legislative act of TRNC.[21]

Then, the Court in affirming the validity of the TRNC acts refused to take into consideration the illegality of Turkish occupation, and it based this determination only on the compatibility of those acts with the Convention.[22]

### 3.2. Cyprus v. Turkey

The ECtHR in the decision on *Cyprus v. Turkey* of 2001[23] adopted a broader approach of the Namibia exception.

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[20] ECtHR, *Loizidou v. Turkey*, Application no. 15318/89, Judgment of 18 December 1996, §44. Available at: http://hudoc.ECtHR.coe.int/eng?i=001-58007.

[21] ECtHR, *Idem*, §45.

[22] Gross, A., *The Writing on the Wall: Rethinking the International Law of Occupation*, 2017, pp. 82-83.

[23] ECtHR, *Cyprus v. Turkey*, Application n. 25781/94, Judgment of 10 May 2001, §98. Available at: http://www.ceceurope.org/wpcontent/uploads/2015/08/CASE_OF_CYPRUS_v._TURKEY.pdf. The judgment of 10 May 2001 deals with one of the few cases in which the applicant is the government of another Member State to the Convention. The Government of the Republic of Cyprus alleged that due to Turkey's military operations in Northern Cyprus, especially after the proclamation of the TRNC, the Government of Turkey was continuing to be responsible for the violations of several human rights: primarily, the living conditions of Greek Cypriots in Northern Cyprus and the violation of freedom of expression and information guaranteed in Article 10; furthermore the TRNC authorities undertook a widespread censorship of school-books and restricted the importation and distribution of media, especially Greek-language newspapers and books. In this context, a report was drafted by the European Commission of Human Rights in 1999 dealing with the Forth Inter-State application lodged by Cyprus against Turkey. Referring to this report, the ECtHR considered that there was not sufficient evidence that restrictions were imposed on the importation and distribution of newspapers and

In fact, in this decision the Court affirmed that the population should be allowed to exhaust domestic remedies primarily to avoid the lack in a specific human rights protection system, since "Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled".[24]

Accordingly, the TRNC court must comply with the function and purposes provided for in art. 35.1 to fill the potential lack of legal protection of the inhabitants and its possible detriment.[25]

For these reasons those acts "cannot be simply ignored by third States or by international institutions, especially courts", and in deciding the contrary inhabitants of that territory would be deprived of a minimum standard of rights to which they are entitled to.[26]

Thus, the ECtHR reached the conclusion that "it cannot simply disregard the judicial organs set up by the TRNC[27]; unless ineffectiveness or inexistence of those acts can be verified, the access to local remedies must be guarantee and, in this determination, a case-by-case analysis proves to be essential in order to evaluate if appropriate and effective remedies existed within the TRNC at the moment of the alleged violations.

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books or on the reception of electronic media. At the same time the Court found that during the period concerned great part of school-books were unilaterally censored by the TRNC authorities. The Court asserted that the Government failed to provide sufficient justification to the widespread censorship which then amounted to a denial of the right to freedom of information. These measures of excessive censorship were considered by the Court to be a violation of Article 10 of the Convention.

[24] ECtHR, *Cyprus v. Turkey*, Application no. 25781/94, Judgment of 10 May 2001, §96.

[25] ECtHR, *Idem,* §98.

[26] ECtHR, *Idem*, §96.

[27] ECtHR, *Idem,* §98.

The partly dissenting opinion of Judge Palm highlighted the importance of this ruling. Indeed, 5 more members of the Court agreed with this opinion.[28]

However, Judge Palm also argued that the Court should have upheld the same position of the *Loizidou* case in refusing to elaborate a general theory concerning the validity and effectiveness of the remedies established by the TRNC, "particularly if it is to be built around the minimalist remarks of the ICJ in its Advisory Opinion on Namibia".

According to the partly dissenting opinion of Judge Palm, the conclusion reached by the Grand Chamber in recognizing that the remedies existing in the TRNC constitute "domestic remedies" for the purposes of the Convention, implies the recognition of the validity of the decisions taken by the North Cypriot courts, and indirectly of the constitutional rules that established that judicial system. [29]

This is what truly changed from the previous ECtHR jurisprudence: in *Loizidou*, the validity of Article 159 of the TRNC Constitution was not recognized, and this inevitably entailed the judicial inexistence of the entity before the International Community.[30]

### 3.3. Foka v. Turkey

A visible broad application of the Namibia exception is found in *Foka v. Turkey* of 2008[31], in which the Court recalled *Cyprus v. Turkey* and defined the validity of the TRNC legislation to be essential for Turkey to fulfill its human rights obligations and prevent the detriment of the population.[32]

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[28] Partly Dissenting Opinion of Judge Palm Joined by Judges Jungwiert, Levits, Panţîru, Kovler And Marcus-Helmons. Available at: http://www.ceceurope.org/wp-content/uploads/2015/08/CASE_OF_CYPRUS_v._TURKEY.pdf.

[29] Partly Dissenting Opinion of Judge Palm Joined by Judges Jungwiert, Levits, Panţîru, Kovler And Marcus-Helmons, p. 101-102.

[30] Cullen, A., Wheatley S., *The Human Rights of Individuals in De Facto Regimes under the European Convention on Human Rights*, in *Human Rights Law Review*, 2013, p. 709.

[31]. ECtHR, *Foka v. Turkey,* Application n. 28940/95, Judgment of 24 June 2008, §82. Available at: http://hudoc.ECtHR.coe.int/eng?i=001-87175.

[32] ECtHR, *Idem.*

In *Foka v. Turkey* the ECtHR dealt with a case concerning a Greek-Cypriot woman living in the TRNC that was subjected to detention.

The issue before the Court was if in that specific situation the detention was a legitimate interference with her right to liberty. According to Article 5 of the Convention, "no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law [...]"[33], therefore the validity of the national law was put into question.

According to the applicant, since the TRNC was a non-recognized entity, the deprivation of liberty perpetrated by its agents was unlawful. The latter argument was rejected by the Court affirming that Turkey's accountability for the violations of the Convention within the TRNC territory "would not be consistent with such responsibility under the Convention if the adoption by the authorities of the TRNC of civil, administrative or criminal law measures, or their application or enforcement within that territory, were to be denied any validity or regarded as having no "lawful" basis in terms of the Convention".[34]

This means that acts implemented according to the TRNC law, should be considered valid. In fact TRNC legislation is described by the Court as essential in order to fulfill human rights obligation towards the inhabitants of the territory. Notwithstanding that, it is worth noting that the ECtHR underlines that: "this conclusion does not in any way put in doubt either the view adopted by the International Community regarding the establishment of the "TRNC" or the fact that the government of the Republic of Cyprus remains the sole legitimate government of Cyprus".[35]

Consequently, the ECtHR affirmed that the deprivation of liberty did not constitute a violation of art. 5 of the Convention.[36]

[33] ECtHR, *Foka v. Turkey,* Application n. 28940/95, Judgment of 24 June 2008, §64.
[34] ECtHR, *Idem,* §83.
[35] ECtHR, *Idem*, §84.
[36] ECtHR, *Idem*, §89.

