

ZOOM IN

The question:

The relocation of the US embassy to Jerusalem and the obligation of non-recognition in international law

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1. Introduction

On 14 May 2018, on the day the 70th anniversary of the establishment of the State of Israel was celebrated, the new United States (US) embassy to Israel in Jerusalem was solemnly inaugurated.¹ This event followed the Proclamation issued on 6 December 2017 by the US President Donald Trump who, building on the Congress 'Jerusalem Embassy Act' of 1995 (Public Law 104-45), decided to officially recognize Jerusalem as the capital of Israel and to relocate the US embassy from Tel Aviv to Jerusalem.²

From the very beginning, the US initiative has prompted strong reactions in the international community. As for the United Nations (UN), the Security Council (SC) was first convened on 8 December 2017 to hear the report on the issue by the Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary

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¹ See the press statement by the US Secretary of State, Mike Pompeo, at <www.state.gov/secretary/remarks/2018/05/282066.htm>.

² See 'Presidential Proclamation Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem' (6 December 2017) <www.whitehouse.gov/presidential-actions/presidential-proclamation-recognizing-jerusalem-capital-state-israel-relocating-united-states-embassy-israel-jerusalem/>.

General, Mr Nickolay Mladenov.³ On 18 December 2017, at the initiative of Egypt, a draft resolution was tabled before the SC; the text obtained 14 votes in favour, but failed to be adopted owing to the veto cast by the US delegation.⁴ A text drafted along the same lines was then introduced by Turkey and Yemen before the General Assembly (GA), convened in the resumed tenth emergency session on 21 December 2017.⁵ The latter text was adopted by the GA as resolution ES-10/19, by 129 votes in favour, 9 against, with 35 abstentions.⁶ The relevant operative paragraphs of resolution ES-10/19 read as follows:

[The General Assembly]

1. *Affirms* that any decisions and actions which purport to have altered the character, status or demographic composition of the Holy City of Jerusalem *have no legal effect, are null and void* and must be rescinded in compliance with relevant resolutions of the Security Council, and in this regard calls upon all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, *pursuant to Council resolution 478 (1980)*;
2. *Demands* that all States comply with Security Council resolutions regarding the Holy City of Jerusalem, and *not recognize any actions or measures contrary to those resolutions*.⁷

The overwhelming majority of States speaking in the meetings of both the SC and the GA deemed the US decision to relocate the embassy to Jerusalem contrary to international law, as well as to pertinent SC resolutions on the status of the Holy City and, on this basis, censured that decision as having no legal effect, null and void. Arguably, the criticism of the US initiative was mostly prompted by the fact that it disregarded the specific commitment, bearing on all States, not to recognize illegal situations arising from, and consolidated after, serious breaches

³ See UN Doc S/PV.8128 (8 December 2017).

⁴ See UN Doc S/2017/1060 (18 December 2017) for the text of the draft resolution submitted by Egypt, and UN Doc S/SPV.8139 (18 December 2017) for the summary records of the relevant SC meeting.

⁵ See the text of the draft resolution in UN Doc A/ES-10/L.22 (19 December 2017).

⁶ See UNGA Res ES-10/19 (21 December 2017) UN Doc A/RES/ES-10/19 and UN Doc A/ES-10/PV.37 (21 December 2017) for the summary records of the relevant GA meeting.

⁷ UNGA Res ES-10/19 (n 6) paras 1 and 2 (emphasis added).



of rules of international law of fundamental importance – such as those prohibiting territorial acquisitions carried out through the use of force – as well as the corollary commitment not to engage in any act or in any form of assistance which may help in consolidating the illegal situation.⁸

While the existence of a general obligation for States not to recognize situations arising from grave breaches of international law is widely endorsed in the legal literature and in international case law, some of the basic questions concerning its legal foundation, nature and content remain controversial. The case of the relocation of the US embassy to Jerusalem could then provide an occasion to revisit some of these controversial issues and try to shed some light on them.⁹

2. An obligation of non-recognition under general international law?

As is widely known, there are a number of different theoretical approaches that have been proposed concerning the legal foundation of

