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The legal relevance of the doctrine of non-recognition

The preservation of the international legal order and the settlement of intractable conflicts

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Writing a doctoral dissertation is sometimes compared to running a marathon. However, I think that a better analogy would be cycling a *Grand Tour* such as the Tour de France. Road bicycle racing, in contrast to long-distance running, is at the same time an individual and a team sport. Similarly, writing this dissertation was very much an individual effort, but it was eventually completed thanks to the following persons:

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Abstract

Non-recognition as lawful of a situation created by a serious breach of a peremptory norm is regarded as a well-established customary duty. Since such a duty fulfils an important function in the preservation of the international legal order, scholars have generally considered its emergence as a welcome development. However, while State practice confirms that there is an established trend towards non-recognition of unlawful situations, it also illustrates that its content is controversial. More specifically, there is a gap between State practice and the prevailing scholarly understanding of this duty, which roughly corresponds to that of the ILC enshrined in Article 41(2) ARSIWA. The cases in which non-recognition has been invoked as a response to certain violations of international law are more complex than is generally assumed and each of them is rather specific. It seems that this norm was consolidated mostly thanks to a political consensus on the underlying primary norms that characterize the contemporary international legal order—ie, the right to self-determination and the prohibition of conquest.

In addition, there is one question that has been mostly glossed over by the scholarship, that is whether the international community can subsequently validate by means of recognition such a breach. The problem is that when States face intractable conflicts, the consensus in favor of the norms that should be protected by non-recognition is weakened by the competing consensus that peace processes aimed at settling long-standing conflicts should not be jeopardized. In these cases, there is an erosion of non-recognition in the sense that while States support in principle this duty, their behavior leads to the gradual validation of the unlawful situation.

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Chapter 1 – Introduction

The end of the Cold War marked a period of optimism when it comes to the UN and to the maintenance of international peace and security. The assumption was that the collective security system envisaged in the UN Charter, which during the period of confrontation between the Western and the Eastern blocs did not work as it was supposed to, would have finally became effective.[1] As for international law, the hopes were somehow similar. For instance, Franck in 1995 observed that 'international law has entered its post-ontological era' and, accordingly, '[i]ts lawyers need no longer defend the very existence of international law'.[2]

Despite this observation, most general treatises on international law and textbooks alike still deal with the question of the existence of international law or, more precisely, with the question on whether international law is really law.[3] One of the standard answers is that States not only raise legal arguments, but that they also tend to observe its prescriptions. Often the answer to such a question ultimately echoes Henkin's famous sentence written already in 1968 that '[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[4]

This dissertation revolves around those violations of the fundamental rules of international law that continue to take place and that are such to erode the whole idea of a rules-based international system. More precisely, the international legal order is not defied by breaches in themselves, given that deviations from the respect of norms do not bear consequences on the normative character of a

[1] See in general Mara R Bustelo and Philip Alston (eds), *Whose New World Order: What Role for the United Nations?* (Federation Press 1991) and Louis Henkin, 'Law and War After the Cold War' (1991) 15 Maryland Journal of International Law 147.
[2] Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) 6.
[3] See, for instance, Raymond Ranjeva and Charles Cadoux, *Droit international public* (EDICEF/AUPELF 1992) 23–25, Tullio Scovazzi, *Corso di diritto internazionale: Caratteri generali ed evoluzione della comunità intenrazionale* (Giuffrè 2000) 7–10, Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 6, Jan Klabbers, *International Law* (1st edn, Cambridge University Press 2013) 9–12, and Mohamed Bennouna, *Le droit international entre la lettre et l'esprit : Cours général de droit international public* (Brill/Nijhoff 2017) 23–40. For some further observations, see Harold H Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599. Interestingly enough Scovazzi concluded his treatise, which was written right after the NATO bombing of Yugoslavia, by expressing some doubts over the normative force of international law. See Scovazzi (n 3) 199–203.
[4] Louis Henkin, *How Nations Behave* (2nd edn, Columbia University Press 1979) 47. See for instance Klabbers (n 3) 10 and Scovazzi (n 3) 200.

legal order, but it is certainly defied by the lack of any response by the international community when breaches are particularly serious. The assumption behind Frank's observation is that international law is now a mature legal system, which entails that the international community should consistently react to violations of its norms. The present dissertation challenges this assumption.

More specifically, this dissertation studies the doctrine of non-recognition—ie, the doctrine according to which States shall refrain from recognizing factual situations emerged in violation of certain norms of international law. We will see that nowadays it is widely held that non-recognition of factual situations brought about by serious breaches of peremptory norms is a well-established customary duty. States and other international actors have frequently invoked non-recognition as a response to such breaches and in these cases they have implemented a policy of non-recognition; non-governmental organizations and activists alike have encouraged States to comply with this duty; legal scholars have almost unanimously supported it. Thus, seemingly, there is not an ongoing debate on the existence of this purported well-established customary norm or, at least, it can be said that the debate is limited to some very specific and somehow secondary aspects, while there is an agreement in principle that in international law there is such a duty. Nonetheless, my contention is that concerning the doctrine of non-recognition there are still many features of interest, which arise not only from a reassessment of the early State practice, but also from some recent developments.

First, we will see that even the staunchest supporters of this duty, when looking at State practice, have conceded that some aspects of this norm are not completely clear. Generally, however these concessions have not detracted from the assertions of the customary character of this norm, nor they have eroded the degree of scholarly support for this duty. In contrast, I will argue that these problematic aspects are such to call into question the customary character of this norm.

Second, a policy of non-recognition is generally implemented on the assumption that the wrongdoer shall be isolated from the rest of the international community as a response for its wrongdoing. We will see that this response does not amount much to a punishment, but rather to a means to exercise pressure on the wrongdoer by depriving it from the hypothetical benefits deriving

from its unlawful conduct as well as to reaffirm the legal relevance of the norm breached. It follows that non-recognition is potentially a long-term policy. With a few exceptions, legal scholars have maintained that unlawful situations in the sense of the above cannot be recognized under any circumstances and that, accordingly, the only way to end the regime of isolation towards such situations is to restore the *status quo ante*. However, looking at international practice it seems that States have tended to be less uncompromising.

Before illustrating more in detail these two questions, this introductory chapter provides some background on the doctrine of non-recognition. Section 1 introduces this doctrine starting from a characteristic common to any legal order that is particularly relevant as for an allegedly mandatory policy of non-recognition, namely the dichotomy lawful–unlawful. Section 2 looks at the support from international law experts for this doctrine and, more specifically, for a customary duty of non-recognition in case of certain breaches of international law. Section 3 links this large degree of support to a wider development of international law, which is the emergence of *ius cogens* norms. Finally, Section 4 further illustrates the two research questions mentioned above and Section 5 delineates the organization of the present dissertation.

1. The dichotomy lawful–unlawful and the doctrine of non-recognition

In general terms, one of the most challenging problems that legal orders necessarily must face is how to manage the complexity of reality. In fact, no matter the degree of complexity, legal orders are binary orders in the sense that they are characterized by the dichotomy lawful–unlawful. Significantly, Weil, in his seminal work on the potential dangers brought about by the emergence of hierarchically superior norms, talks of the 'simplifying rigor' of the law.[5]

This problem is even more challenging in the international legal order, which lacks a central judicial institution endowed with compulsory jurisdiction, thus leaving the characterization of a given

[5] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 American Journal of International Law 413, 441.

conduct as lawful to States themselves, at least in the first instance. Simma and Paulus ask rhetorically how an international lawyer could give proper legal advice to a Government if there is no distinction between *lex lata* and *lex ferenda* and whether legality is ultimately a question of degree rather than a question of kind.[6] Similarly, it seems that the possibility to distinguish, at least on a theoretical plane, what is lawful from what is unlawful is a crucial condition for the continued relevance of the rules-based international system. Significantly, Orakhelashvili notes that '[t]he principal feature of the norms of present public order is that they imperatively separate legality from illegality which is something that nineteenth century international law never did'.[7]

Such a contention—ie, that international law is characterized by the dichotomy lawful–unlawful—does not imply that the distinction in question is clear-cut since often rules of international law are vague and/or ambiguous, neither does it imply that it is always possible to determine the lawfulness of a given conduct.[8] Further, such a contention does not mean to disregard the moral dilemma connected with the necessity to distinguish lawful from unlawful conducts. Sporadic deviations from a norm may be justified in view of the 'greater good'. For instance, some have argued that the protection of human rights and, more in general, the prevention of a humanitarian catastrophe

[6] Bruno Simma and Andreas L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 American Journal of International Law 302, 303. More in general, Weil argues that the distinction between *lex lata* and *lex ferenda* is one of the features that is necessary for preserving 'the neutrality so essential to international law *qua* coordinator between equal, but disparate, entities' and that the 'vertical diversification of normativity' coupled with its 'lateral dilution' is bound to lead to an increase of the indeterminacy of international law. See Weil (n 5) 421, 430. Simma and Paulus made the abovementioned remark on occasion of the Symposium on Method in International Law organised by the American Journal of International Law. It is noteworthy that their contribution was broadly aimed to defend the positivist tradition. It should be noted that scholars from theoretical approaches to international law other than legal positivism have downplayed dichotomies such as lawful–unlawful, *lex lata–lex ferenda*, and law–non-law. See generally Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 24ff and, with specific regard to State recognition, Éric Wyler, *Théorie et pratique de la reconnaissance d'État : Une approche épistémologique du droit international* (Bruylant 2013) XVII, 215–217.

[7] Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2008) 364–365.

[8] The terms 'vagueness' and 'ambiguity' refer to the claim that law is essentially a language and language is inherently vague and/or ambiguous. In contrast, the term 'indeterminacy' refers to the claim that 'even where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises and seeks to regulate a future in regard to which even single actors' preferences remain unsettled'. See, respectively, Andreas Kulick, 'From Problem to Opportunity? An Analytical Framework for Vagueness and Ambiguity in International Law' (2016) 59 German Yearbook of International Law 257, 257–258 and Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument: Reissue with a New Epilogue* (Cambridge University Press 2005) 590.

may justify politically the violation of other rules such as the prohibition of the use of force.[9] Unfortunately, the greater good is generally self-perceived and the invocation of this concept may lead to abuses. It follows that criticisms are likely to be levelled every time that such a doctrine is invoked. One may take as an example the heated debate on humanitarian intervention, which has been initiated in virtually every instance of purported humanitarian intervention.[10]

By now it is enough to emphasize that any legal order comprises a norm embodying the principle *ex iniuria ius non oritur*, which can be interpreted as meaning that acts contrary to law cannot become a source of legal rights for the wrongdoer. This principle is generally traced back to Roman law,[11] and frankly it is difficult to imagine a genuine legal order relying on the opposite principle. This observation prompts an important clarification: the principle *ex factis ius oritur* is not the opposite principle to the principle *ex iniuria ius non oritus*, rather it is a rival principle. In fact, the former merely confirms that certain legal consequences attach to particular facts, but it is silent about hypothetical legal consequences of unlawful acts.[12] Significantly, as for the relationship between these principles, Dawidowicz talks of an '*apparent* antinomy'.[13] In other words, there is an apparently unresolvable conflict between these principles only when the facts in question are unlawful.

[9] For instance, Hakimi uses the expression 'informal regulation' to refer to the possibility of condoning military operations that are undertaken with the purpose of preventing a humanitarian crisis. See Monica Hakimi, 'The Jus ad Bellum's Regulatory Form' (2018) 112 American Journal of International Law 151. A similar argument was raised by Simma with reference to the NATO bombing of Yugoslavia, which is considered as an *ultima ratio* for the prevention of widespread human rights violations. See Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 European Journal of International Law 1. Cf Antonio Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 European Journal of International Law 23 and Antonio Cassese, 'A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis' (1999) 10 European Journal of International Law 791.

[10] Olivier Corten, *The Law Against War: The Prohibition of the Use of Force in Contemporary International Law* (Hart Publishing 2012) 548–549 and Christine D Gray, *International Law and the Use of Force* (3rd ed, Oxford University Press 2008) 51.

[11] Stephen M Schwebel, 'Clean Hands, Principle' in Wolfrum Rüdiger (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press online version) para 1. Cf Anne Lagerwall, *Le principe ex injuria jus non oritur en droit international* (Bruylant 2016) 3. Lagerwall specifies that the exact origin of this principle is unknown and that it is not possible to find this maxim in any extant text of Roman law.

[12] Orakhelashvili (n 7) 367.

[13] Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 678 (emphasis added).

The necessity to distinguish what is lawful from what is unlawful, and accordingly to bar the legal effects of the latter, must be coupled with the necessity not to completely disconnect the law from reality. It is noteworthy that legal orders include a series of 'devices', such as recognition, waiver, acquiescence, and prescription, whose aim is either to attach some legal effects to factual situations emerged outside the framework of the law or even to validate unlawful situations.[14] The question is whether *any* unlawful situation, no matter the norm breached and/or the seriousness of the breach, may be validated.

As regards the contemporary international legal order, a review of the scholarship suggests that serious breaches of peremptory norms are not curable by means of one of the aforementioned legal tool.[15] The International Law Commission (ILC) included in its Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) a specific provision that clearly establishes that third States shall withhold recognition in case of situations brought about by breaches in the sense of the above.[16]

It would be misleading, however, to consider the doctrine of non-recognition as a creation of the ILC, rather it dates back to the interwar period and was later expounded by prominent scholars such as Lauterpacht and Chen.[17] The differences between the doctrine of non-recognition envisaged by these scholars and the duty of non-recognition enshrined in the ARSIWA,[18] which in turn roughly amounts to the contemporary prevailing understanding of this doctrine, are illustrated below.[19] By now, it is worthwhile to note that these scholars were driven by the very same concerns that drove

[14] Orakhelashvili (n 7) 367.
[15] ibid 372–390, 408–409. See also below ch 2, s 5.
[16] Article 41(2), ARSIWA. The text of the ARSIWA is available at 'Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)' (2001) II(2) Yearbook of the International Law Commission 1, 26ff.
[17] Hersch Lauterpacht, *Recognition in International Law* (first published 1947, Cambridge University Press 2013) 409–435 and Ti-Chiang Chen, *The International Law of Recognition with Special Reference to Practice in Great Britain and the United States* (Frederick A Praeger 1951) 411–443.
[18] In this dissertation the term 'doctrine of non-recognition' is used to refer to the general idea that States under certain circumstances have to withhold recognition as a response to certain violation of international law. The expressions 'duty of non-recognition of unlawful situations' is used to refer to the legal duty to withhold recognition from situations brought about by serious breaches of peremptory norms.
[19] See below ch 2, ss 2–3.

the ILC. On the one hand, non-recognition is predicated on the assumption that it may contribute to prevent that exceptionally serious violations of international law remain without any consequence. The reason is that these breaches are particularly appalling given not only their scale and character, but also the role of *ius cogens* norms in the contemporary international legal order as well as the values that these norms protect.[20] On the other hand, this doctrine is predicated on the assumption that a policy of non-recognition may contribute to the preservation of international legality. Lauterpacht captures well this function by holding that:

> The principle of non-recognition fulfils in the present stage of international organization an important function in the maintenance of the authority of law … the acceptance of … the obligation of non-recognition amounts to a vindication of the legal character of international law as against the law creating effects of facts. It is the minimum of resistance which an insufficiently organized but law-abiding community offers to illegality; it is a continuous challenge to a legal wrong.[21]

Along similar lines, Chen observes that: 'In every legal community, the law, however weak, does not succumb to violations without resistance, and the doctrine of non-recognition serves the purpose of preserving the legal *status quo ante* before the submission of law to the dictates of circumstances'.[22] Arguably, it is this function that explains the broad degree of scholarly support enjoyed by this doctrine. In fact, even if, as we will see, there is a chasm between normative principles and State practice, the prevailing scholarship supports wholeheartedly the duty in question and even those scholars who have raised some doubts concerning this duty have refrained from deriving any meaningful consequence from such doubts. The next two sections look at the large degree of scholarly support for the duty in question and illustrates further such a consensus.

2. The large degree of scholarly support for the duty of non-recognition

While, for long time, the idea that in certain circumstances a policy of non-recognition could be mandatory was called into question, today the duty of non-recognition is widely regarded as a well-

[20] See below ch 1, s 3.
[21] Lauterpacht (n 17) 430.
[22] Chen (n 17) 415.

established customary norm.[23] Christakis, for instance, after having illustrated and criticised a series of arguments that were raised over time in order to deny the existence and the usefulness of such a norm, concludes that there are no doubts over the existence of an autonomous customary duty of non-recognition.[24] Lagerwall comes to the very same conclusion by analysing the responses by the international community to two recent events—ie, the recognition of Jerusalem as the capital of Israel by the United States and the annexation of Crimea by Russia. As regards the former event, she notes that the firm response by the international community to this crisis 'illustrates once again the importance to States of reaffirming non-recognition as an important obligation of international law. And their commitment to non-recognition stands, no matter how effective the unlawful situation proves to be or how long it has lasted for'.[25] Similarly, as regards the latter event, she concludes that:

> Le caractère obligatoire pour les Etats de la non-reconnaissance paraît intrinsèquement lié à son fondement juridique. Vu la pratique généralement adoptée par les Etats à l'égard des territoires acquis ou occupés en violation du droit international et l'analyse de leurs opinions à ce sujet, le devoir de ne pas reconnaître de telles situations comme licites revêt *sans nul doute* un caractère coutumier.[26]

Other scholars have presented a less straightforward view. These scholars, while accepting in principle the existence of this duty, have emphasized that some relevant questions have received no answer or, in any case, have received only an unsatisfactory one. Arcari, after having addressed the practice of States on the Jerusalem crisis, notes:

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[23] For some recent contributions, see Stefan Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin, *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006), Théodore Christakis, 'L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales' in Thouvenin and Tomuschat (n 23), Dawidowicz (n 13), Jochen A Frowein, 'Non-Recognition' in Rüdiger (n 11), Lagerwall (n 11), Władysław Czapliński, 'State Responsibility for Unlawful Recognition' in Władysław Czapliński and Agata Kleczkowska (eds), *Unrecognised Subjects in International Law* (Wydawn Naukowe 'Scholar' 2019), Marina Mancini, *Statualità e non riconoscimento nel diritto internazionale* (Giappichelli 2020), and Nina Caspersen, 'Collective Non-Recognition of States' in Gëzim Visoka, John Doyle, and Edward Newman (eds), *Routledge Handbook of State Recognition* (Routledge 2020). See also the second report of the International Law Association dedicated to recognition and non-recognition published in (2014) 76 International Law Association Reports of Conferences 424. Other contributions are referred below in ch 2, ss 3–4.

[24] Christakis (n 23) 142.

[25] Anne Lagerwall, 'The Non-Recognition of Jerusalem as Israel's Capital: A Condition for International Law to Remain Relevant?' (2018) 50 Zoom-in QIL-Questions of International Law 33, 44.

[26] Anne Lagerwall, 'L'aggression et l'annexion de la Crimée par la Fédération de Russie : Quels enseignements au sujet du droit international ?' (2014) 1 Zoom-out QIL-Questions of International Law 57, 63–64 (emphasis added).

> 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.[27]

Arcari, who for the rest fully acknowledges the importance of the duty of non-recognition, concludes his article with a sceptical observation on the limited impact of the duty in question.[28]

Similarly, Milano, analysing the practice of States on the Crimean crisis, notes that there is a 'considerable degree of uncertainty' surrounding the foundation under positive law and the scope of application of this duty.[29] Milano, on the basis of this practice, presents three different theoretical accounts underlying the doctrine of non-recognition. According to the 'normativist' account, non-recognition would be mandatory in as much as it results from the objective illegality and invalidity of an unlawful situation.[30] According to the 'communitarian' account, which amounts to the ILC understanding of this duty, the duty of non-recognition would be part of the law of State responsibility and, more specifically, it would be the minimum response by the international community to a serious breach of a *ius cogens* norm.[31] Finally, according to the 'realist' account, non-recognition would be a *social* sanction, a sanction not mandated by international law.[32] Milano maintains that these theories are, rather than mutually exclusive, complementary. Indeed, they all contribute to explain the conduct of States and the function served by a policy of non-recognition.[33]

One of the reasons why it is not possible to endorse one of these theories leaving out the others is the fact that the statements by means of which States make known their choice whether to recognize a certain factual situation do not allow the interpreter to understand precisely on which grounds States are acting. Significantly, Pertile and Faccio characterize the practice of States on the Jerusalem crisis

[27] Maurizio Arcari, 'The Relocation of the US Embassy to Jerusalem and the Obligation of Non-Recognition in International Law' (2018) 50 Zoom-in QIL-Questions of International Law 1, 3.
[28] ibid 12–13.
[29] Enrico Milano, 'The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unaswered Question' (2014) 1 Zoom-out QIL-Questions of International Law 35, 36.
[30] ibid 39.
[31] ibid 45.
[32] ibid 49.
[33] ibid 53–55.

as ‘rudimentary’, especially when compared to the degree of complexity of the theories underlying the doctrine of non-recognition. Consequently, they note that a ‘significant effort of rationalization’ is required so to bridge the practice to the theory.[34] Arguably, this characterization can be extended to all State practice on non-recognition of unlawful situations.

Further, also other scholars who have dealt with the duty of non-recognition not in relation to a specific factual situation, but rather in a more general manner, such as Talmon and Dawidowicz, have raised a series of doubts. The former, echoing Judge Kooijmans’ separate opinion appended to the *Wall* advisory opinion, talks of this duty as of an ‘obligation without real substance’,[35] while the latter notes that the ILC glossed over ‘some significant ambiguities in relation to the circumstances in which the obligation of non-recognition arises and to its precise content’.[36] Pert, more importantly, puts into question the very legal basis of this duty by noting that the significance of the legal instruments implying a duty of non-recognition and of the relevant State practice have been overstated by the scholarship so that ‘the confidence with which many writers assert the binding status of the principle cannot be justified’.[37]

By now, it is worth mentioning that what emerges from this array of scholarly opinions is a certain scepticism revolving around the duty of non-recognition, whose relevance in the contemporary legal order, however, is not called into question. The reason is at least twofold. On the one hand, non-recognition is frequently invoked by international actors and thus it is possible to make an argument that there is a customary duty of non-recognition.[38] On the other hand, the doctrine of non-recognition is characterized by a strong teleological element so much so that the emergence and consolidation of this duty is generally perceived as a *welcome* development of international law.

[34] Marco Pertile and Sondra Faccio, ‘What We Talk When We Talk about Jerusalem: The Duty of Non-Recognition and the Prospects for Peace after the US Embassy Relocation to the Holy City’ (2020) 33 Leiden Journal of International Law 621, 635.
[35] Talmon (n 23) 125. See also Separate opinion of Judge Kooijmans in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 232, para 44.
[36] Dawidowicz (n 13) 685.
[37] Alison Pert, ‘The “Duty” of Non-Recognition in Contemporary International Law: Issues and Uncertainties’ (2013) Sydney Law School Legal Studies Research Paper No. 13/96 1, 12.
[38] To what extent this argument is compelling is assessed in the next chapters of this work.

Significantly, Christakis talks of a veritable '*caractère salvateur*' of this duty.[39] It seems that it is such a perception that leads to downplay the problematic aspects of this duty mentioned above. In other words, it could be speculated that the strong support for this duty can be connected with the important function that it serves rather than with the consensus within the international community on this purported well-established customary norm. The next section makes a few additional observations related to this function.

3. The function of the duty of non-recognition: the preservation of the fundamental values of the international legal order

As noted above, the contemporary doctrine of non-recognition concerns serious breaches of *peremptory* norms. The gist of such norms is that they function as a limit to State sovereignty since they cannot be freely derogated from by States. The reason is that, in contrast with *ordinary* norms, they do not affect so much the interests of an individual State, but rather they affect the interests of the whole international community, which renders a single State's consent to their violation by another State irrelevant. It should be noted that the concept of *ius cogens* bears some strong ethical underpinnings. Indeed, norms widely considered as having peremptory character are the right to self-determination (at least in the colonial context), the prohibition of the use of force, the prohibition of genocide, the prohibition of torture, and the prohibition of apartheid, which are all norms embodying values considered as non-negotiable.[40]

More in general, some have placed the emergence of these norms in the wider context of the gradual humanization of international law, that is the increasing influence of human rights and

[39] Christakis (n 23) 129.

[40] On *ius cogens* norms, see Giorgio Gaja, 'Jus Cogens beyond the Vienna Convention (Volume 172)' in *Collected Courses of the Hague Academy of International Law* (Brill 1981), Lauri Hannikainen, 'Peremptory Norms (Jus Cogens)' in *International Law: Historical Development, Criteria, Present Development* (Finnish Lawyers' Publishing Company 1988), Orakhelashvili (n 7), Enzo Cannizzaro, *The Present and Future of Jus Cogens* (Sapienza Università Editrice 2015), Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (Hart Publishing 2015), and Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (Edward Elgar 2020).

humanitarian norms on the international legal order at large.[41] Actually, the idea that there are, on the one side, an *old* world order based on unlimited State sovereignty and, on the other hand, a *new* world order that imperatively separates legality from illegality[42] and that, most importantly, is characterized by the existence of certain norms that embody these community interests, is pervasive in the legal literature. Cassese, for instance, talks of the 'dramatic tensions between the old society of States hinging on self-interest, reciprocity, and "a parochial spirit", on the one side, and emerging community values, on the other'.[43] Simma, along similar lines, holds that:

> The good news is that today such community interest is permeating the body of international law much more thoroughly than ever before. International law is finally overcoming the legal as well as moral deficiencies of bilateralism and maturing into a much more socially conscious legal order … Classic bilateralist international law has fallen far behind the present State of consciousness of international society.[44]

Simma identifies the essential characteristic of the old bilateral international legal order in the assumption that international law consists in correlative rights and obligations among States.[45] Concretely, this bilateral order was secured by the emphasis on State consent in rulemaking and by the prohibition of intervention protecting both State's internal and external affairs against interference by third States.[46] However, the argument goes that, starting from the Second World War and the horrors and atrocities committed, the international legal order has gradually abandoned this essentially bilateral mindset in order to protect a set of common values considered as non-negotiable. It follows that the norms protecting these values cannot be freely yielded by States.[47] This evolution

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[41] Theodor Meron, *The Humanization of International Law* (Martinus Nijoff Publishers 2006) 392ff.
[42] Supra n 7.
[43] Antonio Cassese, 'Introduction' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) XX.
[44] Bruno Simma, 'From Bilateralism to Community Interest in International Law (Volume 250)' in *Collected Courses of the Hague Academy of International Law* (Brill 1994) 234.
[45] ibid 231.
[46] ibid 232.
[47] The ILC itself connected explicitly the emergence of the concept of peremptory norms with the wrongs committed during the Second World War. More specifically, the ILC justified the need to qualitatively distinguish different internationally wrongful acts by saying that: 'The need to distinguish … a separate category comprising exceptionally serious wrongs has in any case become more and more evident since the end of the Second World War. Several factors have no doubt contributed to this accentuation of the trend. The terrible memory of the unprecedented ravages of the Second World War, the frightful cost of that war in human lives and in property and wealth of every kind, the fear of a possible recurrence of the suffering endured earlier and even of the disappearance of large fractions of mankind, and every trace of civilization, which would result from a new conflict in which the entire arsenal of weapons of mass destruction would be used—all these are factors which have implanted in peoples the conviction of the paramount

is connected not only with the increased attention towards certain values, but also with the emergence of unprecedent problems that the international community must necessarily face collectively. For example, problems such as pollution, global economic inequality, and nuclear proliferation concern the whole international community and cannot be tackled effectively in the context of an exclusively bilateral legal order.[48]

Villalpando identifies the following positive manifestations of such a development: the proclamation of a series of common values (such as peace and security or the protection of human rights), the creation of a series of organs and legal instruments that have the task to protect these values (such as the UN Charter, which is often seen as the 'constitution' of the international legal order), the emergence of *erga omnes* and *ius cogens* norms, and the affirmation of the international criminal responsibility of individuals that provides a judicial response to the violation of these norms.[49]

But even assuming that the international legal order has evolved as described above, it still presents some characteristics of a bilateral legal order. What is perhaps more troubling in connection with the legal consequences resulting from breaches of *ius cogens* is that the aforementioned development has not been coupled with a parallel development of the structure of the international legal order, which is still a *decentralized* order as to the legislative and the judicial functions and as to the enforcement of its rules. This decentralized structure implies that States themselves are the 'guardians of community interests'.[50] In other words, the protection of these interests is first of all under the responsibility of individual States. However, only to a certain extent States have appeared

importance of prohibiting the use of force as a means of settling international disputes. The feeling of horror left by the systematic massacres of millions of human beings perpetrated by the Nazi regime, and the outrage felt at utterly brutal assaults on human life and dignity, have both pointed to the need to ensure that not only the internal law of States but, above all, the law of the international community itself should lay down peremptory rules guaranteeing that the fundamental rights of peoples and of the human person will be safeguarded and respected'. See 'Report of the International Law Commission on the work of its twenty-eighth session, 3 May–23 July 1976' (1976) II(2) Yearbook of the International Law Commission 1, 101, para 15.

[48] Christian J Tams, 'Individual States as Guardians of Community Interests' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest* (Oxford University Press 2011) 380.

[49] Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 European Journal of International Law 387, 394ff.

[50] This term has been used by Tams. See Tams (n 48).

willing to act in accordance with such a development in the sense that they have refrained from protecting consistently community interests. In this regard, Crawford observes that 'international law develops more rapidly than international society does, seeking to serve as a tractor rather than a trailer, reversing Cicero's scheme of society and law', and thus these 'developments may be fragile and called into question'.[51]

This could be the case when it comes to the duty of non-recognition, which in its contemporary understanding can be seen as an attempt to link the concept of *ius cogens* with the law of State responsibility. On the one hand, it is widely considered as a *welcome* development of international law given that it contributes to the protection of some fundamental values of the international community, values that are enshrined primarily in *ius cogens* norms. On the other hand, this development risks to be fragile since it has not been matched by a significant change of the structure of the international legal order and the concrete application of this duty rests on the discretion of States. Ultimately, this duty is a self-judging norm given that its concrete application depends on the determination of illegality that, in the absence of a binding determination made by a competent organ, is done by individual States.[52]

It was noted that the contemporary international legal order separates lawful from unlawful conducts and that it is characterised by the existence of some hierarchically superior norms that protect values perceived by the whole international community as non-negotiable. At the same time, the problem of the ascertainment of violations of international law, including violations of *ius cogens*,

[51] Traditionally it was believed that *ubi societas, ibi ius* meaning that where there is society there is law. This maxim however also evokes the idea that law follows society. See James Crawford, 'Responsibility for Breaches of Communitarian Norms an Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in Fastenrath and others (n 48) 224–225. See also Heike Krieger, *Rights and Obligations of Third Parties in Armed Conflicts* (KFG Working Paper Series, No. 5, Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?', December 2016) 18ff.

[52] Carty, dealing with the argument that under certain circumstances there is a duty to recognize the right of self-determination and that whether these circumstances are met is due to the discretion of States, observes that '[s]o long as application rests in the discretion of States, one can hardly speak of binding law'. Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press 1986) 127. Lauterpacht, dealing with the distinction between political and legal disputes, notes that '[a]n obligation whose scope is left to the free appreciation of the obligee, so that his will constitutes a legally recognized condition of the existence of the duty, does not constitute a legal bond'. Hersch Lauterpacht, *The Function of Law in the International Community* (first published 1933, Oxford University Press 2011) 197.

remains and, more importantly, it is crucial with respect to the duty of non-recognition. In fact, the premise for the concrete application of this duty is the existence of a violation such to trigger the additional legal consequences arising from Article 41(2) ARSIWA. In this regard, Christakis observes that, notwithstanding the decentralized structure of the international legal order, States have the duty to draw the appropriate consequences following from the commission of a breach in the sense of the above: in general, the lack of a centralised decision-making body does not rule out the relevance of the concept of nullity in international law.[53] Somehow echoing Lauterpacht's remark on non-recognition and its function, which is to preserve the authority of law, Christakis observes that this duty '*constitue … la sanction minimale de droit commun prévu par un ordre juridique qui ne pourrait, sans s'autodétruire, accepter sa capitulation devant le fait accompli*'.[54]

It is worthwhile to note that while many have linked the duty of non-recognition to 'international legality', to the 'international legal order', or to the 'rules-based international system', recently a few States and commentators have linked this duty to the 'international rule of law'. For instance, this concept has been invoked with reference to the controversial decisions adopted by the Trump presidency on the Arab–Israeli conflict.[55] Similar observations have been raised with reference to the annexation of Crimea by Russia, which was considered as a blow at the international legal order that posed a series of challenges to the 'international rule of law … that is to the international community's stride towards a world governed by rules and not by force'.[56] We will see that similar observations have been raised virtually every time that non-recognition was invoked. The growing number of references to this concept with references to unlawful situations in the sense of Article

[53] Christakis (n 23) 130–131.
[54] ibid 165.
[55] S/PV.8128, 8 December 2017, 5 (Egypt) and S/PV.8717, 11 February 2020, 19 (South Africa). See also Stefan Talmon, 'The United States under President Trump: Gravedigger of International Law' (Bonn Research Papers on Public International Law, Paper No 15/2019, 7 October 2019) 2.
[56] Heike Krieger and Georg Nolte, 'The International Rule of Law—Rise or Decline?—Approaching Current Foundational Challenges' in Heike Krieger, Georg Nolte, and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford University Press 2019) 9. See also Olga Burlyuk, 'Lessons from the (Un)rule of Law in Crimea' in Linda Hamid and Jan Wouters (eds), *Rule of Law and Areas of Limited Statehood: Domestic and International Dimensions* (Edward Elgar 2021) 77.

41(2) ARSIWA prompts an observation on the applicability of the concept of the rule of law to the international legal system.

In general terms, the rule of law is a complex concept in the sense that it has a core meaning—ie, the limitation of sovereign power—from which a series of implications, which lie outside this core meaning, derive.[57] While for instance Lord Bingham considered that the rule of law at the international level is roughly equivalent to the rule of law at a national level,[58] others have maintained that between these two concepts there are significant differences, such as the sovereignty of States, which excludes a hierarchy of powers, and the lack of proper executive, legislative, and judiciary powers, which excludes the separation of powers. Arguably, these differences make it impossible to simply transpose the rule of law to the international context.[59]

Chesterman argues that the main characteristic of the international rule of law is the difficulty to define this concept. First of all, he notes that there is particularly high degree of support for this concept, which is suggested by the plethora of declarations adopted in the context of the UN.[60] However, he also maintains that this high degree of support actually suggests that the actual meaning of the concept at hand is controversial. More specifically, he observes that:

> Such a high degree of consensus … is possible only because of dissensus as to its meaning. At times the term is used as if synonymous with "law" or legality; on other occasions it appears to import broader notions of justice. In still other contexts it refers neither to rules nor to their implementation but to a kind of political ideal for a society as a whole.[61]

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[57] It is worthwhile to note that as for the domestic rule of law, Martinelli argues that it is difficult to define it because it is at the same time a simple and a complex concept. It is simple in the sense that it is intuitive in as much as it refers to *a* set of principles that are all aimed to restrain sovereign power. It is complex in the sense that there are *many* ways to achieve this goal. Claudio Martinelli, 'Brevi riflessioni sulla rule of law nella tradizione costituzionale del Regno Unito' (Diritti comparati, 5 June 2017) <www.diritticomparati.it/brevi-riflessioni-sulla-rule-law-nella-tradizione-costituzionale-del-regno-unito>.

[58] Tom Bingham, *The Rule of Law* (Penguin 2011) 119.

[59] Arthur Watts, 'The International Rule of Law' (1993) 36 German Yearbook of International Law 15, André Nollkaemper, 'The Internationalized Rule of Law' (2009) 1 Hague Journal on the Rule of Law 74, Heike Krieger and Georg Nolte, 'The International Rule of Law – Rise or Decline? Points of Departure' (KFG Working Paper Series, No. 1, Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?', October 2016), and Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65 International and Comparative Law Quarterly 277.

[60] Simon Chesterman, 'An International Rule of Law?' (2008) 56 American Journal of International Law 331, 343–355.

[61] ibid 332. Higgins, who shares the scepticism of Chesterman, notes that '[t]he rule of law has become a catchphrase in efforts to address all kinds of global problems from health pandemics to armed conflicts to poverty to terrorism'. See Rosalyn Higgins, *Themes and Theories* (Oxford University Press 2009) 1334.

He continues his argument by observing that the meaningfulness of the international rule of law depends on the coherent meaning of this concept at the national level. As mentioned above, it could be held that the core meaning of the rule of law at the national level is the limitation of sovereign power. It follows that the core meaning of the rule of law at the international level should be the same one.[62] The bottom line is that the international rule of law is best understood in a narrow sense, that is in its power-related function.

In this sense some have contended that this concept is embedded in the UN Charter in as much as one of the functions of this treaty is precisely to avoid that in international relations might makes right. Indeed, it seems that the many references to the international rule of law in connection with the duty of non-recognition actually refer quite literally to the 'rule of law' in contrast to the 'rule of force'. For example, Ben Naftali, with reference to the implications of the reasoning of the European Court of Human Rights (ECtHR) in the case *Demopoulos v. Turkey*, which arguably gave a certain importance to the passing of time also with reference to serious breaches in the sense of the above, maintains that this judgement undermines the distinction between 'the rule of law and violence'.[63] Similarly, Krieger and Nolte refer to the set of legal consequences arising from breaches in the sense of the above as a 'stride towards a world governed by rules and not by force'. But already in 1940 Wright, commenting upon the doctrine of non-recognition of title by conquest, wrote that:

> I should regard the non-recognition doctrine as flowing from a doctrine which seems to me to be a necessary principle of law, namely, that violence, in itself, cannot destroy existing rights. I think that one with a little re flection will see that the latter doctrine is a necessary doctrine of law. If you hold that anyone who has the physical power can destroy existing rights merely by the exercise of violence, you have eliminated law altogether … there is an inconsistency between the idea of a system of law and the idea that might per se creates right.[64]

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[62] ibid 360–361. Similarly, Koskenniemi holds that '[t]he fight for an international Rule of Law is a fight against politics, understood as a matter of furthering subjective desires and leading into an international anarchy. Though some measure of politics is inevitable, it should be constrained by non-political rules'. See Martti Koskenniemi, 'The Politics of International Law' (1990) 1 European Journal of International Law 1, 5.

[63] Orna Ben Naftali, 'Temporary/Indefinite' in Orna Ben Naftali, Michael Sfard, and Hedi Viterbo (eds), *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018) 406.

[64] Herbert W Briggs and others, 'Non-Recognition of Title by Conquest and Limitations on the Doctrine' (1940) 34 Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969) 72 (remarks by Wright). Judge Higgins in her separate opinion appended to the *Wall* advisory opinion uses equally strong terms and contends that '[t]hat an illegal situation is not to be recognized or assisted by third parties is self-evident requiring no invocation of the

However, also referring to the preservation of international legality is not totally precise. The duty of non-recognition, as the other legal consequences envisaged by Article 41 ARSIWA, are *special* consequences deriving from the *aggravated* regime of State responsibility. Violations of international law occur often, and it would be unreasonable to resort to these additional consequences, which have far-reaching effects, every time that international law is violated. Thus, in this work I will be speaking of the preservation of the international legal order. On the one hand, this term lacks the ambiguities inherent to the term international rule of law. On the other hand, it specifies that the duty in question is relevant only when some violations of international law are committed. The relevance for the contemporary international legal order of the dichotomy lawful–unlawful and of the existence of some hierarchically superior norms protecting some values that are perceived by the whole international community as non-negotiable has already been noted. We will see all along this dissertation to what extent only *ius cogens* norms are relevant and to what extent *all* of them are relevant. By now it is enough to identify as particularly important norms for non-recognition the prohibition of forcible acquisition of territory and the right to self-determination. Indeed, this duty has often been invoked with reference to situations resulting from the violation of both these norms at the same time, which is hardly surprising given the connection between them.[65] In fact, in most of the cases, the establishment of an unlawful situation violates the former norm, while its maintenance violates the latter norm.

4. Research questions

This dissertation studies the doctrine of non-recognition with the aim of providing an answer to two questions that are closely related.

uncertain concept of "erga omnes"'. See the separate opinions of Judge Higgins in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 35) 216, para 38.

[65] For the interplay between these two norms, see Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford University Press 1996) 133ff.

The first question is whether the duty of non-recognition of unlawful situations is truly a *well-established* norm of customary international law. As has been seen, on the one hand, there is a strong scholarly support for this duty, a support that arguably derives primarily from the function that this duty has in the international legal order. On the other hand, even scholars who support this duty have pointed at some unanswered questions. This dissertation identifies three of them, namely the actual legal basis of this obligation, what precisely triggers it, and its legal consequences, and discusses them in light of State practice. It then argues that State practice confirms the significance of these questions and suggests that they have remained unanswered because of the process of formation of the norm in question. In general terms, the capacity of a customary norm to cover different situations increases with the growing number of precedents.[66] In contrast, as for the duty of non-recognition, there are only a few precedents and, moreover, each of them is rather specific. It is argued that this norm was consolidated, not so much thanks to a constant and uniform State practice, but rather mostly thanks to a political consensus on the underlying primary norms that characterize the contemporary international legal order—ie, the prohibition of forcible acquisition of territory and the right to self-determination, which indeed represent core values of the international community.

The second question that this dissertation tackles, which in contrast with the previous one has been to a certain extent neglected by the scholarship,[67] concerns the temporal scope of the duty of non-recognition. The question is whether a mandatory policy of non-recognition shall last until the

[66] Lorenzo Gradoni, 'Consuetudine internazionale e caso inconsueto' (2012) 95 Rivista di diritto internazionale 704, 708. One may take as an example the prohibition on the use of force. In a recent edited volume, Ruys, Corten, and Hofer gathered as many as 64 precedents on the use of force that occurred after the adoption of the UN Charter, but these scholars have still been criticized for failing to include some other major conflicts. The three editors explain the relevance of precedents as for customary law as follows: 'Reliance on precedent … can contribute to ensuring consistency and to clarifying the precise meaning and scope of the relevant rules, thus resulting in greater legal certainty'. Admittedly, it could be maintained that, notwithstanding the wealth of State practice when it comes to the prohibition of the use of force, the content of the prohibition is still far from settled. However, often what is debated is not State practice in itself, that is what it actually supports, but more general theoretical issues such as how customary law can evolve. See Tom Ruys, Olivier Corten, and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018) 2 and, for the mentioned criticism, Victor Kattan, 'Tom Ruys, Olivier Corten, and Alexandra Hofer, The Use of Force in International Law: A Case-Based Approach' (2018) 17 Chinese Journal of International Law 1159, 1160.

[67] See below ch 2, s 5.

unlawful situation exists or whether, on the contrary, is it possible, at least in certain cases, to subsequently validate an unlawful situation by means of recognition.