### 3.4. Protopapa v. Turkey

In light of the Namibia exception, the challenge of the validity of TRNC acts continues also in *Protopapa v. Turkey* of 2009[37]. In this case the Court stressed that it was essential to confer effectiveness to the TRNC legislation in order to fulfill the obligations provided for by the Convention and in order to realize an efficient system of protection for the inhabitants.[38]

The case dealt with a Greek Cypriot application who was arrested by TRNC agents for joining a demonstration at the UN Buffer Zone 1989, defined by them as an "unlawful assembly".[39]

As in *Foka*, the applicant affirmed a violation of art. 5 of the Convention. The arguments brought by the Cyprus government were similar; it furthermore alleged that the act did not constitute a criminal offence "under national and International Law" and so it invoked the violation of art. 7 of the Convention since TRNC law cannot be considered as the national law; in response, Turkey affirmed that the arrest complied with the TRNC law.[40]

Following the *Foka* decision, the Court argued that: "when an act of the "TRNC" authorities was in compliance with laws in force within the territory of Northern Cyprus, it should in principle be regarded as having a legal basis in domestic law for the purposes of the Convention".[41] Therefore the applicant, having entered in the TRNC territory without a permission, breached its domestic law, which should be considered valid and effective for the purposes of the Convention.

[37] ECtHR, *Protopapa v. Turkey*, Application n. 16084/90, Judgment of 24 February 2009. Available at: http://www.legislationline.org/documents/id/18499.
[38] ECtHR, *Idem*, §59.
[39] ECtHR, *Idem*, §55.
[40] ECtHR, *Protopapa v. Turkey*, Application n. 16084/90, Judgment of 24 February 2009, §54, 56, 92.
[41] ECtHR, *Idem*, §94.

### 3.5. Demopoulos and Others v. Turkey

In *Demopoulos and Others v. Turkey* of 2010[42], emerges a practical element endorsing the admissibility requirement and related to the scarcity of resources of the Court since "The Court cannot emphasize enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions".[43]

In this case the Court reaffirmed the above-mentioned wide approach to the Namibia exception giving broad *ex ante* effect to TRNC acts, rather than exceptional recognition *ex post facto* to specific acts. In fact, *ex ante* recognition is forward looking since it validates the authority of administrative and judicial organs rather than simply assuming the validity of the effects of their acts *ex post.*

The case dealt with the applications of seventeen Greek Cypriot citizens against Turkey, judged by the Court as inadmissible. All the applicants were displaced by the 1974 Turkish occupation of North Cyprus and denied the use of their properties. The applicants alleged several violations of the Convention, but the main point was the deprivation of the use of their possessions in the TRNC. [44] On that point, Turkey maintained that the application was inadmissible because the applicants did not approach the Immovable Property Commission (IPC), a local body with the function of resolving claims on ownership, and in so doing, they did not exhaust domestic remedies. In response, the applicants affirmed that by approaching the IPC they would entrench the authority illegally occupying their territory.[45]

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[42] ECtHR, *Demopoulos v. Turkey*, Application n. 46113/99, Judgment of 1 March 2010. Available at: https://hudoc.echr.coe.int/eng#{%22docname%22:[%22demopoulos%20and%20others%20v%20turkey%22],%22itemid%22:[%22001-97649%22]}.

[43] ECtHR, *Idem*, §69.

[44] ECtHR, *Idem*, §18-31.

[45] ECtHR, *Idem*, §32, 63.

After the analysis of the TRNC legislation, more specifically of the Law no. 67/2005 which sets out that: "all natural and legal persons claiming rights to immovable or movable property might bring a claim before the Immovable Property Commission (the 'IPC') [...]"[46], the ECtHR affirmed that: "Even if the applicants are not living as such under the control of the 'TRNC', the Court considers that, if there is an effective remedy available for their complaints provided under the auspices of the respondent Government, the rule of exhaustion applies under Article 35 § 1 of the Convention" [47]. Therefore the IPC should be considered lawful and as an accessible mean to refer claims on property.

*Demopoulos and Others v. Turkey* may be considered the climax of the ECtHR approach to the exception since the Court declared for the first time that an application against Turkey was inadmissible for the non-exhaustion of local remedies.

In this decision the Court highlighted the main nature of the Namibia exception in filling the legislative vacuum in the absence of other kind of available remedies for human rights violations: "the key consideration is to avoid a vacuum which operates to the detriment of those who live under the occupation, or those who, living outside, may claim to have been victims of infringements of their rights. Pending resolution of the international dimensions of the situation, the Court considers it of paramount importance that individuals continue to receive protection of their rights on the ground on a daily basis. The right of individual petition under the Convention is no substitute for a functioning judicial system and framework for the enforcement of criminal and civil law."[48].

This ruling breaks with its precedents: first, the Court found that the property claims process established in the TRNC may represent an effective domestic

[46] ECtHR, *Idem*, §35.
[47] ECtHR, *Idem*, §95
[48] ECtHR, *Idem*, §95

remedy; moreover, it required the applicants to prove the exhaustion of this remedy before the Court may find their applications admissible.[49]

The decision has been the object of broad criticism mainly arguing that the ECtHR confused the mechanism of exhaustion of domestic remedies, disposed by art. 35 with the one provided for in art. 13 on the right to an effective remedy.[50] It should be noted, however, that as it reveals from *travaux préparatoires* of the Convention the objective behind Article 13 is: " to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court."[51]

However, if the Convention's nature and primary purpose is to protect human rights and interests, it should interpret its dispositions in a way that favors in practice its aim. Consequently the ECtHR in *Demopoulos and Others v. Turkey* considered the obligation to exhaust local remedies a corollary of the obligation to provide effective remedies under Article 13.

Both in in the previous cases, *Cyprus v. Turkey* and *Foka v. Turkey* the Court noted that it is impossible to assert at the same time, that there is a violation of art. 13 because the entity has not provided for domestic remedy, and that any remedy if provided would be invalid and null.[52]

Indeed, "It would not be consistent if the adoption by the authorities of the "TRNC" of civil, administrative or criminal law measures, or their application or enforcement within that territory, were to be denied any validity or regarded as having no "lawful" basis in terms of the Convention".[53]

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[49] Gross, A., *The Writing on the Wall: Rethinking the International Law of Occupation*, 2017, pp. 94-95.

[50] Vardanyan, A., Zrvandyan, A., *Requirement to Exhaust Domestic Remedies in De Facto Regimes Under Art. 35.1 of ECtHR: Expansion of Namibia Exception*, American University of Armenia, 2008, p. 24.

[51] ECtHR, *Kudla v. Poland,* Application n. 30210/96, Judgment of 26 October 2000, §152. Available at https://www.globalhealthrights.org/wp-content/uploads/2013/10/Kudla-Poland-2000.pdf

[52] ECtHR, *Cyprus v. Turkey*, Application n. 25781/94, Judgment of 10 May 2001, §101.

[53] ECtHR, *Foka v. Turkey,* Application n. 28940/95, Judgment of 24 June 2008, §83.