⁸ For the present purposes, one can assume that an illegal situation originated from the military control acquired following the 1967 Six Days war by Israel over the Palestinian occupied territory, including East Jerusalem, and then perpetuated by the subsequent Israeli unilateral attempts to alter the status of the Holy City, such as the 1980 ‘basic law’ proclaiming Jerusalem as the complete and united capital of Israel. A specific application of the obligation of non-recognition to the situation of Jerusalem is provided for in resolution 478 (1978), where the UNSC affirmed that ‘the enactment by Israel of the “basic law” on Jerusalem constitutes a violation of international law and does not affect the continued application of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ... in the Palestinian and other Arab territories occupied since 1967, including Jerusalem’; determined that ‘all legislative and administrative measures and actions taken by Israel, the occupying power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent “basic law” on Jerusalem are null and void and must be rescinded forthwith’; decided ‘not to recognize the “basic law” and such other actions of Israel that, as a result of this law, seek to alter the status of Jerusalem; and called upon ‘all Member States to accept this decision’ and ‘those States that have established diplomatic missions at Jerusalem to withdraw such mission from the Holy City’. See UN Doc S/RES/478(1978) (20 August 1978) paras 2, 3 and 5 respectively.

⁹ The topic was already considered in one of the very first issues of QIL, dedicated to the 2014 crisis ignited by annexation of Crimea by Russia: see E Milano, ‘The Non-recognition of Russia’s Annexation of Crimea: Three Different Approaches and One Unanswered Question’ (2014) *Zoom out I Questions Intl L* 35.

the obligation of non-recognition in international law.¹⁰ In particular, it is a matter of debate whether non-recognition flows from the application of the general principle *ex iniuria ius non oritur* to any violation of international law,¹¹ whether it attaches only to the breach of specific obligations having *erga omnes* effects,¹² or whether it stands out as a secondary consequence of serious violations of obligations arising under peremptory norms of international law.¹³ Contiguous to these issues, there is the further question as to whether non-recognition, as an obligation provided for under general international law, may be deemed to have a self-executing character or whether its triggering is subject to a previous (binding) determination made by a collective organ, such as the SC.¹⁴

While it would be too much to expect definitive clarification on the issues above, one can nonetheless attempt to identify some clues from the case under review. As already outlined above, a significant number

¹⁰ The available alternatives in this regard are very lucidly summarized by E Milano, ‘The Doctrine(s) of Non-Recognition: Theoretical Underpinnings and Policy Implications in Dealing with *De Facto* Regimes’ ESIL Research Forum 2007 <www.esil-sedi.eu/fichiers/en/Agora_Milano_060.pdf> and Milano, ‘The Non-recognition of Russia’s Annexation (n 9) 39-51.

¹¹ See generally A Lagerwall, *Le principe ex iniuria ius non oritur en droit international* (Bruylant 2016) 141-159.

¹² See ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 159, where the Court held that ‘Given the character and the importance of the rights and obligations involved [ie obligations qualified in previous paragraphs of the Opinion as having an *erga omnes* character], all the States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian territory’.

¹³ This alternative is endorsed by the ILC 2001 Draft Articles on the Responsibility of States for internationally wrongful acts (hereinafter ILC 2001 Draft Articles), arts 40 and 41 of which address the particular consequences of serious breaches of obligations under peremptory norms of general international law. Art 41(2) specifically establishes that ‘No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation’ (see (2001) II/2 YB Intl L Commission 29).

¹⁴ See A Pert ‘The “Duty” on Non-Recognition in Contemporary International Law: Issues and Uncertainties’ (2012) 30 Chinese (Taiwan) YB Intl L & Affairs 48, 60-63. The requirement of a previous binding determination by a UN organ for the triggering of the collective obligation of non-recognition was specifically put forward by Australia during the proceedings of the East Timor case: see ICJ, *East Timor (Portugal v Australia)*, ‘Rejoinder of the Government of Australia’ (1 July 1993) 131-132, para 230 available at <www.icj-cij.org/files/case-related/84/6841.pdf>.