There are some persuasive policy arguments for concluding that the duty of non-recognition entails an open-ended policy of non-recognition. If this duty, as well as the function that it serves, is taken seriously, then it could be argued that the mere passing of time cannot have any relevance. In addition, the gist of peremptory norms is not to allow any derogation, which indeed excludes the possible subsequent validation of breaches in the sense of the above. At the same time, it is possible to raise an argument based on State practice. Christakis, for instance, holds that State practice supports the idea that '*cents ans d'usurpation ne valent pas une seule minute de légitimité*'.[68] Similarly, Orakhelashvili observes that:

> It is impossible to find a single case where the international community has recognized a serious breach of *jus cogens*. Rather, the duty of non-recognition has been adhered to, without qualifications such as are advanced by authors favouring "collective recognition". Despite the assertions that the duty of non-recognition cannot last for ever and will eventually have to capitulate to contrary facts, there is no single case of validation of a situation to which the *jus cogens* duty of non-recognition applies. On the contrary, invalidation has been applied to situations quite widely recognized as apparently "permanent".[69]

The argument that this dissertation makes is that this observation is not totally accurate. On the one hand, States, in particular when trying to settle intractable conflicts, have consistently supported negotiations between opposing parties even if their proposed outcome ultimately leads to the partial validation of the unlawful situation in question. Moreover, by looking at the statements adopted by States in connection with the settlement of such conflicts it is possible to perceive an important policy argument. When States face longstanding and entrenched disputes, the broad consensus in favour of the norms that should be protected by the practice of withholding recognition is weakened by the competing consensus about the necessity of not jeopardizing peace processes that aim to settle such conflicts. In these cases, there is a gradual erosion of the policy of non-recognition in the sense that,

[68] Christakis (n 23) 165.
[69] Orakhelashvili (n 7) 381.

while States continue to support in principle this duty, their actual behaviour leads to the gradual validation of the unlawful situation. More specifically, the narrative conveyed by States is that international law lacks the flexibility required to successfully settle such disputes and that in certain cases political considerations may set aside legalistic considerations.

It could be argued that the duty of non-recognition is not a particular case and that often States in their international relations respect the letter of the law but not its spirit. However, in the case of non-recognition, this outcome is facilitated by the fact that this duty is not well-established customary norm of international law and thus it allows States to take advantage of a wider margin for manoeuvre than most legal norms do.

As mentioned, nowadays scholars, with a few exceptions, either have glossed over this question or have simply assumed that non-recognition is an open-ended obligation without specifying any legal basis. This question, however, appears crucial in as much as ultimately what is at stake—ie, the preservation of the international legal order and the retaining of the possibility for the international community to solve the most complicated conflicts—is of fundamental importance. The present writer does not think that it is possible to give a clear-cut answer to such a question. The impression, however, is that gradually there has been a clear but mostly unacknowledged shift from the older scholarship, which was rather balanced and tended to accept that in certain cases law has to accommodate reality, to the more recent scholarship, which does not tackle this question at all or tends to assume that serious breaches of *ius cogens* norms cannot be recognized under any circumstances. However, we will see that State practice has moved in the opposite direction.

5. Organization

This dissertation proceeds as follows. Chapter 2 presents and deepens the two research questions sketched above. First, it makes some preliminary comments on the terms recognition and non-recognition and on the interplay between State recognition and the duty of non-recognition. Then, it looks at the drafting history of Article 41(2) ARSIWA, which roughly amounts to the prevailing

understanding of this duty. Finally, it identifies and illustrates the aspects of this duty that call into question its well-established customary character and it further illustrates the problem of the open-ended nature of the duty in question.

The following three chapters deal with the relevant State practice. Chapter 3 considers some early cases in which the duty of non-recognition was invoked, namely the invasion of Manchuria by Japan and the subsequent establishment of Manchukuo, the adoption of a unilateral declaration of independence by Southern Rhodesia from the United Kingdom, the continued presence of South Africa in Namibia notwithstanding UN resolutions to the contrary, and the declaration of independence from South Africa adopted by the so-called homelands. These cases are often seen as evidence of State practice accompanied by the necessary *opinio iuris*. In contrast, it is argued that these are merely forerunners of an obligation as the one provided for by Article 41(2) ARSIWA, and thus devoid of any precedential value.

Chapter 4 discusses subsequent cases in which the duty of non-recognition was invoked as a mandatory response to a violation of international law and, more specifically, studies the international response to the allegedly unlawful conduct of Morocco, Israel, Turkey, and Indonesia towards, respectively, Western Sahara, Palestine, Cyprus, and East Timor. It is contended that each of these cases bring into question the prevailing understanding of the duty of non-recognition.

Chapter 5 discusses the cases of Kosovo and of the post-Soviet breakaway republics. From the outset, it is worthwhile to note that both States and scholars have not argued that there is a duty of non-recognition of Kosovo as an independent State deriving from Article 41(2) ARSIWA. Nonetheless, it still seems useful to look at this case especially in comparison with the cases of the post-Soviet breakaway republics, which in contrast are generally regarded as unlawful situations. Admittedly, the case of Kosovo and those of the post-Soviet breakaway republics are often compared as for the lawfulness of unilateral secession, but I deem that a comparison between them is relevant also when it comes to questions of non-recognition. In fact, when these cases are compared some paradoxes and contradictions surface. Moreover, it seems that the very same arguments on the basis

of which many have excluded that Kosovo amounts to an unlawful situation if raised with reference to the post-Soviet breakaway republics would lead to the same conclusion. Moreover, the international response to the emergence of the latter political entities does not fit within the pattern of non-recognition as a response to a serious breach of a peremptory norm of international law in the same way as the cases analysed in the previous chapter.

Chapter 6 concludes with an overall analysis of the arguments raised in the previous chapters on individual cases. Following this analysis, the two above-mentioned questions are answered. Thus, first, it is argued that State practice does not allow to infer that the duty of non-recognition as it has been understood by the ILC and by the prevailing scholarship is a well-established customary duty. Second, it is argued that international law does not necessarily bar recognition until the unlawful situation exist but that, on the contrary, there is a margin for subsequent validation.

Chapter 2 – The contemporary understanding of the doctrine of non-recognition

In the previous introductory chapter, it was noted that, even if nowadays the duty of non-recognition enjoys a large degree of support from both scholars and States, there are still some features of interest that arise from an analysis of State practice. Before looking at this practice, it is necessary to clarify what the contemporary understanding of the doctrine in question is. Section 1 provides some clarifications as to what is meant with the pair of terms 'recognition' and 'non-recognition'. It is contended that even if these terms mean different things, at least to a certain extent, non-recognition is the reverse side of recognition. Section 2 provides a brief illustration of the theories of State recognition on the assumption that State recognition and the duty of non-recognition are closely related and thus, before addressing the latter, it is important to look at the former.

Section 3 takes into consideration the provision of the ARSIWA on non-recognition and examines its drafting history. Starting from the ILC codification project on State responsibility with the aim of illustrating the contemporary understanding of this doctrine makes sense since the inclusion of a specific a norm on non-recognition in the text eventually adopted by the ILC can be seen as the final stage of a gradual development. Moreover, the ILC understanding of this doctrine roughly amounts to the prevailing understanding by the scholarship. Further, it seems that scholarship was driven by the very same concern that drove the ILC in the sense that the teleological approach adopted by a large part of the scholarship is present also in the works of the ILC.

However, it should be added that Article 41(2) ARSIWA refrains from providing an answer to some of the most problematic questions revolving around this duty, which ultimately remain unanswered in the ILC commentary too. Section 4 identifies and illustrates these questions, the first of which is the legal basis of the alleged mandatory character of non-recognition. The second one is what triggers the mandatory policy of non-recognition. On the one hand, the question is whether the duty of non-recognition has self-executory character or whether it is triggered by a specific resolution

adopted by a UN political organ or by a decision of the International Court of Justice (ICJ). On the other hand, it needs to be addressed whether this norm is relevant *only* when it comes to serious breaches of *ius cogens* norms. In other words, it could be asked whether an 'ordinary' breach of a *ius cogens* norm or a serious breach of an 'ordinary' norm may trigger a mandatory policy of non-recognition. The third one concerns the precise content of this obligation. It is generally contended that the duty of non-recognition does not bar *only* formal recognition and that it does not bar *each and every* relation with the unrecognized political entity. However, most of problematic behaviours fall somewhere within these two extremes. In addition, still regarding the consequences of this duty, it is not clear what is the interplay between non-recognition and human rights law and what is the personal scope of this duty—ie, whether States only or also companies and private citizens are legally bound by the duty of non-recognition.

All these questions have been tackled, at least to a certain extent, by scholars, who generally have upheld the ILC understanding of this norm even if some have also emphasized that Article 41(2) ARSIWA as well as State practice do not provide any clear-cut answer to these questions. In contrast, there is another problematic aspect that has been somehow neglected by scholars. This aspect is the temporal scope of the duty in question. If the functions of the duty of non-recognition are those mentioned in the previous chapter, then the temporal scope of this duty cannot be defined beforehand. In other words, the mandatory policy of non-recognition shall last until the unlawful situation exists, but is this really the case? Section 5 further elaborates this question.

1. The terms 'recognition' and 'non-recognition'

In general terms, it is worth mentioning that the term recognition is not a term of art in international law.[1] This term, on the contrary, has acquired a variety of uses, in the first place as to *what* is

[1] Ian Brownlie, 'Recognition in Theory and Practice' (1983) 53 British Yearbook of International Law 197. Brownlie in this regard writes that 'by implication, by dint of repetition and the constant introduction of the word [ie, the word "recognition"] into headings, the standard treatments give the firm impression that "recognition" and its congener, "non-recognition", are terms of art with a consistent content and legal significance. Nothing could be further from the truth'.

recognized. Subjects and organs representing subjects can be recognized, but also changes in territorial jurisdiction. As regards the recognition of subjects and organs, this term is mostly used with reference to States and Governments, but it can be used also with reference to other subjects, such as belligerent parties and national liberation movements. As regards the recognition of changes in territorial jurisdiction, this term is mostly used in the context of acquisition of territory by force and unilateral secessions, but also a contested border or a claim to a continental shelf or to an exclusive economic zone can be recognized.[2] However, in *all* these cases the term recognition has roughly the same meaning. In fact, it *always* refers to an expression of acknowledgement that the object of recognition exists and that certain legal consequences follow from such an acknowledgment.[3]

It should also be clarified that when States 'speak' of recognition, they sometimes mean something quite different than the way this term is generally used in legal language. In other words, often States by recognizing an entity or a factual situation may be simply taking note of its existence, acknowledging its importance, or expressing support *without* the intention of producing any legal consequence.[4] Moreover, it is difficult to ascertain the actual intention of the States granting recognition, and it is equally difficult to tell whether the term recognition is used in its legal sense. These difficulties are increased by a recent development, namely the emergence of *new* forms of recognition, especially as for the recognition of Governments.[5]

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[2] On the variety of uses of the term recognition, see Hans M Blix, 'Contemporary Aspects of Recognition (Volume 130)' in *Collected Courses of the Hague Academy of International Law* (Brill 1970) 596–600. For a fairly vivid illustration of this variety, see both the memorial and the reply submitted by Portugal in connection with the *East Timor* case between Portugal and Australia. These legal documents are addressed below in ch 4, s 4.4.

[3] For instance, an ILC report on Unilateral Acts of States defines the act of recognition as follows: 'A unilateral expression of will formulated by one or more States, individually or collectively, acknowledging the existence of a *de facto* or *de jure* situation or the legality of a legal claim, with the intention of producing specific legal effects, and in particular accepting its opposability as from that time or from the time indicated in the declaration itself'. See 'Sixth Report on Unilateral Acts of States by Special Rapporteur Mr. Victor Rodríguez Cedeño' (2003) II(1) Yearbook of the International Law Commission 53, 63, para 67.

[4] In these cases, the term 'recognition', rather than having a precise legal connotation, has a psychological connotation as in the expression 'struggle for recognition' used by many international relations scholars to refer to the struggle of a given subject aimed to the affirmation of his particular identity. See generally Christopher Daase and others, 'Gradual Processes, Ambiguous Consequences: Rethinking Recognition in International Relations(Non-)Recognition Policies in Secession Conflicts and the Shadow of the Right of Self-Determination' in Christopher Daase and others (eds), *Recognition in International Relations* (Palgrave Macmillan UK 2015).

[5] More specifically, some have noted that, while States have tended to refrain from officially recognizing Governments, in the context of the civil wars in Libya and Syria and in the context of the Venezuelan presidential crisis a number of States recognized a political entity, respectively the National Transitional Council and the National Coalition of Syrian

The term non-recognition too is used in a wide array of situations and in a more or less broad sense. However, it should be noted from the outset that the doctrine of non-recognition is usually invoked with reference to States and other territorial situations, such as annexations, with a precise meaning, that is as a mandatory response to certain breaches of international law.

Some of the difficulties posed by such a doctrine are peculiar to non-recognition, others have arisen from a peculiar characteristic of customary norms, namely the practical difficulties to ascertain State practice as well as *opinio iuris* of an omissive action. More concretely, the problem is how to understand whether an unrecognized entity is such because there is a specific duty in this sense or simply because States have no interest in granting recognition. Moreover, it is noteworthy that the amount of State practice that can be identified on each unlawful situation is different. One may consider the case of the Israeli–Palestinian conflict: each and every international actor has taken a position and makes this position known, for instance by way of statements before international fora. Similarly, a large-scale military intervention as that of the NATO States against the Federal Republic of Yugoslavia or an annexation such as that of Crimea by Russia have attracted the attention of all States. Other cases, in contrast, are not considered particularly significant and, accordingly, third States have tended not to be involved in these disputes. Often these cases have remained relevant only to regional powers. One may think to the case of Transnistria: it is unlikely that international actors other than Russia and the European Union would take a position with the risk to antagonize with Russia or, alternatively, with the European Union.

Actually, the case of Transnistria, but we will see that this observation can be extended to all post-Soviet breakaway republics, illustrates another peculiar phenomenon that we could call 'delayed onset response'.[6] In fact, it can be observed that there was no response at all for example by the

Revolutionary and Opposition Forces, as legitimate representative of the Libyan and the Syrian people or, in the case of Venezuela, recognized the President of the Parliamentary Assembly Juan Guaidó as the legitimate president. However, it is not clear to what extent these forms of recognition amount to the recognition of a Government. See ILA, 'Recognition/Non-Recognition in International Law (Third Report)' (2016) 77 International Law Association Reports of Conferences 533, 542ff.

[6] See below ch 5, s 2.1.

European Community to the alleged Russian intervention in support of separatists during the armed conflict in the 90s and in its aftermath. Only in the second half of the 00s the European Union stepped up its attention towards Transnistria. Nothing had changed from a legal perspective. Relations between the West and Russia however had become gradually more problematic, and thus the stance of the European Union had become more and more assertive, for instance with the adoption of targeted sanctions against Transnistrian separatists and with calls for non-recognition at each round of elections held in the contested territory. It follows that it is not possible to identify any State practice accompanied by *opinio iuris* dating back to the first decade of the existence of Transnistria. In other words, we only know that this political entity was not recognized, but we know almost nothing on the grounds for non-recognition.[7] The bottom line is that a study of the State practice on the doctrine of non-recognition is made more difficult by a series of constraints concerning the identification of the relevant State practice as well as of *opinio iuris*. However, it seems still possible to make some inferences about the doctrine in question and on the way in which States understand this doctrine.

More in general, on the meaning of non-recognition, Warbrick observes that a statement apparently as clear as 'State A does not recognize entity X as a State' can assume many different meanings.[8] The first problem indeed is that this statement describes an omissive action, but, as noted above, States can withhold recognition explicitly or implicitly. In other words, this statement could mean that State A has explicitly refused to recognize entity X. Alternatively, entity X emerged and claimed statehood, while State A has remained silent; in this case, it is not possible to know whether in A's eyes X is a State.

In addition, Warbrick stresses that the refusal to grant recognition can be based on different grounds. Firstly, it could be based on political grounds, thus non-recognition is not related to

[7] For the initial European response and its development clearly contextual to the worsening of the relations between Europe and Russia, see below ch 5, s 2.
[8] Colin Warbrick, 'States and Recognition in International Law' in Malcolm D Evans, *International law* (2nd ed, Oxford University Press 2006) 252.

questions of statehood; it follows that in A's eyes X may be a State but, notwithstanding its possible statehood, X is not recognized as a State because of other reasons.[9] In this regard some have referred to the policy of non-recognition of Israel by many Muslim-majority States.[10] These States, by withholding recognition, rather than making an argument on the statehood of Israel, are manifesting their political condemnation of Israel. Secondly, State A could refuse to recognize entity X as a State because it is unlawful or premature to do so; it follows that in A's eyes X is not, or not yet, *legally* a State.[11] This generally occurs in case of break-up of a federal State or in case of unilateral secession. Thirdly, State A could refuse to recognize entity X as a State because recognition is barred by a specific norm of international law; it follows that, entity X cannot be recognized as a State not depending on whether it is factually a State but depending on a specific rule of international law.[12] This, for instance, is the case expounded by Article 41(2) ARSIWA, which indeed establishes that States have a duty not to recognize as lawful factual situations brought about by a serious breach of a *ius cogens* norm.[13] Finally, State A could refuse to recognize entity X as a State in order to comply with a specific Security Council resolution calling upon States not to recognize entity X. As in the previous case, entity X cannot be recognized as a State not depending on whether it is factually a State but depending on the existence of a Council Resolution.[14] An example is Resolution 662, adopted in the aftermath of the invasion and annexation of Kuwait by Iraq, which considered the annexation as having no legal validity and called upon States not to recognize the annexation and to refrain from any action or dealing that might be interpreted as an implicit recognition of the annexation.[15]

[9] ibid.
[10] See for instance John Dugard, *Recognition and the United Nations* (Grotius Publications Limited 1987) 61.
[11] Warbrick (n 8) 252.
[1212] ibid.
[13] The text of the ARSIWA is available in 'Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)' (2001) II(2) Yearbook of the International Law Commission 1, 26ff.
[14] Warbrick (n 8) 252.
[15] S/RES/662, 9 August 1990, paras 1–2.

It is worth mentioning that some of these options may overlap. For example, the fact that the Security Council called upon States not to recognize this annexation, does not exclude the existence of an independent pre-existing obligation barring recognition. In fact, it could be argued that the Iraqi conduct constituted a serious breach of a *ius cogens* norm and, independently from the action of the Council, States had a pre-existing obligation to withhold recognition. In this case, the gist of a specific resolution is the coordination of the action of States given that it provides an authoritative determination over the unlawfulness of Iraqi conduct. Arguably, the resolution of the UN organ that has the primary responsibility for the maintenance of international peace and security limits the discretion of States, which are otherwise free to determine the lawfulness of a given conduct. Thus, a resolution that declares a given conduct as unlawful triggers a mandatory response of the members of the international community, which in turn increases the chances of eventually changing the behaviour of the wrongdoer and restoring the *status quo ante*.[16]

To sum up, to the extent that recognition is defined as the acknowledgement that an effective entity or a factual situation exists, and that this acknowledgement bears some legal consequences, non-recognition can be understood as the reverse side of recognition. However, under certain circumstances non-recognition becomes a proper legal duty, but unfortunately it is difficult to tell when a policy of non-recognition is undertaken discretionarily by States from when it is undertaken out of a legal obligation. This question arises not only because often States do not express their decision whether to recognize or not a certain political entity, but also because when they do, they usually do not specify the precise legal grounds, neither they actually specify whether it is a decision based on legal or political grounds.[17]

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[16] Théodore Christakis, 'L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales' in Jean-Marc Thouvenin and Christian Tomuschat (eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 143.

[17] This is particularly evident in the cases of Kosovo and of the post-Soviet breakaway republics. See below ch 5, ss 1.3, 2.1–2.3. Actually, the report prepared by the Committee on Recognition/Non-recognition in International Law established by the International Law Association observed that: 'Almost all the memoranda [ie, the memoranda submitted by the members of the committee] show the difficulty of defining a legal principle regarding recognition and non-recognition through State action, which the States themselves say is largely political in nature'. Scholz, one of the members of the committee, further specified that: 'A chasm seems to exist between legal scholarship (based on the basic legal norms on

Even if State recognition consists of a unilateral expression of will and the duty of non-recognition is a legal obligation, in the sense that it limits States' discretion to grant recognition, it is still useful to sketch the theories underlying State recognition since some of their characteristics have an impact on the doctrine of non-recognition.[18] In the next section these theories are summarily illustrated with a focus on Lauterpacht's writings on the question given that his writings are cited by virtually every scholar dealing with matters or recognition and, interestingly enough, he envisages as part of a comprehensive system both a duty of recognition and a duty of non-recognition, but only the latter eventually has been considered as a norm of international law.

2. State recognition and the duty of non-recognition

At the outset, it should be noted that the interplay between recognition and statehood is at the core of the so-called 'great debate' between the two competing theories on State recognition, namely the constitutive and the declaratory theories.[19] In general terms, according to the constitutive theory, the act of recognition is constitutive of statehood. In other words, the act of recognition is the act that turns a political entity into a State. On the contrary, according to the declaratory theory, the act of recognition is the act that, rather than constituting statehood by itself, merely declares it. In other words, it confirms that a political entity has already achieved the status of State.

It is often contended that the declaratory theory finds overall more support in State practice even if, admittedly, the latter does not support unequivocally any of these theories.[20] In addition, it is worthwhile to note that the constitutive theory has been often considered as 'an expression of an

recognition/non-recognition) and state practice'. See 'Recognition/Non-Recognition in International Law (Second Report)' (2014) 76 International Law Association Reports of Conferences 424, 432.

[18] Grant and Nicholson in this regard write that 'Collective non-recognition raises several theoretical questions … To an extent the answers to these questions depend on what approach is taken to recognition generally: declaratory, constitutive, or hybrid'. See Thomas D Grant and Rowan Nicholson, 'Theories of State Recognition' in Gëzim Visoka, John Doyle, and Edward Newman (eds), *Routledge Handbook of State Recognition* (Routledge 2020) 32.

[19] On these theories, see Stefan Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: Tertium non Datur?' (2005) 75 British Yearbook of International Law 101 and Grant and Nicholson (n 18).

[20] Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 446.

outdated, positivist view of international law'.[21] This is so because this theory is based on the idea that the international legal order is essentially based on State consent given that the existence of States is conditioned by prior acts of recognition by other States with all that entails in terms of rights and obligations that derive from having international legal personality.[22] Lauterpacht explains the wide acceptance and increasing support for the declaratory theory recalling that it emerged as a reaction to the constitutive theory, which indeed is based on radical positivist premises.[23]

Conversely, the declaratory theory seems more compatible with the existence of the rule of law and with natural law theories.[24] In fact, statehood does not depend on the free will of each State, but it depends on a set of factual criteria. It follows that this theory, by limiting the discretion of States, can ensure a certain degree of consistency. At the same time, such a theory can be linked to natural law concepts to the extent that the rights and duties related to international legal personality do not derive from acts by other States but derive from the very factual existence of the State. However, it should be pointed out that the declaratory theory too is, at least to a certain extent, State centric. In fact, it is characterized by the primacy of effectiveness in relation to statehood rather than by the primacy of law. The reason is that the Montevideo criteria, which over time have become accepted as amounting to customary law, are factual criteria.[25] Moreover, given that States themselves ultimately decide whether the criteria have been fulfilled, recognition remains a highly political act and thus this theory only partially limits the discretion of States. In other words, even on the

[21] Talmon (n 19) 102.
[22] Thomas D Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger 1999) 3.
[23] Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 61, 76–77. See also Nicholson and Grant (n 18).
[24] Talmon in this regard writes that the declaratory theory 'has its roots in the natural law view of international law, which considers international law as an objective legal order based on a nature-like community of States'. Talmon (n 19) 106. Similarly, Brownlie observes that '[t]he "declaratory" view has much to commend it as a general approach, since it militates in favour of a legal and objective method of analysing situations'. Brownlie (n 1) 206.
[25] Montevideo Convention on the Rights and Duties of States (Signed on 26 December 1933, entered into force on 26 December 1934). On the extent to which the Montevideo criteria amount to customary international law, see Dapo Akande, 'The Importance of Legal Criteria for Statehood: A Response to Jure Vidmar' (EJIL:Talk!, 7 August 2013) <www.ejiltalk.org/the-importance-of-legal-criteria-for-statehood-a-response-to-jure-vidmar> and Jure Vidmar, 'The Importance of Legal Criteria for Statehood: A Rejoinder to Dapo Akande' (EJIL:Talk!, 9 August 2013) <www.ejiltalk.org/the-importance-of-legal-criteria-for-statehood-a-rejoinder-to-dapo-akande>.

assumption that States would make an honest assessment on the fulfilment of these criteria, some of them are by nature difficult to be assessed.

It is meaningful that the main criticism that Lauterpacht raises towards *both* these theories is precisely that they are at odds with the idea that recognition is a legal duty.[26] In fact, according to the constitutive theory, recognition is an 'unfettered act of political will devoid of any legal rule'[27] given that States act as 'organs' of the international community without being bound by any legal criteria for statehood. Indeed, this observation explains why, as mentioned, it is often considered as an outdated positivistic model. Ultimately, the same goes for the declaratory theory, which, by making recognition dependant on the assessment of the fulfilment of a set of factual criteria that are not self-evident, leaves States with a significant margin of discretion.

In addition, both of these theories, at least in their purest forms, are at odds with a duty not to recognize unlawful situations. The reason derives from the inherent characteristics of the constitutive theory—ie, States' complete freedom whether to recognize or not—and of the declaratory theory—ie, the fact that statehood is understood as a fact and considerations of legality have no role in the assessment of a set of factual criteria as the Montevideo criteria.

Capps, who refers to Lauterpacht's approach to international law as of a progressive method, summarizes the problems posed by these theories by saying that '[t]he difficulties of the constitutive and the declaratory theories appear as mirror images of each other'.[28] Indeed, while the latter provides a set of legal criteria but lacks an institutional mechanism, the former provides an institutional mechanism but lacks a set of legal criteria. Capps continues his reasoning by noting that Lauterpacht envisages a qualified theory on State recognition that provides a set of legal criteria *and* an institutional mechanism. Therefore, this theory can be seen as an attempt to solve these problems by

[26] Lauterpacht (n 23) 1.
[27] ibid 41.
[28] Patrick Capps, 'Lauterpacht's Method' (2012) 82 British Yearbook of International Law 248, 257.

theorizing a complete international legal order in which international law fully regulates the creation, the existence, and the extinction of States.

More specifically, for Lauterpacht recognition is at the same time declaratory of facts and constitutive of rights.[29] Recognition is declaratory 'in the meaning that its object is to ascertain the existence of the requirements of statehood and the consequent *right* of the new State to be treated henceforth as a normal subject of international law'.[30] But it is constitutive too since 'it is decisive for the creation of the international personality of the State and of the rights normally associated with it'.[31] The act of recognition thus turn a 'physical fact' into a 'juridical fact'. A logic corollary of this theory is that States are not free to recognize or not a certain political entity as State. On the contrary, the political character of the act is limited by the acknowledgment that State recognition is a matter of law, and thus is characterized by certain obligations. More precisely, States have both the obligation to recognize as States political entities that fulfil the criteria for statehood and a duty not to recognize States that emerged in violation of qualified rules of international law.[32]

At that time, that *some* State practice suggested that there was a duty to recognize was radically denied by Kunz who, after having recalled that State practice is not relevant for the ascertainment of customary law if it is not accompanied by *opinio iuris*, 'accused' Lauterpacht of *creating* international law rather than merely *analysing* it.[33]

Also subsequent State practice has not confirmed that in international law there is such a duty. Indeed, legal scholars have not supported the position adopted by Lauterpacht,[34] even if it should be noted that his writings on the topic of recognition and non-recognition have exercised a far-reaching influence starting from the idea that the formation and existence of States is a matter of law rather

[29] Lauterpacht (n 23) 73–77.
[30] ibid 75 (emphasis added).
[31] ibid.
[32] ibid 6, 409ff.
[33] Josef L Kunz, 'Critical Remarks on Lauterpacht's "Recognition in International Law"' (1950) 44 American Journal of International Law 713, 715
[34] 'Recognition, Alleged Right or Duty of' in John P Grant and J Craig Barker (eds), *Encyclopaedic Dictionary of International Law* (3rd edn, Oxford University Press 2009) 504–505.

than a matter of fact. Moreover, Lauterpacht's writings on this topic are generally the starting point of scholarly contributions on this duty,[35] which is somehow a paradox given two aspects.

On the one hand, while Lauterpacht's position on the duty to recognize has not been supported by scholarship, so much so that today it is generally held that there is not such a duty,[36] his position on the duty of non-recognition has been supported by the majority of scholars, and, as said, it is nowadays regarded as a well-established norm of customary law. It could be argued that that the reason is simply that, while in the meanwhile State practice has not generated any additional evidence supporting the existence of a customary duty of recognition, in support of the duty of non-recognition there is a wealth of State practice. However, on the other hand, it is noteworthy that in the thought of Lauterpacht *both* these duties are instrumental to the preservation of the international legal order and they are both deduced from this overriding need.[37] In other words, Lauterpacht is resorting to a teleological method and international law, including the law of recognition, is conceived as serving a series of specific functions. This aspect should be taken into account because one of the contentions of this dissertation is that most of the scholarly writings on non-recognition too are characterised by a strong teleological approach, which actually characterised the approach of the ILC too.

3. The road to Article 41(2) of the Articles on the Responsibility of States

In 1976 the then Special Rapporteur on State Responsibility Ago introduced the distinction between international delicts and crimes on the assumption that the commission of the latter would entail

[35] See for instance Christakis (n 16) 165, Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 677–678, Vera Gowland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (Nijhoff 1990) 278, Helmut P Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 327, and James Ker-Lindsay, *The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States* (Oxford University Press 2012) 13. See also the ILC commentary to Article 41 published in 'Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)' (2001) II(2) Yearbook of the International Law Commission 1, 113, para 8.

[36] Shaw (n 17) 449–450.

[37] Crawford noted this paradox in the preface to Lauterpacht's *Recognition in International Law*, see Lauterpacht (n 23) XLIV.

additional legal consequences.[38] This distinction, as well as the advisability of an institutional mechanism for the ascertainment of the commission of such crimes, was a matter heatedly discussed during the works of the ILC. In the end, the notion of international crime disappeared from the codification project, but that of a regime of aggravated responsibility did not. Many scholars have written on these issues,[39] here it is enough to note that this regime was conceived so to ensure that serious breaches of those obligations that protect collective interests of the international community would have been met with some resistance.[40] Thus, it is hardly surprising that discussions within the ILC on non-recognition often digressed to the more general issues mentioned above. This section analyses the aspects of the debate that are more closely related to the doctrine of non-recognition and that have thus affected the contemporary understanding of such a duty.

The ILC had already acknowledged the importance of a provision on non-recognition in 1980.[41] Special Rapporteur Riphagen noted that while in principle there was a rule of international law requiring States to recognise factual situations created by another State as legal, if such situations emerged in breach of a rule of international law there was no longer a duty of recognition for the injured State and for third States.[42] Non-recognition was described as directed against the follow-up of the internationally wrongful act and was understood as the refusal 'to give an otherwise mandatory follow-up to the event that has taken place'.[43] In other words, non-recognition was understood as a

[38] 'Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur—the internationally wrongful act of the State, source of international responsibility (continued)' (1976) II(1) Yearbook of the International Law Commission 3, 26, paras 80ff.
[39] See, for instance, Joseph H H Weiler, Antonio Cassese, and Marina Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Gruyter 1989), Gaetano Arangio-Ruiz, 'Counter-measures and Amicable Dispute Settlement Means in the Implementation of State Responsibility: A Crucial Issue before the International Law Commission' (1994) European Journal of International Law 20, Andrea Gattini, 'A Return Ticket to "Communitarisme", Please' (2002) 13 European Journal of International Law 1181, Martti Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' (2002) 72 British Yearbook of International Law 337, and Christian J Tams, 'All's Well That Ends Well: Comments on the ILC's Articles on State Responsibility' (2002) 62 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 759.
[40] Beatrice I Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (Martinus Nijhoff Publishers 2009) 18.
[41] 'Preliminary report on the content, forms and degrees of international responsibility (Part 2 of the draft articles on State responsibility), by Mr. William Riphagen, Special Rapporteur' (1980) II(1) Yearbook of the International Law Commission 107, 115, para 45.
[42] ibid.
[43] ibid 117, para 54.

right. As for third States, Rapporteur Riphagen specified that non-recognition was 'dependent upon a collective decision taken in respect of the wrongful act of the guilty State'.[44] Rapporteur Riphagen also dealt with the possibility that non-recognition may be, rather than a right, a duty. This possibility however was framed in a negative manner[45] and, in any case, non-recognition as a duty too required a collective decision as a prerequisite.[46]

In contrast, newly drafted Article 6(1) mandated non-recognition in case of commission of an international crime.[47] The commentary to this article explicitly connected non-recognition and the commission of such a crime by stating that 'the notion of international crime seems to imply that each individual State has at least an obligation … not to act in such a way as to condone such crime'.[48] However, it was not clear who concretely had to assess if such a crime was committed. The commentary merely recalled that, on the assumption that international crimes affected the whole international community, the latter 'has a role to play in determining the special legal consequences entailed by such act[s]'.[49] Moreover, given that the definition itself of international crime assigned to the international community the task of recognizing which breaches amount *in theory* to international

[44] ibid 121–122, paras 71–72.
[45] Rapporteur Riphagen contended that it cannot be exclude that non-recognition is a mandatory response, especially in case of situations resulting from the commission of an international crime. See ibid 122, para 74.
[46] ibid.
[47] The notion of 'international crime' was defined by draft Article 19 as '[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole'. Draft Article 19(3) specified that: 'Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from: (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression; (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination; (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid; (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas'. For the whole text of draft article 19, see 'Report of the International Law Commission on the work of its thirty-first session 14 May-3 August 1979' (1979) II(2) Yearbook of the International Law Commission 1, 92. Article 6(1) read: 'An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State: (a) not to recognize as legal the situation created by such act; and (b) not to render aid or assistance to the author State in maintaining the situation created by such act; and (c) to join other States in affording mutual assistance in carrying out the obligations under (a) and (b)'. See 'Third report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur' (1982) II(1) Yearbook of the International Law Commission 22, 48.
[48] ibid para 6.
[49] ibid para 5.

crimes, it follows that the international community had a role as for *concrete* cases. As the commentary put it, 'the international community as a whole … accepts a role of the … United Nations system … in the further stages of determining the legal consequences of such a breach and of the "implementation" of State responsibility in that case'.[50] Indeed, the commentary observed that when an international crime was allegedly committed the UN was involved.[51]

ILC members were in general supportive of the principle in question.[52] There were some criticisms, but they concerned more general issues. For instance, Rapporteur Riphagen noted that this article 'had been criticized mainly because it might be interpreted as a provision which prescribed *all* the legal consequences of an international crime'.[53] Some ILC members criticized the fact that the interplay between this article and the article defining the notion of international crime was not clear. Other expressed doubts as to who should decide that an international crime was committed[54] and as to the qualification of 'essential',[55] which was part of the definition of an international crime.[56]

In 1984, Rapporteur Riphagen introduced a new set of draft articles. Draft Article 14 read:

> 1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.
> 2. An international crime committed by a State entails an obligation for every other State: (a) not to recognize as legal the situation created by such crime; and (b) not to render aid or assistance to the State which has committed such crime … and (c) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b).
> 3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under … the present article are subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.[57]

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[50] ibid para 14.
[51] ibid.
[52] For instance, Malek stated that 'Article 6 was extremely important and warranted careful consideration, particularly in regard to paragraph 1, whose content was, in principle, satisfactory'. Summary records of the 1732nd meeting of the ILC (1982) I Yearbook of the International Law Commission 199, 207, para 9.
[53] Summary records of the 1738th meeting of the ILC (1982) I Yearbook of the International Law Commission 241, para 3 (emphasis added).
[54] Summary records of the 1734th meeting of the ILC (1982) I Yearbook of the International Law Commission 217, 221, para 25 (Balanda).
[55] ibid 223, para 40 (Razafindralambo).
[56] Supra n 47.
[57] Summary records of the 1858th meeting of the ILC (1984) I Yearbook of the International Law Commission 259, 260. The draft article continued with a fourth paragraph that established that: 'Subject to Article 103 of the United Nations

At least three aspects are relevant. First, the fact that this provision still referred to non-recognition suggests that a policy of non-recognition as a mandatory response to the commission of an international crime had become well-established in the work of the ILC. Indeed, the support for this principle was expressed by ILC members in an even clearer manner.[58]

Second, the text of this article considered some of the comments raised during the previous sessions. For example, it clearly specified that the legal consequences flowing from the commission of an international crime were *additional* consequences. Moreover, draft Article 15 singled out the crime of aggression, which was considered as particularly serious, thus entailing the consequences deriving from the UN Charter too.[59]

More relevantly, draft Article 14(3) referred to a collective mechanism for the implementation of the provision relating to international crimes, but its precise meaning was not totally clear.[60] In any case, it somehow weakened the provision on non-recognition since it linked the additional legal consequences in question to the collective security system provided for by the UN Charter, which had already proved to be a weak system.[61]

The commentary to draft Article 14 merely clarified that international solidarity dictated that the commission of international crimes was met with some additional consequences. Further, it was specified that the commission of such a crime entailed that 'the substance of the solidarity and the international procedures for the "organization" of that solidarity … may be determined by the

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Charter, in the event of conflict between the obligations of a State under paragraphs 1, 2 and 3 of the present article and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail'.

[58] For instance, Ni held that '[t]hat principle was at least 50 years old and was an effective means of preventing the worsening of the existing situation'. Summary records of the 1865th meeting of the ILC (1984) I Yearbook of the International Law Commission 303, 307, para 24. See also ibid 308, para 30 (Jacovides).

[59] Supra n 57.

[60] Malek held that '[n]othing was said as to whether the procedures set forth in part 3 had to be utilized to determine whether the act amounted to an international crime. All those critical issues had to be clarified with great precision if the provisions on international crimes were to have any meaning and were to contribute to the maintenance of a minimum world order, instead of providing further excuses for endangering that order'. Summary records of the 1866th meeting of the ILC (1984) I Yearbook of the International Law Commission 308, 311, para 16.

[61] Similarly, McCaffrey noted that: 'The main problem … was that the proposed draft articles did not make sufficiently clear provision for collective machinery for the implementation of the provisions relating to international crimes … Nothing was said as to whether the procedures set forth in part 3 had to be utilized to determine whether the act amounted to an international crime. All those critical issues had to be clarified … if the provisions on international crimes were to have any meaning and were to contribute to the maintenance of a minimum world order'. See ibid 313–314, para 33.

international community as a whole if and when it recognizes some internationally wrongful act as constituting an international crime'.[62] Thus, the meaning of this article was to lay down a *de minimis* response. In other words, this provision set out the additional measures that shall be undertaken individually by third States in case of commission of an international crime. But what about the organization of the response by the international community? The starting point is the link between the notions of *ius cogens* and that of international crime.[63]

One may compare the definition of *ius cogens* norm as a 'norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'[64] with that of international crime as an 'act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole'.[65] In both cases the international community plays a crucial role. More specifically, both these notions 'imply a deviation from the bilateralism that characterizes most of the rules of international law'.[66] This link explains why Rapporteur Riphagen suggested to include a provision that mandated a mechanism similar to that envisaged in Article 66(a) of the Vienna Convention on the Law of Treaties, which involved in the procedure the ICJ.[67] As for draft Article 14(3), it should be understood as a residual rule.[68]

Simma, who in any case criticized the lack of clarity over procedures, interpreted the interplay between Article 14(2) and Article 14(3) in a different way. His argument goes that the former

[62] 'Sixth report on the content, forms and degrees of international responsibility (part 2 of the draft articles); and "Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur' (1985) II(1) Yearbook of the International Law Commission 3, 14, para 6.

[63] In this regard, Rapporteur Riphagen noted that Part 2 and Part 3, which were devoted to the implementation of international responsibility, were deeply connected. In fact, all the legal consequences flowing from the commission of an international crime described in Part 2 depended on the actual commission of such a crime. The problem regarding the determination of the commission of an international crime was dealt with in Part 3. See ibid 15, para 3.

[64] Article 53, Vienna Convention on the Law of Treaties.

[65] Supra n 47.

[66] ibid 18, para 31.

[67] ibid, paras 31–32. This article establishes that in case of dispute on the application or interpretation of Articles 53 or 64—ie, the articles that concern the invalidity or the termination of a treaty that conflicts with a peremptory norm—any one of the parties may submit the dispute to the ICJ. Significantly, Rapporteur Riphagen specified that such a qualification cannot be left to each individual State.

[68] ibid 14, para 7. See also ibid, para 11.

established '[t]he minimum obligations applying in all cases of an "international crime", even *without* any further determination and organization by the "international community"'[69], while the precise legal meaning of the latter remained somehow unclear.[70] Admittedly, the wording of Article 14 was not conclusive as to whether these obligations depended on a previous determination by the international community.

However, a few comments made by Rapporteur Riphagen suggest that in his understanding *all* the measures provided for by this article were dependent on such a determination. First, he stated that 'Paragraph 2 of the present article indicates that minimum in respect of the *substance* of the new obligations'.[71] The commentary went on by specifying that the *procedural* aspect was dealt with in Article 14(3). In other words, it seems that, as soon as the international community recognizes that an international crime was committed, States shall take the measures *ex* Article 14(2), while the international community may decide additional measures. Second, Rapporteur Riphagen specified that 'it seems clear *a priori* that such recognition entails certain deviations from the general rules concerning the legal consequences of internationally wrongful acts. Such deviations consist of additional legal consequences'.[72] Accordingly, consequences *ex* Article 14(2) and any other consequence derive from the determination by the international community that an international crime was committed.

In any case, it is worthwhile to note that Simma criticized this article also because of its content. To base all additional legal consequences in question to the ICJ or to the UN political organs risks preventing the success of the response by the international community.[73] On the one hand, it was unlikely that States would voluntarily involve the Court in such a delicate question as the

[69] Bruno Simma, 'Bilateralism and Community Interest in the Law State Responsibility' in René Provost (ed), *State Responsibility in International Law* (Ashgate/Dartmouth 2002) 266 (emphasis added).
[70] ibid 268.
[71] 'Sixth report on the content, forms and degrees of international responsibility (part 2 of the draft articles); and "Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur' (1985) II(1) Yearbook of the International Law Commission 3, 14, para 6.
[72] ibid 18, para 30.
[73] ibid 267–268.

qualification of given conduct as an international crime. On the other hand, the UN political organs had already demonstrated their inefficiency in cases of alleged breaches of international law.

Until 1993 the ILC had refrained from dealing again with the question of non-recognition. In the meanwhile, Gaetano Arangio-Ruiz was appointed as the new special rapporteur. Some have considered the approach chosen by previous special rapporteurs as excessively academic,[74] in contrast, the 1993 report by Special Rapporteur Arangio-Ruiz, when touching upon the matter at hand, finally engaged with State practice. More specifically, this report started by reaffirming some 'law-declaring' General Assembly resolutions[75] and by referring to a series of cases in which non-recognition was invoked, including the UN resolutions concerning Israeli decisions in respect of the occupied territories and of Jerusalem, the annexation of Kuwait by Iraq, the declaration of independence of Southern Rhodesia adopted by a racist regime, the continued presence of South Africa in Namibia, and the situation of democracy and human rights in Haiti.[76]

The reference to the latter is particularly interesting because it provides evidence of a certain confusion on the scope of the possible mandatory policy of non-recognition. General Assembly Resolution 47/20 A condemned 'the attempted illegal replacement of the constitutional President of Haiti, the use of violence and military coercion and the violation of human rights in that country' and reaffirmed that the 'entity resulting from that illegal situation' would have not been considered as acceptable'.[77] Thus, it seems that the case of Haiti is markedly different from the other cases mentioned above. Even if the wording of this resolution resembles that of the resolutions adopted with reference to those cases mentioned above, this one does not refer to non-recognition, but instead

[74] See for instance the summary records of the 1733rd meeting of the ILC (1982) I Yearbook of the International Law Commission 211, 214 (Ni) and the summary records of the 1733rd meeting of the ILC (1982) I Yearbook of the International Law Commission 217, 221 (Balanda).

[75] The Special Rapporteur recalls 'the provision of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal", a principle subsequently reiterated by the General Assembly in the Definition of Aggression. The Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relation may also be recalled'. See 'Fifth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (1993) II(1) Yearbook of the International Law Commission 1, 53, para 242.