A further and more important criticism concerns the pretention of the Court to extend the requirement of exhaustion domestic remedies in entities towards which the International Community has adopted non-recognition measures. In fact this could be considered an implied recognition, since: "the entire court system in the "TRNC" derives its legal authority from constitutional provisions whose validity the Court cannot recognize [...] without conferring a degree of legitimacy on an entity from which the International Community has withheld recognition".[54]

In the practice indeed, an implied recognition operates in a different way according to the category of act concerned, in the sense that many of them need to be explicitly recognized.

Nevertheless, the ECtHR in its decisions has repeatedly asserted the illegality of the TRNC justifying this on the base of different acts, resolutions and international measures of non-recognition, therefore keeping the TRCN domestic court far away from implied recognition [55] The Court in the decision stresses that: "[...] this conclusion does not in any way put in doubt the view adopted by the International Community regarding the establishment of the 'TRNC' or the fact that the government of the Republic of Cyprus remains the sole legitimate government of Cyprus [...]. The Court maintains its opinion that allowing the respondent State to correct wrongs imputable to it does not amount to an indirect legitimisation of a regime unlawful under international law".[56]

Another issue relies on the obligation resting upon states to refrain from favoring the TRNC entrenchment over the territory.[57]

However this does not mean that the Court should not make an attempt to balance the protection of fundamental rights with the duty of non-recognition, even if this could mean a broad interpretation of the Namibia exception.

[54] ECtHR, *Cyprus v. Turkey*, Application n. 25781/94, Judgment of 10 May 2001, §101.
[55] Kohen, M., G., *Secession: International Law Perspectives*, 2006, p. 204-205.
[56] ECtHR, *Demopoulos v. Turkey*, Application n. 46113/99, Judgment of 1 March 2010, § 96.
[57] Vardanyan, A., Zrvandyan, A., *Requirement to Exhaust Domestic Remedies in De Facto Regimes Under Art. 35.1 of ECtHR: Expansion of Namibia Exception*, American University of Armenia, 2008, p. 26.

Holding otherwise would amount to a failure in contributing to peace and good order in a territory in which that is even more necessary[58].

### 3.6. Güzelyurtlu and Others v. Turkey

In the recent case *Güzelyurtlu and Others v. Turkey*[59] of 2017 the Court dealt with the killing of three applicants' relatives shot in the area controlled by the Cypriot Government. They claimed the violation of Article 2 (right to life) of the Convention, by both the Cypriot and Turkish authorities (including those of the "TRNC"); besides, they failed to undertake an appropriate investigation to understand the identity of the killers. For this reason, they claimed the lack of an effective remedy, and then a violation of article 13 of the Convention. Turkey and Cyprus refused to co-operate, so that, the killers have not faced justice yet. In its Chamber judgment the ECtHR maintained that there had been a violation of Article 2 (right to life and investigation) of the Convention by both Cyprus and Turkey. The ECtHR condemned the unwillingness of the Government of Cyprus to co-operate with the judicial authorities of TRNC, which was driven by the fear of lending any legitimacy to the TRNC, by excluding that the steps taken with the aim of judicial cooperation in order to further an investigation in criminal matters would amount to recognition, implied or otherwise, of the TRNC[60].

In this case, the Court moved a step forward in the interpretation of the Namibia exception. In fact it is the first time in which the ECtHR has dealt with the issue of non-recognition in inter-state relations. In the previous cases instead, the internal acts of the TRNC have been analyzed just in relation to the ECtHR.

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[58] *Ibidem.*

[59] ECtHR, *Güzelyurtlu and Others v. Cyprus and Turkey*, Application n. 36925/07, Judgement of 4 April 2017, §291. Available at: http://hudoc.ECtHR.coe.int/eng?i=003-5674802-7195201.

[60] See Ollino, A., *Sull'obbligo di non riconoscimento degli enti sorti in violazione di norme internazionali fondamentali. Il caso Güzelyurtlu e altri c. Cipro e Turchia*, in *Rivista di Diritto Internazionale*, Vol. 101, N. 3, (2018), pp. 811-832.

The decision raised some perplexities. Especially, asking to the Republic of Cyprus to cooperate with the TRNC it seemed that the Court gave an implicit recognition of the TRNC.[61]

However it is worth noting that also in this occasion the Court explicitly stated that: "the Court does not accept that steps taken with the aim of cooperation in order to further the investigation in this case would amount to recognition, implied or otherwise, of the 'TRNC'".[62]

## 4. The ECJ jurisprudence

Also the ECJ has developed its personal approach in addressing the Namibia exception, admitting a flexible element necessary to allow economic and commercial activities between third states and the entity object of a non-recognition measure.

As it will be shown, sometimes in specific circumstances the ECJ granted lawfulness to those acts even though dealing with occupied territories acquired in violation of the self-determination principle.

Therefore the cases concerning Cyprus, Israel and Palestine and the Western Sahara will be discussed.

### 4.1. Cyprus

#### 4.1.1. The Queen v. Minister of Agriculture, Fisheries and Food, *ex parte* S. P. Anastasiou (Pissouri) Ltd and others

Concerning the relationship between the European Economic Community and the Republic of Cyprus it is important to recall the *Anastasiou and Others* case of 1994[63].

[61] *Idem*, p. 824.

[62] ECtHR, Güzelyurtlu and Others v. Cyprus and Turkey, Application n. 36925/07, Judgement of 4 April 2017, §291

[63] ECJ, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others,* Case C-432/92, Judgment of 5 July 1994. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61992CJ0432&from=IT.

This is a case concerning the Agreement establishing an association between the European Economic Community and the Republic of Cyprus and providing for a mechanism to prove the origin of goods.

In that situation, the Court was asked to decide if the EEC-Cyprus Agreement impeded customs authorities of the importing State from accepting certificates issued by authorities different from the customs authorities of the Republic of Cyprus or, on the contrary, required them to do so.

Furthermore, the Court was asked to determine what would be the answer if certain circumstances connected with the special situation of the Republic of Cyprus were taken as established.

The conclusion reached by the ECJ was that the Agreement must be read in the sense that the authorities empowered to issue phytosanitary certificates are exclusively the ones appointed by the Republic of Cyprus.[64]

In the decision the ECJ expressly referred to the Namibia exception.