of States intervening at the SC and the GA meetings maintained that the US decision to move the embassy to Jerusalem ‘contradict[ed] *international law* and Security Council resolutions’.¹⁵ This reference to the violation of international law (besides the relevant SC resolutions) may make sense if one considers the formal element appearing in the preamble of GA resolution ES-10/19, where the principle of the inadmissibility of the acquisition of territory by force is expressly mentioned.¹⁶ This reference confirms the applicability to the case in hand of the customary rule – endorsed in general terms by the GA resolutions on Friendly Relations and on the Definition of Aggression – which sets forth, as a corollary of the prohibition of the use of force in international relations, the specific obligation for all States not to recognize the legality of territorial acquisition carried out through armed actions.¹⁷

The relevance of general international law in the case in hand is further corroborated if one looks at the arguments put forward by the US, and at the replies thereto made by other members of the Council during the SC meeting of 18 December 2017, when the Egyptian draft resolution on the matter was considered. On this occasion, the US representative argued the sovereign right of the United States to determine where and whether to establish an embassy, and refuted any suggestion that any limitation to this right may arise from the previous SC resolution 478 (1980) on the status of Jerusalem, which was qualified as ‘not bind-

¹⁵ See in particular the statement of the delegation of Sweden, UN Doc S/PV.8128 (n 3) 4 (emphasis added). In the same direction see the statements of Bolivia (*ibid* 8) Egypt (UN Doc S/PV8139 (n 4) 2), Yemen (UN Doc A/ES-10/PV.37 (n 6) 2), Turkey (*ibid* 6), Pakistan (*ibid* 10), Indonesia (*ibid* 11), Maldives (*ibid* 12), Syria (*ibid* 13), Cuba (*ibid* 14).

¹⁶ See UNGA Res A/ES-10/19 (n 6), third preambular paragraph. A reference to the same effect was contained in the draft resolution not adopted at the meeting of the SC of 18 December 2017: see UN Doc S/2017/1060 (n 4) second preambular paragraph.

¹⁷ See UNGA Res 2625 (XXV) ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 October 1970), stating that ‘No territorial acquisition resulting from the threat or use of force shall be recognized as legal’; UN Res 3314 (XXIX) ‘Definition of Aggression’ (14 December 1974) art 5(3) stating that ‘No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful’.

ing' and 'without force'.¹⁸ The representative of France proved especially prominent in rebutting the US argument, notably by holding that the voting on the (vetoed) draft resolution reflected 'the desire of 14 members of the Council to reaffirm their collective commitment to international law'.¹⁹ In fact, SC resolution 478 (1980) was not adopted under Chapter VII of the Charter and, while containing a 'decision' by the Security Council not to recognize the basic law and other actions by Israel that seek to alter the status of Jerusalem, it merely called upon all States to accept the latter decision and, for those having established diplomatic missions at Jerusalem, to withdraw such missions from the Holy City.²⁰ This notwithstanding, the binding character of resolution 478 (1980) could have been rather easily grounded on the general power of decision granted to the SC under Article 25 UN Charter, which was prominently upheld by the ICJ in a well-known passage of the 1971 *Namibia* advisory opinion.²¹ Interestingly enough, no member of the SC referred to this interpretation during the meetings devoted to the issue of the US embassy in Jerusalem. This seems to add fuel to the conclusion that, in the case in hand, a duty not to recognize the effects of the US decision was considered by the States involved as something already imposed under general international law, and in respect to which the resolutions by SC may simply have operated as a mere restatement.

In the same vein, one may also be tempted to trim down the critical role that SC resolutions are called to play in triggering the obligation of non-recognition. This is especially true in the light of the above recalled statement by the representative of France, according to which the response tentatively elaborated within the Council in response to the US decision was intended to reaffirm a 'collective commitment to international law'. It can be argued that such a 'collective commitment' may prove to exist under international law for all States independently from

¹⁸ See UN Doc S/PV.8139 (n 4) 4. The US delegate expressly quoted the position put forward by the United States at the time of the adoption of SC res 478 (1980): see UN Doc S/PV.2245 (20 August 1980) 11-12 para 111.

¹⁹ See UN Doc S/PV.8139 (n 4) 6.

²⁰ See (n 8) above.

²¹ 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) [1971] ICJ Rep 16 para 113.



any triggering resolution of the SC – a resolution which, in the event, was lacking due to the veto of one of the Council permanent member.