[76] ibid paras 242–243.

[77] A/RES/47/20 A, 24 November 1992, paras 1–2. See also A/RES/46/7, 11 October 1991.

uses a more general word as 'unacceptable'. Moreover, the resolution in question asked not to recognize a Government—ie, the military Government that deposed the Government of President Jean-Bertrand Aristide, who had been democratically elected in the 1990 presidential election—rather than a State or a territorial situation. Admittedly, these observations do not detract from the fact that the wider context suggests that the aim of the Assembly was to isolate the illegal Government so to prevent its consolidation. The reference to the resolutions adopted by the Ministers for Foreign Affairs of the member countries of the Organization of American States is particularly significant.[78] In fact, in the context of this organization it was decided '[t]o recognize the representatives designated by the constitutional Government of President Jean-Bertrand Aristide as the only legitimate representatives of the Government of Haiti'.[79] Another resolution explicitly referred to the aim of isolating 'the *de facto* regime that arose with the coup d'état of September 30, 1991'.[80] This wording clearly frames the question as a question of non-recognition of an unlawful situation.

However, there is a crucial difference between the cases mentioned above and the case of Haiti: while as regards the former it is possible to argue that an international crime was committed, as regards the latter such an argument cannot be raised and in fact it has not been raised.[81] The 1991 Haitian *coup d'état* was a purely domestic crisis, and it was portrayed as such by the mentioned resolutions. The *coup* received no support by third States, neither it was at odds with the principle of self-determination. Even if the resolutions adopted with reference to the Haitian crisis used the term self-determination, it seems that this term was intended as a synonym of democracy.

In any case, subsequent discussions within the ILC confirm that the problem was not non-recognition *per se*, given that State practice was replete with examples of non-recognition, but

[78] A/RES/47/20 A, 24 November 1992, preamble and para 4.
[79] MRE/RES 1/91, 3 October 1991, para 3. See also MRE/RES 2/91, 8 October 1991. These resolutions are reproduced in 'U.S. and OAS Condemn Coup d'Etat in Haiti, Seek Return of President Aristide' (1991) 2 Foreign Policy Bulletin 61, 62–63, 65.
[80] MRE/RES 3/92, 17 May 1992, para 1. This resolution is available at <www.oas.org/en/columbus/docs/haiti/Ad_Hoc_Meeting_%20of_%20Ministers_%20of_%20Foreign_%20Affairs/OEA%20Ser.F%20V.1%20MRE%20RES.3%2092%20Eng.pdf>.
[81] On this question see, David M Malone and Sebastian von Einsiedel, 'Haiti' in David M Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 169ff.

whether non-recognition as an obligation for third States, together with the other additional legal consequences of international crimes, was dependent on an institutional mechanism.[82] Accordingly, the Special Rapporteur in his summary of the discussion among ILC members observed that there was a certain degree of consensus over a general obligation of non-recognition,[83] even if 'it had been stressed … that that obligation would not be automatic and would exist only after some form of intervention by the so-called organized international community'.[84]

That this was the main question is confirmed also in subsequent reports on State responsibility.[85] Interestingly enough, as regards the organized international community, Rapporteur Arangio-Ruiz had previously remarked that he had doubts that the so-called organized international community really existed.[86] Such an observation is noteworthy because it explains the attempts of the

[82] In this regard, Rapporteur Arangio-Ruiz remarked: 'While recognizing that the consequences of the wrongful acts qualified as crimes of States … are no longer the terra incognita they certainly were at the outset, it is still not possible to reach any conclusions on any of the difficult aspects of the matter. This applies to the determination both of the existing legal situation and of the possible lines of progressive development of the law'. See 'Fifth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (1993) II(1) Yearbook of the International Law Commission 1, 30, para 109. For instance, Al-Baharna bluntly contended that '[t]he general obligation of non-recognition of the consequences of crimes of aggression arose from a normative decision by the Security Council'. See the summary records of the 2342nd meeting of the ILC (1994) I Yearbook of the International Law Commission 90, 97, para 54 (Al-Baharna). Al-Khasawneh, similarly, maintained that a general duty not to recognize requires a prior authoritative statement by the Security Council or possibly by the General Assembly. See ibid 100, para 71 (Al-Khasawneh). Razafindralambo observed more in general that 'the Security Council should have *exclusive* responsibility for the decisions incumbent on the international community'. See Summary records of the 2343rd meeting of the ILC (1994) I Yearbook of the International Law Commission 100, 108, para 50 (Razafindralambo) (emphasis added).

[83] Admittedly, two problems had emerged. Some members emphasized the risk of conflating primary norms and secondary norms. See the summary records of the 2340th meeting of the ILC (1994) I Yearbook of the International Law Commission 74, 77, para 32 (Pambou-Tchivounda) and 2342nd meeting of the ILC (1994) I Yearbook of the International Law Commission 90, 93 para 22 (Bennouna). On the other hand, other members wondered whether non-recognition was a consequence flowing only and exclusively from international crime and not also from delicts. See the summary records of the 2342nd meeting of the ILC (1994) I Yearbook of the International Law Commission 90, 100, para 71 (Al-Khasawneh). See also the summary records of the 2394th meeting of the ILC (1995) I Yearbook of the International Law Commission 102, 106, para 71 (Al-Khasawneh). For these reasons Crawford referred to non-recognition as the most disputable category of legal consequences of international crime. Summary records of the 2342nd meeting of the ILC (1994) I Yearbook of the International Law Commission 90, 95, paras 42–43 (Crawford).

[84] Summary records of the 2348th meeting of the ILC (1994) I Yearbook of the International Law Commission 132, 135, para 23.

[85] As Special Rapporteur Arangio-Ruiz put it, '[t]here remains the question whether the obligation is activated by a prior, authoritative finding by an impartial organ of the world community that the crime of aggression has been committed'. See 'Sixth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (1994) II(1) Yearbook of the International Law Commission 3, 20, para 111. Indeed, this question was defined as 'the most crucial problem'. See 'Seventh report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur responsibility' (1995) II(1) Yearbook of the International Law Commission 3, 20, para 87.

[86] He observed that: 'from the earliest days of his study of international law he had thought and written that there was no such thing as an organized international community, far less a properly or decently organized one. That was the view he continued to hold today, nothing having occurred in the meanwhile to change his mind. To complete the picture, he would add that he was far from sure whether an international legal community, whether organized or not, existed at all; indeed, at the risk of blaspheming, he would confess to daily doubts as to the existence of a system of international law in any

Special Rapporteur to draft an article on legal consequences of international crimes, thus including non-recognition, not dependant on a concept as abstract as the 'international community'. Indeed, afterwards, Special Rapporteur Arangio-Ruiz reviewed a series of options.[87] First, he analysed whether a determination could be made exclusively by the General Assembly, the Security Council, or the ICJ. In this regard, he concluded that it was not persuasive to assign such a determination exclusively to one of these organs. Accordingly, he proposed a new draft article that established that States shall '[r]efrain from recognizing as legal or valid, under international or national law, the situation created by the international crime'.[88] This obligation was subjected to a complex mechanism involving States, the political organs of the UN, and the ICJ.[89]

However, this mechanism was widely criticized, and it eventually disappeared from the text of the codification project. On the one hand, it was contended that the requirement of a prior decision of the ICJ may have an 'adverse effect on the effectiveness and promptness of the reaction'. [90] In fact, this mechanism, because of the involvement of three actors, was deemed to be excessively cumbersome and, in any case, the assumption that States would accept the compulsory jurisdiction of ICJ was regarded as unrealistic.[91] Summing up the debates Rapporteur Arangio-Ruiz recalled that the ILC 'must contribute to the progressive development of international law by striking a fair balance

sense comparable, however imperfect, to the legal systems of interrelated societies'. See summary records of the 2342nd meeting of the ILC (1994) I Yearbook of the International Law Commission 90, 97, para 56 (Arangio-Ruiz).

[87] 'Seventh report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (1995) II(1) Yearbook of the International Law Commission 3, 20ff.

[88] ibid 29.

[89] ibid 30. More specifically, this article established that: 'Any State Member of the United Nations Party to the present Convention claiming that an international crime has been or is being committed by one or more States shall bring the matter to the attention of the General Assembly or the Security Council of the United Nations in accordance with Chapter VI of the Charter of the United Nations'. Draft Article 20 makes clear that these provisions 'are without prejudice to: (a) Any measures decided upon by the Security Council of the United Nations in the exercise of its functions under the provisions of the Charter; (b) The inherent right of self-defence as provided in Article 51 of the Charter'.

[90] 'Report of the International Law Commission on the work of its forty-seventh session (2 May-21 July 1995)' (1995) II(2) Yearbook of the International Law Commission 1, 54, para 302.

[91] ibid 55, para 305. In addition, it was noted that the mechanism in question was hardly compatible with the UN Charter, that such a mechanism would have allowed a State possibly committing an international crime to save time and to delay the resort to countermeasures by third States, and that given that international crimes are likely at the same time threats to peace there is already an institutional mechanism to deal with this kind of conduct. See ibid paras 305, 307.

between the *ideal* and what was *possible*'[92] and he stressed the danger resulting from a unilateral evaluation made by States.[93]

However, this is precisely what would have happened with the draft articles adopted in 1996. In fact, Rapporteur Arangio-Ruiz continued to defend the necessity to envisage a kind of institutional mechanism for the assessment of the commission of an international crime, but, also because of the persistent negative reactions by ILC members, he decided to resign.[94] Eventually, the Drafting Committee completed the first reading of draft articles on State responsibility and afterwards the ILC transmitted the draft articles to Governments for comments and observations.

The structure of the codification project had changed: while Article 19, which defined international crime, is included in Chapter III dedicated to breaches of international obligations, the provision on non-recognition is included in Chapter IV dedicated *exclusively* to international crimes. Article 53 read:

> An international crime committed by a State entails an obligation for every other State:
> (a) not to recognize as lawful the situation created by the crime;
> (b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;
> (c) To cooperate with other States in carrying out
> the obligations under subparagraphs (a) and (b); and
> (d) To cooperate with other States in the application of measures designed to eliminate the consequence of the crime.[95]

The new set of articles did not include a provision amounting to previous draft Article 20. In this regard, the rather concise commentary to Article 53 stated that '[i]n practice, it is *likely* that this collective response will be coordinated through the competent organs of the United Nations' but the commentary added that the function of the draft article was not 'to regulate the extent or exercise of the constitutional power and authority of organs instituted under the Charter of the United Nations'.[96]

[92] ibid 58, para 324 (emphasis added).
[93] ibid 59, para 329.
[94] Summary records of the 2436th meeting of the ILC (1996) II(2) Yearbook of the International Law Commission 22, 30–31, paras 61–62.
[95] See 'Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996)' (1996) II(2) Yearbook of the International Law Commission 1, 72.
[96] ibid (emphasis added).

Thus, besides the collective response of States through the organized international community, States shall *individually* take the measures *ex* Article 53.[97]

In 2000, the Drafting Committee adopted on second reading a new set of articles that did not include any reference to international crimes. This development markedly affected the codification project, but as for non-recognition it was ultimately immaterial. Accordingly, the provision on non-recognition, now enshrined in Article 42(2) refers to 'serious breaches of obligations to the international community as a whole'. In any case, the same questions—namely the extent to which non-recognition was a specific consequence *only* of these breaches,[98] how to determine the threshold of seriousness[99] as well as a certain vagueness of the provision in question for instance on the determination of illegality[100]—persisted. The United Kingdom also observed that:

> [T]he circumstances in which breaches occur vary widely; and States are by no means always all affected in the same way. Furthermore, the temporal element cannot be ignored. Yet draft article 42, paragraph 2, prescribes a single rule with which every State must comply, without any limit in time, in every case of serious breach.[101]

Eventually, in 2001, the ILC finalized the text of the codification project. The decision to get rid of the concept of international crime was confirmed and Article 41(2) establishes a duty not to recognize as lawful a situation created by a serious breach of a peremptory norm of international law, without specifying how the commission of such breaches shall be ascertained.

The features of interest of this story are at least two. First, it is noteworthy that all along the works within the ILC there was an agreement on the principle that factual situations brought about by certain violations of international law cannot be recognized. However, no agreement could be found on a series of substantive aspects, such as whether an authoritative finding by an impartial organ of the international community is necessary or not and as to the precise consequences of non-recognition. In the end, the final text of the ARSIWA simply glossed over such aspects and the

[97] ibid 72–73.
[98] See 'Comments and observations received from Governments' (2001) II(2) Yearbook of the International Law Commission 33, 68, para 6 (Japan) and ibid 67, para 6 (United Kingdom).
[99] ibid 68, para 4 (Austria).
[100] ibid 70, para 4 (Spain).
[101] ibid 67, para 6 (United Kingdom).

wording of Article 41(2) does not provide any conclusive answer. Similarly, the commentary to this article refrains from doing so. It is worthwhile to note that the commentary mentions several cases in which non-recognition was invoked but, besides an interpretation somehow debatable of the *Namibia* advisory opinion,[102] it is difficult to understand why these cases were mentioned and not others, such as Western Sahara, East Timor, or the post-Soviet breakaway republics—ie, cases in which apparently non-recognition was implemented in the absence of a resolution of a UN political organ or of a judgement of the ICJ.[103]

This observation prompts a second remark on the works of the ILC. The drafting history of the article in question shows the extent to which the aspects mentioned above were mostly tackled by referring to a series of policy considerations. State practice was used only with reference to the general principle of non-recognition rather than in to support a certain understanding of the substantive content of the alleged norm. It might be argued that later, on the basis of the ILC codification project, State practice converged around the principle of non-recognition and around a certain substantive understanding of such a principle. However, on the basis of the State practice taken into considerations in Chapters 4–5, it does not seem that such an argument is persuasive.[104]

Overall, subsequently, legal scholars have been supportive of this article and the current scholarly understanding of the doctrine of non-recognition roughly amounts to the one expounded by the ILC in article 41(2) ARSIWA as well as in its commentary. The next sections review the duty of non-recognition as it is understood by contemporary legal scholarship identifying some of the most pressing questions, which are actually the same emerged in the discussions within the ILC. Further, it can be noted from the outset that, similarly to the ILC, also legal scholars have fully agreed on the principle of non-recognition but not on its precise meaning.

[102] See below at 109ff.
[103] See below ch 4, ss 1, 4 and ch 5, ss 2.1–2.3.
[104] See below ch 4, s 5.1 and ch 5, s 3.1.

4. Some problematic questions on the duty of non-recognition

4.1. The mandatory character of non-recognition

The prevailing view in *contemporary* legal scholarship is that non-recognition is a legal duty, but this has not always been the case. Actually for long time, the idea that in certain circumstances a policy of non-recognition could be mandatory was called into question.

Christakis illustrates and criticises three different arguments that were raised over time in order to deny the existence and the usefulness of such a norm. The first two arguments concern the structure of the international legal order and that of the international community. On the one hand, the argument goes that there cannot be any *genuine* duty of non-recognition since States themselves, rather than an impartial judge, ultimately decide whether a given conduct is lawful. Christakis, however, stresses that the UN political organs have undertaken this task and, in any case, States have a duty to draw the appropriate consequences following from violations of international law independently from the determination of illegality made by a competent authority.[105] On the other hand, it could be claimed that States routinely violate international law with barely any consequence and an omissive measure such as non-recognition cannot by itself restore the *status quo ante*. In this regard, Christakis observes that at the end of the day the duty of non-recognition has been rather effective.[106] The racist regime of Southern Rhodesia was brought down and Namibia and Timor East are now independent States: these outcomes were made possible also thanks to a mandatory policy of non-recognition, which moreover was overall respected by States. Similarly, the duty of non-recognition may have contributed to bar the consolidation of other illegal situations, such as the occupation of Palestine and the Golan Heights by Israel, the invasion and annexation of Kuwait by Iraq, and the establishment of the Turkish Republic of Northern Cyprus (TRNC).

[105] Christakis (n 16) 130–131. See for instance S/RES/497, 17 December 1981, para 1, which '[d]ecide[d] that the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect'. This case is discussed below in ch 4, s 2.
[106] Christakis (n 16) 132–134.

The third argument is that the duty of non-recognition would lack any legal basis in positive law.[107] However, in support of the existence of a customary duty of non-recognition, Christakis lists a series of international conventions and of other legal instruments that allegedly imply a general and abstract duty of non-recognition.[108] Even though all of them concern a mandatory policy of non-recognition of factual situations emerged in violation of the prohibition of forcible acquisition of territory, Christakis' argument covers also those situations emerged in violation of *other* peremptory norms.

The legal instruments listed by Christakis are the following ones: the Anti-War Treaty of Non-Aggression and Conciliation (also known as Saavedra Lamas Pact),[109] the Convention on Rights and Duties of States,[110] the Declaration of Lima,[111] the Preamble to the Act of Habana Concerning the Provisional Administration of European Colonies and Possessions in the Americas,[112] the Charter of the Organization of American States.[113] Furthermore, he lists other instruments adopted both in the European context—namely the Helsinki Final Act,[114] the Declaration on the Guidelines on the recognition of new States in eastern Europe and in the Soviet Union,[115] and the opinions adopted by the Badinter Commission—and in the UN context—namely General Assembly Resolutions 2625

[107] ibid 134ff.
[108] Christakis (n 16) 135–137.
[109] Anti-War Treaty of Non-Aggression and Conciliation (signed 10 October 1933, entered into force 13 November 1935).
[110] Convention on Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934).
[111] Declaration of Lima (22 December 1938).
[112] Act of Habana Concerning the Provisional Administration of European Colonies and Possessions in the Americas (signed 30 July 1940, entered into force 8 January 1942).
[113] Charter of the Organization of American States (signed 30 April 1948, entered into force 13 December 1951) 119 UNTS 3.
[114] The Final Act of the Conference on Security and Cooperation in Europe (1 August 1975), IV principle.
[115] Declaration on the Guidelines on the recognition of new States in eastern Europe and in the Soviet Union (16 December 1991).

(XXV),[116] 3314 (XXIX),[117] 36/103,[118] and 42/22.[119] In addition, he mentions Article 41(2) ARSIWA, which allegedly codified this customary norm.[120]

Moreover, Christakis contends that States have acted in accordance with these legal instruments, which is another element that would confirm the existence of a precise legal duty. Besides the cases listed by the ILC in its commentary,[121] Christakis refers also to the resolutions adopted by UN political organs with reference to the occupation of Arab territories and to two cases in which actually the policy of non-recognition was not consistently maintained, namely the Italian invasion of Ethiopia and the Soviet invasion of the Baltic States.[122]

Finally, Christakis mentions two advisory opinions rendered by the ICJ, namely the *Namibia* and the *Wall* advisory opinions, as well as a few cases before other international courts, namely the *Loizidou* and the inter-state case *Cyprus v. Turkey* before the ECtHR and the award in the *Republika Srpska v. The Federation of Bosnia and Herzegovina* adopted by the Arbitral Tribunal for Dispute over Inter-entity Boundary in Brcko Area.

Here it is worthwhile to note that such a view—ie, that the legal instruments listed by Christakis are evidence of a customary duty, and thus non-recognition of certain situations is not a discretionary choice—is the standard view even if it is not universal.[123] Pert, for instance, contends that such a reasoning is not fully persuasive. First, Pert looks at *pre-Charter* legal instruments and at State practice, whose legal relevance should be scaled down.[124] Most of legal instruments including

[116] A/RES/2625 (XXV), 25 October 1970, annex (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, first principle).
[117] A/RES/3314 (XXIX), 14 December 1974, annex (Definition of Aggression, art 5(3)).
[118] A/RES/36/103, 9 December 1981, annex (Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, III(e)).
[119] A/RES/42/22, 18 November 1987, annex (Declaration of the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, I(10)).
[120] Christakis (n 16) 137.
[121] Namely, the invasion of Manchuria by Japan and the subsequent establishment of Manchukuo, the adoption of a unilateral declaration of independence by Southern Rhodesia from the United Kingdom, the continued presence of South Africa in Namibia notwithstanding UN resolutions to the contrary, the declaration of independence by the so-called Homelands from South Africa, the establishment of the TRNC, and the annexation of Kuwait by Iraq.
[122] Christakis (n 16) 137–142.
[123] Additional reasons why it is questionable to contend that these materials, and especially State practice, evidences the customary nature of the duty of non-recognition are presented in the next chapters.
[124] Alison Pert, 'The "Duty" of Non-Recognition in Contemporary International Law: Issues and Uncertainties' (2013) Sydney Law School Legal Studies Research Paper No. 13/96, 2–4. In addition to the legal instruments referred to by

a provision on non-recognition are characterized by different legal significance according to the formal status of each of them. Only the Anti-War Treaty and the Montevideo Convention are legally binding[125] and, in any case, they bind only States parties. Moreover, only the latter includes an express duty of non-recognition.[126]

Additionally, the geographic scope of these instruments is limited since they were all adopted in Latin America. Indeed, many of them refer explicitly to a norm emerged in the American context. For instance, the 1890 First International Conference of American States establishes that 'the principle of conquest shall not … be recognized as admissible under *American public law*'.[127] The project presented by the American Institute of International Law dealing with the prohibition of forcible territorial acquisitions is dedicated to the 'Fundamental Rights of *American Republics*' and it treats it as a 'fundamental concept of *American international law*'.[128] The same goes for the 1940 Act of Havana that refers to non-recognition as a principle of *American international law*.[129]

Finally, even though all the legal instruments mentioned above clearly refer to a specific case, which is non-recognition of situations emerged in violation of the prohibition of conquest, their

Christakis, she refers also to a recommendation on the Right of Conquest adopted in 1890 by the First International Conference of American States, to a statement of the American Institute of International Law adopted in 1925, to the Inter-American Declaration of 1932 concerning the Chaco dispute, to the Declaration of Principles of Inter-American Solidarity and Co-operation (21 December 1936), to the Inter-American Juridical Committee's 1942 Reaffirmation of Fundamental Principles of International Law, and to the 1945 Declaration of Mexico. However, Pert, in contrast with Christakis, does not mention the Preamble to the Act of Habana.

[125] However, some of the legal instruments mentioned reiterate the content of one of these agreements. For instance, the declaration of Lima recalls the Anti-War Treaty.

[126] Article 11 establishes that: 'The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily'. Moreover, Brazil and Peru recorded a declaration by means of which they noted that while in principle they accepted the doctrine of non-recognition, they considered it not ripe yet for codification.

[127] First International Conference of American States (18 April 1890), recommendation on the right of conquest (emphasis added).

[128] American Institute of International Law (1925), project no. 8. 'Fundamental rights of American Republics' (emphasis added).

[129] Convention on the Provisional Administration of European Colonies and Possessions in the Americas (30 July 1940), sixth preambular paragraph (emphasis added).

wording differ to such an extent that it is difficult 'to divine the actual customary rule, if any, that these instruments might evidence'.[130]

To sum up, according to Pert, this series of legal instruments does not provide evidence of a general and abstract duty of non-recognition of serious breaches of *ius cogens* norms. At best, it provides evidence of a local customary duty not to recognize fruits of aggression. In any case, in the view of the author, State practice is not consistent and actually the pattern of forcible acquisitions of territories was the reason that explains why Latin American States were continuing to reaffirm the prohibition of such acquisitions: the very same States were attempting to annex territories on the assumption that such annexations would have been eventually recognized.[131]

The same goes for the pre-UN Charter State practice in other areas than Latin America.[132] Two examples are the annexation of Ethiopia by Italy and the annexation of the Baltic States by Soviet Union. As for the former, it is noteworthy that many States did, albeit after a certain period of time in which sanctions were decided and implemented, recognize the conquest.[133] As for the latter, similarly, some States recognized *de jure* the annexation, others recognized it only *de facto*, some did not express explicitly their position, and others did not recognize it at all.[134] As for the Manchurian crisis, even though the Stimson doctrine is an important antecedent of a mandatory policy of non-recognition, nothing suggests that it was aimed to have a wider effect other than to express the political stance of the United States towards the events occurring in Manchuria in that specific occasion.[135] Pert recalls that the relevant resolutions of the League of Nations had merely political

[130] Pert (n 124) 3. Pert in this regard identifies four variations: (a) an obligation not to recognise territorial acquisitions obtained by force; (b) an agreement not to recognise such acquisitions; (c) an agreement or acknowledgment that forcible territorial acquisitions will (or "shall") not be recognised; and (d) denial of the validity of such acquisitions.
[131] ibid 4
[132] ibid 4–6. See also David Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law' (2003) 2 Chinese Journal of International Law 105, 128–130.
[133] In occasion of an annual meeting of the American Society of International Law Briggs, Padelford, and Wright, while disagreeing on some aspects noted that State practice (the Italian conquest of Ethiopia is mentioned explicitly) was not supporting a customary duty of non-recognition. See Herbert W Briggs and others, 'Non-Recognition of Title by Conquest and Limitations on the Doctrine' (1940) 34 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 78–80 (remarks by Briggs), 83 (remarks by Padelford), and 90 (remarks by Wright).
[134] Peter Van Elsuwege, *From Soviet Republics to EU Member States: A Legal and Political Assessment of the Baltic States' Accession to the EU* (Martinus Nijhoff Publishers 2008) 34–36.
[135] See below ch 3, s 1.

value so much so that the United Kingdom considered the hypothetical recognition of Manchukuo or, for instance, the hypothetical recognition of the annexation of Ethiopia by Italy as legal.[136]

Secondly, the legal instruments adopted *after* the adoption of the UN Charter, rather than demonstrating agreement, demonstrated a certain disagreement over the existence of this customary obligation.[137] In this regard, it is meaningful that while the UN Charter eventually banned the acquisition of territories by force, it did not include a specific provision mandating an obligation of non-recognition of such annexations.

Further, the Draft Declaration on the Rights and Duties of States prepared in 1949 by the ILC on the input of the General Assembly, which included an article barring recognition of forcible acquisition of territory, was simply acknowledged by the Assembly. The Assembly also requested States to furnish comments and suggestions, but afterwards only a few States did so.[138] Thus, the Assembly was compelled to postpone consideration of the document in question.[139] Incidentally, Kelsen was rather critical of the article barring recognition. Besides observing that it was not clear what was the precise meaning of the article in question,[140] he argued that neither general international law nor the UN Charter bars the forcible acquisition of territory and that in international law '[t]he principle *ex injuria jus non oritur* is not—or only with important restrictions—a principle of positive international law'.[141]

During the drafting of the 1970 Friendly Relations Declaration, a compromise was reached in the sense of specifying that the obligation was not to recognize a given unlawful situation as 'legal'.

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[136] Pert (n 124) ibid 5. See also Briggs and others (n 133) 79.
[137] Pert (n 124) 6–7.
[138] A/RES/375, 6 December 1949, paras 1, 4.
[139] A/RES/596, 7 December 1951, preamble and para 1. See also Pert (n 124) 7–8.
[140] Article 11 of the draft declaration in question establishes that: 'Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of Article 9'—ie, the article that establishes that every State has the duty to refrain from resorting to war. More specifically, Kelsen's argument is twofold. On the one hand, he criticized the scope of the prohibition (for instance, it is not clear whether it covers a treaty by means of which the territory acquired is subsequently subject to cession too). On the other hand, Kelsen noted that if recognition is declaratory then non-recognition has only political importance, if it is constitutive this would mean that 'no state can acquire territory from another state without recognition on the part of third state'. However, this contention finds no support in international law. See Hans Kelsen, 'The Draft Declaration on Rights and Duties of States' (1950) 44 American Journal of International Law 259, 272–274.
[141] ibid.

This Declaration remains an important stage in the development of the doctrine in question given that it is viewed as a codification of international law even if the material scope of the provision of non-recognition is rather specific in the sense that it concerns only acquisitions of territories through the use of force.[142] It should also be noted that a provision such as that included in this declaration can be interpreted in a rather different way in the sense that it can simply imply that States have not an obligation to recognize such territorial acquisitions. It is worthwhile to note that Rapporteur Riphagen refers explicitly to the provision of the 1970 Friendly Relations Declaration, which thus is interpreted as implying not a *duty* of non-recognition of forcible acquisitions of territory, but rather a *right* not to recognize them.[143]

In this sense, the comments submitted by States and Governments to the work of the ILC, which have been mentioned in the previous section, are meaningful too given that some States would have just omitted any reference to a specific duty of non-recognition and to other additional consequences of international crimes/serious breaches of peremptory norms of international law.[144]

Pert, on the basis of the elements mentioned—ie, that State practice preceding *and* following the adoption of the UN Charter as well as the various legal instruments adopted over-time—concludes her argument on the legal basis of this duty by maintaining that 'the confidence with which many writers assert the binding status of the principle cannot be justified'.[145]

Also Milano and Orakhelashvili note that State practice following the adoption of the UN Charter is not particularly uniform.[146] One may take as an example Israel's expansion in 1948 beyond

[142] See also the ILC commentary to Article 41 published in 'Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)' (2001) II(2) Yearbook of the International Law Commission 1, 113, para 6.
[143] 'Preliminary report on the content, forms and degrees of international responsibility (Part 2 of the draft articles on State responsibility), by Mr. William Riphagen, Special Rapporteur' (1980) II(1) Yearbook of the International Law Commission 107, 117, para 54.
[144] See above at 48.
[145] Pert (n 124) 12.
[146] It should be noted however that at least some of these situations were characterized by a specificity which may explain why the duty of non-recognition did not operate. See Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Nijhoff 2006) 106 and Alexander Orakhelashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008) 12 Max Planck Yearbook of United nations Law 1, 8.

the lines laid down in the UN partition plan, the Chinese invasion and annexation of Tibet in 1951, the Indian invasion and annexation of Goa in 1961, the Indonesian annexation of West Papua in 1963, and the unilateral secession of Bangladesh from Pakistan in 1971. In contrast to the cases mentioned by Christakis, in these cases the duty of non-recognition was not invoked. These situations occurred *before* the adoption of the 1970 Friendly Relations Declaration, which could suggest that the duty of non-recognition acquired its customary status when this legal instrument was adopted. An exception in this regard is the case of Bangladesh, which deserves further scrutiny given that this case attracted a certain attention in the literature on non-recognition.

Lagerwall analyses the case in question and argues that only apparently it could be seen as a countervailing example to the consistent application of a mandatory policy of non-recognition in case of certain breaches of international law. [147] In fact, it could be speculated that States by recognising Bangladesh recognized a State that achieved independence thanks to a third State's intervention whose legality was 'seriously doubtful'. The political support of India to Bangladesh and its military intervention in support of the secessionists were indeed crucial to the success of the secession of Bangladesh from Pakistan. Even if few States condemned the Indian conduct and characterized it as unlawful, the independence of Bangladesh was recognized by India and then by other States. Afterwards Bangladesh was admitted to many international organizations. However, according to Lagerwall, States did not put into question the duty of non-recognition, in contrast the organized international community merely refrained from qualifying Indian intervention as illegal.[148]

The argument goes that if there is no breach of international law, then there is no unlawful situation with respect to which a policy of non-recognition applies. From the beginning, many States carefully avoided any reference to the illegality of the Indian conduct[149] and, consequently, to the

[147] Anne Lagerwall, *Le principe ex injuria jus non oritur en droit international* (Bruylant 2016) 287–293.
[148] ibid 294–303.
[149] Two exceptions in this regard were the United States and China. Not surprisingly Pakistan argued that the Indian intervention was unlawful. It is interesting that the Pakistan representative said: 'the UN cannot violate the principle of territorial integrity of member States and thus cannot recognize the outcome of any attempt to subvert the territorial integrity of Pakistan by means of aggression'. This intervention is cited by Lagerwall (n 147) at 296.

question of the lawfulness of the recognition of Bangladesh. Lagerwall notes that many States remained silent or limited themselves to reaffirm the need of avoiding any action potentially leading to an escalation of the tensions in the area as well as to the humanitarian aspects of the crisis. The Security Council in the beginning did not intervene at all. The General Assembly did not blame any of the parties to the conflict and pragmatically it postponed any discussion on the origins of the conflict. In addition, it demanded the parties to stop the conflict and it addressed matters relating to the humanitarian situation and to the question of refugees. Only subsequently the Council asked the withdrawal of armed forces of both Pakistan and India even if it was the latter that intervened, probably unlawfully.[150]

Afterwards, in March 1971, Bangladesh declared its independence and the following year it requested to be admitted to the UN. This request was met with reticence, and was eventually rejected and only a second request filed in 1974 was accepted.[151] Lagerwall notes that there were many reasons for this reticence, including in the first place a feeling of uneasiness to admit to the UN an entity recognized only by India. It is noteworthy, however, that no third State explicitly referred to the Indian intervention as a legal ground to reject the Bangladeshi request, but rather States referred to more general grounds, such as the number of outstanding issues between India and Pakistan. Only after the pacification between these States, as well as between Pakistan and Bangladesh, and the recognition of Bangladesh by many third States, including most importantly Pakistan, the UN accepted the request of Bangladesh. Lagerwall concludes by arguing that probably in the eyes of States, after the recognition by Pakistan, Bangladesh was no longer an unlawful entity or, anyway, its existence was no more contested.[152]

It seems persuasive to argue, as Lagerwall does, that by merely refraining to resort to non-recognition, and actually by refraining from characterizing the intervention of India as unlawful,

[150] ibid 290–293.
[151] ibid 304–315.
[152] ibid 314.

States did not put into question the duty of non-recognition. However, this case, rather than supporting the existence of a norm mandating non-recognition, seems to confirm that if such a policy is triggered by a determination done by States, individually or even collectively, then it is hard to contend that it is a mandatory policy. In other words, in the lack of a central judicial institution endowed with compulsory jurisdiction, States can easily circumvent the duty of non-recognition simply by refraining from condemning the illegality of a given situation.

It is noteworthy that the scholars mentioned above who have raised some criticisms towards the duty of non-recognition have not called into question its customary status nor its binding character or, in any case, they have not attached any meaningful consequence to such criticisms.[153] An exception in this sense is Pert, who contends that even if '[t]here has clearly been a principle … of non-recognition for some time, as a corollary to the gradual movement towards the prohibition of aggression', it cannot be concluded that this principle crystallized in customary international law.[154] This seems a crucial point. It should be already clear from what observed above that the doctrine of non-recognition emerged initially as a general principle relevant in cases of forcible annexations, which arguably has gradually consolidated but it is not clear to what extent it crystallized in customary international law and to what extent it has a clear content. The difference between principles and legal norms is a contentious topic,[155] however it is relatively uncontentious that while the former designate general rules that cannot be readily applied to a given factual situation, the latter, being characterized by a greater degree of detail, can be applied.[156] This observation prompts a series of questions on some substantive aspects that are addressed in the next subsections, the first of which deals with what triggers a mandatory of policy of non-recognition.

[153] See also above ch 1, s 2.
[154] Pert (n 124) 11.
[155] Niels Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' (2007) 23 American University International Law Review 275, 286ff.
[156] See Ronald Dworkin, Taking Rights Seriously (Harvard University Press 1978) 22ff.

4.2. What triggers the duty of non-recognition

This question can be divided into two sub-questions. On the one hand, the question is whether the duty of non-recognition mandates that third States have an obligation to withhold recognition from situations in the sense of the above *independently* from any Security Council resolution or in any case not depending on any institutional mechanism. On the other hand, the question concerns the material scope of this duty, which amounts to ask if it is relevant *only* to the situations emerged in connection with a serious breach of a *ius cogens* norm or also to other unlawful situations.

As for as the first sub-question, it was already noted in the previous sub-section that there are many treaties and other legal instruments that envisage a duty not to recognize as legal a situation brought about by the violation of international law. Generally, the violation concerns the prohibition of forcible acquisition of territory, which explains why the Council, which indeed is the UN organ that has the primary responsibility for the maintenance of international peace and security, has often called upon States to implement a policy of non-recognition. But what is the legal meaning of these resolutions? There are at least two different possibilities. They may merely *coordinate* the action of third States so to render the response of the international community as effective as possible. In fact, besides invoking non-recognition, these resolutions declare that a given situation is unlawful, thus they take away from States the characterization of a given conduct as lawful or unlawful. Alternatively, they may be considered as the *proper legal basis* of a mandatory policy of non-recognition in the sense that States have a duty to comply with resolution of the Council. Moreover, both these possibilities may be correct: it could be argued that in the beginning the grounds for a policy of non-recognition were specific Security Council resolutions calling upon States not to recognize, while over time an autonomous duty of non-recognition emerged through the consistent UN practice.

In principle legal scholars have upheld the view that the duty of non-recognition is a self-executing obligation, which is an obligation that arises automatically upon the occurrence of a given event—ie, the serious breach of a *ius cogens* norm. In other words, States would be bound by this

duty starting from the moment in which the norm is violated or, more precisely, from the moment in which States consider that a given conduct amounts to a breach in the sense of the above. The same, apparently, is the view held by the ILC. It has been noted in the previous section that for long time the ILC dealt with the problem of the determination of the lawfulness of a given situation or conduct and wondered whether an institutional mechanism aimed to make such a determination was necessary.[157] Here it is enough to recall that Special Rapporteur Riphagen, while commenting a provision mandating a policy of non-recognition of the situation created by an international crime, which is a provision roughly amounting to Article 41(2) ARSIWA, noted that the qualification of a certain conduct as of an international crime is not self-evident and as such is likely to initiate a dispute. Therefore, he suggested a solution to this problem by relying on a comparison between such a dispute and that over the nullity of a treaty under Articles 53 or 64 of the Vienna Convention on the Law of Treaties. Accordingly, he put forth the idea to include in the text of the articles on State responsibility a procedure similar to that provided for in Article 66(a) of the latter treaty.[158] In any case, Rapporteur Riphagen was of the opinion that the organized international community shall have a role in such a determination. Indeed, subsequently Rapporteur Arangio-Ruiz proposed an institutional mechanism,[159] but eventually the ILC in its final project refrained from dealing with this question and its commentary to Article 41(2) does not directly tackle this question. Thus, it could be argued that the ILC did not consider an authoritative assessment of the UN political organs and/or of the ICJ as a requirement for triggering a mandatory policy of non-recognition.

However, it is difficult to understand to what extent the final choice of the ILC has any legal basis or whether it is based on policy considerations given that, arguably, to subject the obligation of non-recognition to a cumbersome institutional mechanism such as that envisaged by Rapporteur

[157] See above at 38ff.
[158] See above at 40. This article establishes that 'Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration'.[158]
[159] See above at 45ff.

Arangio-Ruiz or even to the Security Council members' political interests risks running counter to the attempt to provide a response to the most reprehensible violations of international law.

Interestingly enough Simma, a few years before the adoption of the ARSIWA, had envisaged such an outcome.[160] In other words, it seems that the final stance of the ILC, according to which the concrete application of the legal consequences of serious breach of international law, including thus the duty of non-recognition, depends on an assessment of States, was the only realistic option.

As for contemporary legal scholarship, this view is supported, among the others, by Dawidowicz, Talmon, and Christakis. The latter emphasizes that State practice supports the view that this duty is independent from any resolution adopted by a UN political organ. Even if, as a matter of fact, the UN has generally acted in this sense, the argument goes that States were applying a pre-existing rule of international law, while the role of the resolutions was merely to confirm that a norm was violated and to coordinate a collective action. This is corroborated by the fact that most of these resolutions were not legally binding since they were not taken under Chapter VII of the UN Charter neither the language used was normative.[161]

Dawidowicz explains its support for this view by noting that as far as it regards the adoption of a General Assembly resolution, this organ has not the power to create an obligation. It follows that 'the legality of the acts adopted by States pursuant to those resolutions was conditional on a pre-existing obligation of non-recognition under general international law'.[162] Concerning the adoption of a Security Council resolution the argument is twofold. It is held that many of the resolutions invoking non-recognition are drafted in an exhortatory language. Therefore, again, there shall be a pre-existing obligation under general international law. Moreover, Dawidowicz notes that this organ 'does not have an *a priori* competence in the field of State responsibility'.[163] Consequently, all States

[160] More precisely, Simma expected that 'what we are going to see as the final result of the ILC work, if it ever reaches the stage of an international convention, will be the endorsement of what is now Article 19 without compulsory adjudication'. Simma (n 69) 268 (emphasis added).
[161] Christakis (n 16).
[162] Dawidowicz (n 35) 683.
[163] ibid.

are called to counteract the effects of the violation of a *ius cogens* norm independently from the intervention of the Council.

Talmon, by making explicit that the self-executing character of the duty derives from the peculiar characteristics of the international legal order, maintains a similar stance. The duty of non-recognition is justified on the basis of 'international solidarity in the face of a violation of a norm of *jus cogens*. They [ie, the obligations *ex* Article 41(2) of the ARSIWA] stem from an understanding that a collective response by all States is necessary to counteract the effects of such a violation'.[164] It follows that non-recognition should be understood as the minimum response to the violation of *ius cogens* norms. In addition, in the view of the author, the title itself of Article 41, which refers to particular consequences of a serious breach, rather than to particular consequences for instance of a Council resolution confirms this view.[165]

Pert, on the contrary, holds that nothing suggests that the obligation of non-recognition is self-executing. On the contrary, what State practice suggests is that a pronunciation of an authoritative body is necessary.[166] She also recalls that this was the position initially adopted by the ILC in previous drafts of the ARSIWA even if it set aside this question in the final text. This is also the opinion expressed by Judges Kooijmans and Higgins in their respective separate opinions with reference to the *Wall* opinion.[167] Turns, even if he maintains that the duty of non-recognition is not limited to those situations where there is a Security Council resolution mandates non-recognition, notes that '[t]here have not been any instances in modern international law of the consistent application of a duty of non-recognition in the absence of such resolutions'.[168]

[164] Stefan Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in Tomuschat and Thouvenin (n 16) 121.
[165] ibid 122.
[166] Pert (n 124) 12–15.
[167] See the separate opinions of Judge Higgins in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 216, para 38 and of Judge Kooijmans ibid 232, para 44.
[168] Turns (n 132) 133–134.

As for the other sub-question, which concerns the material scope of the duty of non-recognition, it was noted that Article 40 of the ARSIWA limits the scope of application of Chapter III, and consequently of Article 41, to serious breaches of *ius cogens* norms. Thus, two criteria can be identified, namely the peremptory character of the norm breached and the seriousness of the breach.

At the outset it should be noted that the norm formulated by the ILC is apparently triggered by serious breaches of any *ius cogens* norm, that is also by the violation of norms such as the prohibitions of slavery, of genocide, and of torture.[169] However, States have invoked a policy of non-recognition only when the following primary norms have been violated: the prohibition of the use of force (eg, in the case of Kuwait), the principle of self-determination and/or the prohibition of racial discrimination and apartheid (eg, in the case Rhodesia), and the basic rules of international humanitarian law pertaining to the law of occupation (eg, in the case of Palestine).[170] Indeed, it seems that the totality of State practice revolves around the violation of these *ius cogens* norms. Along the same lines, the commentary to Article 41(2) of the ARSIWA mentions as examples only cases in which one of these rules was violated. The reason seems eminently practical: for non-recognition to be a meaningful response it can be applied only to those conducts that imply a legal entitlement to a given territory and only the breaches mentioned above may be capable of being denied by third States.[171]

While it is probably uncontentious that the duty of non-recognition, notwithstanding the wording of Article 41(2) ARSIWA, cannot be applied to breaches of each and every peremptory norm, it is contentious to what extent this duty is applicable *only* with reference to breaches of

[169] See also the ILC commentary to Article 40 published in 'Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)' (2001) II(2) Yearbook of the International Law Commission 1, 112–113, paras 4–6.

[170] It can be noted that it is not always easy to identify precisely the primary norm violated. For instance, in the case of Rhodesia both the self-determination principle and the prohibition of racial discrimination are relevant; see Dawidowicz (n 35) 679.