Indeed, according to the ECJ "a policy of non-recognition should not result in depriving the people of Cyprus of any advantages conferred by treaty. The same approach, the Commission maintains, has been followed by the Council and the Commission in interpreting and applying the Association Agreement itself and the financial protocols".[65]

However, the circumstances that took place in Namibia or in Cyprus "are not comparable from both the legal and the factual points of view. Consequently no interpretation can be based on an analogy between them".[66]

An important concept is expressed by the Court in *Anastasiou and Others:* notwithstanding the difficulties arising from the division in 1974 of the territory of Cyprus between a zone fully controlled by Turkey and an area in which Turkey is not entitled to exercise any power, this cannot justify the lack

[64] ECJ, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others,* Case C-432/92, Judgment of 5 July 1994, §61-64.
[65] ECJ, *Idem*, §35.
[66] ECJ, *Idem,* §49.

in the application of clear, precise and unconditional dispositions provided for in that Agreement.[67]

The Court continued affirming that the cooperation between the customs authorities of the importing State is based on a solid trust which ensures that the origin of products is truthful, and guarantees mechanisms of subsequent verification. If such mechanism was extended also to an entity different from the custom authority, the entire system designed in the name of the association agreement would be emptied of its very object and purpose.[68]

These assertations do not accept any exception; the ECJ indeed argued that even though the situation in territories such as the North of Cyprus, the West Bank, or the Gaza Strip is particularly difficult, this cannot justify the denial of all the efforts in realizing the cooperation system among customs authorities of member states and those of the concerned territories, in this way confirming the impossibility to involve goods originating in the occupied territories within the preferential treatment.[69]

### 4.1.2. Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams

In the landmark decision *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams* of 2008[70], the ECJ ruled that certain provisions adopted

[67] Opinion of Advocate General Bot, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, delivered on 29 October 2009, Case C□386/08, Reference for a preliminary ruling from the Finanzgericht Hamburg (Germany), §135.

[68] Opinion of Advocate General Bot, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, delivered on 29 October 2009, Case C□386/08, Reference for a preliminary ruling from the Finanzgericht Hamburg (Germany), §137.

[69] *Idem*, §138, 139.

[70] ECJ, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, Case C□420/07, Judgment of 28 April 2009. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=78109&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2151623.

by internationally non-recognised state entities can be regarded as valid so as to avoid disadvantages for the population concerned.[71]

The case dealt with a Cypriot national, Mr. Apostolides, whose family was expelled from the North of the country; at the time of the expulsion the family owned a property located in that part of the island. Two British nationals purchased the property from a third party. The District Court of Nicosia, a court in the Greek-Cypriot zone, upheld the appeal of Mr. Apostolides ordering the Orams to leave the property and to pay various sums of money.

Following this, another action was brought before the Court of Appeal of England and Wales for the recognition and enforcement of judgments in civil and commercial matters.[72]

Subsequently the Court of Appeal now raised the question whether courts of the United Kingdom are obliged to enforce proceedings under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The doubts derived by the fact that the judgment relates to land in an area of Cyprus in which the Republic of Cyprus does not exercise sovereign jurisdiction and in which the application of Community Law is therefore largely suspended.[73]

The ECJ replied to the first question affirming that despite the suspension of Community Law in the northern part of Cyprus, as provided for by Protocol No 10 to the 2003 Act of Accession, Regulation (EC) No 44/2001[74] may be

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[71] ECJ, *Idem*, §69.

[72] Opinion of Advocate General Kokott, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, delivered on 18 December 2008, Case C□420/07, Reference for a preliminary ruling from the Court of Appeal, London, §4, 5. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62007CC0420&from=IT.

[73] Opinion of Advocate General Kokott, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, delivered on 18 December 2008, Case C-420/07, Reference for a preliminary ruling from the Court of Appeal, London, §5.

[74] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (c.d. Brussels Regulation I). The Regulation is the first of a series of legislations lasted until January 2015; it replaced 1968 Brussels Convention and applied to all Member States an area of freedom, security and justice.

applied to a judgment which is given by a Cypriot court and concerning a property situated in the northern part of the island.

Without entering into details about the second and last questions relevant to the ECJ for a preliminary ruling, for the present analysis it is important to examine the third question. More specifically the Court has been asked to provide an interpretation of the public order provision contained in art. 34, n. 1, of the Regulation.

The Court found that no fundamental principle of the United Kingdom legal system was harmed by the recognition and enforcement of judgments delivered by the Cypriot Courts and therefore the refusal of recognition was not justifiable on the basis of the public policy provision. Furthermore, the ECJ did not focus on the position advanced by the European Commission concerning this issue. According to the Commission the precepts of international policy in relation to Cyprus would have acquired a legally binding character, since they were reproduced in UN Security Council resolutions. The Court instead on this consideration observed that: "the requirements and appeals contained in the Security Council resolutions on Cyprus are in any case much too general to permit the inference of a specific obligation not to recognise any judgment given by a court of the Republic of Cyprus relating to property rights in land situated in Northern Cyprus".[75]

Finally, concerning this last issue, it is important to underline the position of the ECJ in assessing the role of non-recognition and the limits to its application (Namibia exception) in this case. In fact Court stated that: "it is also by no means clear whether recognition of the judgment in the present context would be beneficial or detrimental to solving the Cyprus problem and even whether this would be necessary for the protection of the fundamental rights of Mr Apostolides".

From the above, the role of the judge appears essential in the evaluation on a case by case analysis of the application of non-recognition (and of its

[75] Opinion of Advocate General Kokott, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, delivered on 18 December 2008, Case C-420/07, Reference for a preliminary ruling from the Court of Appeal, London, §111.

exceptions), always bearing in mind the purpose of non-recognition: the maintenance of peace and International Order.

### 4.2. Israel and Palestine

On the one side the European Community concluded with Israel an agreement, the Euro-Mediterranean Association Agreement, applying to the territory of the State of Israel and, on the other side, another agreement with the Palestine Liberation Organization (PLO), namely the Interim Association Agreement on Trade and Cooperation, applying to the territories of the West Bank and the Gaza Strip. [76]

Both the agreements are aimed at establishing a free trade area and abolishing customs duties as quantitative restrictions between the parties.

On this point, the ECJ highlighted that the agreement with Israel must be read in the sense that products coming from the West Bank are not involved in the territorial scope of the agreement and that any kind of privileged treatment has to be reserved to them.

Various EU Member States have also endorsed that products which are exported within the EU and originating in the occupied territories cannot wear the label of Israel, and then enjoy of the benefits arising from the E-Israeli Association Agreement.

About that, the European Commission has also prepared guidelines to prevent any kind of economic support from being given to the Israeli authorities by the European Union.[77]

The West Bank is controlled and *de facto* administered by both the authorities, therefore the Israeli idea in realizing an "ethnocratic regime" is threatened by

[76] *Euro-Mediterranean Interim Association Agreement on Trade and Cooperation between the European Community and the Palestine Liberation Organization (PLO)*, Brussels, 24 February 1997. Available at: http://europa.eu/rapid/press-release_PRES-97-50_en.pdf.

[77] European Commission, "Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967", published in the Official Journal of the European Union on 19 July 2013.

the presence of the PLO established according to the Oslo Agreements and representing the Palestinian general interest.[78]

The circumstances became interesting when in 2012 through a General Assembly resolution, Palestine statehood was affirmed although the concerned territory is subjected to two different authorities.[79]

What emerges is that in this case the territory is no more a requirement to gain statehood, or that same can be gained even if the territory is controlled by two entities.

### 4.2.1. Brita GmbH v Hauptzollamt Hamburg-Hafen

Concerning the Euro-Mediterranean Agreements concluded by the EU and Israel, a relevant decision of the ECJ is *Brita GmbH v Hauptzollamt Hamburg-Hafen* of 2009.[80]

As previously outlined, these agreements provide for the importation within the EU of products manufactured in Israel and Palestine, exempt from customs duties. The competent authorities have to cooperate to determine which is the precise origin of the good receiving a peculiar treatment.