The latter French statement, recalling the collective dimension of the interests involved in the case under review, also brought to light an aspect of the obligation of non-recognition that is often foreshadowed, namely its *erga omnes* nature. As aptly maintained by the ICJ in the *Wall* case, it is mainly the *erga omnes* character of the obligations involved which explain the collective commitment of third States not to recognize the legal effects of the situation created through the breach of such obligations.²² To put it in other words, 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. It is however less clear whether the obligation of non-recognition in itself may be considered to have *erga omnes* nature and effects. Case law in this respect is rather scant, as there are few precedents in which States have acted in open defiance to their obligation of non-recognition, by performing acts which may have the effect of consolidating the illegal situation created, for example, by an aggression.²³

The palette seems now enriched by the controversy over the US embassy in Jerusalem, especially considering that in the instant case non-recognition (at least as required by GA resolution ES-10/10) was intended to directly target the action of a State (namely, the US) as different from the author of ‘main’ breach (allegedly, Israel). 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 the violation of which originated non-recognition, the latter obligation may also be deemed to share the same character. Assuming that the obligation not to recognize the legal validity of measures intended to alter the status of the Holy City of Jerusalem and not to give

²² See (n 12) above.

²³ A case in point is provided by the US Government decision to grant visas for entrance into US territory to members of the Southern Rhodesian racist regime, which between the 1960s and 1970s was the target of the United Nations action explicitly calling for non-recognition. The US decision was ultimately condemned by SC res 437 (1978). On this case law see A Tancredi, *La secessione nel diritto internazionale* (CEDAM 2000) 797-799.

any assistance in consolidating such measures is owed to the international community as a whole, any State would be entitled under Article 48 of ILC 2001 Draft Articles to invoke the responsibility of the US arising out from the decision to move the embassy to Jerusalem.²⁴ The fact that this ‘invocation’ of responsibility by third States took the form of claims aimed at denying the validity of the US decision further suggests that non-recognition, as a secondary consequence of a wrongful act, applies to breaches of obligations that have an *erga omnes* character, but which do not amount to *jus cogens*. In other words, non-recognition does not necessarily need to be confined within the strict boundaries of Article 41(2), specifically dealing with the consequences of serious infringements of *jus cogens* obligations.²⁵

It remains to be seen however, what this exactly means from a practical point of view or, in other words, what the specific consequences of non-recognition in a case such as that under review can be.

3. *What content and effects for the obligation of non-recognition?*

In order to frame the question above, it seems appropriate to start from a prior argument put forward by the US delegation at the SC meeting of 18 December 2017. Borrowing from the Presidential Proclamation of 6 December 2017 – where it can be read that ‘the foreign policy of the United States is grounded in principled realism’ – the US representative held that the decision to relocate the embassy to Jerusalem did not intend to prejudge in any way the negotiations concerning the Middle East peace process: rather, that decision was simply recog-

²⁴ Under art 48(1)(b) ILC 2001 Draft Articles (n 13) 29 ‘1. Any State other than the injured States is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: ... (b) the obligation is owed to the international community as a whole’.

²⁵ See the text of art 41(2) (n 13) above. In fact, one may doubt that the US decision to relocate the embassy to Jerusalem can as such be qualified as a serious breach of a *jus cogens* obligation under arts 40/41 of the ILC 2001 Draft Articles. On the possibility that the obligation of non-recognition may exist independently from the commission of such a serious breach see G Gaja ‘The Protection of General Interests in the International Community’ (2013) 364 *Recueil des Cours de l’Académie de Droit International* 134.



nising a 'fundamental reality', namely that 'Jerusalem is the capital and seat of the modern Israeli government'.²⁶

This statement can be appraised against the background of some past attempts, put forward during the preparatory work of the UNGA 1970 Declaration on Friendly Relations, to promote a stringent reading of the clause providing that 'no territorial acquisition resulting from the threat or use of force shall be recognised *as legal*'.²⁷ The underscored reference was inserted in the text eventually adopted by the GA to meet the insistence of the Western States, which wanted to limit the scope of the obligation of non-recognition to the mere prohibition of *de iure* recognition of territorial acquisition resulting from the use of force. Such a reading would have had the effect of not precluding the possibility of material or practical intercourses between third States and the power detaining the control of the territory acquired by force, and thereby would have left open the possibility of a *de facto* recognition of the underlying illegal situation.²⁸