[171] Dawidowicz observes: 'The breach of such a norm results in a legal claim to status or rights by the wrongdoing State which is capable of being denied by other States … situations created by acts of genocide, torture, or crimes against humanity do not, in principle, result in any legal consequences which are capable of being denied by States'. See ibid 683.

peremptory norms and not also to breaches that do not have peremptory character but that are still capable to create a certain factual situation whose legality can be recognized. It is equally contentious to what extent this duty is applicable *only* to serious breaches.

As seen above, both these aspects were already called into question during the drafting of the ARSIWA.[172] State practice too does not support unequivocally the two above-mentioned criteria on the material scope of the duty of non-recognition. For instance, some have invoked the duty of non-recognition in case of unilateral secession too.[173] In this case the primary norm that is violated is the territorial integrity of States, which is not usually defined as a *ius cogens* norm.[174].

As for the second criterion, State or international Courts have simply refrained from assessing the seriousness of the breach. For instance, the ICJ in the *Wall* opinion did not argue that Israeli violations amounted to *serious* breaches.[175] The same goes for the various statements adopted in the context of the European Union with reference to the post-Soviet breakaway republics. In fact, non-

[172] See above ch 2, s 3. More in general some States criticized the scope of application of Chapter III at large. For instance, some States when submitting to the ILC their comments and observations have argued that there were no persuasive reasons for distinguishing between serious and not serious breaches of *ius cogens* norms. See 'Comments and observations received from Governments' (2001) II(1) Yearbook of the International Law Commission 33, 68 (Japan) and 69 (United States). Moreover, it was even contentious to what extent State practice was really supporting this distinction. See ibid 66 (United Kingdom) and 69 (United States). Other States noted that, in any case, it was unclear how to identify the threshold of seriousness necessary to trigger the additional consequences set out in Article 41. See ibid 65 (Mexico, Netherlands, Poland), 66 (United Kingdom), 67 (Austria). On a similar vein, some States expressed doubts whether there were persuasive reasons to distinguish breaches of *ius cogens* norms and breach of ordinary norms and whether State practice really supports the contention that these consequences, in particular the duty of isolation, follow only from the commission of breaches of the former norms. See ibid 67 (United Kingdom), 68 (Japan, United States).

[173] Olivier Corten, 'Déclarations unilatérales d'indépendance et reconnaissances prématurées: Du Kosovo à l'Ossétie du Sud et à l'Abkhazie' (2008) 112 Revue générale de droit international public 721, 744ff.

[174] Jochen A Frowein, 'Non-Recognition' in Wolfrum Rüdiger (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press online version). We will see that in some cases, such as in the cases of Transnistria, Nagorno-Karabakh, and South Ossetia and Abkhazia, arguably the violation of the territorial integrity of the parent States allegedly happened in conjunction with the military intervention of a third State or at least with the support of a third State. The extent to which the legal grounds for non-recognition are the territorial integrity of the parent State or the support of a certain State is dubious. In fact, by reading the statements by means of which third States affirm not to recognize those entities it seems that what render recognition unlawful is the violation of the territorial integrity of the mother State *per se* even if some have suggested that non-recognition derives from the fact that these entities are ultimately puppet States. See below ch 5, s 2.

[175] The same case is relevant actually for the other criteria too. In fact, the Court referred to *erga omnes* norms rather than to *ius cogens* norms. In this regard, Judge Higgins in her separate opinion argued that '[t]hat 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*"'. See the separate opinion of Judge Higgins in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 167) 216, para 38 .

recognition in such statements is connected with other elements without any reference to the threshold of seriousness or for what it matters to the concept of *ius cogens*.[176]

4.3. The consequences of the duty of non-recognition

Assuming that non-recognition is a customary duty that is triggered by serious breaches of peremptory norms, what is its content? That is, what are the consequences arising from this duty for third States in relation to these situations? This problem emerges because Article 41(2) ARSIWA is silent over the precise legal consequences of this duty, neither is it possible to infer the content of the duty of non-recognition from State practice.[177] Concerning the content of the obligation, Christakis talks of a veritable obligation of 'isolation' of the unlawful entity.[178] The rationale is that, by isolating the political entity that committed a breach in the sense of the above, the entity in question cannot reap the benefits of its unlawful conduct.

The *Namibia* advisory opinion is considered as the *locus classicus* as for the consequences of the duty of non-recognition. Indeed, the question posed to the ICJ by the General Assembly was on the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding a Security Council resolution to the contrary. The Court in this regard referred to the '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', the obligation to abstain from diplomatic relations with Namibia, and the 'obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory'.[179] Christakis on the basis of State practice lists the following additional consequences: the obligation not to admit the illegal regime as a member of an international organization, the obligation not to recognize the illegal regime before a

[176] See below ch 5, s 2.
[177] Dawidowicz (n 35) 684–686.
[178] Christakis (n 16) 146.
[179] See 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 (1970)*, ICJ Reports 1971, 16, paras 122–124.

domestic or international court, and the obligation to consider as null and void the constitutional, legislative, and administrative acts of the illegal regime.[180]

However, the ICJ excluded from the scope of a mandatory policy of non-recognition some agreements with the unlawful entity and some acts adopted by the unlawful entity. The reason is that non-recognition of these agreements and acts would harm the local population rather than the true responsible of the breach. Thus, the Court drafted an exception to the general rule of non-recognition as for 'certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia'.[181] The acts performed by South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, but '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'. The rationale is that '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 Co-operation'.[182] Such a humanitarian exception has become known as Namibia exception.

In contrast, concerning the content of the duty in question, Talmon talks of an 'obligation without real substance' thus echoing the view expressed by Judge Kooijmans with reference to the Israeli wall. However, the positions of Talmon and Judge Kooijmans are not completely comparable.

Talmon firstly raises a point that to a certain extent pertains to the material scope of the duty in question. It was noted above that according to the wording of Article 41(2) ARSIWA *all* breaches of peremptory norms entail a mandatory policy of non-recognition, even breaches from which no territorial claim may arise. This problem pertains at the same time to the material scope of the obligation, but also to its actual consequences given that such consequences depend on whether a norm falling within the scope of the duty was violated.

[180] Christakis (n 16) 147ff.
[181] *Namibia* advisory opinion (n 179) 55, para 122
[182] ibid 56, para 125.

Secondly, Talmon refers to the interplay between the duty not to recognize and the duty not to render aid or assistance. While in theory it is clear that not every act providing aid or assistance implies recognition, concretely it is not obvious which conduct falls within the scope of the former duty and which one falls within the scope of the latter. Talmon in this regard makes the example of a State that finances the construction of a road in the territory between the green line and the Israeli wall. This conduct could amount to the violation of the prohibition of non-recognition, to the violation of the prohibition of providing aid or assistance, or to none of them given that such a road could be used also by Palestinians, thus it could 'simply alleviate the plight of the Palestinians in the occupied territories' and accordingly such a construction would fall within the scope of the Namibia exception, at least if it is interpreted broadly.[183]

Thirdly, Talmon, using again the *Wall* case as an example, notes that the subsequent State practice does not provide any conclusive answer as to the precise content of this norm. In fact, apparently no State has modified its conduct with respect to Israel and to the construction of the wall after the advisory opinion was rendered.[184]

Judge Kooijmans in his separate opinion raises two points. On the one hand, he observes that rather than non-recognition of a legal claim to the territory in question, the advisory opinion concerns the non-recognition of a mere fact. Then the question is what are the consequences for those States that deem such construction lawful? He states that 'those States which abstained or voted against … did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to an obligation without real substance'.[185] Therefore, overall, it seems that the legal consequences are not completely clear neither for States that deem the construction in question unlawful nor for those States that deem it lawful.

[183] See below ch 3, s 2.
[184] Talmon (n 164) 103–106.
[185] Separate opinion of Judge Kooijmans in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 167) 232, para 44.

The uncertainty over the content of this duty is also identifiable when looking at State practice. In the cases in which the Security Council adopted a resolution recommending or mandating non-recognition then it also specified what are the consequences. The problem has concretely emerged in connection with trade relations with unrecognized entities and is actually twofold. On the one hand, as already noted, the Namibia exception can be interpreted more or less broadly. On the other hand, the duty of non-recognition binds States and not privates. Crawford in this regard makes a significant example and, more specifically, excludes that the sale of a glass of milk in store located in a settlement to a private violates the duty in question.[186] More in general, there is no doubt that the duty of non-recognition does not prohibit each and every relation with the unrecognised entity. However, the problem is that most of trade relations occur between privates as in Crawford's example, but their relevance far exceeds that of a glass of milk, neither however these relations fit clearly within the scope of the Namibia exception.

5. One neglected problem: the open-ended nature of the duty of non-recognition

While legal scholars have dealt with all the issues shortly illustrated in the previous section, there is one problematic aspect of the doctrine in question that has attracted less attention, at least by *contemporary* legal scholarship. This aspect concerns the temporal scope of the duty of non-recognition and, more precisely, the question of whether this duty is an open-ended obligation in the sense that States shall hold fast to a mandatory policy of non-recognition until the relevant unlawful situation exists. In this regard, it is possible to identify an important shift in the scholarship. While Lauterpacht, Chen, and, to a certain extent, Crawford have left a door open for recognition of unlawful situations, starting from Dugard, who connects clearly non-recognition with State responsibility, and more specifically with the serious violation of *ius cogens* norms, this window has been gradually shut.

[186] James Crawford, 'Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories', 22 <www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>.

Afterwards, with few exceptions, either legal scholars have refrained from tackling the problem altogether or they have simply asserted that recognition in the case of breaches in the sense of Article 41(2) ARSIWA is not possible under any circumstance.

Before illustrating this shift, it is appropriate to show that the open-ended nature of this duty bears some important practical consequences. If we look at past cases in which a policy of non-recognition was invoked, it is possible to note that the existence of the unlawful situation and its consolidation depend on a series of factual circumstances such as, first of all, whether non-recognition is the only response of the international community or more concrete actions are undertaken.

For instance, one may consider the opposite cases of Kuwait and Crimea. In the former case, a policy of non-recognition was from the beginning coupled with a series of harsh economic and diplomatic measures.[187] These measures, even though they were implemented by most States, did not persuade Iraq to withdraw.[188] Eventually, this aim was reached only with the subsequent military intervention authorised by Security Council.[189] Thus, the unlawful situation lasted only for few months between adoption of resolutions mandating non-forcible measures and the armed intervention, which means that States had to implement a policy of non-recognition for only a *short* period of time.

In contrast, if the international community refrains from taking such an assertive posture, which is the exception rather than the rule, and thus circumscribes its reaction to a policy of non-recognition and to other measures not involving the use of force, an unlawful situation may become so entrenched that its end appears unlikely notwithstanding the passing of years and sometimes of decades. One could take as an example the case of Crimea, which is characterised by an increasing

[187] More specifically, Security Council Resolution 661, which called upon States not to recognize any regime set up by Iraq, decided as well a series of measures aimed to isolate Iraq and to pressure it to withdraw. See S/RES/661, 6 August 1990, paras 3–7. Resolution 662 decided that the annexation of Kuwait by Iraq under any form and whatever pretext had no legal validity, and is considered null and void, and called upon States not to recognize the annexation explicitly or implicitly. S/RES/662, 9 August 1990, paras 1–2. The initial reaction of the UN is described in Christopher Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law' (1992) 55 Modern Law Review 153, 158–163.
[188] ibid 160.
[189] S/RES/678, 29 November 1990, paras 2–3.

gap between law and reality. Christakis observes that this unlawful situation is destined to last given, on the one hand, the degree of effectiveness of Russian control on this territory and, on the other hand, the declarations of many States that clarified that they will never accept Russian annexation of Crimea.[190] At the same time the economic and diplomatic measures decided as a response do not seem strong enough to pressure Russia to change its stance. *A fortiori* the same goes for the mere policy of non-recognition. It follows that non-recognition of Crimea as part of Russia is a *long-term* policy, with all the consequences that this implies.

More in general, unlawful situations may survive for lengthy periods of time and during their existence law is more and more detached from reality. In other words, while a given illegal regime has effective control over the territory, the very same illegal regime is not effective in the international context since it is not recognized as a State and its acts are considered as null and void.[191] In addition, the practical consequences of a long-term policy of non-recognition are rather serious including political, economic, and in certain cases even humanitarian consequences. Further, such consequences affect not only the 'wrongdoer', but also the 'victim' as well as other political entities in the area. One may take the case of Moldova and Transnistria, which is another long-standing and entrenched conflict. The economic development of both entities is undermined by the unresolved conflict.[192] The very existence of such unrecognized entities is a continuous factor of instability. One may think of the other post-Soviet conflicts that despite being considered 'frozen conflicts', they are all but frozen as demonstrated by the 2008 Russo–Georgian War, the April 2016 Armenian–Azerbaijani clashes over Nagorno-Karabakh, and the full-scale war between Armenia and Azerbaijan between September and November 2020. One may think also of the conflict between Israel and Palestine, as well as to the situation of the Golan Heights, that constitutes a continuous factor of destabilization of the whole Middle East. Thus, the question is whether in the long term such state of

[190] Théodore Christakis, 'Les conflits de sécession en Crimée et dans l'Est de l'Ukraine et le droit international' (2014) 141 Journal du droit international 733.
[191] Yaʿel Ronen, *Transition from Illegal Regimes under International Law* (Cambridge University Press 2011) 8.
[192] Nico Popescu, The EU in Moldova – Settling Conflicts in the Neighbourhood (European Union Institute for Security Studies, Occasional Paper n. 60, October 2005) 29ff.

things is tolerable and whether there are other possibilities to end an unlawful situation rather than indefinitely continuing to refuse to accept at least in part the *de facto* situation. But does international law allow a less rigid approach?

From a legal perspective there are grounds for supporting the thesis according to which the temporal scope of the duty in question is indefinite. If it is true that non-recognition is instrumental to the conservation of the international legal order, then its temporal scope cannot be defined beforehand. From the function of this duty, it follows that a mandatory policy of non-recognition shall last as long as the unlawful situation exists. In this regard, Christakis notes that the passing of time cannot have any effect on the unlawfulness of a given unlawful situation. However, he merely argues that to maintain the contrary would be incompatible with the principle *ex iniuria ius non oritur*, which is defined as the keystone of any legal order: a legal order that accepts a *fait accompli* is, in Christakis' words, condemned to self-destruction.[193] Similarly, Mancini considers the open-ended nature of the duty in question as 'reasonable' and bases this contention on the fact that the cases of Rhodesia, Namibia, and the bantustans required many years to be settled.[194] Both of them however do not deepen such an argument. Admittedly, Mancini refers to the writings of Christakis himself and of Talmon, but as for the former it has already been shown that he does not provide any clear legal basis to this contention and as for the latter he actually does not make such a contention. Talmon, in fact, suggests that the international community, or more precisely the Security Council, may endorse a settlement and, in any case, the problem of the temporal scope is treated as such, that is as one of the problematic aspects of non-recognition.[195]

The same conclusion, that is that the temporal scope of the duty of non-recognition is indefinite, could derive from the peremptory character of the norm breached in the sense that a

[193] Christakis (n 16) 165.
[194] Marina Mancini, *Statualità e non riconoscimento nel diritto internazionale* (Giappichelli 2020) 127.
[195] Talmon (n 164) 122–123.

situation brought about by a breach of a peremptory norm cannot be validated through recognition no matter what because the gist of this kind of norms is precisely that in no case they can be derogated.

Brownlie maintains that '[a]part from the law of treaties the specific content of norms of this kind involves the irrelevance of protest, recognition, and acquiescence; prescription cannot purge this type of illegality'.[196] Orakhelashvili notes that '[d]espite the assertions that the duty of non-recognition cannot last forever and will eventually have to capitulate to contrary facts, there is no single case of validation of a situation to which the *jus cogens* duty of non-recognition applies'.[197] This observation was made inside a monography dedicated to peremptory norms in which it is clearly argued that the gist of this kind of norms is not to allow any derogation. *Ius cogens* norms are considered as absolute norms and, in this regard, Orakhelashvili recalls that the International Criminal Tribunal for the Former Yugoslavia 'has stated in quite categorical terms that the *jus cogens* character … is designed to produce a deterrent effect and it "is an absolute value from which nobody must deviate"'.[198]

If the argument according to which the peremptory character of the violated primary norm entailed the impossibility to validate an unlawful situation by means of recognition is taken seriously then even the consent of the injured State or political entity injured and of the international community at large would not suffice to validate the unlawful situation, which in turn can render negotiations meaningless at least when one of the key issues at stake is a breach of a norm having peremptory character. Weller, with regards to the peace settlements of the conflicts over northern Cyprus and Nagorno-Karabakh, and indirectly with regards to the duty of non-recognition, observes that:

> In these two instances in particular, where effective control over Northern Cyprus and Nagorno-Karabakh respectively was obtained in conjunction with the use of foreign military forces, a settlement formally ratifying the disruption of the territorial unity of the state under attack would have been legally difficult. The doctrine of *jus cogens*,

[196] Ian Brownlie, *Principles of Public International Law* (6th ed, Oxford University Press 2003) 490. See also Mary Ellen O'Connell, 'Jus Cogens: International Law's Higher Ethical Norms' in Donald Earl Childress, *The Role of Ethics in International Law* (Cambridge University Press 2011) 97–98.
[197] Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2008) 381. See also Marcelo G Kohen, *Possession contestée et souveraineté territoriale* (1st ed, Presses universitaires de France 1997) 367ff and Stefan Talmon, *La non-reconnaissance collective des états illégaux* (Pedone 2007) 35.
[198] Orakhelashvili (n 197) 67.

> which uncontroversially includes the prohibition on the use of force, would inhibit such an approach.[199]

Along similar lines, Hannikainen characterizes the invasion and annexation of East Timor by Indonesia as a breach of *ius cogens* and adds that such a breach is incurable, which in turn excludes the possibility of a settlement that is not in compliance with the right of self-determination of East Timorese people.[200] With regards to Palestine, Judge Al-Khasawneh in his separate opinion to the *Wall* advisory opinion, held that:

> Whilst there is nothing wrong in calling on protagonists to negotiate in good faith with the aim of implementing Security Council resolutions and while recalling that negotiations have produced peace agreements that represent defensible schemes and have withstood the test of time, no one should be oblivious that negotiations are a means to an end and cannot in themselves replace that end. The discharge of international obligations including *erga omnes* obligations cannot be made conditional upon negotiations … [I]t is of the utmost importance if these negotiations are not to produce non-principled solutions, that they be grounded in law and that the requirement of good faith be translated into concrete steps by abstaining from creating faits accomplish on the ground such as the building of the wall which cannot but prejudice the outcome of those negotiations.[201]

With reference to the same case, Abi-Saab, after having argued that Palestine remains an occupied territory, held that:

> A fundamental element of this status is that any change, territorial or in the demographic composition, of this occupied territory is illegal. Settlements are thus illegal … In consequence, in the search for a solution, any arrangement which would ignore one of these elements would not legally stand. It would in fact contravene *jus cogens* rules of international law, rules which create *erga omnes* obligations that not only confer on every member of the international community the right or locus standi, but even impose on these members the duty to act to uphold them.[202]

That the doctrine of *ius cogens* may prohibit any settlement that ultimately leads to the validation of a serious breach of a norm having peremptory character irrespectively of the consent of

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[199] Marc Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20 European Journal of International Law 111, 127.

[200] Lauri Hannikainen, 'The case of East Timor from the Perspective of Jus Cogens' in International Catholic Institute for International Relations with International Platform of Jurists for East Timor (eds) *International Law and the Question of East Timor* (CIIR/IPJET 1995) 105.

[201] Separate opinion of Judge Al-Khasawneh in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 167) 238–239, para 13.

[202] Nassib G Ziadé and others 'Is There a Role for International Law in the Middle-East Peace Process?' (2005) 99 Proceedings of the Annual Meeting (American Society of International Law) 213, 216 (remarks by Abi-Saab).

the 'victim' as well as of the international community at large, seems a rather rigid view. In the past States and legal scholars have raised the problem of the indefinite temporal scope of this duty.[203] Actually, in this regard, it is possible to identify four distinct phases.

It has been noted above that the modern doctrine of non-recognition dates back to the writings of Lauterpacht and Chen. Both these scholars denied that non-recognition is an open-ended obligation and, conversely, argued that recognition is still possible, at least under certain circumstances.

As for Lauterpacht, he recalls first of all that the principle *ex iniuria ius non oritur*, which is considered as the proper legal basis of the doctrine of non-recognition, given the characteristics of the international legal order, is 'exposed to considerable strain and to wide exceptions'.[204] More specifically, it is exposed to its rival principle—ie, *ex factis ius oritur*—to a greater degree than in the domestic legal order. It follows that, so that the international order may retain its legal character, illegal acts cannot be *automatically* recognized, which in turn raises the question whether an illegal act can be ever incorporated to international law or not. Lauterpacht observes that a negative answer would make international law excessively rigid making in turn the international order immutable. He envisages three options so to avoid such a risk. First, an illegal act could be simply forfeited. However, this option would require the lapse of a substantial period of time coupled with the lack of protests.[205] The second option is the consent of the injured party. But this option, since it requires the waiver of rights by the injured party, is possible only in the context of bilateral relations.[206] Finally, an illegal act could be recognized by 'States proceeding, as it were, as members of the international community, *i.e.*, when acting in pursuance of the general interest and not with a view to promoting their private advantage'. Recognition in this sense is defined as a quasi-legislative act—ie, 'an act that give legal force to a situation which is in the eyes of law a mere nullity'.[207] The rationale is that States operate

[203] Supra n 101. See also Robert Y Jennings, *The Acquisition of Territory in International Law with a New Introduction by Marcelo G. Kohen* (first published 1963, Manchester University Press 2017) 79 and Joe Verhoeven, *La reconnaissance internationale dans la pratique contemporaine* (Pedone 1975) 277ff, 308.
[204] Lauterpacht (n 23) 421.
[205] ibid 427–428.
[206] ibid 428–429.
[207] ibid 429–430.

as if they were collectively the legislative organ of the international order. Lauterpacht clarifies that such a recognition does not *legalize* the illegal act, which remains illegal as illegal are its consequences, but the gist of such an act is to *disregard* these illegalities with the aim of conducting to the general good. He adds that:

> To rule out that possibility altogether would mean to postulate for the law a degree of rigidity which may not always be compatible with justice and progress. Occasion may arise when the continuation of the policy or the obligation of non-recognition may not be conductive to the general good.[208]

Appropriately, he talks of recognition in this sense as of a wise weapon of policy that is at the same time a bitter pill. This argument can be extended even to illegal acts such as aggression, the only difference is that in such cases the burden of proof is higher.[209]

Chen too talks of recognition in this sense, that is as of a quasi-legislative act. Compared to Lauterpacht, Chen stresses to a greater extent the role of the international community making reference to the legal interest that any member of this community has. Accordingly, he clarifies that '[w]hen a *de facto* situation arises making the continued maintenance of the existing legal order absolutely impossible, it would still be open to the society of nations to modify its laws by means of general recognition'.[210] It is worthwhile to note that Chen makes this clarification while dealing with forcible acquisition of territory; nowadays such an acquisition amounts to a violation of a *ius cogens* rule, but already at that time it was recognized, at least by some as indeed Chen, that this rule does not fall within ordinary subjective contractual relations. But, according to the author, even in this case recognition remains possible.

Similarly, Crawford, while dealing with the interplay between legality and statehood, mentions the risk of creating a conflict between law and fact, especially when the situation has existed for a considerable period of time,[211] but he refrains from directly tackling the question whether it is

[208] ibid.
[209] ibid.
[210] Ti-Chiang Chen, *The International Law of Recognition with Special Reference to Practice in Great Britain and the United States* (Frederick A Praeger 1951) 431.
[211] James R Crawford, *The Creation of States in International Law* (Oxford University Press 2007) 98–99.

possible to validate by recognition a violation of a peremptory norm. However, he apparently concedes that this can lawfully happen. More precisely, with reference to the invasion and annexation of Goa by India he holds that:

> The significance of self-determination in this context [ie, as a legal justification of the invasion and annexation] is not so much that it *cures* illegality as that it may allow illegality to be more readily *accommodated* through the processes of recognition, whereas in other circumstances aggression partakes of the nature of a breach of a peremptory norm and is not, or not readily, curable by lapse of time or acquiescence.[212]

If unlawful situations *cannot be readily* recognized, one might argue that these situations under certain circumstances *can be* recognized. More specifically, it seems that they can be recognized when the organized international community intervenes in this sense. Indeed, Crawford concludes his argument by recalling that the UN Special Committee on Decolonization over time simply ceased to treat Goa as a non-self-governing territory and gradually the invasion and annexation of Goa was accepted.[213] It is interesting that, addressing the same case, Wright observes that the duty of non-recognition is supported in principle by UN organs, but the UN itself may recognize a situation to the extent that this situation, even if originated in illegality, 'is on the whole beneficial'.[214]

The difference between Lauterpacht and Chen's understanding of the doctrine of non-recognition, on the one hand, and Crawford's,[215] on the other hand, is that the latter seems to consider recognition possible only in a specific case, namely in the case in which the violation of the peremptory norm is instrumental to the realization of the right to self-determination. Admittedly, in another passage of his treatise on the creation of States, Crawford observes that 'recognition of an unlawful situation is not necessarily forbidden by international law. A State directly affected may waive its rights … or other States may waive any interest they may have in the observance of the rule in question'.[216] In another passage, he notes that 'one may refuse to recognize the validity or the

[212] ibid 138 (emphasis added).
[213] ibid.
[214] Quincy Wright, 'The Goa Incident' (1962) 56 American Journal of International Law 617, 631.
[215] Further, the absence of serious breaches of *ius cogens* is considered by Crawford as a veritable requirement of statehood.
[216] Crawford (n 211) 158.

legality of a particular act and yet be bound to recognize or accept all or some of the consequences'.[217] Similarly, in yet another passage it is suggested that the secession of Bangladesh, which received the support of India, could be read as a *fait accompli* and that third States had no alternative other than to accept, not depending thus on the realization of self-determination.[218] Thus, to the contrary of the contention mentioned above, it does not seem that recognition is lawful only if the breach of the peremptory norm is connected with the realization of self-determination, but it is lawful in an array of situations. However, it seems that the crucial element is a certain feeling of empathy towards the violator of the norm. For example, in the cases mentioned, this feeling originated from violence and repression by Pakistan or from the feeling that people of Goa deserved self-determination. In any case, Crawford seems to leave a window open for recognition of unlawful situations even if apparently there is such a possibility only when the breach was committed in view of the realization of the right to self-determination. In this respect, the writings by Dugard marked a turning point.

In his monograph on the topic of recognition in the context of the UN, when addressing the doctrine of non-recognition, Dugard firstly emphasizes the common grounds with the legal scholars who firstly envisaged such a doctrine, including Lauterpacht and Chen. In this regard, he notes that they had already recognized the connection between this doctrine and the international community as well as the fundamental rules of international law. However, he also notes that these scholars were preserving the possibility for States to recognize an unlawful situation through a quasi-legislative act. In contrast, Dugard starts his reasoning by maintaining that the concept of '[j]us cogens is a central feature of the modern doctrine of non-recognition'.[219] Accordingly, he considers what this doctrine entails *per se* and what it entails concerning the doctrine of non-recognition. In this regard, he argues that while inn earlier writings the doctrine in question was based on the principle *ex iniuria ius non oritur,* it is now based on the concept of *ius cogens*.[220] When addressing these norms it seems that

[217] ibid.
[218] ibid 393.
[219] Dugard (n 10) 137.
[220] ibid 132ff.

Dugard accepts that these norms are absolute norms that do not admit any derogation even when there is an agreement on the question.[221] It follows that there cannot be any recognition of a factual situation emerged in violation of a *ius cogens* norm.

In a fourth and last phase, the doctrine of non-recognition, as seen in the previous sections of this chapter, either is explicitly predicated on the assumption that it is an open-ended obligation, or this open-ended nature is considered as problematic, but it is still not repudiated. There are only few exceptions to this.

For instance, Oeter considers that a policy of non-recognition lasting for an indefinite period of time may be excessively drastic.[222] Given that an unlawful situation is still, at least locally, effective, there may be cases in which the need to engage with the unrecognized entity emerges. A rigid understanding of non-recognition, however, arguably excludes any kind of engagement with such an entity. Thus, he advocates a more flexible approach, but rather than investigating whether a policy of non-recognition may be circumvented, he resorts to the concept of '*de facto*' States. More specifically, with the concept in question the attempt is to avoid the 'rigid exclusion of "illegal regimes" from the international system' and, conversely, to allow a certain degree of flexibility that preserves international intercourse with the *de facto* States.[223] He goes on by sketching a legal framework that, instead of isolating the effective but unrecognized authorities, bestows to them rights and obligations. Here it should be noted that the concept in question is predicated on the assumption that it is not desirable to totally isolate the entity that violated international law and instead it is necessary to allow productive intercommunal relations. Oeter also observes that:

> At a certain moment in time a question will arise as to why the population of an established political entity – a population that has been born into the regime, grown up in it and spent (at times had no choice but to spend) all its life there – is denied any self-determination? In fact, both the spirit and purpose of the right of self-determination speaks against such a construction of static and immutable legality.[224]

[221] ibid 140–141.
[222] Stefan Oeter, 'De Facto Regimes in International Law' in Władysław Czapliński and Agata Kleczkowska (eds), *Unrecognised Subjects in International Law* (Wydawn Naukowe 'Scholar' 2019) 74.
[223] ibid.
[224] ibid 75.

In any case, even if Oeter does not tackle the duty of non-recognition, it is still relevant to note that he emphasizes the problems resulting from an excessive rigid understating of a policy of non-recognition.

As far as the present writer is aware, only few scholars have explicitly argued that non-recognition of unlawful situations allows a little leeway. Arcari, dealing with the duty of non-recognition and the role played by the Security Council, observes that 'the UN SC may be called upon to manage the long-term existence of unrecognised entities under a different perspective. As a matter of fact, while surely not a short-term measure, non-recognition cannot be conceived as an open-ended obligation'.[225] Further, he specifies that '[e]ven if its termination in principle presupposes a successful return to the *status quo ante*, non-recognition can hardly be accepted as permanently divorced from the situation on the ground'.[226] It follows that the Council may *temper* or even *reconsider* the scope of the obligation of non-recognition. The basis for this argument resides partially in State practice and partially in the observation that both the 1970 Friendly Relations Declaration and the ARSIWA include a clause according to which the duty of non-recognition is to be construed without prejudice to the power of the Council and to the UN Charter. The argument based on State practice is that the Council on a few occasions addressed directly all the parties to a given conflict that amount to an unlawful situation thus apparently introducing a 'leeway' in the isolation of the wrongdoer.[227]

Similarly, Zappalà observes that the argument that there is nothing to negotiate between the 'victim' and the 'wrongdoer', which recurs routinely when it comes to unlawful situations, is excessively drastic.[228] On the contrary, settling a conflict by way of negotiations is what the UN Charter demands to States. Moreover, it is State practice that suggests there is always a margin for negotiations.[229] Zappalà is aware of the potential risks of such a solution and therefore argues that

[225] Maurizio Arcari, 'The UN SC, Unrecognised Subjects and the Obligation of Non-recognition in International Law' in Czapliński and Kleczkowska (n 222) 239.
[226] ibid.
[227] ibid 239–240.
[228] Salvatore Zappalà, *Effettività e valori fondamentali nella comunità internazionale* (Editrice CUSL 2005) 109ff.
[229] ibid.

there are margin of negotiations only when certain conditions are met, namely the involvement of the UN, the support of the majority of the international community, guarantees of non-repetition, and reparations.[230]

Finally, in a more critical sense, Drew referred to 'contemporary practice which selectively favours pragmatic negotiation over formal legal entitlement—the all important peace process over self-determination as process', which is defined as an 'unacknowledged trend'.[231] This trend is seen in a more negative light so much so that it is considered as a *departure* from international law. Referring to Western Sahara, Palestine, and East Timor she observes that there is a tendency to solve the tension between formal legal entitlements and the pragmatic spirit of the peace processes in favour of the latter.[232] As we will see all along this work, recently this tendency has done nothing but increase.

[230] ibid 115ff.
[231] Catriona Drew, 'The East Timor Story: International Law on Trial' (2001) 12 European Journal of International Law 651, 681.
[232] ibid.

Chapter 3 – Early international practice: The cases of Manchuria, Rhodesia, Namibia, and the homelands

This chapter retraces the historical genesis of the duty of non-recognition by illustrating the first cases in which recognition has been withheld arguably on legal grounds. It is worth mentioning at the outset that it is possible to identify a causal link between, on the one hand, the emergence of different *ius cogens* norms and, on the other hand, the emergence of the duty of non-recognition itself. Logically, such a duty of could have not crystallised into customary law *before* the formation of the relevant *ius cogens* norms nor actually *before* the establishment of the very concept of *ius cogens*. However, non-recognition was already invoked in the interwar period and during the process of decolonisation. These cases concerned, respectively, the prohibition of acquisition of territory by force in the case of the invasion of Manchuria by Japan, which is discussed in Section 1, and the right to self-determination in conjunction with other norms having peremptory character in the cases of Rhodesia, Namibia, and the homelands, which are discussed in Section 2.

1. The interwar period and the demise of the right to conquest

For long time international law had not regulated the resort to war. Accordingly, States could acquire territories in different manners, including by armed conquest.[1] However, as is well-known, during the 20th century there was an important development in this regard and, gradually, international law

[1] Robert Y Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963) 52–68 and Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford University Press 1996) 7–131. Cf Herbert W Briggs and others, 'Non-Recognition of Title by Conquest and Limitations on the Doctrine' (1940) 34 Proceedings of the American Society of International Law at its Annual Meeting (1921-1969) 89 (remarks by Wright). Wright more specifically argued that: 'If you hold that anyone who has the physical power can destroy existing rights merely by the exercise of violence, you have eliminated law altogether. In other words, there is an inconsistency between the idea of a system of law and the idea that might per se creates right. That is, I believe, recognized by most of the writers who deal with the subject of conquest. I have not been able to find any who consider that the mere exercise of violence gives a title to territory. They all make some qualifications. After you have exercised violence and established a military occupation? I may notice incidentally that they distinguish between "military occupation" on the one hand, and "conquest" on the other—after you have established your military occupation and you want to get a completed title, one of three further operations is necessary. Either you must get a treaty from the state which has been subjugated, giving you title to the territory you are occupying, or there must be general recognition by other states, or there must be acquiescence by other states conferring a prescriptive title. I think one of these three things must follow before your title is complete'.

incorporated a rule prohibiting the resort to war.[2] This development culminated with the adoption of the General Treaty for Renunciation of War as an Instrument of National Policy in 1928 and with the adoption of the UN Charter in 1945.[3]

The material scope and the legal significance of these treaties differ. For instance, Article I of the Kellogg-Briand Pact refers to the 'recourse to war', which arguably does not cover coercive behaviours short than war.[4] Moreover, this prohibition was undermined by a series of structural deficiencies that affected the League of Nations. In contrast, the UN Charter refers to the 'threat or use of force' and, on the other hand, the creation of a collective security system was aimed precisely to avoid the shortcomings that had characterised the League of Nations.[5] Nowadays, the prohibition of war is considered as the cornerstone of the international legal order. In addition, this conventional prohibition is complemented by a customary rule prohibiting the use of force, which is widely considered as having peremptory character.[6] In any case, arguably the logical consequence following from such a prohibition is the prohibition of acquiring territories by armed conquest.[7]

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[2] See Randall Lesaffer, 'Too Much History: From War as Sanction to the Sanctioning of War' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) and Oona A Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2017).

[3] By means of the former, known also as Kellogg-Briand Pact or as Pact of Paris, States parties 'condemn[ed] recourse to war for the solution of international controversies, and renounce[ed] it as an instrument of national policy in their relations with one another' and conversely 'agree[ed] that the settlement or solution of all disputes … which may arise among them, shall never be sought except by pacific means'. See Articles I and II of the General Treaty for Renunciation of War as an Instrument of National Policy (Paris, 27 August 1928). By means of the latter it was decided that: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'. See Article 2(4) of the UN Charter.

[4] Oliver Dörr , 'Use of Force, Prohibition Of' in Wolfrum Rüdiger (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online edition) paras 7–8 and Michael W Reisman, 'Article 2(4): The Use of Force in Contemporary International Law' (1984) 78 Proceedings of the Annual Meeting (American Society of International Law) 74, 76.

[5] ibid.

[6] Dörr (n 4) para 1. See also Oscar Schachter, 'In Defense of International Rules on the Use of Force' (1986) 53 University of Chicago Law Review 113, Carin Kahgan, 'Jus Cogens and the Inherent Right to Self-defense' (1997) 3 ILSA Journal of International and Comparative Law 767, Michael Wood, 'The Law on the Use of Force: Current Challenges' (2007) 11 Singapore Year Book of International Law 1, Alexander Orakhelashvili, 'Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions' in Marc Weller (ed), *The Oxford Handbook on The Use of Force in International Law* (Oxford University Press 2005), Christine Gray, *International Law and the Use of Force* (3rd ed, Oxford University Press 2008) 30ff, and the International Law Association's Final Report on Aggression and the Use of Force presented on the occasion of the Sydney Conference (2018) available at <www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf>. Cf James A Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 Michigan Journal of International Law 215.

[7] Korman (n 1) 179ff.

The invasion of Manchuria by Japan and the United States' reaction can be seen as a turning point. In fact, the refusal by the United States to recognise the alteration of the status of this territory, which indeed was motivated with the violation of the Kellogg-Briand Pact, is the first attempt to enforce the above-mentioned prohibitions by means of a collective policy of non-recognition.

On 7 January 1932, the American Government delivered a diplomatic note[8] to the Chinese and Japanese Governments in response to the Japanese invasion of Manchuria, which had begun on 18 September 1931 and would have later led to the establishment of Manchukuo, widely regarded as a puppet State of Japan.[9]

Given that it is considered as the first clear example of non-recognition on the assumption that a rule of international law was violated, the Stimson note is routinely mentioned in scholarly writings dealing with the duty of non-recognition as an evidence for the formation of a customary duty of non-recognition.[10] It is significant that already by that time it was pointed out that: '[n]o diplomatic note of recent or even more distant years is likely to go down in history as of greater significance in the

[8] The text of the note is reported in Quincy Wright, 'The Stimson Note of January 7, 1932' (1932) 26 American Journal of International Law 342. The text of the note reads: 'In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government 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 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'.

[9] For a brief outline of the factual background, see David Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law' (2003) 2 Chinese Journal of International Law 105, 107–111. The relevance of the *de facto* control of Japan over Manchuria is analysed in James R Crawford, *The Creation of States in International Law* (Oxford University Press 2007) 132–133.

[10] Stefan Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 101, Théodore Christakis, 'L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant Des règles fondamentales' in Thouvenin and Tomuschat (n 10) 135, Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 468, Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press 2017) 193–195, and Anne Lagerwall, *Le principe ex injuria jus non oritur en droit international* (Bruylant 2016) 144–145. cfr Alison Pert, 'The "Duty" of Non-Recognition in Contemporary International Law: Issues and Uncertainties' (2013) Sydney Law School Legal Studies Research Paper No. 13/96, 4–6.

development of international law'.[11] States, however, had already decided to withhold recognition of a given situation, but non-recognition as understood in the Stimson note differs from earlier cases.

At the outset, it should be noted that States did resort to non-recognition of a certain factual situation even before the Manchurian crisis. In this regard, Middlebush in 1933 talked of the Stimson doctrine as of an old practice adapted to a new purpose.[12] The old practice was invoked in three cases, namely the establishment of revolutionary governments, the acquisition of territories characterised by non-compliance with relevant procedures or by the refusal to carry out treaty obligations taken over by succession, and the validity of treaties adopted by the violator of a norm affecting third parties.[13] It is worth noting that the circumstances triggering non-recognition were either dealing with questions of *legitimacy* either with questions of legality vis-à-vis an *individual* State given that, as already mentioned in the introduction to this work, the international legal order was strictly understood as a bilateral legal order. Thus, third States could resort to non-recognition as an individual sanction short of coercive measures. In contrast, the Stimson doctrine consists of a collective action undertaken by the parties to the treaty that has been breached.[14] Lauterpacht, in this regard, affirms that with the Stimson note 'non-recognition was being transformed into an instrument of general application—into a long-range determination not to validate the fruits of illegal acts'.[15] It follows that the new purpose of this old practice is primarily the preservation of the order of international relations come into existence with the adoption of the aforementioned treaty.[16] Stimson esteemed that this treaty implied logically the illegality of forcible acquisition of territory. Accordingly, he submitted that war 'is no longer to be the source and subject of rights. It is no longer to be the principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing'.[17]

[11] ibid 342.
[12] Frederick A Middlebush, 'Non-Recognition as a Sanction of International Law' (1933) 27 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 40.
[13] For a description of these cases, see ibid 40–44.
[14] Hersch Lauterpacht, 'The Principle of Non-Recognition in International Law', in Quincy Wright and others, *Legal Problems in the Far Eastern Conflict* (Institute of Pacific Relations 1941) 136.
[15] ibid.
[16] Middlebush (n 12) 45.
[17] ibid.

As mentioned, traditionally international law was not regulating the use of force.[18] This situation then gradually evolved starting from the Hague Conventions of 1899 and of 1907.[19] The Covenant of the League of Nations limited further the resort to war, even if it still did not declare aggressive war illegal,[20] rather it merely condemned aggressive war and tried to prevent it through a series of procedural mechanisms. In contrast, as mentioned, the Pact of Paris not only reiterated such a condemnation but properly outlawed aggressive war.[21]

Given that, on the one hand, the Stimson note is the first instance of non-recognition undertaken on a precise legal ground and that, on the other hand, the Pact of Paris is the first treaty that unambiguously prohibits the use of force, it is possible to identify a causal link between the emergence of the duty of non-recognition and the demise of the right to conquest. However, it is worth mentioning that the Stimson note does not prescribe a rule thus leaving the Unites States free to act differently in the future. The diplomatic note simply said that the United States was refusing to recognise any alteration to the status of Manchuria. It did not say that they were under an obligation not to recognise any future acquisition of territories in breach of the Pact of Paris, neither it suggested that other States were bound by such an obligation.

Subsequently, the Assembly of the League of Nations adopted a resolution that overall reiterated the terms of the Stimson note. The resolution established that it is incumbent upon members member States 'not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris'.[22] Arguably, this

[18] Korman (n 1).
[19] Lesaffer (n 2). These conferences had been convened with the aim to develop international humanitarian law, but they also introduced some *ius ad bellum* rules, such as the duty to resort to arbitration in case of disputes so to prevent the outbreak of a war.[19] However, the only outcome concerning the resort to recourse to force was the codification of the duty to formally declare war before engaging in the hostilities.
[20] Article 12 of the Covenant of the League of Nations. Its preamble merely recalls the overriding aim 'to achieve international peace and security … by the acceptance of obligations not to resort to war'. Article 10 of the same legal instrument reads: 'The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'. State parties undertook in case of dispute to submit the question to arbitration, judicial settlement, or to enquiry by the Council and, in any case, not to resort to war prior to three months after the answer to the submission.
[21] Briggs and others (n 1) 89–90 (remarks by Wright).
[22] Wright (n 8) 343.

wording has a clear normative character. While the Stimson note refers to the political will of a single State, the resolution understands non-recognition as a legal obligation binding the member States of the League of Nations and clarifies the legal basis of this obligation.[23] Turns meaningfully argues that a customary duty of non-recognition emerged precisely in 1932 through the adoption by the Assembly of the League of Nations of a resolution that reiterated the terms of the Stimson note.[24]

Other have contended that the duty of non-recognition at that time was understood as a conventional duty of international law. In other words, the duty of non-recognition was understood as a corollary of the ban of the use of force contained in the Pact of Paris in the sense that this treaty can be interpreted as implying logically the illegality of the acquisition of territory by the use of force.[25] Wright stresses that the logical step between the illegality of the use of force and the illegality of forcible acquisition of territories was confirmed also by two legal instruments—the Report of the Assembly of the League of Nations, adopted on 24 February 1933, and the Budapest Articles of Interpretation of the Pact of Paris, adopted on 10 September 1934.[26] While only the former constitutes an authentic interpretation of the Covenant, since the latter is a set of articles adopted by the International Law Association, both of them regard non-recognition of forcible acquisition of territories as a duty deriving directly from the Pact.