Brita is a German company importing drink-makers for sparkling water and accessories, all of them produced by an Israeli supplier, Soda-Club Ltd, and manufactured in the West Bank.

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[78] Nicolini, M., Palermo F., Milan, E., *Law, Territory and Conflict Resolution: Law as a Problem and Law as a Solution*, 2016, pp. 331-336.

[79] The GA "Decides to accord to Palestine non-member observer State status in the United Nations, without prejudice to the acquired rights, privileges and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people, in accordance with the relevant resolutions and practice"..; See GA Resolution 67/19, 29 November 2012.

[80] ECJ, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, Case C-386/08, 29 October 2009. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=72631&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7386.

The German company tried to import goods of Soda-Club in Germany and informed the German customs authorities to be granted the preferential treatment since the products were realized in Israel.

The authorities suspected that those goods were manufactured in the occupied territories, then they asked for clarifications to the Israeli customs authorities, which however did not reply to that question and only said that the products originated in an area under Israel responsibility.

At this point the German authorities refused to allow the preferential treatment to the company viewing the impossibility to establish if those goods actually fell within the scope of the Euro-Mediterranean Agreement.[81]

In this decision the ECJ underlined that the territorial scope of the two agreements is different and separate, since the Euro-Mediterranean Agreement with Israel applies to the State of Israel, whereas the one with the PLO to the West Bank and the Gaza Strip; any obligation can be imposed upon third parties without its consent.[82]

Consequently, the Palestinian authority is not obliged to renounce in exercising the competence conferred according to the agreement and to the right to issue customs documents providing proof of the goods' origin, which were manufactured in the West Bank and the Gaza Strip.[83]

Therefore, those goods do not fall within the territorial scope of application of the agreement with Israel and, according to the ECJ, the German authorities may refuse to allow the preferential treatment to Israeli goods.[84]

An interesting point is that the ECJ recalled the content of the preamble to the two agreements: "The EC-Israel Agreement entered into force on 1 June 2000.

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[81] Opinion of Advocate General Bot, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, delivered on 29 October 2009, Case C□386/08, Reference for a preliminary ruling from the Finanzgericht Hamburg (Germany), §49-58. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62008CC0386&lang1=it&type=TXT&ancre=.

[82] Opinion of Advocate General Bot, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, delivered on 29 October 2009, Case C□386/08, Reference for a preliminary ruling from the Finanzgericht Hamburg (Germany), §20, 32-35.

[83] *Idem*, §48.

[84] *Idem*, §31, 59.

The preamble to that agreement provides that "the Community, its Member States and Israel wish to strengthen [the existing traditional links between them] and to establish lasting relations based on reciprocity and partnership and promote a further integration of Israel's economy into the European economy", and primarily that "The preamble to the EC-Israel Agreement also states that the parties have concluded that agreement in the light of 'the importance [which they] attach to the principle of economic freedom and to the principles of the United Nations Charter, particularly the observance of human rights and democracy, which form the very basis of the Association".[85]

On the other hand, also the agreement between the EU and the PLO imposes "the observance of human rights, democratic principles and political and economic freedoms which form the very basis of their relations". The agreement was also concluded in the light of 'the difference in economic and social development existing between the parties and the need to intensify existing efforts to promote economic and social development in the West Bank and the Gaza Strip".[86]

Furthermore, according to the Madrid Process started in 1991[87], Israel and the PLO signed the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip according to which an elected Council and an elected Executive Authority would have been founded for the Palestinian people in the West Bank and the Gaza Strip primarily to settle a permanent peace.

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[85] Opinion of Advocate General Bot, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, delivered on 29 October 2009, Case C□386/08, Reference for a preliminary ruling from the Finanzgericht Hamburg (Germany), §14, 15.

[86] *Idem*, §32.

[87] The Madrid Conference is an international peace conference, held in 1991 as an attempt to negotiate a peace process between Israel and Palestine, and involving these two countries as well as Arab countries, such as Jordan, Lebanon and Syria. The conference was followed by bilateral negotiations between Israel and the Jordanian-Palestinian delegation, Lebanon and Syria. In 1992, multilateral negotiations towards regional cooperation started and they were joined by Israel, the Jordanian-Palestinian delegation and the international community, but without Lebanon and Syria.

The bilateral negotiations successively led to the signing of the Oslo I Accord, the Israel-Jordan negotiations led to a peace treaty in 1994, whereas Israeli–Syrian negotiations and a series of following meetings failed to result in a peace treaty.

In the ECJ opinion this is a fundamental step to guarantee the realization of legitime rights and interest of the Palestinian population, and for the creation of a democratic basis for its future institutions. [88]

The cooperation mechanism between the EU and Israel must rely upon a mutual trust among the customs authorities of the states' parties and on the mutual recognition of the acts which they issued.

However, recognition is not absolute, since in specific circumstances the customs authority of the importing State may not be bound by the result of *a posteriori* verifications carried out by the customs authorities of the exporting State.[89]

### 4.3. The Western Sahara and Front Polisario

The Western Sahara is a territory of northern-west Africa, which became a Spanish province after the colonization of the Kingdom of Spain in the nineteenth century.

However, the territory is still considered by Morocco to be an integral part of its territory; on the contrary the United Nations General Assembly recognised Western Sahara in 1960 as a non-self-governing territory, and stated that "has never recognised that the Kingdom of Morocco has the status of administering power (*de jure* or *de facto*) and even continues, to the present time, to show the Kingdom of Spain as administering power in its list[90] of non-self-governing territories and administering powers".[91]

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[88] Opinion of Advocate General Bot, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, delivered on 29 October 2009, Case C□386/08, Reference for a preliminary ruling from the Finanzgericht Hamburg (Germany), §38.

[89] Opinion of Advocate General Bot, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, delivered on 29 October 2009, Case C□386/08, Reference for a preliminary ruling from the Finanzgericht Hamburg (Germany), §76-77.

[90] See Report of 3 February 2017 of the United Nations Secretary-General on information from Non-Self-Governing Territories transmitted under Article 73(e) of the Charter of the United Nations (A72/62).

[91] Opinion of Advocate General Wathelet, *Council of the European Union v Front Populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, Case C-104/16 P, delivered on 13 September 2016, §229.

For this reason, the Front Polisario, a national liberation movement representing the resistance of the Saharawi population during all the various stages of the territory's occupation, has been created.

### 4.3.1. Council of the European Union v Front Populaire pour la Libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)

On December 21, 2016, the ECJ dismissed an action brought by the Front Polisario contesting the decision of the Council of the European Union to approve an agreement between the European Union and the Kingdom of Morocco on the mutual liberalization of certain agricultural goods (Liberalization Agreement). According to general International Law applicable in the EU and Morocco, the ECJ argued that the scope of application of the agreement did not involve the Western Sahara territory.[92]

The decision has obviously arisen political implications, however it represents a landmark case in the ECJ approach to treaty law and, primarily, to the principle of self-determination.