Coming back to our case, the fact that the US decision to relocate the embassy to Jerusalem has been censured by a substantive number of States in both the SC and the GA seems to leave little room for a formalistic reading of the obligation of non-recognition, based on the artificial distinction between the formal recognition of the legality of a situation and the factual endorsement of its material consequences. This being said, it remains open to determination what concrete dealings States are actually forbidden to carry out as a consequence of their obligation of non-recognition. The question appears to be critical, especially with reference the performance of those acts which would involve an implicit recognition of the illegal situation created by the violation of international law.

²⁶ See UN Doc S/PV.8139 (n 4) 4.

²⁷ See UNGA Res 2265(XXV) (n 17) above.

²⁸ For an overview of the negotiations on this point within the Special Committee of the GA charged with the elaboration of the Declaration on Friendly Relations, see S Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by Illegal Use of Force or Other Serious Breaches of a *Ius Cogens* Obligation: An Obligation without Real Substance?' in C Tomuschat, M Thouvenin (eds) *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 103-120.

In this respect, it is worth recalling that in the *Namibia* advisory opinion the ICJ was at pains to delineate the basic requirements arising from the obligation of non-recognition. With reference to the illegal presence of South Africa in Namibia, the Court held that States must first abstain from entering into treaty relations with South Africa in all cases where the Government of South Africa purported to act on behalf of Namibia; second, that States must abstain from diplomatic relations which may imply recognition of South Africa authority over Namibia; third, that States must avoid entering into economic or other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may consolidate the control of South Africa over this territory.²⁹ The ICJ then qualified the above ‘negative’ requirements in light of what later become famous as the ‘Namibia exception’, by holding that the policy of non-recognition ‘should not result in depriving [the local population of the targeted territory] of any advantages derived from international cooperation’.³⁰ In practice, this meant for example that the prohibition to entertain treaty relations with South Africa cannot be applied to conventions of humanitarian character the non-performance of which may adversely affect the people of Namibia;³¹ or that, while official acts performed by South Africa in Namibia are to be considered illegal and invalid by third States, this invalidity cannot be extended to acts formed to the benefit of local civilian population, such as registration of births, deaths and marriages.³²

Subsequent case law has demonstrated how difficult the practical implementation of the standards above can be, especially in cases where illegal situations created through serious breaches of international law have consolidated over time. A case in point in this respect is given by the generous (if not sometimes truly overstretched) interpretation of the ‘Namibia exception’ elaborated on by the European Court of Human Rights to cope with the effective governmental functions performed by the Turkish Republic of Northern Cyprus, notwithstanding the SC resolutions proclaiming the establishment of that entity as null and void.³³

²⁹ *Legal Consequences for States* (n 21) respectively paras 122, 123 and 124.

³⁰ *ibid* para 125.

³¹ *ibid* para 122.

³² *ibid* para 125.

³³ See for example *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 may 2001) paras 98-102, where the ECtHR held that it cannot disregard the judicial organs set up by the



At first glance, the case of the transfer of the US embassy to Jerusalem may appear less problematic, insofar as in this case non-recognition is essentially addressed at, and is supposed to be limited to, the realm of diplomatic relations between States. In other words, third States will be bound not to recognize the relocation of US embassy to Jerusalem and to refrain from having diplomatic intercourses with the US premises in Jerusalem, and it can hardly be expected that the implementation of this commitment would require special exemptions or adaptations due to some ‘humanitarian’ circumstances.

Some hurdles are however posed by the fact that, further to not recognizing the validity of the US decision to relocate the embassy and its legal effects, some of the States speaking at the SC meetings have also expressly qualified this decision as ‘null and void’. Moreover, a statement to the same effect is included in the above quoted text of GA resolution ES-10/19.³⁴ These statements raise the question as to whether the nullity of the act of a State may automatically flow from a declaration of invalidity, especially when the latter is issued by a collective organ that, while lacking binding powers, is deemed to reflect the position of the overwhelming majority of States in the international community. More concretely, one can wonder what practical effects can be anticipated from a declaration of invalidity targeting – as in the case under review here – the unilateral act of a State which retains full control over the implementation of the same act.