Other have raised different arguments. Yokota, for instance, argues that the Stimson doctrine is not a corollary of the Pact of Paris, but it is merely one of the possible interpretations of what are the duties following from a treaty that prohibits the recourse to war. The argument goes that the doctrine expounded in the Stimson note would have become legally binding only when prescribed by a treaty as it happened on 10 October 1933 when Argentina, Brazil, Chile, Mexico, Paraguay and

[23] This is confirmed by the wording of a note by members of the Council of the League of Nations to Japan. See ibid.
[24] Turns (n 9) 107. The text of the Resolution reads: 'The Assembly . . . declares that it is incumbent upon the members of the League of Nations not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris'. See Wright (n 8) 343.
[25] Lesaffer (n 2) 45–50, Quincy Wright, 'The Legal Foundation of the Stimson Doctrine' (1935) 8 Pacific Affairs 439, 441 and Lauterpacht (n 14) 137.
[26] Wright (n 8) 340–342.

Uruguay signed the Anti-war Treaty (also known as Saavedra Lamas Treaty).[27] Its Article 2, in fact, explicitly established that the contracting parties 'will not recognize any territorial arrangement which is not obtained by pacific means, nor the validity of the occupation or acquisition of territories that may be brought about by force of arms'. According to Yokota, the importance of this treaty is that the obligation not to recognise is embodied in a formal source of international law and that the provision in question is framed in general terms.[28] The fact that afterwards more States adhered to this treaty suggests that it is emerging as a customary norm of international law.[29]

Lauterpacht resorts to the principle *ex iniuria ius non oritur* as the legal basis of the duty of non-recognition. As already mentioned,[30] in the context of statehood this principle implies that the creation of a State cannot result from the violation of a norm of international law or, in other terms, that a certain political entity cannot be recognised as a State if it was established in violation of international law. The relevance of this principle would emerge also from the wording of the Stimson note and of the resolution of the Assembly of the League of Nations. In fact, in these texts the connection between the illegality of the unlawful invasion of Manchuria and the duty not to recognise any alteration of the status of Manchuria is rather explicit. However, Lauterpacht considers the mentioned principle not only as the rationale of the duty in question but also as its proper legal basis. In fact, this principle is understood as a general principle of law in the meaning of Article 38(1) of the Statute of the ICJ.[31] This different stance, which is not isolated,[32] is relevant because by separating the duty of non-recognition from the Pact and, more broadly, from conventional law, it makes it possible to resort to the same principle in connection with other rules of the international legal order.

Wright does not agree with Lauterpacht and contends: 'I should regard the non-recognition doctrine as flowing from a doctrine which seems to me to be a necessary principle of law, namely,

[27] Kisaburo Yokota, 'The Recent Development of the Stimson Doctrine' (1935) 8 Pacific Affairs 133, 134–135.
[28] ibid 136.
[29] ibid 137.
[30] See above at 83–84 .
[31] Lauterpacht (n 14) 139.
[32] Giuliana Ziccardi Capaldo, *Le situazioni territoriali illegittime nel diritto internazionale* (Editoriale Scientifica 1977) and Lagerwall (n 10).

that violence, in itself, cannot destroy existing rights'.[33] In another contribution he emphasises the connection between non-recognition of unlawful territorial situations and the stage of development of international law.[34] He envisages the following stages of development of a legal order: a first stage in which titles can be acquired through the use of force; a second stage in which, so that title can be acquired through the use of force, there is the need of a supplementary act—ie, recognition; a third stage in which the international community does not recognise the acquisition of titles through the use of force; and finally, a fourth stage in which the international community takes active efforts to prevent the use of force and, in the case, is committed to restore the *status quo ante*. The latter stage somehow foreshadows the emergence of a duty of non-recognition and of a duty not to render aid or assistance to the political entity created through the use of unlawful force. According to Wright, with the Stimson note, the international legal order reached the third stage of development of a legal order. In this sense the writings of Lauterpacht and Wright converge since that the former too considers non-recognition as an *indirect* sanction in the sense that the sanctioning effect consisting of a policy of isolation towards the wrongdoers is only a consequence of the more fundamental aim of 'upholding the authority of international law against successful assertions of illegal force'.[35]

It is worth mentioning that the twofold rationale of a policy of non-recognition as understood by Stimson is the same than the rationale of the contemporary duty of non-recognition as understood by the prevailing legal scholarship and by the ILC, that is as a way to prevent the consolidation of the unlawful situation and preserve the international legal order while maintaining as a consequence its sanctioning character. Be that as it may, the Stimson doctrine is mentioned in virtually every scholarly work dealing with the duty of non-recognition.[36] What is interesting is that, already at that time, it was not clear to what extent the Stimson doctrine was a corollary of the Pact of Paris and of the Covenant of the League of Nations or was a consequence of the principle embodied in the

[33] Briggs and others (n 1) 89–90 (remarks by Wright).
[34] Wright (n 8) 344–345.
[35] Lauterpacht (n 14) 154.
[36] Supra n 11.

aforementioned Latin maxim (or, as put it by Wright, that violence cannot the source of any legal title).

2. The decolonisation and the emergence of the principle of self-determination

The next major development occurred in connection with the emergence of the principle of self-determination. As observed by Crawford, one of the most significant political developments of the 20th century was the creation of a large number of new States.[37] This development was primarily associated with the process of decolonisation,[38] which, in turn, was connected with the principle of self-determination that emerged approximately together with the norm prohibiting the use of force. This is not a coincidence: self-determination, as noted by Korman, 'runs directly counter to the suggestion that States may acquire rights of sovereignty merely by virtue of conquest'.[39] It should not come as a surprise then that the doctrine of non-recognition has been invoked also towards territorial situations established in violation of this principle.

However, in contrast with the prohibition of war, self-determination in the interwar period remained a principle of political thought lacking a precise legal dimension.[40] Notably, one of President Wilson's Fourteen Points referred to self-determination.[41] At the same time, Lenin articulated a

[37] Crawford (n 9) 4. See also on self-determination Anthony Whelan, 'Self-Determination and Decolonisation: Foundations for the Future' (1992) 3 Irish Studies in International Affairs 25, Christian Tomuschat (ed), *Modern Law of Self-Determination* (Nijhoff 1994), Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 International and Comparative Law Quarterly 241, 'Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995), James Summers, 'The Status of Self-Determination in International Law' (2003) 14 Finnish Yearbook of International Law, Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 Human Rights Law Review 609, and Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (Cambridge University Press 2018).

[38] ibid.

[39] Korman (n 2) 139.

[40] See the Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question, League of Nations Official Journal, special supplement no. 3 (October 1920) 5. See also Malcolm N Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford University Press 1986) 59–91.

[41] President Woodrow Wilson's Fourteen Points are available at: <https://avalon.law.yale.edu/20th_century/wilson14.asp>. More specifically, President Wilson affirmed that '[a] free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined'.

socialist right of nations to self-determination.[42] Self-determination was brought up during the 1919 Peace Conference, but found no place in the Covenant of the League of Nations.[43]

In contrast, the UN Charter did refer to this principle: Article 1(2) considers it as one of the purposes of the UN itself, while Article 55 views it as necessary for the preservation of peaceful and friendly relations among nations. However, given the vagueness of these references, whether the principle of self-determination was creating a proper legal obligation was contentious.[44]

It is only with the subsequent practice of the General Assembly that the principle of self-determination acquired a more practical dimension since it was eventually associated with the process of decolonisation. The Assembly declared that all peoples have the right to self-determination in the sense that all peoples have the right to determine their political status and to freely pursue their economic, social, and cultural development.[45] More specifically, self-determination can be attained when a people subjected to colonial domination is put in the conditions to freely decide between emergence as a sovereign State, association with an independent State, or integration with an independent State.[46] Thus clearly the principle of self-determination and colonisation are radically incompatible.[47] The 1970 Friendly Relations Declaration reiterated this stance.[48] Other legal

[42] The International Socialist Workers and Trade Union Congress held in London in 1896 passed in this regard a resolution, defended later by Lenin, which reads: 'This Congress declares that it stands for the full right of all nations to self-determination and expresses its sympathy for the workers of ever country now suffering under the yoke of military, national or other absolutism. This Congress calls upon the workers of all these countries to join the ranks of the class-conscious workers of the whole world in order jointly to fight for the defeat of international capitalism and for the achievement of the aims of international Social-Democracy'. The relevant part of the resolution in question is available at: <www.marxists.org/archive/lenin/works/1914/self-det/ch07.htm>.

[43] Shaw (n 40) 60. This does not mean that it had no concrete relevance. Mazower notes that 'the war's victors were committed to recognizing the successor States in eastern Europe on the basis of the Wilsonian principle of self-determination. The difficulty was that … these new States could well contribute to destabilizing the region by the harsh handling of their minorities'. See Mark Mazower, 'The Strange Triumph of Human Rights, 1933–1950' (2004) 47 Historical Journal 379, 382. The solution to this difficulty was to adopt so-called minority treaties whose function was indeed to guarantee certain collective rights to minorities. A second concrete manner in which self-determination exercised an important role was the creation of the mandate system by means of which 'a form of international supervision over colonial administration, as mandatories undertook as a sacred trust of civilization' was introduced and institutionalised. See Ruth Gordon, 'Mandates' in Rüdiger (n 4) para 1.

[44] Shaw (n 40) 61.

[45] A/RES/1514 (XV), 14 December 1960, para 2.

[46] A/RES/1541 (XV), 15 December 1960, Principle VI.

[47] A/RES/1514 (XV), 14 December 1960, paras 1, 4–5 and, more in general, A/RES/1654 (XVI), 27 November 1961.

[48] A/RES/2625 (XXV), 24 October 1970, Annex. Admittedly, the Declaration, by referring to 'all peoples', arguably provided for a slightly wider scope of the principle in question in as much as it suggested that it could be relevant also *outside* the colonial context. However, it also includes a clause which reads: 'Nothing in the foregoing paragraphs shall

instruments such as in the first place the human rights covenants adopted in 1966 consider self-determination as a right.[49]

Roughly at the same time, in a series of cases non-recognition was invoked as a response to the violation of this right in conjunction with the prohibitions of racial discrimination, of apartheid, and, even if to a limited extend, the rules on the use of force.[50] The cases in question are the following: the unilateral declaration of independence of Southern Rhodesia from the United Kingdom adopted by a white minority government, the continued presence of South Africa in South West Africa notwithstanding the General Assembly resolution which terminated the Mandate for South West Africa and subsequent Security Council resolutions, and finally the declaration of independences of the so-called homelands from South Africa. In all these cases there has been an intervention of the Security Council or of the General Assembly.

Legal scholars analysing them have found a confirmation that the main tenet of the Stimson doctrine—ie, that international law prevents the recognition of territorial situations established in violation of a norm of international law—has emerged as a norm of customary international law. The problem is that while in the case of the Manchurian crisis the Stimson doctrine was implemented by the United States and was supported by the League of Nations when there were already legal provisions prohibiting conquest, the precise status of the principle of self-determination was still contentious when these cases occurred, actually to a certain extent it is these cases that provided more certainty on the scope of this principle. Significantly, Faundez observes that the standard account on the UN response to the Namibian situation 'may give the impression, albeit false, that the question of Namibia followed a logical and uncontroversial evolution through the organs of the United Nations'. On the contrary:

> A consensus view on Namibia did not emerge spontaneously; it was the outcome of a slow, oblique and often frustrating process. Four factors account for the eventually

be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'. See ibid.

[49] For a history of the development of the principle of self-determination, see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 37–162.

[50] However, in the case of Namibia also the rules on the use of force are relevant.

> successful outcome of this process: determination of the Namibian people, under the leadership of SWAPO, to resist the superior military force of the occupying power; political pressure exerted by some states, mainly the front-line states within the UN; incessant efforts by some non-governmental organisations to maintain the issue of Namibia alive in public debate; and changes in general international law which have resulted in effectively outlawing colonialism as an instrument of state policy.[51]

Eventually, all these situations were settled in accordance with the principle of self-determination in the sense that the white regime governing Rhodesia was compelled to cede its power to the black majority, Namibia became an independent State, and the regime of apartheid in South Africa has not survived. Non-recognition was invoked in all these situations and was of the factors, albeit not the only one, that arguably contributed to these developments.

2.1. Rhodesia

The UN resorted for the first time to the doctrine of non-recognition in case of the violation of the right to self-determination rather than in case of violation of the prohibition of forcible acquisition of territory, in connection with the declaration of independence of Southern Rhodesia from the United Kingdom. In fact, it is generally argued that the grounds for resorting to this doctrine were that such a declaration was adopted by a government constituted predominantly by white Rhodesians and that moreover supported the continuation of white minority rule. Significantly, Abi-Saab in the foreword to Gowlland-Debbas' monograph on the collective responses to illegal acts, which addresses mainly the UN response to the Rhodesian crisis, explains the legal significance of the international community's response to this crisis by referring to its value as 'precedent'.[52]

Rhodesia before declaring independence, was a colony of the United Kingdom that enjoyed a certain degree of internal self-government. The Special Committee on Decolonization considered it as a non-self-governing territory, thus having the right of self-determination,[53] while the United

[51] Julio Faundez, 'Namibia: The Relevance of International Law' (1986) 8 Third World Quarterly 540, 546.
[52] Vera Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (Nijhoff 1990) 17.
[53] A/PV.1117, 25 June 1962, paras 6–7.

Kingdom considered it as a self-governing territory, although not independent, and claimed not to be responsible for the achievement of self-determination of this territory.[54] The General Assembly, after having recalled a host of resolutions adopted previously the Assembly itself and by the Special Committee on Decolonization concerning the principle of self-determination, held that Southern Rhodesia was a non-self-governing territory and requested the United Kingdom, which was regarded as the administering authority, to act accordingly.[55] Eventually, on 11 October 1965, after the enactment of a new constitution in 1961, the holding of elections under the constitutional framework envisaged by this constitution, which had been harshly criticised by the General Assembly and by the Special Committee on Decolonization since it was aimed to the continuation of white minority rule, and the worsening of the relation between Southern Rhodesia and the United Kingdom, the government of Southern Rhodesia issued a declaration of independence from the United Kingdom.

On 6 May 1965, thus *before* the adoption of the declaration in question, both UN political organs had taken a position on the possible adoption of such a declaration. Security Council Resolution 202 requested members States not to accept a unilateral declaration of independence by the minority Government and requested the United Kingdom to take all necessary measures to prevent the adoption of such declaration.[56]

General Assembly Resolution 2012 condemned the attempt by Southern Rhodesia to 'seize independence by illegal means in order to perpetuate minority rule', which was considered as incompatible with the principle of self-determination. Accordingly, this resolution requested members States 'not to accept a declaration of independence … by the present authorities, which would be in the sole interest of the minority, and not to recognize any authorities purporting to emerge therefrom'. In the case of adoption of such declaration, the resolution called upon the United Kingdom 'to put an immediate end to the rebellion, with a view to transferring power to a representative

[54] For a discussion over the arguments raised by the United Kingdom and by the majority of the General Assembly, see Gowlland-Debbas (n 52) 93ff.
[55] A/RES/1747 (XVI), 28 June 1962, paras 1–2. Similarly, A/RES/1760 (XVII), 31 October 1962, A/RES/1883 (XVIII), 14 October 1963, and A/RES/1889 (XVIII), 6 November 1963.
[56] S/RES/202, 6 May 1965, paras 3–4.

government in keeping with the aspirations of the majority of the people'.[57] In addition, General Assembly Resolution 2022 condemned any support or assistance rendered by any State to the minority regime in Southern Rhodesia and called upon all States to refrain from rendering any such support/assistance.[58]

Subsequently Resolution 2024, adopted on the same day of the declaration of independence, recommended the Security Council to consider the situation in Southern Rhodesia as a matter of urgency.[59] Indeed, the following day, with Resolution 216 the Council decided to condemn 'the unilateral declaration of independence made by a racist minority in Southern Rhodesia' and accordingly 'to call upon all States not to recognize this illegal racist minority régime and to refrain from rendering any assistance'.[60] A few days after, with Resolution 217, the Council undertook a more comprehensive approach. More specifically, it condemned 'the usurpation of power by a racist settler minority in Southern Rhodesia' and it stated that the declaration of independence is to be regarded as having no legal validity, it called upon all States 'not to recognize this illegal authority and not to entertain any diplomatic or other relations', and it called upon all States 'to refrain from any action that would assist and encourage the illegal régime and to do their utmost in order to break all economic relations with Southern Rhodesia'.[61] Subsequently, other resolutions spelled out additional positive measures including economic and diplomatic sanctions.[62]

Gowlland-Debbas observes that, at that time, some had contended that the determination by the UN political organs that the unilateral declaration of independence was illegal was done against the background of constitutional law of the United Kingdom.[63] In contrast, she argues that the above-mentioned resolutions framed the illegality in terms of international law. More importantly, she contends that the UN response to the Rhodesian crisis was 'the first building block of a subsequently

[57] A/RES/2012 (XX), 12 October 1965, paras 2–4.
[58] A/RES/2022 (XX), 5 November 1965, paras 5–6.
[59] A/RES/2024 (XX), 11 November 1965, para 3.
[60] S/RES/216, 12 November 1965.
[61] S/RES/217, 20 November 1965, paras 3, 6, 8.
[62] See, for instance, S/RES/253, 29 May 1968, paras 3–5, and S/RES/ 277, 18 March 1970, para 9.
[63] Gowlland-Debbas (n 52) 225ff.

consistent state practice', which consists in the imposition of the sanction of nullity in case of particularly serious breaches of certain norms of international law.[64] In other words, a policy of mandatory non-recognition is the outcome of a twofold process consisting firstly in the determination of illegality at an international plane and secondly in the imposition of nullity.

As for the grounds of nullity, Gowlland-Debbas concedes that at least *some* of the references to illegality found in both UN resolutions and in the debates before the UN political organs point at the constitutional illegality of the initial act adopted by Southern Rhodesian authorities. Such a view is supported by the references to the Southern Rhodesian Constitutional framework,[65] to an 'act of rebellion' with reference to the adoption of the declaration of independence, and to the 'usurpation of power by a racist settler minority', and by the call upon the United Kingdom to 'quell this rebellion of the racist minority'.[66] *A contrario* it is significant that these resolutions do not clearly link the illegality with a violation of international law. However, Gowlland-Debbas lists a series of aspects that, in her words, 'clearly indicates that the United Nations was referring to the legal invalidity of the situation arising from the UDI *on the international plane'*.[67] In a nutshell the argument goes that the unilateral declaration of independence was not invalid because it was unilateral, but instead because it was adopted by a racist regime. Thus, in her view, when UN resolutions use the term 'illegal' they refer to a violation of international law.

Actually, Gowlland-Debbas analyses two possible grounds for such an illegality the first of which is the violation of human rights and fundamental freedoms. In other words, the adoption by Southern Rhodesian authorities of a declaration of independence aimed to consolidate minority rule and to formally transform Southern Rhodesia into an apartheid State is at odds with the prohibition

[64] ibid 252.
[65] For instance, the last part of the preamble to General Assembly Resolution 2012 (XX), 12 October 1965, reads: 'Noting the attitude of the Government of the United Kingdom of Great Britain and Northern Island that a unilateral declaration of independence for Southern Rhodesia would be an act of rebellion and that any measure to give it effect would be an act of treason'.
[66] S/RES/217, 20 November 1965, preamble, paras 3–4.
[67] Gowlland-Debbas (n 52) 216 (emphasis added).

of racial non-discrimination and with the principle of majority rule.[68] On the one hand, these rules amount to well-established customary norms and, on the other hand, the fact that Southern Rhodesia was considered as a non-self-governing territory explains why the violation of these rules can affect the status and the recognition of the wrongdoer. In addition, UN resolutions as well as States did refer to these norms or to loosely related concepts. For example, General Assembly Resolution 2022 based the condemnation of the declaration of independence on the fact that it was not based on 'universal adult suffrage'.[69] The representative of India qualified the conduct of Southern Rhodesian authorities as a 'rebellion against the principles of civilized international behaviour, a violation of the political, in fact the human, rights of the vast majority of the inhabitants of Zimbabwe'.[70] Moreover, nullity could derive from the violation of these rules because from the status of non-self-governing territory flow additional rules on racial discrimination. However, even if the violation of these rules could seem a persuasive legal ground for non-recognition, Gowlland-Debbas notes an aspect that prevents such a conclusion. In fact, the adoption by Rhodesian authorities of a policy of racial discrimination predated the adoption of the declaration of independence and, moreover, such a policy was adopted with the acquiescence of the United Kingdom.[71]

The second possible ground is the violation of the principle of self-determination. Once again, the argument relies both on the wording of both UN resolutions and interventions of States' representatives before UN organs, which is characterised by many references to General Assembly Resolution 1514 as well as explicitly to the principle of self-determination. Firstly, Gowlland-Debbas cites General Assembly Resolution 2012, which condemned the attempt to perpetuate minority rule and specified that this attempt is incompatible with Resolution 1514.[72] She then cites the preamble to Resolution 2022, which noted that the intention of Southern Rhodesian authorities when adopting a unilateral declaration of independence was to 'continue the denial to the African majority of their

[68] ibid 221ff.
[69] A/RES/2022 (XX), 5 November 1965, para 3.
[70] S/PV.1258, 12 November 1965, para 68.
[71] Unfortunately, Gowlland-Debbas does not deepen the latter argument.
[72] A/RES/2012 (XX), 12 October 1965, para 2.

fundamental rights to freedom and independence'. But also the operative paragraphs of this resolution reiterated these rights and recognised the legitimacy of the struggle of people of Southern Rhodesia.[73] As for the Security Council, Gowlland-Debbas admits that only in 1978 this organ clearly linked the question of Southern Rhodesia to the right of self-determination,[74] even if actually already Resolutions 202 and 217 framed the question against the background of the right to self-determination.[75] Similarly, Gowlland-Debbas notes that routinely States mentioned this principle. For instance, the United States before the 4th Committee stated that it 'cannot condone any action taken in defiance of the responsible power … and any action contrary to the principle of equal rights and self-determination of all the peoples of the Territory'.[76]

Gowlland-Debbas, having argued that the grounds for illegality of the UDI was the violation of the right to self-determination, contends that the determination of nullity is the consequence of 'the contemporary development in international law relating to the importance of certain obligations considered fundamental to the international community, and which has found … expression in the concept of international crime'.[77] It could be said that the determination of nullity is the consequence of a serious breach of a *ius cogens* norm such as the right to self-determination. Even though UN resolutions and States do not make any reference to the violation of *ius cogens* norms, she contends that 'it is not a far-fetched academic exercise to state that these concepts can be appropriately applied in this context'.[78] In this sense the case of Rhodesia can be seen as 'the logical extension of a process

[73] A/RES/2022 (XX), 5 November 1965, preamble and para 2.
[74] S/RES/423, 14 March 1978, para 5. The Security Council called upon 'the United Kingdom … to take all measures necessary to bring to an end the illegal racist minority régime in Southern Rhodesia and to effect the genuine decolonization of the Territory *in accordance with General Assembly resolution 1514 (XV)*' (emphasis added). Interestingly enough this resolution also clearly declared 'illegal and unacceptable any internatl settlement concluded under the auspices of the illegal regime and calls upon all States not to accord any recognition to such a settlement'. See ibid para 2.
[75] S/RES/202, 6 May 1965, paras 5–6, which requested the United Kingdom to promote Southern Rhodesia attainment of independence and enter into consultations with all the parties so to convene a conference aimed to adopt new constitutional provisions acceptable to the majority of the people of Southern Rhodesia, and S/RES/217, 20 November 1965, para 7, which called upon the United Kingdom to take measures to allow Southern Rhodesians to determine their own future consistent with the objectives of Resolution 1514.
[76] Cited in Gowlland-Debbas (n 52) 226.
[77] ibid 241.
[78] ibid 251.

begun well before the establishment of the United Nations, as well as the first building block of a subsequently consistent state practice' that is that the violation of certain norms of international law are so serious to deserve the sanction of nullity.[79] But is this really the case?

First of all, the fact that the violation of the principle of self-determination as the ground for subsequent measures including non-recognition does not result from UN resolutions or debates before UN political organs cannot be set aside. Gowlland-Debbas does acknowledge that States did refer to the constitutional arrangement of Southern Rhodesia as well as to majority rule and to racial discrimination. However, she argues that the true ground is the breach of self-determination. Such an argument does not seem persuasive in the sense that the wording of the materials cited do not allow to identify some *true* grounds as compared to *false* grounds. Firstly, the references to the violation of constitutional law of the United Kingdom in the debates before the Security Council seem too many to be reduced to irrelevance. For instance, Ghana maintained that:

> The racist white settler régime of Southern Rhodesia has seized power from the United Kingdom Government. The Ian Smith clique bas unashamedly committed an act of treason and rebellion against the United Kingdom Government in broad daylight. Because of this seizure of power, the 4 million Africans in Southern Rhodesia have been rendered impotent and powerless, without any protection whatsoever, and have been dangerously exposed to the whim and caprice of a shameless racist régime, which is bent on subjugating Africans in perpetuity in the name of Western civilization. Ian Smith has defied the United Kingdom Government. By his unilateral declaration of independence, Ian Smith and his racist accomplices have precipitated a serious crisis which poses a threat of immense proportions to peace and security in the world. The grave consequences of this illegal seizure of power will be felt not only in Southern Rhodesia itself, but throughout the continent of Africa and the world.[80]

Such a vocal statement on the relation between Southern Rhodesia and the United Kingdom was not isolated. Senegal referred to a veritable act of rebellion under domestic and international law and to an act of international piracy.[81] Mali observed that it is difficult to imagine that 'the use of force against persons in a state of rebellion can be avoided'.[82] Tanzania referred to an aggression to the

[79] ibid 252.
[80] S/PV.1257, 12 November 1965, para 39–40. In another occasion Ghana maintained that a rebellion is a rebellion and raised an argument on purely domestic matter as the role of the governor in the 1961 constitution. See S/PV.1264, 19 November 1965, para 23.
[81] S/PV.1257, 12 November 1965, para 96.
[82] S/PV.1258, 12 November 1965, para 52.

United Kingdom.[83] Guinea referred to the usurpation of powers by Southern Rhodesian authorities as of a crime even if this statement seems to refer to the fact that Southern Rhodesian authorities declared independence notwithstanding the stance expressed by UN organs.[84] Similarly, Pakistan recalled that: 'My Government had declared time and that any declaration of unilateral independence would be a direct challenge to the world community and a blatant denial of huma rights and justice'.[85] As noted by Gowlland-Debbas, many States also referred in general to the violation of human rights and fundamental freedoms and more specifically to the violation of the principle of non-discrimination and of majority rule.[86] Overall it seems that States referred to a *plurality* of reasons why to condemn Southern Rhodesia. In this regard, Devine identifies as many as eight possible different grounds.[87]

The observation made by Howell that these debates occurred in an atmosphere in which there was not space for veritable legal arguments seems relevant.[88] States described the adoption of the declaration of independence as an evil that has been done,[89] as a mad act that endanger international peace and security,[90] as a humiliation for the whole continent,[91] as a matter of life and death for the African continent.[92] Overall all States expressed their condemnation for the situation created by Southern Rhodesian authorities. *Per se* the fact that debates before UN political organs were politically charged does not mean that it is not possible to examine the attitudes of States, which could be still legally relevant. However, these attitudes, so to be relevant with a view of creating new customary law, should at least be accompanied by a reference to international law. In contrast, in the debates in question there is not any clear reference in this sense. Instead, it is possible to detect the

[83] S/PV.1260, 13 November 1965, para 94.
[84] ibid para 111.
[85] S/PV.1259, 13 November 1965, para 7. See also the intervention of Jordan referring to a struggle for the preservation of the authority of the Security Council in S/PV.1258, 12 November 1965, para 5.
[86] Gowlland-Debbas (n 52) 222, footnotes 1–4.
[87] Dermott J Devine, *The Status of Rhodesia in International Law* (Acta Juridica 1973) 133ff.
[88] John M Howell, A Matter of International Concern (1969) 63 American Journal of International Law 771, 780.
[89] S/PV.1257, 12 November 1965, para 64 (Mali). See also S/PV.1259, 13 November 1965, para 45 (Algeria).
[90] S/PV.1260, 13 November 1965, para 19 (Ethiopia).
[91] ibid para 30 (Tanzania).
[92] ibid para 77 (Zambia) and para 120 (Guinea).

feeling that it was urgent to act, the idea of being *morally* compelled to act, or, to put it as Ghana did, there is the will 'to avoid having in Africa another South Africa'.[93] Similarly, Jordan, presenting the draft resolution that would have been adopted, albeit with a few minor changes, as Security Council Resolution 216, put it as follows: 'We have all agreed that that minority régime is illegal, that its presence is immoral, that its continuation is wrong'.[94] Overall, what is lacking is the sense of legal obligation. It is interesting to note that, on another occasion, Jordan affirmed that:

> The United Kingdom brought this question to the Security Council for action … This brings me to Chapter VII of the Charter … to invoke Chapter VII, we have, under Article 39, to determine first, whether or not there is a breach of the peace within the meaning of the Charter. This is a question of fact, it is not a question of law. The determination of the situation as one falling within the meaning of Article 39 is not a question of legal interpretation, it is a question of evidence, a question of proof, a question of fact. Now, what are the facts? There are uncontroversial facts relating to this matter. The most important of these facts is that an attempt was made by Ian Smith group to alter, by force, the constitutional set up. As a result of this—and these are the words of the Assembly, last week—an explosive situation was created in Southern Rhodesia … I say that all these factors justify the finding that a threat to the peace exists, and that the Council is called upon to take legitimate measures to check this explosive situation.[95]

Indeed, most of the discussions focused on what measures were effective and whether forcible measures could be decided since clearly non-recognition is a *de minimis* measure. But it is not clear whether there is any difference between non-recognition and other measures, which amounts to ask whether non-recognition is a legal measure and other measures are political measures. The wording of resolutions as well as of the statements adopted by the States intervening do not make any neat distinction between non-recognition and the other measures decided or recommended by UN political organs. It seems that non-recognition is just *one* among the many measures adopted. However, Gowlland-Debbas argues that that non-recognition is a fundamentally different measure in as much as it is omissive and it flows from a declaratory of nullity, while the other measures are positive measures—ie, measures that require a positive action by States—and their legal basis resides in

[93] S/PV.1257, 12 November 1965, para 68.
[94] S/PV.1258, 12 November 1965, para 5.
[95] S/PV.1264, 19 November 1965, paras 12–14.

Chapter VII of the UN Charter.[96] But this does not follow neither from the wording of resolutions nor from debates.

The fact that non-recognition is fundamentally different could be supported by looking at Resolution 216, whose first paragraph declares a nullity and the second one demands non-recognition. Thus, it could seem that non-recognition is a consequence of nullity. Subsequent Resolution 217 merely reaffirms non-recognition and, after having determined that the situation constitutes a threat to international peace and security, calls upon States to implement a series of measures. However, by looking at the debates preceding Resolution 216 it does not seem that nullity and non-recognition are causally linked, but it appears that while all States agreed on non-recognition, they did not agree on the opportunity to decide economic and diplomatic measures, neither they agreed whether these measures should have been mandatory or whether forcible measures were needed. Most importantly, most States did not make such a distinction. On the contrary, it seems that non-recognition is only *one* of the measures decided. For instance, the United Stated, after having pointed out that 'we are now here to consider all steps that can usefully be taken by the Security Council', said that:

> In our view, all States should be requested to refuse to recognize the minority régime in Southern Rhodesia and asked to refrain from any action—and I emphasize "any action"—which could aid it; and in particular, as a matter of urgent and immediate necessity, to refrain from supplying it with armaments. We must, in our view, call upon States to lend assistance to the United Kingdom in making effective the steps it is taking, including financial and economic ones, to end this rebellion. And it is the view of my Government that we should.[97]

Jordan presented the declaration of illegality, the condemnation of the Southern Rhodesian authorities, the call upon States not to aid or assist these authorities as well as non-recognition as a preliminary action.[98] India, with reference to the same measures, talked of a 'momentous step' and specified that:

> It is imperative for the United Nations to take other concrete and effective measures against the usurpers in Salisbury and to take those steps with increasing severity. A few measures of economic sanction do not meet the requirements of the situation.

[96] Gowlland-Debbas (n 52) 277–278.
[97] S/PV.1257, 12 November 1965, para 91.
[98] ibid paras 109–110.

> There should be political, economic and even military measures to deal with the present situation.[99]

The United Kingdom too, before the adoption of Resolution 216, had announced, as other States did, that the implementation of a series of measures including non-recognition.[100] Actually, the fact that many States adopted a series of measures including non-recognition *before* any declaratory of nullity and before any breach had occurred apparently suggests that non-recognition is just one of the measures that it is possible to adopt. Similarly, that measures changed over-time and that they were before only recommended and only then were made mandatory confirms this. Gradually, the Security Council realized that the measures already adopted were not effective and accordingly took a more assertive posture making what was previously a recommendation a mandatory measure.[101] Another reason that perhaps contributed to this development is that in the meanwhile the principle of self-determination consolidated and only after this consolidation a link between non-recognition and self-determination emerged in a clearer manner. As conceded by Gowlland-Debbas only in 1978 the Security Council explicitly link the duty of non-recognition and the violation of self-determination.[102]

At that time no States[103] made a clear connection between the violation of the right to self-determination and the declaration of nullity. In this regard, it is also rather striking that there was no mention to Manchuria, that is a case in which the connection between the violation, albeit of a different norm, and non-recognition was rendered manifest by States. The reference here to Manchuria and to the Stimson doctrine, which was from the beginning postulated on a breach of international law, is relevant also because it shows that States resort to legal language. Conversely this case, that is non-recognition of Rhodesia, was not recalled for instance when discussing the cases

[99] ibid para 72.
[100] ibid paras 25ff. See also S.PV/1258, 12 November 1965, para 10 (France) and para 85 (United States).
[101] ibid para 80 (Nigeria).
[102] Supra n 74.
[103] Except Jordan and Ivory Coast and even in this case in a rather ambiguous manner. Ivory Coast merely said that the draft resolution proposed by Jordan was declaring the declaration of independence illegal and consequently inviting States not to recognize it. S/PV.1257, 12 November 1965, para 120. The same goes for Jordan, ibid para 149.

of Namibia, the homelands, but even after for example discussing the East Timor case. All these aspects put the value of this case as a 'precedent' in doubt.

To sum up, it seems that the question as to the legal grounds the UN organs acted can be simply answered by saying that they acted on the base of the political determination that a threat to peace existed. This seems for instance the interpretation given by Special Rapporteur on State Responsibility Ago when addressing the topic of State responsibility.[104] At best Special Rapporteur Ago argues that the practice of apartheid being in violation of a *ius cogens* norm can be considered as a threat to the peace and consequently States can resort to the measures envisaged by the UN Charter for this kind of situations. Arguably, even though the case of Rhodesia is an important case in as much as it gives 'consistence' to the right to self-determination, it does not seem that it can have any value as relevant state practice in respect to a general and abstract duty of non-recognition as it seems Gowlland-Debbas is arguing.

2.2. Namibia

The Security Council called upon States not to recognise a certain territorial situation established in violation of the principle of self-determination for the second time in relation to the presence of South Africa in South West Africa (known today as Namibia). This case, as the preceding one, is routinely mentioned as relevant in order to assess the customary character of the duty of non-recognition.[105] However, when looking at the advisory opinion of the Court on this case, at the judges' separate and dissenting opinions, and at the interventions of States before the Court as well as before UN political organs it is difficult to identify any *opinio juris*.

[104] 'Report of the International Law Commission on the work of its twenty-eighth session 3 May-23 July 1976' (1976) II(2) Yearbook of the International Law Commission 1, 107, para 27. See also 'Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur—the internationally wrongful act of the State, source of international responsibility (continued)' (1976) II(1) Yearbook of the International Law Commission 3, 34, paras 106ff.

[105] Christakis (n 11) 139, Talmon (n 10) 101, and Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 680. See also 'Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)' (2001) II(2) Yearbook of the International Law Commission 1, 114–115, paras 7–8.

After the First World War, South West Africa was awarded to South Africa as a mandated territory. After the demise of the League of Nations, while the majority of States placed the territories held as mandated territories under the new international trusteeship system created with the UN Charter, South Africa refrained from doing so and, instead, kept administrating the territory in question.[106] The situation was referred to the ICJ, which conceded that there was not a specific duty to place the mandated territory under the international trusteeship system. However, the Court specified that the demise of the League of Nations did not imply the exemption from fulfilling the international obligations deriving from Article 22 of the Covenant of the League of Nations and from the Mandate for South West Africa. In addition, the supervisory function arising from these legal instruments, previously exercised by the League of Nations, was to be exercised by the UN.[107]

It is worthwhile to stress that South Africa, besides introducing in South West Africa policies such as the apartheid and the establishment of homelands, was administering this territory as if it had been annexed.[108] Because of these and other reasons, including the fact that the ICJ had controversially declared a case revolving around these matters instituted by Ethiopia and Liberia as inadmissible for lack of these states of legal rights or interests,[109] the General Assembly itself in 1966 terminated the mandate. More specifically, Resolution 2145, after having reaffirmed that the people of South West Africa have the right to self-determination and that this territory has international status, terminated the mandate on the grounds that South Africa failed to fulfil its obligations with respect to the administration of the mandated territory and put South West Africa under the direct responsibility of the UN.[110] In addition, it called upon South Africa to refrain from any action aimed to alter the international status of this territory.[111]

[106] Shaw (n 40) 105–106.
[107] *International status of South-West Africa*, Advisory Opinion, ICJ Reports 1950, 128, 19.
[108] Nele Matz-Lück, 'Namibia' in Rüdiger (n 4) paras 16ff.
[109] John Dugard, 'Namibia*(South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future' (1972) 11 Columbia Journal of Transnational Law 14.
[110] A/RES/2145 (XXI), 27 October 1966, paras 1–4.
[111] ibid para 7.

The following year, the Assembly condemned the refusal of South Africa to comply with its previous resolutions and declared that the continued presence of South Africa in South West Africa was a violation of the territorial integrity and international status of the territory in question.[112] Accordingly, it called upon South Africa to withdraw from South West Africa, it appealed all States to take effective economic and other measures designed to ensure such withdrawal, and requested the Security Council to take effective steps to enable the UN to fulfil its responsibilities with respect to this territory.[113] It can be noted that while the General Assembly in the previous resolutions framed the question exclusively as a case of violation of the right to self-determination,[114] starting from this moment it framed the question also as a case of violation of the rules on the use of force. In other words, the presence of South Africa in South West Africa after the termination of the mandate was equated to an illegal occupation or even to a veritable act of aggression.

The Security Council had already intervened in 1968 by adopting two resolutions dealing with the arrest and trial of 37 South West Africans on charges of terrorism.[115] Arguably these resolutions, by reaffirming General Assembly Resolution 2145 and by referring to the illegal extension of South African laws to South West Africa, confirmed the termination of the mandate. Eventually, with subsequent Resolution 264 the Council clearly aligned itself with the Assembly. In fact, it held that the continued presence of South Africa in Namibia was considered to be illegal and contrary to the principles of the UN Charter and of the previous decisions of the UN and to be detrimental to the interests of the population of the territory. Moreover, it reiterated the call upon South Africa to withdraw immediately from this territory. In addition, it may be of interest that the Council declared that 'the actions of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishments of homelands are contrary to the provisions of the UN Charter'.[116]

[112] A/RES/2325 (XXII), 16 December 1967, paras 3–4.
[113] ibid, paras 5–7.
[114] The preamble to General Assembly Resolution 2145, as well as its first paragraph, expressly stated that the situation in South West Africa falls within the terms of General Assembly Resolution 1514 (XV).
[115] S/RES/245, 25 January 1968 and S/RES/246, 14 March 1968. These resolutions reaffirmed General Assembly Resolution 2324 (XXII), 16 December 1967.
[116] S/RES/264, 20 March 1969, paras 2–4, 7.

With Resolution 2372 the General Assembly, besides deciding to use the name Namibia instead of South West Africa, condemned the action of South Africa aimed to consolidate its illegal control over Namibia, condemned the actions of those States which continued to provide political, military, and economic support to South Africa, called upon States to refrain from those dealings with South Africa which would have the effect of perpetuating South Africa's illegal occupation and conversely to provide support to Namibia, and finally considered the continued foreign occupation of Namibia in defiance of previous UN resolutions a grave threat to international peace and security.[117] Even though the term 'illegal' with reference to the control of South Africa over Namibia is used starting from this resolution, already since 1967 the General Assembly had qualified the South African conduct as a violation of international law. It is in any case doubtful that the demand of *isolating* the territorial situation in question with the aim of preventing South Africa to consolidate its control amounts to an explicit policy of *non-recognition* and indeed the latter term does not appear.

Subsequently, the Security Council with Resolution 269 decided that the continued occupation of Namibia by South Africa constituted an aggressive encroachment on the authority of the UN, a violation of the territorial integrity, and a denial of the political sovereignty of the people of Namibia. Accordingly, it recognised the legitimacy of the struggle of the people of Namibia against the illegal presence of South Africa in the Territory. This resolution called upon South Africa to withdraw its administration from the Territory immediately within a fixed deadline, decided that in the event of failure on the part of the Government of South Africa to comply, the Security Council would have met to decide effective measures, and called upon all States to refrain from all dealings with the Government of South Africa purporting to act on behalf of Namibia and conversely to increase their assistance to the people of Namibia in their struggle against foreign occupation.[118] Finally, the Council with Resolution 276 condemned the refusal of South Africa to comply with previous resolutions and it:

[117] A/RES/2372 (XXII), 12 June 1968, paras 7–11.
[118] S/RES/269, 12 August 1969, paras 3–8.

> Declare[d] that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid;
> …
> Call[ed] upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution.[119]

Afterwards, at the initiative of Finland, the Security Council submitted the question of non-recognition to the ICJ so to receive advice on the legal consequences of the continued presence of South Africa in Namibia notwithstanding Resolution 276 as well as the previous relevant resolutions of the UN political organs.[120] This judgement is important for a variety of reasons.[121] After having found that the relevant resolutions of the Security Council were binding even if they had not been adopted under Chapter VII,[122] the Court maintained that once that the Council has taken a decision States have a duty to conform to it. The Court stated that:

> The Court considers that the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end. It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violation of law resulting from it.[123]

Accordingly, the Court held that member States are 'under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia', which amounts to an obligation not to recognize, and 'under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia', which amounts to the duty not to render aid or assistance.[124]

[119] S/RES/276, 30 January 1970.
[120] S/RES/284, 29 July 1970.
[121] On the importance of this opinion, see Dugard (n 109) 23ff.
[122] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, para 110.
[123] ibid paras 111–112.
[124] ibid para 119.