As in *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams,* the main issue faced by the ECJ in *Council of the European Union v. Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)*, was the validity of the EU-Morocco Association Agreement (AA) and Liberalisation Agreement (LA), as well as the application of these agreements within the territory of Western Sahara and to the goods originating in that area.[93]

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[92] ECJ, *Council of the European Union v Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)*, Case C□104/16 P, Judgment of 21 December 2016. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CJ0104&from=EN.

[93] In 1966, the UN General Assembly adopted Resolution 2229 (XXI) on the Question of Ifni and the Spanish Sahara, reaffirming the inalienable right of the people of the Spanish Sahara to self-determination. The Resolution requested Spain "to determine, at the earliest possible date, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation with the Governments of Mauritania and Morocco and any other interested party, the procedures for the holding of a referendum under [UN] auspices with a view to enabling

In 2012, the EU and Morocco concluded the above-mentioned LA providing for mutual liberalization measures and whose territorial scope is the same as that of the EU-Morocco AA. The former was approved by the EU through a Council decision. The Front Polisario appealed the General Court of the European Union (GCEU) requesting the annulment of this decision.[94]

With the judgment delivered on 10 December 2015, the General Court partially annulled Council Decision 2012/497/EU of 8 March 2012. In fact the GCUE concluded in paragraph 247 of the judgment that: "Council failed to fulfil its obligation to examine all the elements of the case before the adoption of the contested decision. Accordingly the action must be upheld and the contested decision must be annulled in so far as it approves the application of the agreement referred to by it to Western Sahara".[95]

The Council did not peacefully accept the GCEU words and referred the matter to the ECJ for its annulment; the ECJ finally accepted the appeal and dismissed the judgment of the CGEU through the ruling of December 2016.

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the indigenous population of the Territory to exercise freely its right to self-determination". In 1974, the Kingdom of Spain accepted to organize a referendum in Western Sahara under the UN supervision. However, the situation in Western Sahara deteriorated during the next year when King Hassan II of Morocco decided to announce the belonging of Western Sahara to Morocco and when he called for the organization of a peaceful march towards that area. The UN condemned the march announced by the King of Morocco and commanded to immediately leave the territory of Western Sahara. In 1976, the Kingdom of Spain informed the UN that from the date of withdrawing from Western Sahara, the Kingdom considered itself untied from any responsibility concerning the administration of the territory.

In the meanwhile, the conflict between the Kingdom of Morocco, the Islamic Republic of Mauritania and the Front Polisario started and continued until 1988 when the parties accepted the UN Secretary-General proposal for settlement and ceasefire, as the organization of a referendum.

However, today the referendum has still not been organized. Great part of the Western Sahara territory if controlled by Morocco, whereas the Front Polisario only controls a small est-area.

[94] Opinion of Advocate General Wathelet, *Council of the European Union v Front Populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, Case C□104/16 P, delivered on 13 September 2016, §21.

[95] GCEU, Front populaire pour la libération de la *Saguia-el-Hamra et du Rio de Oro* (Front Polisario), v Council of the European Union, Case T-512/12, Judgment of 10 December 2015, §247. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012TJ0512&from=EN.

Indeed, the ECJ found that to determine the territorial scope of the LA, which textually does not refer in any passage to Western Sahara, the GCEU had failed to take into account all the International Law rules applicable within the relations between the EU and Morocco, as provided for in 1969 Vienna Convention on the Law of Treaties.[96]

On this point, the ECJ noted at first that, in view of the separate and distinct status accorded to the territory of Western Sahara under the UN Charter and the principle of self-determination of people, it is excluded that the expression "territory of the Kingdom of Morocco", defining the territorial scope of the association and liberalization agreements, includes Western Sahara; secondly, the ECJ noted that such agreements are applicable to that territory. Thus, the General Court did not lead to the consequences arising from the status of Western Sahara in the light of International Law. [97]

Yet, as it is quite assumed by the international practice, when a treaty is applicable not just to the territory of a State, but also beyond that, the same treaty always expressly provides for it, whether it deals with a territory under the jurisdiction of that State or with a territory of which the State is responsible for the international relations. This rule also precludes the association and liberalization agreements being considered applicable to Western Sahara.

After recalling the principle of the relative effect of the Treaties (*pacta tertiis nec nocent nec prosunt*) providing that a treaty must neither undermine nor operate for the benefit of third parties without their consent, the ECJ explained that, having regard of the Western Sahara Advisory Opinion issued by the ICJ in 1975, the people of this territory must be considered as a third party in relation to the EU and Morocco, on which the implementation of the liberalization agreement can affect. In the present case, the ECJ affirmed that it

[96] Opinion of Advocate General Wathelet, *Council of the European Union v Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)*, Case C□104/16 P, delivered on 13 September 2016, §51.

[97]Idem, §75; ECJ, *Council of the European Union v Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)*, Case C□104/16 P, Judgment of 21 December 2016, §84.

did not appear that this people gave their consent to the agreement being applied to Western Sahara.[98]

As to the circumstance that certain clauses of the association and liberalization agreements have been *de facto* applied in some cases to products originating in Western Sahara, the ECJ verified that it has not been demonstrated that this practice was a direct consequence of an agreement between the parties modifying the interpretation of the scope of application of those agreements.

Moreover, if it was the truth that the will of the EU were such, then it intended to implement the agreements in a manner which is incompatible with the principle of self-determination and the relative effect of the Treaties, as with the requirement of good faith deriving from International Law.[99]

Having concluded that the liberalization agreement did not apply to the territory of Western Sahara, the ECJ annulled the judgment of the General Court and decided to rule itself on the appeal lodged by the Front Polisario.

In this regard, the ECJ noted that, since the liberalization agreement did not apply to Western Sahara, the Front Polisario is not affected by the decision through which the Council concluded that agreement.

Therefore, the ECJ "rejects the Front Polisario's action on the ground of lack of standing" [100].

[98] Opinion of Advocate General Wathelet, *Council of the European Union v Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)*, Case C□104/16 P, delivered on 13 September 2016, §52, 76, 105, 108; ECJ, *Council of the European Union v Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)*, Case C□104/16 P, Judgment of 21 December 2016, §105, 106.

[99] ECJ, *Idem,* §118-123.

[100] ECJ, *Council of the European Union v Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)*, Case C□104/16 P, Judgment of 21 December 2016, §133, 134, available at http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0104&lang1=it&type=TXT&ancre=

### 4.3.2. Western Sahara Campaign UK, The Queen v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs

Another recent ECJ decision concerning the territory of Western Sahara is *Western Sahara Campaign UK, The Queen v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* of 2018.[101]

As already explained, the ECJ through the sentence of 21 December 2016 declared that the association and liberalization agreements concluded between the EU and Morocco must be interpreted, according to International Law, in the sense that they are not applicable to Western Sahara. However, this decision did not deal with the Partnership Agreement between the European Community and the Kingdom of Morocco in the fisheries sector (Fisheries Agreement); consequently the ECJ did not sentence on the validity of that agreement.

The Western Sahara Campaign (WSC) is an independent voluntary organization aimed at promoting the recognition of the right of self-determination of the Saharawi population.