Scholars have rightly pointed out that in the international legal order it is very unlikely that a declaration of invalidity may operate *de iure*, with the result of automatically voiding and depriving of any legal effects the targeted act. In this context, non-recognition is presented as ‘a strategy

TRNC, that it was in the very interests of the inhabitants of the TRNC to be able to seek the protection of such organs and that they may therefore be regarded as ‘domestic remedies’ which the inhabitants of the territory of TRNC may be required to exhaust. In the recent case *Güzelyurtlu and Others v Turkey* App no 36925/07 (ECtHR, 4 April 2017) para 291, the European Court condemned the unwillingness of the Government of Cyprus to cooperate 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.

³⁴ See UNGA Res ES-10/19 (n 6) para 1.

deployed in the process leading towards nullity³⁵ and inefficacy, instead of being the automatic effect of a declaration of invalidity, stands out as

‘the factual culmination of a process in which the aggregate of the material conducts of third States may (or may not) be able to assert the inappropriateness of a behaviour, preventing it from producing the effects desired by its author, and then inducing a real change’.³⁶

In other words, it can be assumed that the real impact of the declarations of invalidity of US decisions affecting the status of the Holy City of Jerusalem has to be tested in the long term, mainly against the determination that third States will demonstrate in abiding to their commitment to non-recognition.

4. *Conclusive remarks*

In his separate opinion in the *Wall* case, Judge Kooijmans provocatively presented the obligation of non-recognition as ‘an obligation without real substance’.³⁷ In an essay published some time ago, Stefan Talmon elaborated upon that qualification in order to frame the principal difficulties surrounding the nature, scope and content of non-recognition in international law.³⁸ At the end of his review, Talmon observed that ‘[t]here is more authority for the obligation as such ... than for its particular content’ and concluded with a rather disarming statement to the effect that the scope of application of the obligation of non-recognition ‘seems to be rather limited’.³⁹

After having summarily reviewed the problems raised by the application of non-recognition in the case of the relocation of US embassy to Je-

³⁵ M Reisman, D Pulkowski, ‘Nullity in International Law’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* vol VII (OUP 2013) 906 para 29.

³⁶ A Tancredi, ‘Some Remarks on the Relationship between Secession and General International Law in the Light of the ICJ’s Kosovo Advisory Opinion’ in P Hilpold (ed), *Kosovo and International Law. The ICJ Advisory Opinion of 22 July 2010* (Martinus Nijhoff 2012) 99; see also Tancredi, *La secessione* (n 23) 817-822.

³⁷ *Legal Consequences of the Construction of a Wall* (n 12) Separate Opinion of Judge Kooijmans 232 para 44.

³⁸ Talmon (n 28) especially at 99-104.

³⁹ *ibid* 125.



Jerusalem, there could be room for endorsing the above quoted sceptical remarks. Especially taking account of the fact that the firm call to non-recognition expressed within the UN has not prevented the material transferral of the US embassy to Jerusalem, and that some few States have announced their intention to follow the path of the United States and to move their diplomatic missions to the Holy City,⁴⁰ one may be tempted to paraphrase Judge Koojimans' expression and to qualify non-recognition as 'an obligation without real impact'.

Nonetheless, the fact that non-recognition has proved to be a vocal commitment must not authorize definitive conclusions about its irrelevance. The case here considered proves that, over and above the hurdles that may surround its implementation, non-recognition remains a vital tool available to States willing to react to the most serious breaches of international law obligations protecting common interests of the international community.

⁴⁰ Guatemala was the first State to follow the US lead and inaugurated its new embassy in Jerusalem on 16 May 2018 <www.reuters.com/article/us-israel-palestinians-guatemala/guatemala-opens-embassy-in-jerusalem-two-days-after-u-s-move-idUSKCN1IH0Q7>. Honduras, Paraguay and Romania have also expressed their willingness to follow the same path.