The judgement goes on by specifying that the precise content of this obligation shall be determined by the Security Council, which may also determine additional measures.[125] 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'.[126] In compliance with the obligation of non-recognition member States have to refrain from a series of specific conducts.[127]

However, according to the Court, multilateral treaties having humanitarian character continue to apply and similarly acts such as 'the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory' remain valid.[128] The principle underlying this paragraph has been later known as the 'Namibia exception'. The rationale is that non-recognition should target the wrongdoer—ie, the State or the political entity that violated international law, rather than its inhabitants. Admittedly, measures such as an oil embargo do not target directly the inhabitants, but they do have a direct negative effect on the population at large. The extent to which the Namibia exception applies would have later proved to be controversial.

The advisory opinion is slightly equivocal on the legal basis of the mandatory policy of non-recognition. On the one hand, it seems that States have a duty not to recognise because this has been decided by the Security Council.[129] On the other hand, when the Court is addressing the consequences

[125] ibid para 120.
[126] ibid para 122.
[127] States have to: '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 on behalf of or concerning Namibia which may entrench its authority over the Territory'. See ibid paras 123–124.
[128] ibid paras 122, 125.
[129] The Court in this regard is rather explicit: 'For instance, it maintains that '[m]ember 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'. See ibid para 123 (emphasis added). See also para 122 in which the Court held that '[t]he question therefore arises as to the effect of this decision of the Security Council for States Members of the United Nations in accordance with Article 25 of the Charter'.

for non-member States, it seems that the mandatory policy of non-recognition derives from the illegality of the situation. More specifically, the Court held:

> 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: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof. The Mandate having been terminated by decision of the international organization in which the supervisory authority over its administration was vested, and South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with those decisions.[130]

It follows that Security Council and General Assembly resolutions are binding when it comes to the termination of the mandate and thus States are not free to disregard the determination on the unlawfulness of the presence of South Africa in South West Africa despite the termination of the mandate. Indeed Milano defines it as 'the most significant articulation' of what he brands as 'normativist approach' to non-recognition, which means that the doctrine of non-recognition relies on the mere concept of illegality. [131] In other words, the illegality of the presence of South Africa in South West Africa implies the automatic illegality of the acts performed by South Africa on behalf of Namibia after the termination of the mandate. A mandatory policy of non-recognition such as this one may be considered as the response of the international community to a conduct considered as intolerable, but its legal basis resides in the illegality itself of the situation.

Gowlland-Debbas maintains that while the Court addressed only the question of the obligatory character of the resolutions of the Security Council, judges who did not attribute a mandatory character to Resolution 276, evidently considered that the mandatory character of non-recognition had to be sought outside conventional international law, that means that it had to be sought in

[130] ibid para 126.

[131] Enrico Milano, 'The Doctrine(s) of Non-Recognition: Theoretical Underpinnings and Policy Implications in Dealing with De Facto Regimes' (The Power of International Law at Times of European Integration, Budapest, 26–28 September 2007) 1–2. See also Enrico Milano, 'The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question' (2014) 1 Zoom-out QIL-Questions of International Law 35, 39–44. In the latter work Milano adds that the source of the legal obligation is the already mentioned principle *ex iniuria ius non oritur*. See also above at 9.

customary international law.[132] Her argument is rather different from Milano's one, in fact she argues that these judges considered that a customary obligation of non-recognition was the *actual* legal basis for a mandatory policy of non-recognition. If interpreted in this sense the case of Namibia would be another clear instance of State practice confirming the customary nature of the principle of non-recognition. However, this argument does not seem totally persuasive, starting from the interpretation given to the separate opinions.

Incidentally, it is worthwhile to note that as many as four judges did not share the opinion of the Court on non-recognition expounded in Paragraph 133(2) of the advisory opinion. Considering that also another judge, even if voting with the majority, distanced himself from the advisory opinion on the question of non-recognition, overall the case of Namibia suggests a considerable disagreement on the issue at hand.

Two judges—ie, Judges Fitzmaurice and Gros—appended dissenting opinions, which however are not particularly relevant as for non-recognition. In fact, these opinions deal mainly with a series of preliminary matters and, having concluded that the advisory opinion is wrong on such matters (in the first place that the mandate had been lawfully terminated by the Assembly), they do not investigate further the legal consequences of the continued presence of South Africa.

In contrast, Judges Petren and Onyeama appended two separate opinions, which to a certain extent deal with non-recognition. The argument of the Judge Petren is that States 'must consider the termination of the Mandate as an established fact and they are under an obligation not to recognize any right of South Africa to continue to administer the Mandate'.[133] Accordingly, the answer to the question of what States can lawfully do must be sought in State practice and the question on effects of non-recognition and that on the effects of Resolution 276 shall be kept distinct. While the former does not imply a positive action, but it merely implies abstention from acts signifying recognition,

[132] Gowlland-Debbas (n 52) 286.
[133] Separate opinion of Judge Petren to the *Namibia* advisory opinion (n 122) 134.

the latter implies a series of additional consequences. However, 'resolution 276 (1970) seems to go beyond the area of the obligatory effects of mere non-recognition' since:

> The wording of paragraph 2 gives the impression that the non-validity of *all* acts taken by South Africa concerning Namibia is considered to be an automatic effect of the illegality of its continued presence in that Territory. The sense of paragraph 5 therefore seems to be that States must not recognize such acts as valid. However, having regard to the foregoing, the duty incumbent on States not to recognize South Africa's right to continue to administer Namibia does not entail the obligation to deny all legal character to the acts or decisions taken by the South African authorities concerning Namibia or its inhabitants.[134]

Also from Judge Onyeama's separate opinion is not possible to infer that the legal basis of non-recognition is a specific breach of international law. Judge Onyeama's argument can be divided in three parts. First, he observes that Security Council Resolution 276 does not render illegal the presence of South Africa, but is a legal assessment that does not bind other States and likewise paragraphs 2 and 5[135] are not binding. Second, the same resolution reaffirms General Assembly Resolution 2145, which had lawfully terminated the mandate of South Africa over South West Africa. It follows that the question can be reformulated in the following terms: 'the legal consequences to States of South Africa's continued presence in Namibia after the Mandate over South West Africa had been duly terminated by the United Nations'.[136] Third, from the termination of the mandate would follow automatically some legal consequences including non-recognition. Thus, both judges do not connect non-recognition to a particular breach of international law as maintained by Gowlland-Debas.

Other separate opinions are somewhat relevant. Judge Dillard, who voted for operative clause 2, expressed a 'cautionary note' precisely on non-recognition. The premise is that this clause is based on the resolutions adopted by UN political organs and on Article 25 of the Charter and he adds that '[i]n part, it is also a reflection of general principles of international law arising from the obligations of States to refuse official recognition to a government illegally in control of a territory'.[137] As for the

[134] ibid 135 (emphasis added).
[135] That is the paragraphs establishing that 'all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid' and calling upon States 'to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution'.
[136] Separate opinion of Judge Onyeama to the *Namibia* advisory opinion (n 122) 148.
[137] Separate opinion of Judge Dillard to the *Namibia* advisory opinion (n 122) 165.

legal consequences he specifies that 'the references in operative clause 2 to "any acts" and "any dealings" are to be read subject to the critically significant qualifying phrase "implying recognition of the legality" of South Africa's presence in Namibia'[138] in the sense that a policy of non-recognition does not preclude *all* intergovernmental dealings.[139]

Judge Padilla Nervo maintains that member States of the UN have a duty 'to accept and carry out the decisions of the Security Council which it has taken … in accordance with the Charter (Art. 25)' and accordingly member States have to refrain from recognizing the presence of South Africa in Namibia in contravention of relevant resolutions adopted by UN political organs.[140]

Judge De Castro similarly contends that:

> the Security Council, by giving its support to resolution 2145 (XX) in its resolution 276 (1970), lays upon the Members of the Organization the obligation to accept and apply what is laid down in those resolutions … In the present case, the acts of the occupying authorities cannot be considered as those of a legitimate government, but must be likened to those of a *de facto* and usurping government.[141]

Overall, in none of the separate opinions emerge clearly the argument made by Gowlland-Debbas according to which there would be an obligation of general international law that mandates non-recognition because of a serious breach of the principle of self-determination.

The argument that since the Security Council resolutions were not adopted under Chapter VII then the mandatory character of non-recognition was necessarily deriving from a customary principle of non-recognition has been raised also by others such as Crawford.[142] However, it should be noted that the Court took considerable efforts to stress that the resolutions of the General Assembly and the Security Council *were* binding. On the one hand, the Court held that even the General Assembly can adopt 'in specific cases within the framework of its competence, resolutions which make determinations or have operative design'.[143] On the other hand, it is uncontentious that the Security

[138] ibid 166.
[139] ibid.
[140] Separate opinion of Judge Padilla Nervo to the *Namibia* advisory opinion (n 122) 120.
[141] Separate opinion of Judge De Castro to the *Namibia* advisory opinion (n 122) 218.
[142] Crawford (n 9) 162–163.
[143] *Namibia* advisory opinion (n 122) para 105.

Council can adopt binding resolutions, the problem in the case at hand is that the Council acted outside Chapter VII. However, the Court maintained that the Council can adopt binding resolutions even in other cases the legal basis being Article 24 of the UN Charter.[144]

According to the Court that the Charter assigns certain specific powers to the Security Council does not exclude that the Council has some more general powers deriving from its primary responsibility concerning the maintenance of international peace and security the only limit being the purposes and principles of the UN. States moreover ex Article 25 of the UN Charter 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.[145] Indeed, Dugard argues that the binding character of the policy of non-recognition would be based on the 'combined operation of the resolutions of both political bodies'.[146] Ziccardi Capaldo maintains that the Court connected mandatory non-recognition to the theory of nullity, but she also adds that it is not totally clear whether the mandatory character of this policy derives from Security Council Resolution 276 or from general international law.[147] Ronen however contends that:

> By remaining in Namibia's territory, South Africa violated the obligation under Article 25 of the UN Charter to comply with the decisions of the Security Council. Article 25 does not, per se, constitute a peremptory norm. However, its violation would not alone have resulted in a drastic measure such as an obligation of non-recognition of South Africa's territorial claim. It is therefore important to look behind the obligation under Article 25, to the reasons for the revocation of the mandate. The revocation was brought about by South Africa's violation of the mandate's terms, which were geared towards advancing the right of the Namibian people to self-determination. In short, *South Africa's administration of Namibia was essentially in violation of its obligation to respect the right to self-determination of the Namibian people*.[148]

[144] Article 24(1)(2) establishes that: 'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII'.
[145] *Namibia* advisory opinion (n 122) para 110.
[146] Dugard (n 109) 29.
[147] Ziccardi Capaldo (n 32) 85.
[148] Yaʿel Ronen, *Transition from Illegal Regimes under International Law* (Cambridge University Press 2011) 45 (emphasis added).

Significantly this is roughly the same opinion expressed by the ILC in its Commentary on Article 41(2).[149] Some, on the basis of the mentioned passages of this opinion, have contended that all Security Council resolutions calling upon States not to recognize are mandatory resolutions notwithstanding not only the lack of a reference to Chapter VII but also the wording of the resolution.[150] Simma connected the reasoning of the Court in this instance to the fact that the Security Council in that period was adopting only a few resolutions and it could be speculated that such an extension of the powers of the Council at that time (Simma wrote this in the 1994) could not be assumed so easily.[151] It is noteworthy that Gowlland-Debbas is not the only one to argue that the resolutions of the Security Council invoking non-recognition are not binding. For example, the European Court of Justice (ECJ) with reference to Cyprus and the TRNC maintained that:

> According to the case-law of the Court, the Court is not bound by an act of an organ of the United Nations addressed to the Member States of that organization where the Community has not assumed powers previously exercised by the Member States, as in the field of the recognition of States. As regards Resolution No 541 (1983), the Council points out that it does not impose any binding obligation and that the Member States of the United Nations, and consequently the Community, are not in any event automatically obliged to adopt, on their own initiative, countermeasures for penalizing any breach of the resolution.[152]

It was noted above that neither the advisory opinion in question nor the individual judges made the argument that non-recognition was motivated by a serious breach of a peremptory norm of international law, but there are a few exceptions. India maintained that: '[t]he territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal'.[153]

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[149] 'Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)' (2001) II(2) Yearbook of the International Law Commission 1, 114–115, paras 7–8. More specifically the ILC when listing examples of the practice of withholding recognition of acts in breach of peremptory norms referred to the *Namibia* case.

[150] ILA, 'Recognition/Non-Recognition in International Law (Second Report)' (2014) 76 International Law Association Reports of Conferences 424, 450–451. See also Turns (n 9) 107.

[151] Bruno Simma, 'From Bilateralism to Community Interest in International Law (Volume 250)' in *Collected Courses of the Hague Academy of International Law* (Brill 1994), 264–265.

[152] *Hellenic Republic v Council of the European Communities*, Transfer of appropriations from one chapter to another within the Commission's budget estimates for the 1986 financial year (Special aid for Turkey), Case 204/86, 27 September 1988, European Court Reports 1988, 5323, 5334–5335. See also below at 286–288.

[153] ICJ Pleadings, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Vol II, 115 (India). Significantly, India added: 'These

Even if admittedly in another statement submitted by India non-recognition is apparently connected with the decision of the Security Council. Moreover, it is not clear to whether non-recognition derives from nullity or whether it is a communitarian reaction.[154]Also Mr Stavroupolus[155] and Mr Vickers,[156] both representatives of the UN Secretary General, referred to the duty of non-recognition and to the Stimson doctrine.

That the legal basis of the policy of non-recognition in this case was the Security Council resolution is also suggested by the fact that the Court specified that it is in the competence of the Council to delineate the precise content of the obligation. If on the contrary the duty of non-

basic principles, namely the inalienable right of the colonial people to self-determination and independence, the non-acquisition of territory by threat or use of force or any other form of aggression, the non-recognition of fruits of aggression or illegal occupation of territory, and the duty to fulfil international obligations in good faith are in fact the foundations of international legal order. They are, therefore, of interest to the international community of states as a whole. Their recognition and application by the World Court is bound to strengthen and promote the rule of law in international relations'. See ibid 119.

[154] In these regards, India maintained that: 'The legal consequences for States may be summed up as follows: 1. From the termination of South Africa's Mandate by the General Assembly and the assumption of direct responsibility by the United Nations over the Territory of Namibia until its independence, and since South Africa has no other right to administer the territory, it follows that its presence in that territory is illegal. It further follows that all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are without any legal authority and are consequently illegal and invalid … 2. Since the action taken has ken by the United Nations, all Members of the United Nations shall give to the United Nations every assistance in the action taken by it in accordance with the present Charter (Art. 2, para. 5). Consequently, it would be the duty of every Member of the United Nations:
(a) to recognize the authority of the United Nations to administer the territory of Namibia:
(b) to recognize the inalienable right of the people of Namibia to self-determination and independence … 3. To accept and carry out the decisions of the Security Council which it has taken or which it may take from time to time in accordance with the Charter … 4. Conversely, all States have the obligation not to recognize the presence of South Africa in Namibia in contravention of resolution 276 of the Security Council and resolution 2145 of the General Assembly'. ibid 117–118. Another meaningful passage in this sense is the following one: 'Every State is bound, under well-established principles of international law, irrespective of considerations flowing from other sources as for example decisions of the United Nations subsequent to the termination of the Mandate, not to recognize any authority exercised by South Africa on behalf of, or concerning, Namibia, in relation to which Territory, South Africa has ceased to have any locus standi with the termination of the Mandate, arid the exercise of which authority would amount to an unlawful encroachment on the legitimate rights of the United Nations as the Administering Authority'. See ICJ Pleadings, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Vol. I, 842 (India).

[155] He maintained that: 'While for South Africa the legal consequences of its continued presence flow from the fact that it is continuing to commit an internationally wrongful act for which it is responsible, the legal consequences for States other than South Africa consist in their obligation not to recognize this internationally wrongful act. They also consist in their obligation to cooperate with the United Nations … Among the legal consequences for States, other than South Africa, is their obligation not to recognize in any way South Africa as the territorial authority for the Territory and not to maintain, in so far as Namibia is concerned, diplomatic, consular or other relations with South Africa'. See ICJ Pleadings (n 153) 60.

[156] He held that: 'The problem of how third States should react to facts of this type is by no means a new one. It arose in the time of the League of Nations in connection with what became known as the "Stimson doctrine" … Members of the League of Nations were expected not to recognize any situation brought about by means contrary to the Covenant of the League or to the Briand-Kellogg Pact. Similarly, Members of the United Nations are expected to recognize that the Mandate for Namibia has come to an end, and not to recognize the legality of the continued presence of South Africa in Namibia after the Mandate has been terminated'. See ibid 481, para 22.

recognition is an autonomous duty, then it is not clear who should delineate its content. This point was raised by Blix too who emphasizes that the Court 'could hardly … enumerate but a few, if any, restraints that would be legally obligatory—in the absence of mandatory Security Council decisions'.[157] The reason is that 'the Security Council appears to have acted on the premise that the pressures to be applied should fall within the category of non-recognition restraints'.[158] It is interesting that something similar has been noted above concerning Rhodesia: in that case too the Security Council did not clearly distinguish non-recognition from all the other measures decided.

Coming back to the Security Council's effort to settle the conflict, Resolution 301 expressed the agreement of the Council with the main tenets of the advisory opinion of the Court, but it also added two worthwhile remarks. Firstly, it qualified the South African continued presence in Namibia as an internationally wrongful act and as a breach of international obligations calling upon States to act accordingly.[159] Secondly, it characterised the fate of this territory as of immediate concern to all members of the UN, which therefore 'should take this into account in their dealings with the Government of South Africa, in particular in any dealings implying recognition of the legality of, or lending support or assistance to, such illegal presence and administration'.[160]

In addition, Security Council Resolution 385 clearly demanded free elections so to enable the exercise of the right to self-determination of Namibians and specified that these elections shall be held under the supervision and control of the United Nations, which thus maintain control over the date, timetable, and modalities for the elections.[161] Similarly, Security Council Resolution 431 takes note of a settlement between the parties, specifying again that this settlement is specifically aimed to the 'independence of Namibia through free elections under the supervision and control of the United Nations'.[162] Such a settlement was slowed down by the Angolan Civil War in which South African

[157] Hans M Blix, 'Contemporary Aspects of Recognition (Volume 130)' in *Collected Courses of the Hague Academy of International Law* (Brill 1970) 672.
[158] ibid 671.
[159] S/RES/301, 20 October 1971, para 4.
[160] ibid para 7.
[161] S/RES/385, 30 January 1976, paras 7–8.
[162] S/RES/431, 27 July 1978, para 1.

intervened. The situation thus could be finally settled only after the adoption of the so-called tripartite accords between Angola, Cuba, and South Africa—ie, the main participants to the Angolan Civil War—which, besides ending this armed conflict, marked the independence of Namibia.[163] Eventually, the Security Council with Resolution 652 recommended the admission of Namibia to the UN.[164]

Compared to the case of Rhodesia, this case more clearly supports the argument that non-recognition is a mandatory policy that is connected with a previous illegality. However, the source of the illegality is the conduct of South Africa in disregard of the previous Security Council resolutions that terminated the mandate rather than a breach of the right to self-determination. Ultimately self-determination and racial discrimination constitute the background rather than the reason not to recognise. Indeed, the advisory opinion of the ICJ is rather explicit on this matter. Only in retrospect it could be possible to contend that the legal basis of the policy of non-recognition was a serious breach of a *ius* cogens norm.

2.3. The homelands

Finally, the UN invoked a policy of non-recognition with reference to the South African homelands, which were 'independent' States that South Africa established in its own territory with the aim to create a national home for black South Africans. As part of its policy of apartheid South Africa had created something akin to American Indian reservation for black South Africans with the aim to keep the rest of the territory for white South Africans. South African authorities also hoped that, with the establishment of these purported independent homelands the international community would have stopped treating South Africa as a pariah State because of its discriminatory policies. However, the creation of these political entities was very far from the demands of the international community to

[163] These events are illustrated in Joseph P Lorenz, *Peace, Power, and the United Nations: A Security System for The Twenty-first Century* (Routledge 1999) 81ff.
[164] S/RES/652, 17 April 1990.

give full effect to the right of self-determination and to refrain from discriminating ethnic groups.[165] Eventually, ten of such political entities were created, but South Africa granted independence only to four of them, namely Transkei, Bophuthatswana, Venda, and Ciskei.[166]

From the beginning the General Assembly connected the policy of creating homelands with the wider policy of apartheid. The Assembly in 1971, after having recalled a number of UN resolutions condemning apartheid and more in general the policies of racial discrimination undertaken by South Africa as well as the relevant obligations under international law, the UN Charter, human rights principles, and the Geneva Conventions, condemned both the establishments of homelands and the forcible removal of black South Africans, which is a 'contrary to the principle of self-determination and prejudicial to the territorial integrity of the countries and the unity of their people'.[167] Subsequently, in 1975 the Assembly reiterated its condemnation and also called upon States not to deal with any institutions or authorities of the homelands or to accord any form of recognition to them.[168] In 1976, notwithstanding these resolutions, South Africa declared Transkei independent and the Assembly rejected such declaration, declared it invalid, and called upon States to deny any form of recognition to Transkei and to refrain from having any dealing with this political entity or with other homelands. In addition, the Assembly requested States to take effective measures to prohibit natural or legal persons under their jurisdiction to have any dealings with Trasnkei.[169] Other similar resolutions have been adopted with reference to the other independent homelands.[170] The Security Council too intervened by simply endorsing these General Assembly resolutions.[171]

[165] John Dugard, *Recognition and the United Nations* (Grotius Publications Limited 1987) 98–99.
[166] For a short historical background, see John Dugard, 'South Africa's Independent Homelands: An Exercise in Denationalization' (1980) 10 Denver Journal of International Law 11, 12ff.
[167] A/RES/2775 (XXVI) E, 29 November 1971, para 1.
[168] A/RES/3411 (XXX) D, 28 November 1975, para 3.
[169] A/RES/31/6 A, 26 October 1976, paras 2–4.
[170] A/RES/32/105 N, 14 December 1977, paras 2, 5 with reference to Bophuthatswana, A/RES/34/93 G, 12 December 1979, paras 2, 5 with reference to Venda, and A/RES/36/172 A, 17 December 1981 with reference to Ciskei.
[171] S/RES/402, 22 December 1976, para 1 and S/RES/407, 25 May 1977, preamble.

Crawford observes that '[t]he various resolutions and statements referred to above are *diffuse* in their justification for non-recognition'.[172] He suggests three possible hypotheses and he clarifies from the beginning that non-recognition is justified on the basis of the status of the Bantustans under international law in the sense that non-recognition is not a *discretionary* policy but rather it is a *mandatory* policy.

The first hypothesis is that the statehood of the homelands was prevented because these political entities emerged in violation of the principle of self-determination. This hypothesis is suggested by some General Assembly resolutions such as Resolution 2775 E, which condemned the establishment of the homelands as a violation of inalienable rights of South African people.[173] However on closer inspection this hypothesis is not persuasive. In fact, as Crawford puts it:

> self-determination … has only a limited application to independent metropolitan States. Nor does practice demonstrate any general requirement that the government of a State be representative of its people—even though it is for almost all purposes the representative of that people. The principle of 'territorial integrity' does not provide a permanent guarantee of present territorial divisions, nor does it preclude the granting of independence to part of its territory, even where such a grant is contrary to the wishes of the majority of the people of the State as a whole.[174]

The second hypothesis is that the homelands were not fulfilling one of the factual criteria for statehood. The criteria that arguably was lacking was the criteria of independence given that they were relying economically and politically on South Africa. This hypothesis is suggested by some resolutions adopted by the Organization of African Unity (OAU), which explicitly referred to the lack of independence of the homelands.[175] For instance, a resolution adopted by the Executive Council referred to the 'sham independence' of Transkei,[176] another to the 'fraudulent pseudo-independence',[177] and another one of 'puppet States'.[178] However, Crawford adds that when a State grants independence to a part of its own metropolitan territory the criteria of independence is

[172] Crawford (n 9) 343.
[173] A/RES/2775 E (XXVI), 29 November 1971, para 2.
[174] Crawford (n 9) 344.
[175] ibid.
[176] OAU Res 553 (XXIX), 23 June–3 July 1977, preamble.
[177] OAU Res 492 (XXVII), 24 June–3 July 1976, para 4.
[178] OAU Res 455 (XXVI), 23 February–1 March 1976, para 4.

'predominantly informal'.[179] In other words, the argument goes that any political entity that separates from an already established territory has necessarily to rely economically and politically, at least to a certain extent and for a certain period, to the State from which it separated. In any case there are a few small States that have to rely on the former metropolitan State or on a third State but nonetheless are generally considered as sovereign on equal footing with the rest of the international community. In addition, the reliance on another State could well be temporary and therefore it could hardly justify the permanent and categorical non-recognition which was called for by the UN and by the OAU.

The third hypothesis is that the achievement of statehood is prevented because the policy of creating the homelands was an integral part of the wider policy of apartheid, which in turn amounts to a serious breach of a *ius cogens* norm. Crawford concludes by holding that:

> Apartheid as such … was a clear case of a policy predicated on a fundamental denial of equality on the grounds of race or ethnic origin. There is considerable support for the principle of racial equality and non-discrimination as a peremptory norm of general international law, a conclusion now consolidated by the apt inclusion of apartheid and similar systematic acts as crimes against humanity for the purposes of the International Criminal Court. The creation of the bantustans was an integral part of a policy which violated this fundamental principle.[180]

As in the preceding cases there is a connection between the declaration of illegality and the call for non-recognition. However, also in this case, it is not totally clear what are the legal grounds for non-recognition. One may take for instance the resolutions adopted in the context of the OAU. These resolutions refer to *all* the hypothesis formulated by Crawford.

For instance, Resolution 553 refers to the sham independence of Namibia, but also to apartheid, to the principle of self-determination, to the fact that South African conduct is a threat to the peace and security of the whole region, to the territorial integrity of Namibia, and to the risk of balkanisation.[181] The same goes for many other resolutions adopted in the context of the OAU.[182] Not

[179] Crawford (n 9) 344.
[180] ibid 345.
[181] Supra n 176.
[182] Supra nn 176–178. See also OAU Res 538 (XXVIII), 21–28 February 1977, OAU Res 428 (XXV), 18–25 July 1975, OAU Res 391 (XXIV), 13–21 February 1975, and OAU Res 299 (XXI), 17–24 May 1973.

only different grounds are mentioned but it seems that these grounds are somehow conflated or at least it does not seem possible to identify a single ground that justify illegality and non-recognition.[183]

There is another aspect that is noteworthy. Also in this case the Security Council rejected any attempt to settle the situation by way of negotiation and made clear that 'the total eradication of apartheid' is not negotiable.[184] It could thus be inferred from the position of the Security Council that there can be no validation of a breach of the right to self-determination. This aspect is meaningful because we will see that the contrary view can be inferred from other cases.

3. Concluding remarks

3.1. Tentative conclusions on the first research question

First of all, it is worthwhile to emphasize the existence of an important difference between the case of Manchuria, on the one hand, and the three cases that broadly occurred during the process of decolonization, on the other hand. In fact, when the Manchurian crisis erupted, there was *already* a clear prohibition against forcible acquisition of territory, which was the result of a gradual development from a veritable right of conquest to a clear-cut prohibition of conquest. This norm was applicable to the invasion of Manchuria given that Japan was an original signatory of the Kellogg-Briand Pact and China subsequently ratified this treaty, which indeed bars the recourse to war. It follows that the subsequent alteration of the legal status of Manchuria was unlawful, which in turn made recognition of such alteration problematic. In this regard, Turn labels the response of the international community to Japanese conduct as of a 'merger of law and policy'.[185]

In contrast, as for the other three cases, self-determination emerged as a norm of international law only *after* that the first calls for implementing a policy of non-recognition were made. Thus, as for self-determination, a merger of law and policy occurred only gradually and, in any case, only in

[183] On this point see also Gowlland-Debbas (n 52) 262–264.
[184] S/RES/554, 17 August 1984, para 4. Similarly, even if with reference more in general to apartheid, see A/RES/43/13, 26 October 1988, para 3.
[185] Turns (n 9) 111.

a second phase. In other words, the Kellogg-Briand pact can be seen as the culmination of the gradual development mentioned above, while the three cases in question, and more precisely the UN practice on these cases, are themselves part of the emergence of self-determination as a veritable legal right. However, so that the breach of the primary norm can be the legal ground for the mandatory policy of non-recognition, the primary norm should already exist *before* that the secondary norm—ie, the duty of non-recognition—is invoked and implemented.

There is another aspect that distinguishes the case of Manchuria and the three other cases involving the right to self-determination. In fact, in the latter cases, there is no explicit connection between, on the one hand, a breach of this right (or, for what it matters, of other peremptory norms of international law such as the prohibition of apartheid), let alone of a particularly serious breach, and, on the other hand, the policy of non-recognition. In this regard, it is interesting to make again a comparison with the response of the international community to the Manchurian crisis. Non-recognition in this case was *expressly* implemented on the assumption that there was a violation of the rules on the use of force and, in this sense, the Stimson note, as well as the subsequent resolution by the Assembly of the League of Nations, is rather explicit.[186] In this regard, it is also significant to note that the Manchurian precedent is not recalled neither by the Court in the *Namibia* advisory opinion nor by the individual judges who appended a declaration or a separate opinion or by the States that intervened before the Court itself and before UN political organs.[187]

This does not mean that the invocation of a policy of non-recognition towards Rhodesia, Namibia, and the homelands, as well as the adoption of a series of additional measures, was detached from the wider development of international law that had begun in the 60s and, more specifically, from the evolution of self-determination from a political principle to a proper legal right. It merely means that these cases do not provide a clear support for the understanding of the duty of non-

[186] Admittedly, the fact that Manchuoko was arguably a puppet State of Japan had a role in its non-recognition This does not detract from the fact that both the Stimson note and the above-mentioned resolution are remarkably clear as for the grounds of non-recognition. Crawford (n 9) 132–133.
[187] With the exceptions mentioned above at 114–115.

recognition as a communitarian response by the international community to serious breaches of peremptory norms, which is the understanding of the ILC as well as the prevailing understanding within the legal scholarship.

This is confirmed by other aspects emphasized above concerning specifically these three cases. First, States invoked a plurality of political and, but to a lesser degree, of legal grounds for non-recognition, which suggests a certain confusion on the actual motives for non-recognition. Second, and conversely, in particular in the first phase of the Rhodesian crisis, there was a distinct lack of references to the right to self-determination, which is compatible with the argument that self-determination became a veritable legal right only subsequently, that is through UN practice and through the adoption of some legal instruments including in the first place the 1966 Covenants on human rights and the 1970 Friendly Relations Declaration.[188] Third, it is noteworthy that States' representatives as well as commentators have tended to conflate the different theoretical accounts on non-recognition.[189] This conflation is problematic when it comes to the customary status of the duty in question. In fact, in general terms, a case that supports the normativist account can hardly be used to support the communitarian account. However, this is what often happens, for instance the ILC Commentary to Article 41(2) ARSIWA refers to the *Namibia* advisory opinion as if it supported the communitarian approach, when, on the contrary, it clearly supports the normativist approach. Fourth, above it was stressed that the case of Manchuria was not mentioned by States at the time of the cases of Rhodesia, Namibia, and the homelands, here it is worthwhile to note that, in turn, these cases were seldom mentioned in subsequent cases.[190] Finally, roughly in the same period of time, there have been

[188] The question is complex and it does not lend itself to a straightforward answer. For instance, Judge Sebutinde in his separate opinion and Judges Cançado Trindade and Robinson in their joint declaration to the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* case apparently argued that self-determination was a customary norm already in 1965. However, even in their submissions it is not clear whether the peremptory character was acquired at the same time.

[189] For the possible theories on non-recognition, see above at 9.

[190] For the rare exceptions, see below at 228, 275. Respectively, Sri Lanka, addressing the case of the TRNC, mentioned the case of Rhodesia and Capo Verde, addressing the case of East Timor, mentioned the cases of Rhodesia and Namibia.

some cases of contrary State practice including, most prominently, the cases of Goa and Bangladesh, which deserve further scrutiny.

Crawford maintains that these cases cannot be seen as contrary State practice because even if these factual situations emerged unlawfully, such emergence was in accordance with the right to self-determination.[191] The international community was sympathetic to Indian and Bangladeshi claims so much so that it eventually recognized the new factual situations *notwithstanding* the original unlawfulness. As noted this argument is somehow problematic in the sense that it is at odds with the prevailing understanding of the duty of non-recognition. On the one hand, ultimately it assigns a crucial role to the organized international community, which apparently can decide to resort to a policy of non-recognition on the basis of a political choice. On the other hand, this argument is at odds with the idea that a breach of a *ius cogens* norm cannot be validated under any circumstances. In fact, in these cases the link between the breach of the rules on the use of force and the implementation of the right to self-determination contributed to the subsequent validation of the unlawful situations.

The advisory opinion on *Namibia* is widely regarded as the *locus classicus* on the consequences resulting from non-recognition. However, at the outset, it shall be noted that this opinion deals with the legal consequences of the continued presence of South Africa in Namibia notwithstanding a Security Council to the contrary. Accordingly, the Court answered to this specific question and there was no need to elaborate a general theory of non-recognition.

As seen, it is often claimed that this opinion, as well as the separate opinions that build on the reasoning of the Court, supports the argument that international law mandates a policy of non-recognition in case of certain exceptional breaches of international law. However, looking at the wording of the opinion it is difficult to find any support to this argument, indeed, if anything, the Court suggests first that a policy of non-recognition relies on the concept of nullity, which in turn is

[191] Along similar lines, Lagerwall notes that States did not explicitly maintained that there is not a duty of non-recognition, but rather they merely 'decided' not to resort to the doctrine of non-recognition. See above at 56–58.

determined by the Security Council. In fact, in a well-known passage the Court held that 'A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence'.[192] Moreover, the opinion suggests that is up to the same organ to determine with precision what third States are allowed to do. The Court more precisely held that '[t]he precise determination of the acts permitted or allowed … is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter'.[193] It follows that the role of the Security Council is crucial both as for the determination of the illegality and as for the determination of the specific measures towards the wrongdoer.

It is equally meaningful to underline what the Court did not say. More specifically, no passage of the opinion suggests that non-recognition is connected with the law of State responsibility or made an argument based on the nature of the norm violated or on the character of this violation. Actually, the principle of self-determination is barely mentioned by the Court and the same goes for the prohibition of forcible acquisition of territory and, in any case, the violation of these norms is not put in relation with the policy of non-recognition. In contrast, the ILC Commentary listing examples of practice of non-recognition of acts in breach of peremptory norms held that '[a]s regards the denial by a State of the right of self-determination of peoples, the opinion of ICJ in the Namibia case is similarly clear in calling for a non-recognition of the situation'.[194] But this statement, given what said above, is not fully accurate.

In addition to these observations, four aspects should be stressed. First, this opinion connects non-recognition with the termination of the mandate. Admittedly, the mandate had been terminated on legal grounds, but it does not seem that it was terminated because of a serious breach of a peremptory norm of international law. Significantly in this regard Milano defines the opinion in

[192] *Namibia* advisory opinion (n 122) para 117.
[193] ibid para 120.
[194] See the ILC Commentary to Article 41 published in 'Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)' (2001) II(2) Yearbook of the International Law Commission 1, 114, para 7.

question as 'the most significant articulation' of what he brands as normativist approach to non-recognition, which indeed relies on the concept of objective illegality.[195]

Second, some have noted that towards Namibia there was a *mandatory* policy of non-recognition. The argument goes that given that the resolutions calling upon States to refrain from recognizing Namibia were not adopted under Chapter VII of the UN Charter, it follows that the binding character of non-recognition must have come from a pre-existing customary obligation, that is from an autonomous customary duty of non-recognition. However, it has been emphasized that the Court in different passages specified that Security Council resolutions, and possibly General Assembly resolutions, were binding.

Third, it is striking that there is no reference at all to the policy of non-recognition towards Rhodesia, which was invoked only few years earlier or for what it matters to the Stimson doctrine. Neither, incidentally, the Court would have later recalled these two cases in the *East Timor* case. Actually, addressing the *East Timor* case the Court recalled the *Namibia* opinion but only with reference to the *erga omnes* character of the right to self-determination. If the opinion of the Court was that non-recognition was a customary obligation, it would have been natural to recall relevant precedents in the context of the UN or, even more importantly, in the case-law of the very same court.

Finally, the Court gave a powerful rationale to the argument that an authoritative assessment is needed so to trigger a policy of non-recognition when it held that it is up to the Security Council to decide which conducts are allowed and which ones are prohibited.[196]

3.2. Tentative conclusions on the second research question

In the cases of Rhodesia and the homelands, third States *explicitly* excluded the possibility of negotiations, or at least of negotiations concerning the outcome of the conflicts, which have never been called into question. For instance, the conduct of the Rhodesian regime was perceived as so

[195] Supra n 131.
[196] *Namibia* advisory opinion (n 122) (n 122) para 120.

intolerable that negotiations with the Smith regime on the fate of this territory were not an option.[197] In other words, only one solution was considered as acceptable, that is a solution that would have brought the racist regime to the end. The same stance was adopted by the international community towards the homelands.[198] More in general, in these cases, it seems that States were not willing to support a negotiated settlement unless the proposed settlement was ensuring the realization of the right to self-determination (as it is understood in relevant UN resolutions) as well as the end of the policy of apartheid and of systematic discrimination. In these cases, UN political organs remained the final arbiter of the settlement, which thus was not left directly to the opposing parties. It will be shown that such an uncompromising stance has not been adopted with reference to other unlawful situations, and this holds true for all the cases taken into consideration in the next two chapters. While a minority of States have continued to support that when a *ius cogens* violation was committed there can be no negotiations, the international community at large has gradually shown the willingness to come to terms with unlawful situations renouncing to a strict policy of non-recognition.[199]

[197] See above at 99–100. See also supra n 74. On the efforts of Rhodesian authorities to reach an internal settlement and the reticence of the international community, see Robert O Matthews, 'Talking without Negotiating' (1979) 35 International Journal 91, 111ff.
[198] See above at 121.
[199] See below ch 4, s 5.2 and ch 5, s 3.2.

Chapter 4 – The cases of Western Sahara, Palestine, the Turkish Republic of Northern Cyprus, and East Timor

This chapter addresses the international practice on four situations that are generally viewed as unlawful in the sense of Article 41(2) ARSIWA. These situations are the invasion and annexation of Western Sahara by Morocco, the occupation of Palestine by Israel, the emergence of the Turkish Republic of Northern Cyprus (TRNC) made possible by the Turkish intervention, and the invasion and annexation of East Timor by Indonesia. In general, each of these situations presents some specificities. For instance, in the cases of Palestine and of the TRNC there is a determination of illegality and a call for non-recognition by the Security Council. In the case of Western Sahara there is only a more general call for avoiding unilateral measures that could escalate the situation. The same occurred in the case of East Timor, even if subsequently this situation developed differently compared to the other three situations given that eventually East Timor became an independent State. However, these situations besides being unlawful have something else in common. On the one hand, none of them unambiguously supports the prevailing understanding of the duty of non-recognition in the sense that they do not support the argument that there is an automatic duty of non-recognition upon the serious breach of a peremptory norm and the consequences resulting from the policy of non-recognition in each case vary. On the other hand, the international community as a whole has gradually tended to support a solution of compromise with the purported wrongdoer with the consequence of weakening the policy on non-recognition.

1. A 'mutually acceptable political solution' to the question of Western Sahara

1.1 Factual and legal background

The case of Western Sahara is, from a legal perspective, very clear in the sense that it is a rare example of general scholarly agreement on a question of international law. It is uncontentious

that Moroccan conduct in Western Sahara has been unlawful and that, more specifically, Morocco has violated several rules of international law that have peremptory character, such as the prohibition of forcible acquisition of territory and the right to self-determination.[1] With the exception of the United States, no State has recognized Western Sahara as an integral part of Morocco.[2] Even if the international community has paid lip service to this duty, a closer analysis of the response by the Security Council to this crisis paints a different picture. This section focuses on the wording of the resolutions that this organ has adopted starting from 1975—ie, the year in which Morocco annexed the territory of Western Sahara—in order to show how its response has evolved and why this change is legally relevant in connection with the duty of non-recognition. It is also contended that this approach is not isolated given that the approach of the African Union and of the European Union is not dissimilar.

Since 1884, the territory roughly corresponding to present-day Western Sahara was a colony of Spain.[3] By the middle of the sixties, the question of the decolonization of this territory came before the General Assembly and the UN Special Committee on Decolonization. These

[1] A comprehensive analysis on the lawfulness of Moroccan conduct is outside the scope of the present work. For an overview of the peremptory norms violated by Morocco, see Lauri Hannikainen, 'The Case of Western Sahara from the Perspective of *Jus Cogens*' in Karin Arts and Pedro Pinto Leite (eds), *International Law and the Question of Western Sahara* (International Platform of Jurists for East Timor 2007). See also Robert T Vance Jr, 'Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara' (1980) 7 Yale Journal of World Public Order 45, 81–82, Carlos R Miguelin, 'The Principle, the Right of Self-determination and the People of Western Sahara' in Marco Balboni and Giuliana Laschi (eds), *The European Union Approach Towards Western Sahara* (PIE Peter Lang 2017) 85, Francesca Martines, 'Obblighi internazionali gravanti su Stati e Organizzazioni internazionali di concorrere all'affermazione del diritto all'autodeterminazione. Accordi dell'Unione europea e il caso del Sahara Occidentale' (2017) X Osservatorio sulle fonti 1, 11–15, Peter Hilpold, 'Self-determination at the European Courts: The Front Polisario Case or "The Unintended Awakening of a Giant"' (2017) 2 European Papers 907, 915–916, and Mara Valenti, *La questione del Sahara occidentale alla luce del principio di autodeterminazione dei popoli* (Giappichelli 2017) 145ff.

[2] However, a number of States have declared their support for the territorial integrity and sovereignty of Morocco. These statements perhaps, rather than implying recognition of this unlawful territorial situation, can be read as implying support for the peace plan proposed by Morocco that, as it is explained below, while granting a certain degree of autonomy to Western Sahara preserves the territorial integrity and sovereignty of Morocco. See the statement of Asma Al Hamady, representative of United Arab Emirates before the Fourth Committee of the General Assembly, 15 October 2018, which reiterated her 'country's firm support for Morocco's territorial integrity and the Moroccan autonomy proposal', and the statement of Jassim Al Maamda, representative of Qatar before the Fourth Committee of the General Assembly, 12 October 2018, which expressed the 'hope that a peaceful, fair settlement could be found that preserves the sovereignty of Morocco'. These statements are available respectively at <www.un.org/press/en/2018/gaspd667.doc.htm> and <www.un.org/press/en/2018/gaspd666.doc.htm>. See also below ch 4, s 1.7.

[3] See also José I Algueró Cuervo, 'The Ancient History of Western Sahara and the Spanish Colonisation of the Territory' in Arts and Pinto Leite (n 1).

organs adopted many resolutions that affirmed the right of the Sahrawi people to self-determination. Moreover, they invited Spain to implement this resolution by holding a referendum aimed to enable the Sahrawi people to freely exercise their right to self-determination.[4]

In the colonial context the implementation of this right has consistently implied the independence of the political entity previously subjected to a colonial regime and, consequently, the creation of a new State.[5] However, Morocco and Mauritania raised partially overlapping claims in the sense that they were both claiming that there were a series of pre-dating colonization ties between them and Western Sahara.[6] The argument was that the existence of these ties was mandating that the process of decolonization in this specific case implied the reintegration of this territory respectively to Morocco or to Mauritania on the basis of the principles of national unity and territorial integrity.[7] In order to solve the matter, the Assembly, on the initiative of Morocco and Mauritania, requested an advisory opinion to the ICJ.[8] The Court concluded that the case of Western Sahara is not distinctive in terms of how the process of decolonization should be undertaken.[9] Accordingly, the people of Western Sahara may retain, modify, or divest their sovereignty by freely choosing to become an independent State, to associate, or to integrate into another State, which are the three options listed in Assembly resolutions on self-determination, such as Resolutions 1541 and 2625.[10] However, right after the publication of this opinion, Morocco, announced the holding of what

[4] See, for instance, A/RES/2229 (XXI), 20 December 1966, para 4 and A/6300/Rev.1, 16 November 1966, ch X, para 243. See also Thomas M Franck, 'The Stealing of the Sahara' (1976) 70 American Journal of International Law 694, 701ff.