The organization referred to the High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court) that the Fisheries Agreement as all the acts approving and implementing it were invalid in those parts affirming that the same agreement and acts are applicable to the waters adjacent the Western Sahara territory.

Hence, the WSC believed that the British authorities were acting illegally in providing for the implementation of that agreement and, primarily, in issuing licenses to fish in the waters in question.[102]

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[101] ECJ, *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Case C□266/16, Judgment of 27 February 2018. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CJ0266&from=EN.

[102] ECJ, *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Case C□266/16, Judgment of 27 February 2018, §30, 31.

The High Court of Justice asked the ECJ to decide on the validity of the Fisheries Agreement according to EU Law.

#### 4.3.2.1. Opinion of Advocate General Wathelet

The important issue concerning this case is the opinion delivered by Advocate General Wathelet in January 2018 in which he directly addresses the question of the limitations on the obligation not to recognize an illegal situation[103].

More precisely, in the case under study, the Court by order joined the 'Confédération marocaine de l'agriculture et du développement rural' (Comader) as a party to the proceedings.

The Comader and the Commission maintained that "the obligation not to recognize an illegal situation resulting from a breach of rules *erga omnes* of International Law and the obligation not to render aid or assistance in maintaining that situation" did not correspond to the prohibition of concluding international agreements aimed at encouraging the economic development of Western Sahara population. In sustaining so they relied upon paragraph 125 of the Namibia Advisory Opinion.[104]

However, according to Advocate General Wathelet the exception was not applicable to the case.

He recalled the Commission's attempt to justify through the Namibia exception the acceptance made by the United Kingdom customs authorities of movement certificates for agricultural goods originated in the occupied territory of Cyprus issued by the TRNC, an entity object of a non-recognition measure.

[103] Opinion of Advocate General Wathelet, *Western Sahara Campaign UK, The Queen v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Case C-266/16, delivered on 10 January 2018, §288-292.

[104] Opinion of Advocate General Wathelet, *Western Sahara Campaign UK, The Queen v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Case C-266/16, delivered on 10 January 2018, §291.

However, the Advocate General rejected that interpretation arguing that there was no correspondence between the situation under discussion and the Namibia circumstances.[105]

Moreover, the limitation to the non-recognition rule asserted by the ICJ has the purpose not to deprive the inhabitants of the territory of the advantages arising from the international cooperation; consequently, this "could not justify the conclusion of international trade agreements", since "the conclusion of such agreements was covered by the obligation not to recognize illegal situations"[106].

Not by chance, the examples made by the ICJ in the Namibia Advisory Opinion concerned acts such as "the registration of births, marriages and deaths, the effect of which can be ignored only to the detriment of the inhabitants of the Territory"; international trade agreements are in any means involved in this kind of advantages.[107]

Consequently, the contested acts, applicable to the territory of Western Sahara and to the waters adjacent to it since they are involved within the jurisdiction or sovereignty of the Kingdom of Morocco, "breach the European Union's obligation to respect the right to self-determination of the people of that territory and its obligation not to recognize an illegal situation resulting from a breach of that right and not to render aid or assistance in maintaining that situation".

#### 4.3.2.2. ECJ ruling

In response the ECJ, in its ruling of February 2018, declared firstly that it had the competence to judge on the validity of those acts concluding the

[105] Opinion of Advocate General Wathelet, *Western Sahara Campaign UK, The Queen v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Case C-266/16, delivered on 10 January 2018, §291.

[106] Opinion of Advocate General Wathelet, *Western Sahara Campaign UK, The Queen v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Case C-266/16, delivered on 10 January 2018, §292.

[107] ECJ, *Idem,* §292.

international agreement, and in this field to decide if similar agreements complied with the Treaties as with the International Law rules binding upon the EU.[108]

The ECJ in examining the Fisheries Agreement and its validity has verified if the possibility to exploit the resources originating in the waters adjacent to the Western Sahara complied with the EU law and with the International Law; to confirm this point it should understand if those waters fell within the territorial scope of application of the agreement.

In this regard, the ECJ observed that the agreement is applicable to the "territory of Morocco", which means to the "territory of the Kingdom of Morocco" involved in the association agreement.[109] Therefore, as the ECJ asserted in *Council of the European Union v. Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)*, that expression refers to the geographical space on which the Kingdom of Morocco may exercise its sovereignty according to International Law, with the exclusion of any other territory, as Western Sahara[110].

Furthermore the Fisheries Partnership Agreement applies not only to the territory of the Kingdom of Morocco, but also to the "waters falling within the sovereignty or jurisdiction of that State, as stated in paragraph 57 of the present judgment. The Association Agreement does not use such an expression".[111]

What is important to underline in this ruling is paragraph 65 in which it is made clear that the inclusion of the territory of Western Sahara within the scope of application would violate several rules of International Law applicable to the UE and Morocco relations, and especially the right of self-determination.[112]

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[108] Opinion of Advocate General Wathelet, *Council of the European Union v Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)*, Case C□104/16 P, delivered on 13 September 2016, §52, 76, 105, 108; ECJ, *Idem,* §43.

[109] ECJ, *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Case C□266/16, Judgment of 27 February 2018, §57-64.

[110] ECJ, *Idem*, §62.

[111] ECJ, *Idem*, §65.

[112] ECJ, *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Case C□266/16,

The ECJ noticed that the Fisheries Agreement is applicable to the "waters subjected to sovereignty or jurisdiction" of the Kingdom of Morocco.

That being the case, according to the UN Convention on the Law of the Sea, waters on which the coastal State has the right to exercise its sovereignty or jurisdiction are limited to the waters adjacent to its own territory and belonging to its territorial sea or to its exclusive economic zone.[113]

## 5. Conclusions

Contrary to the ICJ, the ECtHR has acquired a different attitude, often ignoring the entrenchment of the entity in the name of the general interest and arising wide criticism primarily based on the threat that this behavior may entail to the international order.

It is true that the essence of the non-recognition principle is to safeguard international peace and security by refraining from recognizing illegal acts; however in some circumstances this rule cannot be considered having absolute nature when the need to protect the public order arises.

Another basic consideration is that the ECtHR, needless to say, has the main purpose to safeguard human, civil and political rights set out in the Convention, and it is therefore natural that the Court adopts a more liberal approach to the principle of non-recognition enlarging the scope of the Namibia exception when threats to human rights occur

As it has been showed, the ICJ in its Advisory Opinion on Namibia has asserted the duty of third States not to recognize official acts of South Africa in Namibia, depriving South Africa of its sovereignty; this rule did not extend to

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Judgment of 27 February 2018. In paragraph 65 the Court affirms: "If the territory of Western Sahara were to be included within the scope of the Association Agreement, that would be contrary to certain rules of general International Law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, stated in Article 1 of the Charter of the United Nations, and the principle of the relative effect of treaties, of which Article 34 of the Vienna Convention is a specific expression".

[113] ECJ, *Idem*, §67, 68.

acts such as "the registration of birth, deaths and marriages, the effect of which can be ignored only to the detriment of the inhabitants of the Territory".