[5] Ved P Nanda, 'Self-Determination under International Law: Validity of Claims to Secede' (1981) 13 Case Western Reserve Journal of International Law 257, 257–259, Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 256–257, and Peter Hilpold, 'Self-determination and Autonomy: Between Secession and Internal Self-determination' (2017) 24 International Journal on Minority and Group Rights 302, 306ff.

[6] To what extent these claims were overlapping is clarified in the advisory opinion adopted by the ICJ on Western Sahara. See *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, para 102.

[7] Franck (n 4) 701ff.

[8] A/RES/3292 (XXIX), 13 December 1974, para 1.

[9] See *Western Sahara* (n 6) para 162.

[10] ibid paras 57–58. See also A/RES/1541 (XV), 15 December 1960, Annex (Principle VI) and A/RES/2625 (XXV), 24 October 1970, Annex (The principle of equal rights and self-determination of peoples).

would have become known as the Green March—ie, a popular march that gathered approximately 300.000 volunteers and 40.000 officials and other government functionaries organized by the Moroccan Government for the purpose of expressing support for the reintegration of Western Sahara into Morocco by crossing the contested border.[11]

In 1975 and after 1991—ie, the year in which Morocco and the Sahrawi National Liberation Movement, also known as Polisario Front, agreed on a ceasefire—the Security Council adopted several resolutions that explicitly supported the free exercise of the right to self-determination of the Sahrawi people. However, since 2000 this position, which was in full compliance with the international consensus on the question, has started to crumble away. In a nutshell, it is argued that the Council, by adopting a series of resolutions that ultimately do not support the free exercise of self-determination by the Sahrawi people and that, on the contrary, support a 'mutually acceptable political solution' between Morocco and Western Sahara, is implicitly recognizing Moroccan territorial claims over this territory.

1.2. The initial response of the Security Council

As a reaction to the Green March, the Council adopted Resolutions 377 and 379, which, in contrast to what could have been legitimately expected given the sudden escalation of the tensions and the responsibilities of this organ when it comes to the maintenance of international peace and security, did not demand that Morocco desist from the proposed march. Indeed, Costa Rica, which intervened in the Council meeting preceding the adoption of Resolution 377, proposed a draft resolution including such a demand.[12] Similarly, Spain argued that the proposed march 'constitutes an act of force, prepared and carried out by Moroccan subjects and authorities in order to jeopardize the territorial integrity of the Sahara and to violate an internationally recognized border'.[13] However, the Council merely reaffirmed the terms of

[11] Jerome B Weiner, 'The Green March in Historical Perspective' (1979) 33 Middle East Journal 20, 26.
[12] S/PV.1849, 20 October 1975, para 93.
[13] ibid para 6.

Assembly Resolution 1514—ie, the resolution that, together with the two Assembly resolutions mentioned above, provided the legal basis for the process of decolonization—and appealed to the parties to exercise restraint and moderation and to avoid any action that might further escalate the situation.[14] Nevertheless, on 6 November 1975, the Green March took place and, on the same day, the Council adopted Resolution 380, which called upon Morocco to withdraw the participants in the march.[15]

Some have maintained that the Council was cognisant that Morocco violated the territorial integrity of Western Sahara and that this march was at odds with the right to self-determination of the Sahrawi people. In this regard, Pinto Leite holds that:

> What clearly engages the UN Charter … is the violation of Western Sahara's territorial integrity. The right to self-determination of the Saharawi people having been denied by the invasion of their territory, such an act must be ended by the withdrawal of Moroccan government control from the territory. The Security Council had an accurate understanding of this at the material time when it demanded … that "Morocco immediately … withdraw from the Territory of Western Sahara".[16]

While the first two sentences of this passage describe the legal situation that occurred after the Green March, already at that time it was possible to perceive the mildness of the Council response. In fact, Resolution 380 did not ask that Morocco withdraw from the territory of Western Sahara, but instead asked to withdraw the participants in the march and the Council refrained from treating the Green March as a violation of international law. Indeed, Spain, after having qualified the march as an internationally unlawful act, held that '[t]he Council must act by … condemning this violation of international law, of the Charter and of the resolutions of the General Assembly' and accordingly '[t]he Council must demand that Morocco withdraw from the Territory'.[17]

[14] S/RES/377, 22 October 1975, para 2 and S/RES/379, 2 November 1975, paras 1–2.
[15] S/RES/380, 6 November 1975, para 2.
[16] Pedro Pinto Leite, 'Independence by Fiat: A Way out of the Impasse – the Self-Determination of Western Sahara, with Lessons from Timor-Leste' (2015) 27 Global Change, Peace & Security 361, 373.
[17] S/PV.1854, 6 November 1975, para 19. See also the statement issued by Algeria, which vaguely echoes the doctrine of non-recognition, S/PV.1852, 2 November 1975, 17, paras 135–136: 'Algeria is not prepared, either today or tomorrow, to recognize or endorse any situation of fait accompli which could result from any kind of unilateral action. The position of Algeria is clear: we consider that sovereignty over the Territory of Western

Similarly, Algeria criticized the mildness shown by the Council by stating that:

> The Security Council met before the frontier was crossed. The Security Council adopted a resolution … the resolution was drafted in courteous language; it asked all the parties concerned and interested to exercise restraint and moderation. What effect did resolution 377 (1975) have? … I am entitled to wonder why the Security Council, knowing how the situation would develop, aware of the deterioration in the situation, assessing the increasing tension and able to foresee what would happen on the morrow, has shown itself to be so timid in its resolutions. Either the Council considers itself responsible for this situation…in which case it should take the appropriate measures prescribed in the Charter with the means provided by the Charter. Or else the Council is shirking its responsibility and says that there is nothing it can do.[18]

Spain specified that the withdrawal had become a *condicio sine qua non* for the settlement of the conflict and held that no peaceful solution to the conflict over Western Sahara can be conceived 'in contradiction of the relevant resolutions of General Assembly, the basic premise of which is the right of the people of the Western Sahara to self-determination'.[19] This statement is a perfect illustration of the argument that unlawful situations in the sense of Article 41(2) ARSIWA under no circumstances can be validated. Incidentally, it is worthwhile to note that in the end no resolution would have explicitly demanded the withdrawal of Morocco.

The Green March marked the beginning of the process that eventually led to the annexation of Western Sahara by Morocco.[20] On 14 November 1975, Spain together with Morocco and Mauritania adopted the so-called Madrid Agreement by means of which Spain confirmed its decision to decolonize Western Sahara and to institute a temporary administration in this territory.[21] Morocco and Mauritania would have controlled this administration in collaboration with the *Djemaa*, which was a Spanish colonial body supposed to represent the interests of the Sahrawi people. According to this agreement, all the responsibilities and powers that Spain possessed as the administering power were to be transferred to this administration.

Sahara is the responsibility of the United Nations; we consider that the Organization has duties in respect of the people of Sahara, and that is why … we continue to believe that the solution to this problem has to be found within the Organization and by the General Assembly'.

[18] ibid paras 79–84.

[19] ibid para 22.

[20] Franck (n 4) 714–715.

[21] Hannikainen (n 1) 66.

The actual upshot of this agreement was to divide the territory of Western Sahara between Morocco and Mauritania, while Spain gave up its Saharan possession supposedly in exchange for a 35 percent interest in a phosphate mine.[22]

Between 1975 and 1988, the question of Western Sahara was dealt with by the Assembly and by the Organization of African Unity (OAU), both of whom reaffirmed the terms of Assembly resolutions on self-determination. However, similarly to the Council, these bodies generally refrained from clearly condemning the invasion and annexation in question.[23]

1.3. The renewed interest of the Security Council

Eventually, in 1988, the Secretary-General, together with the Chairman of the OAU, proposed a peace plan that was accepted on paper by both parties. This proposal envisaged a cease-fire and a referendum that would have allowed the Sahrawi people to exercise their right to self-determination. However, the commitment by the two parties did not end the territorial dispute between them.[24] In the same year, the Council took matters into its own hands by requesting the Secretary-General to transmit a report on the holding of such a referendum.[25] Consequently, it approved a report that contained the text of the above mentioned settlement proposal.[26] This plan, known as 'UN Settlement Plan', contained a provision establishing that '[t]he UN will organize and conduct a referendum … in which the people of Western Sahara will choose between independence or integration with Morocco'.[27] A further detailed report reiterated this

[22] 'Supposedly' since the Madrid Agreements did not contain such a provision. See Hannikainen (n 1) 66 and Franck (n 4) 715. Some have held that this treaty is void since it is in conflict with a *ius cogens* norm, see Ben Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' (2015) 27 Global Change, Peace & Security 301, 313ff.
[23] There are however two exceptions. See A/RES/34/37, 21 November 1979, paras 5–6 and A/RES/35/19, 11 November 1980, paras 2–3. In fact, the former resolution deplored 'the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco' and urged 'Morocco to join in the peace process and to terminate the occupation of the territory of Western Sahara' while the latter resolution simply reiterated these terms.
[24] Yahia H Zoubir, 'The Western Sahara Conflict: A Case Study in Failure of Prenegotiation and Prolongation of Conflict' (1996) 26 California Western International Law Journal 173, 196.
[25] S/RES/621, 20 September 1988, para 2.
[26] S/RES/658, 27 June 1990, para 2.
[27] S/21360, 18 June 1990, para 47(f).

specific point.[28] The fact that the referendum, in order to comply with the right of self-determination of peoples, should include the option of independence was also emphasized in a previous decision of the Assembly of Heads of State and Government of the OAU.[29]

Resolution 690 established a UN mission with the aim of facilitating the organization and the conduct of the referendum envisaged by the UN Settlement Plan.[30] Nevertheless, from the very beginning, the organization of a referendum appeared to be an extremely complicated task given the existence of two crucial problems—that is, who would be entitled to vote and what would be the options on the ballot.[31] Some have contended that Morocco has never really accepted the idea of giving up sovereignty over Western Sahara and, accordingly, these problems were purposefully used as excuses to maintain the *status quo*.[32]

Overall, the Council between 1991 and 2000 adopted almost thirty resolutions that cyclically extended the mandate of the UN mission. These resolutions also recorded the difficulties and the delays in the implementation of the UN Settlement Plan as well as of the other peace plans that had been put forward and called upon parties to cooperate with the Secretary-General in the implementation of these plans. However, in some of these resolutions the Council started using terms whose relevance would have become clear only later. For instance, it referred to its commitment to a 'just and lasting solution,[33] it 'urge[d] the parties to demonstrate the political will to overcome the persisting stalemate, and find an acceptable solution',[34] and it emphasized the importance of exploring 'ways and means to achieve an early durable and agreed resolution of their dispute'.[35] Similar terms and expressions are commonly used when negotiations occur. However, terms such as 'acceptable solution' may be interpreted

[28] S/22464, 19 April 1991, para 37.
[29] AHG/Dec.114 (XVI), 17–20 July 1979, para 2.
[30] S/RES/690, 29 April 1991, para 4.
[31] The problem concerned, on the one hand, the identification of the Sahrawi people and whether Moroccan settlers would have been entitled to participate to the referendum and, on the other hand, whether one of the options was the independence of Western Sahara. See Pinto Leite (n 16) 365–366.
[32] Foreword by Frank S Ruddy in Arts and Pinto Leite (n 1) 11–12 and Zoubir (n 24) 211–213.
[33] S/RES/907, 29 March 1994, preambular part.
[34] S/RES/1108, 22 May 1997, para 3.
[35] S/RES/1292, 29 February 2000, para 2.

as implying that there are acceptable solutions other than the free exercise of self-determination by the Sahrawi people. However, to what extent can there be negotiations whose proposed outcome is not conformity with a peremptory norm? In other words, on the credible assumption that Western Sahara is an unlawful situation in the sense of the above, can third States recognize a factual situation that results from negotiations between the parties and that does not lead to the free exercise of self-determination by the Sahrawi people?

However, the resolutions mentioned above are to a certain extent ambiguous in as much as they still explicitly call for a solution in conformity with the UN settlement plan, which was providing for the organization of a free, fair, and impartial referendum. In any case, these resolutions arguably foreshadowed how the Council approach would have evolved.

1.4. The shift toward the support for a 'mutually acceptable political solution'

In 2000 the Secretary-General recalled the lack of developments in the implementation of the UN Settlement Plan and that, in any case, the results of a referendum on self-determination would have not been accepted by the parties, thus leaving in any case the conflict unsettled. Therefore, he decided to ask James Baker, who had been appointed in 1997 as Personal Envoy of the Secretary-General for Western Sahara, 'to consult with the parties and … to explore ways and means to achieve an early, durable and agreed resolution of their dispute'.[36] Indeed, the resolutions adopted by the Council between 2000 and 2001 marked a turning point. After having underlined that fundamental differences persisted between the parties, Resolution 1301 called for the parties to 'explore *all* ways and means to achieve an early, durable and agreed resolution'.[37] The Resolution passed with twelve votes in favour, two abstentions (Jamaica and Mali) and one against (Namibia). The primary reason for the

[36] S/2000/131, 17 February 2000, paras 36–37. See also S/2000/461, 22 May 2000, para 28.
[37] S/RES/1301, 31 May 2000, para 1 (emphasis added).

abstentions and the negative vote was precisely the concern over the possibility that a political solution may set aside the right to self-determination. In this regard, Namibia held:

> The United Nations settlement plan remains the only viable mechanism by which to achieve a lasting solution to the question of Western Sahara. The United Nations plan will enable the people of Western Sahara to exercise their inalienable rights to self-determination and independence in accordance with General Assembly resolutions 1514 (XV) of 14 December 1960 and 40/50 of 2 December 1985, and with resolution AHG/Res.104 (XIX), adopted by the Assembly of Heads of State or Government of the Organization of African Unity at its nineteenth ordinary session, held at Addis Ababa from 6 to 12 June 1983.[38]

A similar concern was expressed by the abstaining States as well as by Netherlands, Argentina, and Malaysia, which nonetheless supported the resolution in question.[39]

Arguably, it is possible to infer the meaning of the expression 'agreed resolution' used in the abovementioned resolution by reading a subsequent report by the Secretary-General, where it is noted that:

> A political solution could be a number of things …. Such a solution could be: a negotiated agreement for full integration with Morocco; a negotiated agreement for full independence; a negotiated agreement for something in between; or a negotiated agreement that would permit a successful implementation of the settlement plan. It should be noted, however, that the positions of the parties in interpreting some of the key provisions of the settlement plan … do not augur well for that prospect.[40]

The Secretary-General, before the last observation, regretted that the parties had consistently insisted on a 'winner-take-all' approach.[41] Thus, and considering that the parties had already showed their aversion towards the UN Settlement Plan, the only realistic alternative becomes the third one, which is a negotiated agreement in where each of the parties would get some, but not all of what each wanted. Indeed, starting from Resolution 1309 the Council began to use the expression 'mutually acceptable political solution' to the dispute in question.[42] At the same

[38] S/PV.4149, 31 May 2000, para 2.
[39] ibid 2–4.
[40] S/2000/683, 12 July 2000, para 29.
[41] ibid para 28.
[42] S/RES/1309, 25 July 2000, para 1.

time, starting from Resolution 1380, the Council has no longer explicitly mentioned the necessity of holding a self-determination, nor it has explicitly reaffirmed Resolution 690.[43]

From this moment on, all resolutions adopted by the Council, except those that were not purely technical, have supported such a solution that, at the same time, should 'provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations'.[44] However, it is worth noting that these two propositions are in direct contradiction with one another since, on the one hand, the right to self-determination in the colonial context has consistently been interpreted as implying, at least in the abstract, the possibility of independence and, on the other hand, a mutually acceptable political solution seems to exclude precisely this outcome.

Afterwards, Personal Envoy of the Secretary-General Baker drafted the so-called 'Framework Agreement', known also as 'Baker Plan I'.[45] This plan started to make explicit the transition from the support of a 'free, fair and impartial referendum for the people of Western Sahara' to the support of a 'negotiations without preconditions'.[46] This plan, in fact, was an autonomy proposal that envisaged a referendum to be held within five years following the initial actions of implementation of the plan itself. The Moroccan Government supported the plan probably because Moroccan settlers would have had the right to vote in the referendum and, consequently, Morocco would have likely succeeded in obtaining a majority for integration even if the Sahrawi people had consistently favoured independence.[47] Pinto Leite noted that the

[43] S/RES/1380, 27 November 2001.
[44] See for instance S/RES/1720, 31 October 2006, preambular part.
[45] S/2001/613, 20 June 2001, Annex I (Framework Agreement on the Status of Western Sahara). In the literature there is a certain confusion regarding the denominations of the different peace plans. In fact, some scholars have considered the 1997 Houston Agreement—ie the outcome of a series of negotiations that have been conducted under the auspices of Personal Envoy of the Secretary-General Baker—as the first Baker plan; these scholars have referred to the 'Framework Agreement' as the second Baker plan. Others have talked about different versions of the same Baker Plan. A detailed timeline is provided by Anna Theofilopoulou, 'The United Nations and Western Sahara: A Never-Ending Affair' (2006) United States Institute of Peace Special Report 166, 6–7.
[46] See for instance S/RES/1754, 30 April 2007, para 2.
[47] Pinto Leite (n 16) 366.

participation of Moroccan settlers to the vote was at odds with the principle of self-determination.[48] In any case, the Polisario Front eventually did not accept this plan.

In 2002, the Council continued to support the efforts to find an alternative political solution to the dispute.[49] The new plan drafted provided for an autonomy status of Western Sahara under Moroccan rule, which would have functioned throughout a transition period of five years.[50] Afterwards, there would have been an independence referendum. This new plan attempted to restrict the right to vote to *bona fide* residents.[51] The Council, with Resolution 1495, supported this new attempt. In fact, it reaffirmed its commitment to assist the parties in achieving a just, lasting and mutually acceptable political solution and expressed its support for this peace plan, which is defined as an 'optimum political solution on the basis of agreement between the two parties'.[52]

While this time the Polisario Front accepted the new plan, Morocco did not, and this development pushed Personal Envoy of the Secretary-General Baker to resign in 2004.[53] Paraphrasing the words that Franck had used in connection with the Madrid Agreements, the stage had *again* been set for abandoning the principle of self-determination.[54] In this regard, it is noteworthy to note how the Secretary-General attempted to clarify the meaning of the expression 'political solution' in the context of this conflict by affirming that:

> Once the Security Council recognized the political reality that no one was going to force Morocco to give up its claim of sovereignty over Western Sahara, it would realize that there were only two options left: indefinite prolongation of the current deadlock in anticipation of a different political reality; or direct negotiations between the parties … which should be held without preconditions. Their objective should be to accomplish what no "plan" could, namely to work out a compromise between international legality and political reality that would

[48] ibid 366–367.
[49] S/RES/1429, 30 July 2002, para 1.
[50] The plan is reported in S/2003/565, 23 May 2003, Annex II (Peace Plan for Self-Determination of the People of Western Sahara).
[51] S/2003/565, 23 May 2003, Annex III (Responses of the parties and the neighbouring States to the peace plan for self-determination of the people of Western Sahara), Observations of the Kingdom of Morocco on the new proposal of James Baker entitled 'peace plan for self-determination of the people of Western Sahara'.
[52] S/RES/1495, 31 July 2003, para 1.
[53] Supra n 48.
[54] Franck (n 4) 714–715.

> produce a just, lasting and mutually acceptable political solution, which would provide for the self-determination of the people of Western Sahara.[55]

However, he also added that:

> My Personal Envoy clarified that … he had spoken of negotiations without preconditions … *The Security Council would not be able to invite parties to negotiate about Western Saharan autonomy under Moroccan sovereignty, for such wording would imply recognition of Moroccan sovereignty over Western Sahara*, which was out of the question as long as no States Member of the United Nations had recognized that sovereignty. Negotiating without preconditions meant … that there would not be a precondition that the Frente Polisario first recognize Morocco's sovereignty over Western Sahara and then discuss the autonomy to be "granted" by Morocco … In this context, he observed that the advisory opinion had been handed down more than 30 years ago and that the resolution had still not been implemented. In reference to that inordinate lapse of time, my Personal Envoy observed that a solution for the question of Western Sahara could only be achieved if the parties worked to seek a mutually acceptable compromise based upon relevant principles of international law and current political realities.[56]

These two texts capture well the tension between political and legal considerations when it comes to intractable conflicts. On the one hand, as observed by the personal envoy to the Secretary-General, the *only* acceptable solution is a solution in full compliance with international law, which is a solution that provides for the self-determination of the Sahrawi people. The support to other solutions, including various autonomy plans, seems precluded by the duty of non-recognition. On the other hand, as observed by the Secretary-General, this solution may be in full compliance with international law, but it is not realistic. Accordingly, rather than prolonging indefinitely the dispute it is better to achieve a compromise between international legality and political reality. Unfortunately, the Secretary-General did not elaborate further on the extent to which such a compromise could concretely preserve the right of self-determination of the Sahrawi people. Even if, as noted above, from a legal perspective the Council may not openly support an autonomy arrangement envisaging Western Sahara as an integral part of Morocco, given that this would imply an implicit recognition of Moroccan

[55] S/2006/249, 19 April 2006, paras 32–34.
[56] ibid paras 37–38 (emphasis added).

territorial claims, gradually the Council, as well as the international community at large, has begun supporting precisely such an arrangement.

Two peace plans were later presented, which were drafted directly by the parties. With Resolution 1754, the Council took note of and welcomed the Moroccan proposal presented on 11 April 2007 and also took note of the Polisario Front proposal.[57] Moreover, the Council:

> Call[ed] upon the parties to enter into negotiations without preconditions in good faith, taking into account the developments of the last months, with a view to achieving a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara.

It should be underlined that the Moroccan proposal did not envisage at all the holding of a self-determination referendum but, was yet another autonomy proposal, which, in addition, in many ways lacked clarity. In any case, being drafted directly by Morocco, it was even less amenable to the Sahrawi's claims including the free exercise of self-determination.[58]

The Council, with Resolution 1813, '[e]ndorse[d] the report's recommendation that *realism* and a *spirit of compromise* by the parties are essential to maintain the momentum of the process of negotiations'.[59] This passage should be read together with the following words quoted in the Secretary-General's report on Western Sahara: 'On 6 November 2007 … King Mohammed VI of Morocco stated that the Kingdom would spare no effort to ensure the success of the negotiations within the framework of the Kingdom's sovereignty and territorial integrity'.[60] Therefore it could be speculated what no preconditions really means: Morocco would maintain possession of Western Sahara, while the right to self-determination of the Sahrawi people is limited to a marginal degree of autonomy.

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[57] S/RES/1754, 30 April 2007, preambular part. The full text of the Moroccan Initiative for an Autonomy Plan can be retrieved at <www.moroccoembassy.org.au/?q=full-text-moroccan-initiative-autonomy-plan>.

[58] In this regard, some have talked of an 'even more regressive plan' and of a plan characterized by 'too many black holes'. See Carlos R Miguel, 'The 2007 Moroccan Autonomy Plan for Western Sahara: Too Many Black Holes (Groupo de Estudios Estratégicos Analysis n° 196, 2007) 1.

[59] S/RES/1813, 30 April 2008, para 2 (emphasis added).

[60] S/2008/251, 14 April 2008, para 2. See also S/PV.6758, 24 April 2012, 4 and Zoubir (n 24) 202 who cites a statement adopted by King Assan saying that 'there is nothing to negotiate because the Western Sahara is Moroccan territory'.

Admittedly the expression 'political solution' had already been used with reference to Western Sahara in several resolutions of the General Assembly. However, in these resolutions this expression referred to an agreement on the ceasefire and to the creation of the conditions necessary to organize a referendum that allowed the Sahrawi people to exercise their right of self-determination.[61] In contrast, the expression 'political solution' in these Council resolutions seems to refer to the settlement of the dispute itself.

1.5. A realistic, practicable and enduring political solution

The subsequent Council resolutions, until those adopted starting from 2018, have simply reiterated the call for a mutually acceptable political solution. This development was met with some criticisms in the context of the Council itself. For instance, South Africa affirmed that:

> The word "realism" would be interpreted as implying that the Council endorses the view of the Personal Envoy of the Secretary-General on political reality and international legality. *No State or individual can bestow upon itself the right to deny the right of self-determination to the people of Western Sahara.* That interpretation could set a precedent that could be used in many other cases. Are we going to say to the people of Palestine that they should be realistic in that they cannot get their freedom because of the powerful State of Israel? Indeed, are we going to say to the people of Serbia that they must accept Kosovo as a reality because of what has happened? This attempt would set aside international law in favour of the principle that "might is right". *We maintain that "realism" in the text of the resolution is related to the negotiations and not to any outcome*.[62]

Costa Rica had proposed to add the expression 'within the framework of international law' near the expressions 'realism' and 'spirit of compromise'.[63] Other States, such as Uganda,[64]

[61] For instance, both General Assembly Resolutions 34/37 and 37/28 refer to a just and definitive solution to the question of Western Sahara, but they also explicitly reaffirmed the right of the Sahrawi people to independence, the need to organize a referendum in order to give the possibility to the Sahrawi people to choose between independence or other possibilities. These resolutions do not imply that negotiations can get to the point of circumventing the right of independence. See A/RES/34/37, 21 November 1979, and A/RES/37/28, 23 November 1982. See also Valenti (n 1) 21–22.
[62] S/PV.5884, 30 April 2008, 4(emphasis added). See also for a similar statement S/PV.5773, 31 October 2007, 2–3.
[63] S/PV.5884, 30 April 2008, 3.
[64] S/PV.6305, 30 April 2010, 2.

Nigeria,[65] Mexico,[66] New Zealand,[67] Venezuela,[68] and Angola[69] took overall similar positions. All of them expressed a concern over the gradual disappearance of any support for the right to self-determination of the Sahrawi people in favour of a solution acceptable to Morocco.

Starting from 2018, the Council used an even more straightforward language. For instance, the Council with Resolution 2414:

> Emphasize[d] the need to make progress toward a *realistic, practicable and enduring* political solution to the question of Western Sahara based on *compromise* …
> Call[ed] upon the parties to resume *negotiations* under the auspices of the Secretary-General *without preconditions* and in good faith … with a view to achieving a just, lasting, and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations, and noting the role and responsibilities of the parties in this respect.[70]

Resolutions 2440, 2468, and 2494 move along similar lines.[71] Again few States, namely Bolivia,[72] South Africa,[73] and Russia,[74] condemned the use of vague terms, such as 'realism' and 'compromise', that suggest a departure from principles of international law.

To sum up, already in the first phase of the conflict it is possible to detect a certain ambiguity in how the conflict was dealt with by the Council. For instance, there was a lack of a clear condemnation of Moroccan conduct. From a legal perspective, the Council refrained from determining that there had been a violation of international law, let alone a violation of a peremptory norm, and subsequently refrained from calling for non-recognition. While in this phase the Council did not do much to preserve the territorial integrity of Western Sahara, at least verbally it continued to support the *free* exercise of the right to self-determination of the

[65] ibid 3.
[66] ibid 5.
[67] S/PV.7684, 29 April 2016, 3.
[68] ibid 5.
[69] ibid 9.
[70] S/RES/2414, 27 April 2018, paras 2–3 (emphasis added).
[71] S/RES/2440, 31 October 2018, S/RES/2468, 30 April 2019, and S/RES/2494, 30 October 2019.
[72] S/PV.8387, 31 October 2018, 8.
[73] S/PV.8518, 30 April 2019, 3–4.
[74] ibid 5.

Sahrawi people as understood in a number of General Assembly resolutions and by the ICJ advisory opinion. In contrast, starting from the nineties, certain expressions that may be interpreted as a deviation from support to this right appeared in the relevant Council resolutions. Indeed, subsequently the Council called for a pragmatic solution and requested the parties to the conflict to accept a compromise. These elements were coupled with other elements that are not directly related to the legal aspects of the settlement of the conflict but that also suggest that the *status quo* is hardly sustainable and thus a compromise solution is welcomed. For instance the suffering of the people of Western Sahara, the potential instability in the region, and the obstruction of the economic development of the Maghreb region at large are mentioned.[75] In other cases the Council referred to the necessity to improve the quality of life of the Sahrawi people, to the aim to improve the human rights situation in Western Sahara, to the contribution to stability and security in the Sahel region, to jobs, growth and opportunities for all the peoples in the Sahel region, and to the enhancement, the promotion and the protection of human rights in Western Sahara and the Tindouf camps, including the freedoms of expression and association.[76] In this regard, the Council even praised the steps and initiatives undertaken by Morocco.[77] Starting from 2008, the explicit references to the holding of a referendum disappeared, the principle of self-determination in these resolutions is still reaffirmed but, arguably, as a mere rhetorical gesture since what the Council is endorsing is at odds with this principle. It follows that the Council has gradually acquiesced to the factual situation in Western Sahara and, implicitly, it is at least implicitly recognizing Moroccan claims over the territory notwithstanding the unlawfulness of the situation in question.

[75] S/RES/1495, 31 July 2003, preamble.
[76] S/RES/1920, 30 April 2010, preamble, S/RES/1979, 27 April 2011, preamble, S/RES/2099, 25 April 2013, preamble, S/RES/2414, 27 April 2018, preamble, and S/RES/2440, 31 October 2018, preamble.
[77] ibid.

1.6. The similar positions of the African Union and the European Union

The previous sections have focused on the response of the Security Council because it is this international body that has been dealing with this unlawful situation more extensively. However, it is worthwhile to note that the African Union and the European Union too at some point had to deal with the situation of Western Sahara. Significantly, their approaches have not departed from that of the Council. Not only both of the organizations explicitly supported its efforts aimed to the settlement of the conflict, but they also have implicitly recognized Moroccan territorial claims. The position of the African Union has shifted from the support of a solution in full compliance with international law to the support of a political solution. The European Union while verbally it still supports the duty of non-recognition and, more in general, the rights of the Sahrawi people, as a matter of fact, has acquiesced to the factual situation. The next few paragraphs shortly illustrate how the approach of these international organizations has changed in a way that reminds the shift that occurred within the Council.

As for the African Union, it is worthwhile to recall that Morocco in 1984 withdrew from the organization as a response to the admission of the Sahrawi Arab Democratic Republic (SADR). In 2017, Morocco formally asked to be readmitted to the African Union and, after a debate and a vote, was readmitted even if the situation of Western Sahara had not been settled in the meanwhile.[78] Notwithstanding the fact that many member States have recognized the SADR[79] and that South Africa and Algeria have consistently supported the Sahrawi cause,[80]

[78] Assembly/AU/Dec.639 (XXVIII), 30–31 January 2017.

[79] Rina Bassist, Morocco's pro-active diplomacy, two years after (re)joining the African Union (Moshe Dayan Center for Middle Eastern and African Studies, 21 March 2019) <https://dayan.org/content/moroccos-pro-active-diplomacy-two-years-after-rejoining-african-union>.

[80] For instance, Jacob Zuma, at that time President of South Africa, coming from the African Union Summit that decided to readmit Morocco said that: 'We have accepted the outcomes of the summit on the readmission of Morocco to promote unity and coherence within the continent. However, there were strong views from member states that by virtue of acceding to the Constitutive Act, Morocco should abide by all provisions of the Act and immediately resolve its relations with the Western Sahara to ensure territorial integrity between the two nations. The summit agreed on the view that the African Union should prioritize the impasse between the two countries to change the status quo, otherwise we would risk undermining the principles on which the African Union was constituted, as articulated in the Constitutive Act'. <www.dirco.gov.za/docs/2017/au0201.htm>. On another occasion he specified the following policy principles on Western Sahara: 'The principles of multilateralism and international legality in seeking a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara. The centrality of the African Union and United Nations in

Morocco obtained some meaningful results such as, first of all, to be readmitted to the organization. Roussellier notes in this regard:

> Morocco's new place at the AU serves its strategy of streamlining, if not sidetracking, the Western Sahara issue, so the dispute does not stand in the way of long-term regional interests. Indeed, its *de facto* rule of most of the Western Sahara territory is no longer an obstacle to Morocco's management of relations with the AU and most individual African states.[81]

Most importantly, thanks to a considerable diplomatic effort on the part of Morocco, between 2017 and 2019 the approach of the African Union has overall changed showing how the Western Sahara issue has been increasingly side-tracked. In 2017, besides welcoming the return of Morocco to the organization, it aligned itself with the Council and it requested 'the Chairpersons of the African Union and the AU Commission … to take appropriate measures … to support the efforts of the United Nations and encourage the parties … to cooperate in good faith'.[82] Further, in January 2018, the Assembly adopted the following decision:

> Expresse[d] its support for the re-launching of the negotiation process between Morocco and the … SADR with a view to reaching a durable solution consistent with letter and spirit of the relevant OAU/AU decisions and UN resolutions. The Assembly reiterate[d] its call on the two Member States, to engage, without pre-conditions, in direct and serious talks … for the holding of a free and fair referendum for the people of Western Sahara … The Assembly reiterate[d] its repeated calls … on the Crans Montana Forum, a Switzerland-based organization, to desist from convening its meetings in the city of Dakhla, in Western Sahara and appeale[d] to all Member States, African civil society organizations and other relevant actors to boycott the upcoming meeting scheduled to take place from 15 to 20 March 2018.[83]

This passage is significant in as much as, on the one hand, it clarified that negotiations shall lead to the holding of a free and fair self-determination referendum and, on the other hand, it

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the resolution of the conflict. The Constitutive Act of the African Union, in particular the principle of the sanctity of inherited colonial borders in Africa and the right of peoples of former colonial territories to self-determination and independence. Respect of international human rights law in the occupied territories, notably the right to freedom of association, assembly, movement and expression. Respect of international humanitarian law and support for the provision of humanitarian assistance to the Sahrawi refugees in a way that is predictable, sustainable and timely. An end to the illegal exploration and exploitation of the natural resources of Western Sahara in the illegally occupied territory and the discouragement of the involvement of foreign companies in such activities'. <www.dirco.gov.za/docs/speeches/2018/sisu0329.htm>.

[81] Jacques Roussellier, Morocco Brings the Western Sahara Issue Back to the AU (Carnegie Endowment for International Peace – Sada, 31 January 2017) <https://carnegieendowment.org/sada/67850>.

[82] Assembly/AU/Dec.653 (XXIX), 3–4 July 2017.

[83] Assembly/AU/Dec.677 (XXX), 28–29 January 2018.

upheld the policy of non-recognition by calling upon States to boycott an international conference held under the patronage of Morocco in a city located in the territory of Western Sahara.

However, starting from July of the same year the call for negotiations and for a just, lasting and mutually acceptable political solution has no longer been coupled with any reference to a referendum on self-determination.[84] Moreover, notwithstanding the fact that the Assembly decided to remain seized of the issue,[85] at the next ordinary session of the Assembly held in February 2019 the question of Western Sahara was not raised at all.

The European Union too aligned itself with the Security Council. The question of Western Sahara has routinely been the object of parliamentary questions. Recently, for instance, while answering to one of them Borrell, High Representative and Vice-President of the Commission, specified that:

> The EU recalls its support to the United Nations Secretary-General's efforts to achieve a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations. Democracy, the rule of law and human rights are essential components of the EU's foreign policy and of its dialogue with partner countries like Morocco, as notably reflected in the provisions of the EU-Morocco Association agreement. The EU trade policy is also conducted in the context and in line with the principles of the Union's external action.

This statement, and in particular its last paragraph, which reflects the idea that the European Union perceives itself as an ethical power, could suggest that the Union has implemented a *rigid* policy of non-recognition. However, the contrary is true so much so that some have talked of a 'cosmetic non-recognition'.[86] Here it is enough to highlight some of the features arising

[84] Assembly/AU/Dec.693 (XXXI), 1–2 July 2018.
[85] ibid.
[86] Valentina Azarova and Antal Berkes, 'The Commission's Proposals to Correct EU-Morocco Relations and the EU's Obligation not to Recognise as Lawful the 'Illegal Situation' in Western Sahara' (EJIL:Talk!, 13 July 2018) <www.ejiltalk.org/the-commissions-proposals-to-correct-eu-morocco-relations-and-the-eus-obligation-not-to-recognise-as-lawful-the-illegal-situation-in-western-sahara>.

from the approval of the EU–Morocco Agreement on agricultural, processed agricultural and fisheries products, which has been subject to an action of annulment before European courts.[87]

Some have contended that this agreement concluded in 2010 is at odds with the right to self-determination of the Sahrawi people, and more specifically with the principle of permanent sovereignty over natural resources, as well as with the duty of non-recognition. The gist of this agreement is to guarantee the reciprocal trade liberalization of abovementioned products. The problem is that this agreement is not specifying its geographical scope and limits itself to establish that it applies to products originating in Morocco and thus arguably to products originating in Western Sahara too, which prompted the Polisario Front to bring proceedings.

The General Court when addressing the substance of the case maintained that there is not an 'absolute prohibition' to conclude a treaty whose geographical scope includes Western Sahara.[88] The Polisario Front had put forward as many as 11 pleas including, most importantly, one concerning the 'incompatibility' of the contested decision with 'general international law' and, more specifically, the right to self-determination.[89] The Court clarified that:

> [N]othing in the contested decision or in the agreement the conclusion of which was approved by it, involves the recognition by the European Union of Moroccan claims over Western Sahara. The mere fact that the agreement at issue also applies to products exported from or imported into, the part of Western Sahara controlled by the Kingdom of Morocco does not amount to such recognition.[90]

[87] See Eva Kassoti, 'The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)' (2017) 2 European Papers 339 and Eva Kassoti, 'The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)' (2017) 2 European Papers 23.

[88] Judgement of the General Court (Eighth Chamber), Case T-512/12, 10 December 2015, para 215.

[89] ibid paras 200–211. Actually the 11th plea too is particularly relevant to this work since this plea was based on various provisions of the draft articles on the responsibility of international organisations for internationally wrongful acts, whose Article 42(2) amounts to Article 41(2) ARSIWA. However, the Court glossed over this plea and eventually dismissed it arguing that this plea overall repeats the argument raised in the 10th plea and that, in any case, the action brough before the Court is an action for annulment and not an action for damages. ibid paras 212–214.

[90] ibid para 202.

Subsequently, the Court maintained that 'nothing in the arguments or evidence put forward by the applicant proves the existence of a rule of customary international law which prohibits the conclusion of an international treaty which may be applied on a disputed territory'.[91]

As legal basis for this argument the Court cited the legal opinion prepared on the request of the Security Council by Hans Corell, UN Under-Secretary-General for Legal Affairs.[92] Its object was 'the legality … of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara'.[93] The Under-Secretary first clarified that Western Sahara is a non-self-governing territory[94], which makes relevant Article 73 of the UN Charter[95] as well as Assembly resolutions on self-determination relevant.[96] The opinion took into account both the case law of the ICJ and the practice of States. As for the former, it is observed that this question has not been dealt with expressly by the ICJ. However, it is significant that it did not find that mineral resource exploitation in non-self-governing territories is illegal.[97] As for the latter, it confirms that both administering powers and third States consider that mineral resource exploitation in non-self-governing territories is lawful to the extent that it is conducted for the benefit, on the behalf, or in consultation with the peoples of these territories.[98]

The opinion did not address the question as to who should verify how the exploitation of mineral resources is concretely conducted. The Court in this regard maintained that '[t]he

[91] ibid para 205.
[92] ibid paras 207–211.
[93] S/2002/161, 12 February 2002, Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, para 1. Cfr www.au.int/web/sites/default/files/newsevents/workingdocuments/13174-wd-legal_opinionof-the-auc-legal-counsel-on-the-legality-of-the-exploitation-and-exploration-by-foreign-entities-of-the-natural-resources-of-western-sahara.pdf> and <www.arso.org/LegalopinionUE200206.pdf >.
[94] ibid paras 5–8.
[95] The first paragraph of this article reads: 'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories'.
[96] S/2002/161, 12 February 2002, Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, paras 9–14.
[97] ibid paras 15–17, 23.
[98] Ibid paras 18–20, 24.

Council cannot merely conclude that it is for the Kingdom of Morocco to ensure that no exploitation of that nature takes place'.[99] On the contrary, it is the Council of the European Union that, by carrying out an examination of the relevant facts, shall ensure that an exploitation carried out to the detriment of the Sahrawi people is not taking place. It follows that the contested decision must be annulled insofar as it is applied to Western Sahara.[100]

The appeal decision overturned this judgment as regards both the admissibility and the substance. In the latter regard, the ECJ maintained that, by annulling the contested decision insofar as it is applied to the territory in question, the General Court was assuming that the Union, in absence of a specific territorial clause, considered that the EU–Morocco Agreement applied to that territory. The terms of this agreement should be interpreted in the light of the rules of interpretation drawn by the Vienna Convention of the Law of Treaties, of the principle of the relative effect of treaties, and of general international law, including most importantly the right to self-determination.[101] Interpreted accordingly Western Sahara, which has a 'separate and distinct status', does not fall within the territorial scope of the agreement in question.[102] As noted by the Council, according to the reasoning of the General Court, the application of the EU–Morocco agreement to Morocco was the prerequisite of the standing of the Front Polisario.[103] It follows that the Front Polisario does not have standing to seek annulment of the decision of the Council approving the EU–Morocco agreement.[104]

It is worthwhile to highlight a few aspects. The outcome of both judgements is unfavourable to the Sahrawi cause. It is true that the General Court upheld the action for annulment brought by the Polisario Front and that, on the other hand, the Court of Justice held that Morocco and Western Sahara are separate and distinct. However, as for the judgement

[99] Judgement of the General Court (Eighth Chamber), Case T-512/12, 10 December 2015, para 241.
[100] ibid para 227.
[101] Judgement of the Court (Grand Chamber), Case C-104/16 P, 21 December 2016, para 87.
[102] ibid para 92, 114–116.
[103] ibid para 78.
[104] ibid paras 133–134.

adopted by the General Court, the territory of Western Sahara is considered as a *disputed* area.[105] As noted above, however, the case of Western Sahara seems a casebook example of an unlawful situation so much so that the unlawfulness of Moroccan conduct has not seriously been called into question. The above-mentioned legal opinion, on which the Court relied, refrained from viewing the situation as unlawful, but it clearly contended that the legal status of Western Sahara is of a non-self-governing territory and it can be inferred that Morocco has not the status of administering power but only *de facto* administers this territory.[106]

The Court of Justice, on the other hand, did not take into account that the agreement in question was applied *de facto* also to the territory of Western Sahara. According to the Court, what really matters is that the European Union repeatedly reiterated the need to comply with the principles of self-determination and of the relative effect of treaties. It follows that the practice of extending the scope of the agreement in question to the products originating from Western Sahara is irrelevant. Kassoti in this regard observes that '[b]y circumventing the thorny question of the factual application of the agreements to Western Sahara, the Court effectively turned a blind eye to the EU's actual practice on the ground'.[107]

Subsequently, the Commission reacted to the latter judgement by adopting two proposals aimed to extend the scope of the EU–Morocco to the products originating from Western Sahara so that the practice of applying the trade preferences in question could continue not on a *de facto* basis but on a clearer legal basis. Again, it is possible to see an attempt to circumvent the duty of non-recognition. These proposals clarified that 'nothing in the Agreement implies that it [ie, the European Union] recognizes Morocco's sovereignty over

[105] See for instance Judgement of the General Court (Eighth Chamber), Case T-512/12, 10 December 2015, paras 117, 140.
[106] Supra n 93.
[107] Eva Kassoti (n 87) 41. The same goes for the case raised by Western Sahara Campaign UK, a ONG based in United Kingdom campaigning in favour of the Sahrawi cause. Overall, the ECJ in this case upheld the position adopted in the case C-104/16 P, see Judgement of the Court (Grand Chamber), Case C-266/16, 27 February 2018. See also Jed Odermatt, 'The EU's Economic Engagement with Western Sahara: The Front Polisario and Western Sahara Campaign UK Cases' in Antoine Duval and Eva Kassoti (eds), *The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspective* (Routledge 2020).