The ICJ has in this way proposed a double *criterium* for applying non-recognition: it should evaluate if the recognition of those acts is necessary to protect the interest of the inhabitants, and if such recognition permits the illegal entity to assert such public authority as the occupation purports to generate.

The English Court's tendency in denying exception to non-recognition has entailed that the litigation before the English Courts addressed the whole matter through the lens of private International Law; Public International Law issues to the Namibia exception were not addressed.

In this sense the "state necessity doctrine" criticized this attitude on the basis that English Courts had always looked at the internal effects of recognition and not at the external ones, to the law which is effective and enforced in that territory.

It is true that the essence of the non-recognition principle is to safeguard international peace and security by refraining from recognizing illegal acts; however in some circumstances this rule cannot be considered having absolute nature when the need to protect the public order arises.

That is why the ECtHR has adopted a broader approach in applying the Namibia exception. This Court in fact often ignored the entrenchment of the entity in the name of the general interest.

Needless to say, the main purpose of the ECtHR is to safeguard human, civil and political rights as set out in the Convention, and it is therefore natural that the Court adopts a more liberal approach to the principle of non-recognition enlarging the scope of the Namibia exception when threats to human rights occur.

The ECJ instead took a stricter position in *Anastasiou*, by denying the TRNC the power to issue export licenses for exporting goods to the EU market, as well as towards Israel. The same approach has been adopted in the recent case of *Western Sahara Campaign UK, The Queen v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and*

*Rural Affairs,* in which the Court stressed how the inclusion of Western Sahara within the territorial scope of the agreements would violate several rules of International Law applicable to the EU and Morocco relations, and primarily the right of self-determination[114].

[114] ECJ, *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Case C□266/16, Judgment of 27 February 2018, §63.

## CONCLUSIONS

The aim of this work was to highlight the fact that non-recognition consists of a legal obligation that plays a fundamental role in International Law.

Furthermore, we wanted to challenge the fact that assessing that it is an obligation without real substance[1] or without real impact[2] is not sufficient reason for determining its irrelevance.

We have started from the concept of recognition of States, analyzing the different theories on recognition and evaluating the possible legal character of this concept. The aim was to infer the binding nature of non-recognition out of its opposite concept. It emerged "the idea that the Constitutive/Declaratory dichotomy is insufficient to explain the complex effects of recognition"[3]. In fact it has been noted the rise of a "third approach" which "holds that recognition occasionally has certain constitutive effects"[4]. This was analyzed in Chapter 1.

Secondly we wanted to show how non-recognition is one of the tools that puts into practice the principle *ex iniuria ius non oritur* to the detriment of the application of the principle *ex factis ius oritur* which is one of the manifestations of effectiveness.

In fact in the last three decades there was a dramatic decrease in the attention that International Lawyers have reserved to effectiveness. That has occurred as

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[1] Separate opinion of Judge Kooijmans, ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep para 44; See also, Talmon, S. '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, JM Thouvenin (eds), *The Fundamental Rules of the International Legal Order : Jus Cogens and Obligations Erga Omnes,* (Martinus Nijhoff 2005) 127-166

[2] Arcari, M. *The Relocation of the US Embassy to Jerusalem and the Obligation of Non-recognition in International Law,* in QIL, 50, (2018), 1-13, p 13.

[3] *Report of the Sydney Conference on Recognition/Non –Recognition in International Law*, in *International Law Association (ILA) Fourth (Last) Report*, 2018, p. 26.

[4] *Ibidem*.

a result of the development of the emergence of the principles that constitute the so called International Public Order, that have spread the feeling amongst International Lawyers that the role of effectiveness was no more fundamental to the operation and understanding of their discipline. As a consequence the principle *ex iniuria ius non oritur* has found a way to assert itself more, and with it one of its manifestations, the instrument of non-recognition. In this way, non-recognition finds its foundation in the protection of public order and in the principle *ex iniuria ius non oritur*. This is what has emerged in Chapter 2.

Always with the aim to demonstrate the relevance of the concept of non-recognition, we wanted to propose an evolutionary reconstruction. This in order to deduce coherence within the International Legal Order. In fact, as the International Community and the corresponding International Law have evolved, so has the duty of non-recognition. Indeed, non-recognition can be understood as the tool that indicates the evolutionary stage of International Law. Not only that, it also indicates which direction it is heading to. The analysis of the state practice of non-recognition shows that. Initially, in fact, the case of Manchkuo, Bantustans and TRNC concerns the field of statehood, a topic at the heart of International Law. The cases concerning Palestine, East Timor, Kuwait, Abkhazia and South Ossetia and Crimea show instead the interest of International Law in the protection of international sovereignty but at the same time recognize the importance of fundamental norms such as the prohibition of the use of force and the prohibition of aggression. Then the cases related to Rhodesia, Namibia, The Wall in the Occupied Palestinian Territory and, more recently, the US Embassy to Jerusalem have highlighted how International Law has felt the need to protect other principles and interests, such as the self-determination of peoples and the respect of other international obligations. In fact, the recent case of the US embassy in Jerusalem has given the opportunity to see how International Law considers essential the respect of the obligation of non-recognition. On this respect has

been assessed that "States approach non-recognition as a safeguard for International Law itself; its integrity and its relevance as a framework meant to maintain and restore peace[5]". In particular it is worth noting the intervention of Mr. Aboulatta made before the Security Council representing Egypt: "The call to safeguard the international legal terms of reference and International Law is not a luxury, especially in a region that is beset by conflict and a world subjected to huge challenges. We have no need for further unjustified chaos. This is all that takes into account what is before our very eyes — the huge danger posed by the deterioration of the International Legal System". This is what has emerged from Chapter 3.

Continuing with the evolutionary analysis of the non-recognition we wanted to finally verify the impact of the protection of fundamental rights with reference to the application of non-recognition, the so-called Namibia exception. As already stated, it seeks to find a balance between the *ex iniuria ius non oritur* principle serving "as a bulwark against injustice", and the *ex factis ius oritur* principle safeguarding against disorder. Through the analysis of the jurisprudence of the ECJ and the ECtHR we wanted to verify the scope of the application of the Namibia exception. The ECJ took a stricter position in *Anastasiou*; the same restrictive attitude was adopted towards Israel, as well as towards Morocco in the recent case of *Western Sahara Campaign UK, The Queen v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*.

Contrary to the ICJ, the ECtHR has acquired a different attitude, often ignoring the entrenchment of the entity in the name of the general interest and arising wide criticism primarily based on the threat that this behavior may entail to the international order. The main purpose of the ECtHR is to safeguard human, civil and political rights as set out in the Convention, and it is therefore natural that the Court adopts a more liberal approach to the

[5] Lagerwall, A., *Non recognition of Jerusalem as Israel's Capital: A condition for International Law to remain a relevant framework?* In QIL, 50 (2018), 33-46, p. 42.

principle of non-recognition enlarging the scope of the Namibia exception when threats to human rights occur.

A very careful assessment of the impact of the "Namibia exception" in individual situations results therefore necessary in order to maintain a right balance between the guarantees of the fundamental rights and the objectives pursued by the International Community through the application of the duty of non-recognition. This is what has emerged from Chapter 4.

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