Western Sahara' and that '[t]he Union will also continue to step up its efforts in support of the process, initiated through the UN, working towards a peaceful resolution of the dispute'.[108] However, the meaning of 'not to recognize' is significantly narrowed. In fact, the Commission, citing the benefits for the development of Western Sahara's economy and for the protection of human rights as well as the consultation of the interested parties, concluded that the proposed agreement 'helps achieve the aims pursued by the Union under Article 21 of the Treaty on European Union'—that is the article that establishes that the European Union action on the international scene shall be guided inter alia by principles of the UN Charter and international law—and therefore the agreement should be signed.[109] Eventually, the Council adopted in July 2018 a decision in the sense of these proposals.[110]

The problems raised by these proposals, as well as by the relevant Council decision, are many, here it is enough to note a few aspects.[111] Firstly, the Commission relies totally on Article 73 of the UN Charter, which deals with non-self-governing-territories and with the obligations that States that assumed responsibilities for the administration of these territories have. It follows that the Commission is equating an international administration with an illegal form of control, thus circumventing the illegality of Moroccan conduct, as well as the obligations that

[108] Preambular disposition 10. See also preambular disposition 3 which says: 'the Union, which has not recognised Morocco's sovereignty over Western Sahara, has consistently reaffirmed its commitment to resolving the dispute in Western Sahara, a non-self-governing territory, large parts of which are currently administered by Morocco. It fully supports the efforts made by the United Nations Secretary-General and his personal envoy to help the parties reach a fair, lasting and mutually acceptable political solution that would ensure the self-determination of the people of Western Sahara under agreements aligned with the principles and objectives enshrined in the Charter of the United Nations, as set out in the Resolutions of the UN Security Council, in particular Resolutions 2152 (2014) and 2218 (2015)'. See Proposal for a Council Decision relating to the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part COM/2018/479 final, 11 June 2018, and Proposal for a Council Decision on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part COM/2018/481 final - 2018/0256 (NLE), 11 June 2018.

[109] Preambular dispositions 12 and 13.

[110] Council Decision (EU) 2018/1893, OJ L 310, 6.12.2018, 1–3, 16 July 2018. The conclusion of the agreement was approved on 28 January 2019 with Council Decision (EU) 2019/217, OJ L 34, 6.2.2019, 1–3.

[111] For a general comment, see Azarova and Berkes (n 86), Eva Kassoti, 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU–Morocco Association Agreement' (2019) 4 European Papers 307, and Pål Wrange, 'Western Sahara, the European Commission and the Politics of International Legal Argument' in Duval and Kassoti (n 107).

third States may have, which in fact are not addressed neither in the proposals neither in the explanatory memorandum preceding them.

Secondly, it is worthwhile to note that while some of the interested parties were reportedly consulted, and they were in favour of extending the scope of the agreement in question to Western Sahara, the Polisario Front expressed a negative view.[112] Besides the fact that the Polisario Front is considered as the international representative of the Sahrawi people, it is noteworthy that the Commission emphasized that the negative view of the Polisario Front was not due to the fact that such an extension would have not benefitted the Sahrawi people, but it was due to the fear that it would have consolidated the status quo, that is precisely the rationale of a policy of non-recognition!

Thirdly, the reasons put forward by the Commission that militate in favour of the extension in question seem problematic. In accordance with what said above on the reliance on Article 73 of the UN Charter, and also in accordance with the way in which the Commission dismissed the view of the Polisario Front, the Commission did not address whether there is with respect to Western Sahara a mandatory policy of non-recognition and, more specifically, did not address whether an agreement as the one proposed falls within the scope of the duty of non-recognition or conversely falls within the scope of the Namibia exception.

Here the assumption is that the situation is unlawful, and that this unlawful situation amounts to a situation in regard to which Article 41(2) ARSIWA applies. Admittedly, from the position taken by the Commission no unlawfulness can be inferred. Ryngaert and Fransen in this regard hold that 'from the flawed legal characterisation of Western Saharan territory as disputed territory, the GC derived that under international law there would be no absolute prohibition of concluding a trade agreement that might be applied to such a territory'.[113] As for

[112] Later as many as 93 of these interested parties have denied having been consulted in this regard. See the letter published on the website of the Western Sahara Resource Watch entitled 'EU–Morocco Trade Agreement on Western Sahara: The Commission Ignoring the Court, Misleading Parliament and member States and Undermining the UN', 2 July 2018 <www.wsrw.org/files/dated/2018-07-03/02072018-sahrcivilsocietyappeal.pdf>.

[113] Cedric Ryngaert and Rutger Fransen, 'EU Extraterritorial Obligations with Respect to Trade with Occupied Territories: Reflections after the Case of Front Polisario before EU Courts' (2018) Europe and the World: A Law

the Court of Justice it did contend that the agreement cannot be interpreted as applying to Western Sahara, but it refused to take into account that in the practice the agreement was interpreted as applying to this territory. From another perspective, it does not seem that the Commission is referring to the Namibia exception as a benchmark. In contrast, it seems that the Commission addressed in a rather general way the impact of the extension of the territorial scope of the agreement in question to Western Sahara can produce on human rights and on the economic and commercial development of this area. Nonetheless, some have inquired whether the proposals and the relevant council decision are compatible with the Namibia exception.[114]

It was noted above that the *Namibia* advisory opinion remains the *locus classicus* with regards to the content of a mandatory policy of non-recognition. This opinion clarifies that non-recognition is not merely formal, but also that it does not prohibit each and every dealing with the wrongdoer. It is noteworthy that, talking of the international conventions and of the acts that fall within the scope of the Namibia exception, the Court makes a general statement followed by an example so to provide a clarification on the scope of the exception itself. As for the international conventions, it refers to those agreements the non-performance of which may adversely affect the peoples living in the illegal entity such as those having humanitarian character; as for the acts, it refers to those acts whose effect can be ignored only to the detriment of the peoples living in the illegal entity such as the acts issued by the register office. Thus it seems that there shall be a direct causal link between non-recognition and the harm to the peoples living in the territory of the unrecognized political entity. In this regard, arguably, international trade is different from international cooperation and has nothing to do with the registration of acts such as births, deaths, and marriages certificates.

Review 1, 6. Ryngaert and Fransen actually analyse the compatibility of the European Union conduct taking into account the duty of non-recognition but also the legal regime provided by occupation law.

[114] This question had been previously raised in the opinion of Advocate General Wathelet, Case C-266/16, 10 January 2018, paras 288–292, who excluded the relevance of the Namibia exception. See also Azarova and Berkes (n 86) and more in general on the scope of the Namibia exception and on its interpretation Yaʿel Ronen, *Transition from Illegal Regimes under International Law* (Cambridge University Press 2011) 83–100.

Conversely, to establish trade relations with a State concerning products originating from an unlawful situation in the sense of Article 41(2) ARSIWA may well amount to an implicit recognition given that it falls rather neatly in the scope of the general rule.[115] *Mutatis mutandis*, the *de facto* application of the agreement in question to Western Sahara is at odds with the duty of non-recognition given that it hardly falls within the Namibia exception.

Overall, it seems that the approach of the Security Council has influenced the African Union as well as the European Union or at least is not dissimilar from the approach subsequently chosen by these international organizations. On the one hand, all these organizations support verbally the right to self-determination of the Sahrawi people and a policy of collective non-recognition, but, on the other hand, non-recognition becomes merely cosmetic and the right to self-determination is trumped by considerations pertaining broadly to the advantages resulting from the settlement of the conflict.

1.7. The US recognition of Moroccan sovereignty over the Western Sahara

On 10 and 11 December 2020, two remarkably important events occurred that, at first glance, may seem unrelated. On the one hand, on the initiative of the Trump administration, Morocco and Israel signed a normalization agreement.[116] On the other hand, President Trump announced that the United States would have recognized Moroccan sovereignty over Western Sahara.[117] Apparently, the American recognition of Western Sahara as an integral part of Morocco has

[115] In its advisory opinion the ICJ holds that the duty of non-recognition entails that States are 'under obligation to abstain from entering into treaty relations with [the occupying power] in all cases in which [it] purports to act on behalf of or concerning [the occupied territory]'. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, para 122. Moreover, according to the ICJ in that opinion, the duty of non-recognition imposes 'upon Member States the obligation to abstain from entering into economic and other forms of relationship or dealings with [the occupying power] on behalf of or concerning [the occupied territory] which may entrench its authority over the Territory'. See ibid para 124.

[116] 'President Donald J. Trump Has Brokered Peace Between Israel and the Kingdom of Morocco', 11 December 2020 <www.whitehouse.gov/briefings-statements/president-donald-j-trump-brokered-peace-israel-kingdom-morocco>.

[117] Proclamation on Recognizing the Sovereignty of the Kingdom of Morocco over the Western Sahara, 10 December 2020 <www.whitehouse.gov/presidential-actions/proclamation-recognizing-sovereignty-kingdom-morocco-western-sahara>

been quite literally traded with the Moroccan recognition of Israel and with the consequent restoration of diplomatic relations between these two States.

A few aspects of the American recognition of Moroccan sovereignty over Western Sahara are noteworthy. First, the wording of the presidential proclamation clearly echoes the wording of recent Security Council resolutions on Western Sahara. Not only the same peculiar expressions are used, but also the same underlying rationales are repeated. More specifically, the Moroccan autonomy plan is regarded as credible and realistic, and it is considered as the basis for a just and lasting solution of the Western Sahara question. Conversely, an independent Western Sahara is not considered as a feasible option. According to the proclamation, the United States supports the Moroccan plan, it encourages the parties to engage in discussions using this plan as the 'only framework to negotiate a mutually acceptable solution', and it recognizes Moroccan sovereignty over the territory in question.[118]

While the wording of the proclamation reminds the wording of Council resolutions, the American administration makes explicit the link between the Moroccan plan and Moroccan sovereignty, link that was only implicit in those Council resolutions. It follows that this one may be one of the last controversial decisions taken by the Trump presidency, but nonetheless it can be situated within a precise trend pre-existing within the organized international community. Actually, other States have already supported the territorial integrity of Morocco even if they refrained from expressly recognizing its sovereignty over the territory in question.[119]

Second, while other decisions adopted by the Trump administration were met with harsh criticisms, this decision was mostly unchallenged. More precisely, it generated political attention at home, and indeed some congressmen have protested,[120] but on the international

[118] ibid.
[119] Supra n 2. On the mostly unofficial support of the Arab league to Morocco, see Belkacem Iratni, 'The Arab League and the Western Sahara Conflict: The Politics of a Sheer Neglect' (2018) 29 Africana Studia 103.
[120] 'US recognised Morocco's claim to Western Sahara. Now what?', Al Jazeera, 11 December 2020 <www.aljazeera.com/news/2020/12/11/us-recognised-moroccos-claim-to-western-sahara-now-what>.

plane it did not attract particular criticisms. The Security Council held a closed-door meeting on 21 December 2020. The Spokesman of the Secretary-General merely stated that the Secretary-General's position remains unchanged in the sense that he remains convinced that a solution is possible in accordance with relevant Council resolutions.[121] The same, reportedly, goes for the European Union. The Spokesperson for Foreign Affairs and Security Policy of the European Union held that: 'The EU regards Western Sahara as a non-self-governing territory in the sense of the U.N., for which a dedicated U.N. process is ongoing to determine its final status and which the EU supports'.[122] The spokesperson continued by stating that the Union supports the 'resumption of a political process with the aim to achieve a just, lasting and mutually acceptable political solution, based on compromise and which will provide for the self-determination of the people of Western Sahara'.[123] The same goes for the African Union, whose position remains overall unchanged.[124] All of these are rather mild statements compared to the importance of the American move.

The same goes for individual States. Actually, many States simply refrained to take any specific position. The States that took a position eventually issued similarly worded statements. Spanish and Moroccan authorities should have held a high-level meeting in Morocco on the same day that President Trump adopted the presidential proclamation in question. The meeting was postponed apparently for other reasons even if some have observed that probably the postponement had something to do with the American recognition. Spain in any case reaffirmed that the Spanish position on the matter does not change and that it continues to support the UN

[121] Daily Press Briefing by the Office of the Spokesperson for the Secretary-General, 11 December 2020 <www.un.org/press/en/2020/db201211.doc.htm>.
[122] EU stresses UN peace process after US U-turn on Western Sahara, 10 December 2020 <www.politico.eu/article/eu-stresses-un-peace-process-after-us-u-turn-on-western-sahara>.
[123] ibid.
[124] The spokesperson for the AU Commission Chairperson made a tweet stating that the position of the African Union has not changed <https://twitter.com/EbbaKalondo/status/1337403438070685698>. Apparently, a first version of the tweet was referring also to the necessity to hold a referendum on self-determination. See also Western Sahara Consultations, 19 December 2020 <www.securitycouncilreport.org/whatsinblue/2020/12/western-sahara-consultations-7.php>.

process aimed to reach a mutually acceptable solution in accordance with Council resolutions.[125] France[126] and the United Kingdom[127] adopted a similar stance.

In contrast many Arab States, admittedly States allied with the United States and namely Bahrain,[128] Jordan,[129] Kuwait,[130] Oman,[131] Qatar,[132] and the United Arab Emirates,[133] reaffirmed their support for the Moroccan autonomy plan and for Moroccan territorial integrity, some of them even *before* the presidential proclamation in question. Bahrain and Jordan even announced the intention to open a consulate in Laayoune, which is the largest city in Western Sahara.[134] The Supreme Council of the Gulf Cooperation Council, which includes in addition to some of the already mentioned States also Saudi Arabia, dedicated a part of the closing statement of its 41st summit to Western Sahara and, more specifically, it 'confirmed its firm positions and decisions in support of Morocco's sovereignty and territorial integrity'.[135] Finally, a ministerial conference in support of the Moroccan autonomy plan was held after the presidential proclamation in question and reportedly as many as forty States participated to this conference. The Co-Chairs recalled the presidential proclamation, considered it as providing the necessary

[125] Joint statement by Spain and Morocco on high-level meeting, 10 December 2020 <www.exteriores.gob.es/Portal/en/SalaDePrensa/Comunicados/Paginas/2020_COMUNICADOS/20201210_COMU093.aspx>. See also 'Spain Warns US that non-UN Western Sahara Solution Cannot Be Imposed' (The Telegraph, 11 December 2020) <www.telegraph.co.uk/news/2020/12/11/spain-warns-us-non-un-western-sahara-solution-cannot-imposed>.

[126] See the press briefing with French Foreign Minister, 11 December 2020 <www.diplomatie.gouv.fr/fr/dossiers-pays/israel-territoires-palestiniens/processus-de-paix/evenements/article/maroc-israel-q-r-extrait-du-point-de-presse-11-12-20>

[127] See the statement adopted by Foreign Secretary Raab on 11 December 2020 <www.gov.uk/government/news/israel-and-morocco-uk-responds-to-announcement-of-normalisation>.

[128] See the statement adopted on 30 December 2020 <www.mofa.gov.bh/Default.aspx?tabid=7824&language=en-US&ItemId=15192>. See also the statement adopted on 27 November 2020 <www.mofa.gov.bh/Default.aspx?tabid=7824&language=en-US&ItemId=14847>.

[129] See the statement adopted on 12 November 2020 <www.reuters.com/article/us-morocco-jordan-western-sahara/jordan-to-open-consulate-in-western-sahara-amid-dispute-idUSKBN27Z30U>.

[130] See the statement adopted on 16 January 2021 <www.kuna.net.kw/ArticleDetails.aspx?id=2952833&language=en>.

[131] See the statement adopted on 14 November 2021 <https://fm.gov.om/oman-offers-support-to-morocco>.

[132] See the statement adopted on 13 November 2020 <www.mofa.gov.qa/en/statements/qatar-supports-the-kingdom-of-morocco's-move-on-karakat-border-crossing>.

[133] See the statement adopted on 10 December 2020 <www.mofaic.gov.ae/en/MediaHub/News/2020/12/10/10-12-2020-UAE-Decision>.

[134] Supra nn 128 and 129.

[135] 'Transcript: Closing statement of 41st GCC summit', 7 January 2021 <www.aljazeera.com/news/2021/1/7/closing-statement-of-41st-gulf-cooperation-council>.

guidance for advancing the peace-process, and highlighted the decision of twenty UN member States to open consulates in Laâyoune and Dakhla.[136]

In contrast only few States took an opposite stance. Namibia addressed a letter to the President of the Security Council in which there is a clear reference to the duty of non-recognition of situations created by a serious breach of the basic principles of international law.[137] The Foreign Minister of Algeria held that the United States move has no legal effect since is at odds with previous Council resolutions and clarified that '[t]he proclamation would undermine the de-escalation efforts made at all levels in order to pave the way for launching a real political process'.[138] South Africa held that 'any recognition of Western Sahara as part of Morocco is tantamount to recognising illegality as such recognition is incompatible with international law' and added that 'decisions contrary to multilateral collective decisions' are at odds with UN resolutions as well as with the Constitutive Act of the African Union and its decisions. Russia refrained from explicitly referring to the doctrine of non-recognition but clarified that the proclamation is considered as 'yet another unilateral step that threatens regional stability'. More importantly, the statement goes on by stating that:

> This decision by the Trump administration will undermine the generally recognised international legal framework of the Settlement Plan for the Western Sahara, which provides for determining the final status of this territory by way of a referendum. This new US position can seriously impede UN efforts to promote a settlement, exacerbate relations between the directly involved parties, and provoke a new round of armed violence in the Sahara-Sahel zone. Our principled approach to the Western Sahara problem remains unchanged. We believe that a lasting and just solution is possible based only on UN Security Council resolutions within the framework of the procedures consistent with the principles and purposes of the UN Charter. The path to this lies through resuming direct talks between Morocco and the Polisario Front with UN mediation.[139]

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[136] See the text of the Chair's Summary, 15 January 2021 <https://ma.usembassy.gov/the-ministerial-conference-in-support-of-the-autonomy-initiative>. See also 'Morocco wins growing international support for autonomy as 'Sole' solution to Sahara issue', 15 January 2021 <https://northafricapost.com/46866-morocco-wins-growing-international-support-for-autonomy-as-sole-solution-to-sahara-issue.html>.

[137] S/2020/1268, 21 December 2020, Annex (Letter dated 21 December 2020 from the Permanent Representative of Namibia to the United Nations addressed to the President of the Security Council).

[138] 'Algeria rejects Trump's stance on Western Sahara', 12 December 2020 <www.reuters.com/article/algeria-westernsahara-usa/algeria-rejects-trumps-stance-on-western-sahara-idUSKBN28M0MZ>.

[139] See the press release concerning Moroccan–Israeli normalisation and US recognition of Morocco's sovereignty over Western Sahara, 12 December 2020 <www.mid.ru/en/web/guest/maps/us/-/asset_publisher/unVXBbj4Z6e8/content/id/4483435>.

This statement is noteworthy because it revives the position according to which a referendum is necessary and because it links this thesis to previous Council resolutions. On the other hand, it is striking that, as far as the present writer knows, no other State took a similar position. It could be speculated that perhaps States are waiting to see to what extent the new United States administration will confirm such a proclamation.[140] However, even if President Biden will back off, it is hard to imagine that the all the States that welcomed the American move will back off too. Indeed, it seems significant that only few States openly criticized this move, but perhaps it is even more significant that no State criticized the initiatives of Bahrain, Jordan, Kuwait, Oman, Saudi-Arabia, Qatar, and the United Arab Emirates, which suggests the degree of consolidation of the unlawful situation and confirms what argued on the base of the practice of the Security Council, of the African Union, and of the European Union.

2. The settlement of the Israeli–Palestinian conflict and the role of international law

2.1. Two rival approaches to the settlement of the conflict and the Trump administration

For many reasons the Israeli–Palestinian conflict is the intractable conflict *par excellence*, here it is worthwhile to underline that one of the features that has probably contributed to its intractability is the centrality of both international law and justice. As for the centrality of the former, it should be noted that the conflict itself can be seen as a 'by-product' of international law. Israel draws its legitimacy as a State from the UN Partition Plan approved with General Assembly Resolution 181 (II) that provided a legal basis for the statehood of Israel. However, at the same time, the plan acknowledged that the Palestinian people constitutes a national

[140] As of May 2021, this does not seem the case. See 'Biden reportedly won't reverse Trump recognition of Western Sahara as Morocco's', The Times of Israel, 1 May 2021 <www.timesofisrael.com/biden-reportedly-wont-reverse-trump-recognition-of-western-sahara-as-moroccos>.

community with historical attachment to the territory in question.[141] Thus, the plan recommended the creation of two independent States—ie, a Jewish and an Arab State—as well as the establishment of a special international regime for Jerusalem. As is well known, the plan has never been implemented, but its core concept—the two-State solution—has never lost its relevance.

More in general, Kearney notes that 'the various claims to territory, as well as the actions and legitimacy of various State, non-State and international actors, has [sic] revolved around international law' and that '[n]o other conflict has been the subject of as many resolutions before the various UN bodies, nor as many academic papers and debate'.[142] Thus it can be said that international law has shaped the conflict, but also the contrary is true. In fact, this conflict has contributed to the progressive development of many norms of international law.[143] More specifically, this conflict has posed a series of relatively new questions on different fields of international law such as the application of international humanitarian law to a prolonged occupation[144] and the use of natural resources in an occupied territory.[145]

Against this background many have called into question the effectiveness of international law in relation to this conflict as well as to its settlement. The fact itself that the

[141] On the partition plan see John Strawson, *Partitioning Palestine: Legal Fundamentalism in the Palestinian-Israeli Conflict* (Pluto Press 2010) 105ff and John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press 2010) 88ff. In general, under the Mandate system, the mandatory power was obligated by Covenant Article 22(4) to bring the mandate to independence. However, it is also worthwhile to note that the Preamble to the Mandate for Palestine states that 'the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country'.

[142] Michael Kearney, 'Lawfare, Legitimacy and Resistence: The Weak and the Law' (2010) XVI The Palestine Yearbook of International Law 79, 94.

[143] See for instance Michael Lynk, 'The ABC of the OPT: Mobilizing the Untapped Capacity of International Law' (Verfassungsblog, 15 July 2019) <https://verfassungsblog.de/the-abc-of-the-opt-mobilizing-the-untapped-capacity-of-international-law>.

[144] See for instance Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84 American Journal of International Law 44 and Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 American Journal of International Law 580.

[145] Iain Scobbie, 'Natural Resources and Belligerent Occupation: Perspectives from International Humanitarian and Human Rights Law' in Susan M Akram, Michael Dumper, Michael Lynk, and Iain Scobbie (eds), *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (Routledge 2010).

role of international law has been routinely called into question suggests that international law has disappointed the expectations of those who believe that it can shape the behaviour of States. D'Aspremont connects this feeling of disappointment with the observation that rules of international law have barely been observed, which stands in contrast with the idea that international law can be a 'vector for justice'.[146][147]

This observation leads us to the centrality of justice. In this regard, Quigley notes that each of the opposing parties justify its territorial claims not only in terms of international law, but also, more fundamentally, in terms of justice.[148] This should not come as a surprise given the ethnic, national, historical, and religious divide between the two opposing parties. In addition to this, it is important to underline the feeling of distrust connected with a history of dispossession for the Palestinians and with a history of extermination for Jewish. Because of these tragic histories, Mead observes that 'many people on both sides feel profoundly that a compromise would be morally wrong'.[149]

The centrality of both international law and justice, explains why many scholars have opted for a rights-based approach, which can be roughly defined as the need to take into account legal and justice considerations in the settlement of a given conflict. In other words, the centrality of such elements to a given conflict makes it necessary to take them into account also in its settlement. Two important assumptions underpin this position—that international law prescribes a specific solution to the settlement of these conflicts, which is characterised by its

[146] Jean D'Aspremont, 'The International Legal Scholar in Palestine: Hurling Stones under the Guise of Legal Forms?' (2013) 14 Melbourne Journal of International Law 1, 2ff. In any case, D'Aspremont adds that: '[M]any participants in the conflict decided to revise their methods of combat by bringing the struggle under the umbrella of international law … International law has accordingly been seen as a narrative providing legitimacy and authority to various claims heard in the context of the Israeli–Palestinian conflict. In the same vein, it was also expected that fighting on the side of (and on the basis of) international law would help convince third parties … that one's fight was just and legitimate'.

[147] ibid 2.

[148] John Quigley, 'Justice in the Palestine-Israel Conflict' (Center for Law, Policy and Social Science Working Paper Series No. 14, August 2004) 1.

[149] Walter R Mead, 'Change They Can Believe In: To Make Israel Safe, Give Palestinians Their Due' (2009) 88 Foreign Affairs 59, 60.

justness. Provided that these assumptions are well-founded, it follows that such a solution may have a better chance of enduring over time than another one based on mere political expediency.

Such an approach is exemplified by the following statement by Michael Lynk, Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967:

> Without the framework of international law, any peace plan … will crash upon the shoals of political realism … Prior plans for Middle East peace over the past five decades have all failed, in large part because they did not seriously insist upon a rights-based approach to peace between Israelis and Palestinians.[150]

The key expression in the text above is 'rights-based approach', which implies that any attempt to settle the conflict in question shall take into account the norms of international law as well as the relevant UN resolutions. It follows that this approach focuses on correctly interpreting these legal instruments and, consequently, on identifying the rights and duties of the opposing parties. In this regard, the Committee on the Exercise of the Inalienable Rights of the Palestinian People bluntly held that the conflict in question 'is not … between two equal parties over disputed territory. It is a conflict emanating from one State occupying, colonizing and annexing the territory of another State under oppressive, inhumane and discriminatory conditions'.[151]

Dajani and Lovatt, addressing the role of Europe, hold that Europe, in order to promote peace in the Israeli–Palestinian conflict should use international law as its 'guiding star'.[152] Boatman and Martin refer to the necessity to resort to a 'new rights-based, human centred and principled approach, grounded in international law'.[153] Rempel and Prettitore note that the term rights-based approach 'refers to a negotiated political settlement governed by international legal

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[150] Press release by the United Nations High Commissioner for Human Rights, 28 June 2019 <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24760&LangID=E>.
[151] A/74/35, 16 August 2019, 20.
[152] Omar Dajani and Hugo Lovatt, *Rethinking Olso: How Europe Can Promote Peace in Israel-Palestine* (ECFR 2017) 10. They add that : 'Unilateral attempts to obscure, or change outright, the legal status of the OPT must continue to be met with firm and consistent reaffirmation of the long-established normative framework for managing and resolving armed conflicts in international law. That framework has three pillars: the inadmissibility of the acquisition of territory by force and of the illegal use of force to maintain a situation of occupation for that purpose … the law of belligerent occupation under international humanitarian law … and the law governing the self-determination of peoples'.
[153] OXFAM, *From Failed to Fair: Learning from the Oslo Accords to Foster a New Rights-Based Approach to Peace for Palestinians and Israelis* (Oxfam GB 2019) 5.

standards, procedures, and mechanisms that protects the rights of all parties to the conflict'.[154] Bisharat holds that such an approach 'is one that is normatively based on international law, including international human rights standards, international humanitarian law, and general principles of public international law'.[155]

Two aspects are noteworthy. First, it is not clear what does it mean precisely that the human rights-approach is, for instance, *based on* international law. Does the expression 'to be based on' mean that international law is the starting point of negotiations from which it is possible to depart, at least to a certain extent? Or does it mean that the settlement shall be in absolute compliance with international law?

It is also worthwhile to note that the scholars who adopted such an approach have held that legal and justice considerations clearly support Palestinian claims. Quigley, in this regard, argues that 'the international community must understand where the *true* claims to justice lie, and must make policy to recognize those claims'[156] and, talking of the so-called final status issues—namely, the borders between Israel and Palestine, the fate of the settlements in the Occupied Palestinian Territories, the fate of refugees displaced during the hostilities of 1949 and 1967, and finally the borders and the status of Jerusalem—he affirms that '[t]here is a key difference between the potential demands of disaffected Palestinians and disaffected Israelis, namely, that the demands of the former would be consistent with legal requirements, whereas the demands of the latter would not'.[157]

If such an approach is taken to its extreme, then to be based on international law means absolute compliance with international law. In turn it follows that there is nothing to be really negotiated given that international law provides already for all the answers needed or, more

[154] Terry Rempel and Paul Prettitore, 'Restitution and Compensation for Palestinian Refugees and Displaced Persons: Principles, Practical Considerations, and Compliance' in Susan M Akram and others, *International Law and the Israeli–Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (Routledge 2010) 95.
[155] George Bisharat, 'Maximising Rights: The One-State Solution to the Palestinian-Israeli Conflict' in Akram and others (n 154) 229.
[156] Quigley (n 148) 14.
[157] John Quigley, 'The Role of Law in a Palestinian-Israeli Accommodation' (1999) 31 Case Western Reserve Journal of International Law 351, 375.

precisely, negotiations cannot regard the outcomes of the conflict, which are predetermined, but rather regard the process aimed to achieve these outcomes.[158] It follows that there could not be any negotiation between Israelis and Palestinians whose proposed outcome is not fully consistent with the solution prescribed by international law and by UN resolutions. Concretely, the only thing to do is to assign and apportion the rights and duties of the opposing parties on the basis of the applicable legal framework and to draw the appropriate consequences. For the proponents of this approach, this assumption usually entails characterizing Israeli conduct as unlawful, not recognizing as legal the factual situations brought about by this unlawful conduct, and implementing positive actions aimed to end the relevant unlawful factual situations.

In contrast to this approach, the way in which the Trump administration has tackled this conflict seems to be characterised by the will to side-line international law as a relevant framework for its settlement. The very idea that international law predetermines a certain substantive outcome of the conflict in question also explains the position of those who regard international law as the major obstacle to its settlement. In fact, this predetermination adds an element of inflexibility in negotiations because the specific substantive outcome regards precisely the most sensitive friction points between Israelis and Palestinians. The United States Secretary of State Michael Pompeo argued in connection with the decision to characterize as lawful the Israeli settlements in the West Bank that:

> The hard truth is there will never be a judicial resolution to the conflict, and arguments about who is right and wrong as a matter of international law will not bring peace. This is a complex political problem that can only be solved by negotiations between the Israelis and the Palestinians.[159]

[158] There is a third approach which consists of a critique 'against the law' in the sense that international law is considered as intrinsically biased in favour of those who detain power and thus not it cannot be a 'weapon' for Palestinians who are seen as dispossessed. See Orna Ben Naftali, Michael Sfard, and Hedi Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018) 1–25 and Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford University Press, 2019) 1–22.

[159] Remarks to the press by Secretary of State Pompeo, 18 November 2019 <www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press>.

The idea that the settlement of the Israeli–Palestinian conflict is a political problem rather than a legal problem underlies President Trump's peace plan for the Middle East too.[160] In outlining its guiding principles, the plan emphasizes that the plethora of relevant UN resolutions is part of the problem since it 'enabled political leaders to avoid addressing the complexities of this conflict rather than enabling a realistic path to peace'.[161] On the contrary, the plan 'presents a package of compromises that both sides should consider'.[162] More specifically, the plan, taking into accounts today's realities, 'provides the Palestinians, who do not yet have a state, with a path to a dignified national life, respect, security and economic opportunity and, at the same time, safeguards Israel's security'.[163] Thus, the premise of the plan is that the approach undertaken by the UN and by the international community at large is a narrowly legalistic approach that is characterized by rigidity. In contrast, what is needed is a more nuanced approach that fully acknowledges the complexities of the factual situation.

During the four-year term of President Trump's administration, several decisions have been taken that directly affected the conflict in question.[164] On 6 December 2017, the relocation of the United States embassy from Tel Aviv to Jerusalem and the recognition of the latter as the capital of Israel was announced. The text of the presidential proclamation reads as follows:

> The foreign policy of the United States is grounded in principled realism, which begins with an honest acknowledgment of plain facts. With respect to the State of Israel, that requires officially recognizing Jerusalem as its capital and relocating the United States Embassy to Israel to Jerusalem … Today's actions—recognizing Jerusalem as Israel's capital and announcing the relocation of our embassy—do not reflect a departure from the strong commitment of the United States to facilitating a lasting peace agreement. The United States continues to take no position on any final status issues. The

[160] Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People, 28 January 2020. The President Trump's peace plan is available at <www.whitehouse.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf>.
[161] ibid 5.
[162] ibid.
[163] ibid 3.
[164] Arguably, the Trump administration took other decisions detrimental to Palestinians other than the one listed below, such as the closure of the PLO office on Washington and the curtailments of United States funding to Palestinian-related aid. See Jean Galbraith, 'United States Recognizes Israeli Sovereignty Over the Golan Heights' (2019) 113 American Journal of International Law 600, 618–619.

> specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties.[165]

Two aspects of this proclamation are noteworthy. On the one hand, President Trump underlined that the foreign policy of the United States is guided by pragmatism, which explains the reasons why recognizing Jerusalem as the capital of Israel and why to relocate the embassy. On the other hand, the statement above clarifies that the reversal of existing United States policy on Jerusalem does not affect the final status and borders of Jerusalem, which, on the contrary, is to be negotiated by the opposing parties. Arguably, it could be held that this specification witnesses the will not to deviate excessively from the policy undertaken by the rest of the international community, which has never recognized Jerusalem, *rectius* the whole of Jerusalem, as the capital of Israel.[166] In addition to that, in another passage the text of the proclamation recalls also the 1995 Jerusalem Embassy Act, which was urging the United States to recognize Jerusalem as Israel's capital and to relocate there the United States Embassy, whose implementation had been routinely delayed on security grounds until 2017.[167]

Furthermore, on 25 March 2019, President Trump issued a presidential proclamation by means of which the United States recognized Israeli sovereignty over the Golan Heights. This act of recognition does not concern the Israeli–Palestinian conflict, but it is still part of the same set of initiatives undertaken in the Middle East. The text of the proclamation clarifies that the main reason behind this decision was Israel's security. The relevant part of the text reads:

> The State of Israel took control of the Golan Heights in 1967 to safeguard its security from external threats. Today, aggressive acts by Iran and terrorist groups, including Hizballah, in southern Syria continue to make the Golan Heights a potential launching ground for attacks on Israel. Any possible future

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[165] The full text of the Presidential Proclamation is available at <www.whitehouse.gov/presidential-actions/presidential-proclamation-recognizing-jerusalem-capital-state-israel-relocating-united-states-embassy-israel-jerusalem>.

[166] Russia and Australia for instance consider West Jerusalem as the capital of Israel. See respectively <www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2717182> and <www.dfat.gov.au/geo/israel/Pages/israel-country-brief>. For the position of States on Jerusalem, see Marco Pertile and Sondra Faccio, 'What We Talk When We Talk about Jerusalem: The Duty of Non-Recognition and the Prospects for Peace after the US Embassy Relocation to the Holy City' (2020) 33 Leiden Journal of International Law 621, 628–635, 642–643.

[167] Jean Galbraith (ed), 'President Trump Recognizes Jerusalem as the Capital of Israel' (2018) 112 American Journal of International Law 306, 307.

> peace agreement in the region must account for Israel's need to protect itself from Syria and other regional threats.[168]

This decision too reversed United States' policy on the question and the United States became the first, and at the moment, the only State to recognize Israeli sovereignty over the territory the latter has held since 1967. In occasion of the signing of the proclamation, neither President Trump nor Prime Minister of Israel Netanyahu made a precise legal argument for the establishment and maintenance of Israeli sovereignty over the territory in question, even if their words[169] to a certain extent do echo the argument that some have raised on the admissibility of annexation of territory acquired in the lawful exercise of self-defence.[170] It should be noted that in this presidential proclamation, in contrast to the one mentioned above, there is not a clause that limits somehow the scope of the proclamation.

Afterwards, on 18 November 2019, the United States administration announced the decision to characterize the establishment of Israeli settlements in the West Bank as lawful. Secretary of State Pompeo made the following observations:

> First, look, we recognize that … the legal conclusions relating to individual settlements must depend on an assessment of specific facts and circumstances on the ground. Therefore, the United States Government is expressing no view on the legal status of any individual settlement … Second, we are not addressing or prejudging the ultimate status of the West Bank. This is for the Israelis and the Palestinians to negotiate. International law does not compel a particular outcome, nor create any legal obstacle to a negotiated resolution. Third, the conclusion that we will no longer recognize Israeli settlements as per se inconsistent with international law is based on the unique facts, history, and circumstances presented by the establishment of civilian settlements in the West Bank … And finally – finally – calling the establishment of civilian settlements inconsistent with international law hasn't worked. It hasn't advanced the cause of peace. The hard truth is there will never be a judicial resolution to the conflict, and arguments about who is right and wrong as a matter of international law will not bring

[168] The full text of the proclamation is available at: <www.whitehouse.gov/presidential-actions/proclamation-recognizing-golan-heights-part-state-israel>.

[169] President Trump and Prime Minister Netanyahu's remarks are available at <www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-presidential-proclamation-recognizing-israels-sovereign-right-golan-heights>.

[170] For this argument, see Stephen M Schwebel, 'What Weight to Conquest?' (1970) 64 American Journal of International Law 344, 346–347. See also Eugene Kontorovich, 'Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal' (2015) 16 Chinese Journal of International Law 127, 139–140. This argument should not be confused with similar arguments, such as that Israel has a better title than Jordan and Egypt over the West Bank and Gaza Strip or that Israel has not a duty to withdraw pending a peace settlement. See respectively Yehuda Z Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 Israel Law Review 279 and Rosalyn Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council' (1970) 64 American Journal of International Law 1, 7–8.

> peace. This is a complex political problem that can only be solved by negotiations between the Israelis and the Palestinians … The United States encourages the Israelis and the Palestinians to resolve the status of Israeli settlements in the West Bank in any final status negotiations.[171]

A few aspects of this statement deserve particular attention. First, it is not specified what is the legal ground of this nth reversal of United States policy. This is even more notable taking into account that the United States did not use its veto power to prevent the adoption of Security Council Resolution 2334, which inter alia affirmed that Israeli settlements in Palestinian territories occupied since 1967 are illegal.[172] Similarly, Secretary of State Pompeo argued that there is the need to take into consideration 'specific facts' as well as 'unique facts, history, and circumstances' as regards the legality of individual settlements and, more in general, of the settlements in the West Bank. However, he refrained from specifying against which background these facts and circumstances must be legally assessed, which ultimately condemns international law to total irrelevance on the question of the settlements. Finally, the observation that international law does not compel a particular outcome and that, accordingly, it does not create any legal obstacle to a resolution negotiated by the two opposing parties is paradigmatic of the United States wider approach. Arguably, this observation indicates the will to keep open the possibility of a compromise also when it comes to final status issues.

In fact, arguably this is the core of President Trump's peace plan unveiled on 28 January 2020, which, at least in theory, was drafted with the aim of resolving the Israeli–Palestinian conflict by asking both parties to compromise. This plan, which is analysed more in detail below, is characterized by a strong shift to pragmatism as the key to solve the conflict in question.[173] It should be noted from the beginning that, in addition to the status and borders of

[171] The remarks to the press by United States Secretary of State Pompeo are available at <www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press>.

[172] Secretary of State Pompeo mentioned also that the United States policy on the settlements in the West Bank has been inconsistent over decades and mentioned specifically the policy undertaken by President Reagan, who did not believe that the settlements were inherently illegal. Indeed, settlements were defined On the policy of the Reagan administration, see Richard L Fruchterman and others, 'Israeli West Bank Settlements, the Reagan Administration's Policy toward the Middle East and International Law' (1985) 79 Proceedings of the Annual Meeting (American Society of International Law) 217.

[173] During the meeting of the Security Council convened right after the official publication of the plan, the representative of the United States illustrates this point by saying that: 'Since the formation of the United Nations,

Jerusalem and Palestine, the plan deals also with the question of refugees. In this regard too, the plan advocates for a 'just, fair and realistic solution'.[174] In practical terms this means, on the one hand, to exclude the so-called right of return and to limit monetary compensation to those who have already a permanent place of residence and, on the other hand, to envisage several alternative options for the refugees still seeking a permanent place of residence.[175]

These three decisions and the plan proposed by the United States share the resolve to side-line international law as a relevant framework and, to a certain extent, to set aside the international community itself, which historically has consistently tried to rely on such a framework through a number of legal instruments, such as resolutions adopted by the General Assembly,[176] the creation of a Special Rapporteur on the situation of human rights in the Palestine,[177] and the establishment of a series of UN bodies, such as the Relief and Works Agency for Palestine Refugees[178] and the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People.[179] Therefore, it is hardly surprising that many States voiced their objections to the shift implemented by the United States.

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the Council and the General Assembly have demonstrated their belief in the importance of Middle East peace through countless hours of debate and by adopting more than 800 resolutions addressing this issue, but neither these debates nor these resolutions have resulted in a true and lasting peace. So with a record of failure this spectacular, it would be folly to suggest that this time was well spent and that what is needed now is more of the same. That is why President Trump has proposed a new vision for peace that poses a tangible challenge to the status quo'. See S/PV.8717, 11 February 2020, 12.

[174] Supra n 160.

[175] ibid 31–33.

[176] For a detailed account of the UN effort to settle the question of Palestine, see *The Question of Palestine and the United Nations* (United Nations 2008). General Assembly resolutions can be found at <www.un.org/unispal/data-collection/general-assembly>.

[177] The Special Rapporteur was appointed with the Commission on Human Rights resolution 1993/2. See E/CN.4/RES/1993/2, 19 February 1993, para 4.

[178] The agency was established with A/RES/302, 8 December 1949, para 7.

[179] This committee was established with A/RES/2443, 19 December 1968, para 1.

2.2. The response of the international community

The stances adopted by the Trump administration were all met with harsh criticisms because, besides reversing existing United States policies, they are at odds with the international consensus on the Middle East.[180] More specifically, the international community has firmly rejected the unilateral recognition of both Jerusalem as the capital of Israel and of Israeli sovereignty over the Golan Heights considering both of them as violations of several Security Council resolutions, of the prohibition of forcible acquisition of territories, and of the duty of non-recognition. Given the weight that is assigned to these resolutions, it is worthwhile to shortly recall their content and especially the aspects more relevant to non-recognition.

Resolution 242, adopted in the aftermath of the Six Day War, reaffirmed that the acquisition of territory by force is inadmissible and established the 'peace for land' formula.[181] Resolution 388, adopted during the Yom Kippur War with the purpose of achieving a ceasefire, called upon the opposing parties to start the implementation of the abovementioned resolution. Moreover, it decided that 'immediately and concurrently with the cease-fire, negotiations start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East'.[182] Resolution 476 established that 'all legislative and administrative measures and actions taken by Israel, the occupying Power, which purport to alter the character and status of the Holy City of Jerusalem have no legal validity' and that these measures are null and void and must be rescinded.[183] Eventually, Resolution 478, determined that 'the recent "basic law" on Jerusalem, [is] null and void and must be rescinded forthwith'

[180] See *inter alia* S/PV.8128, 8 December 2017, S/PV.8495, 27 March 2019, S/PV.8669, 20 November 2019, and S/PV.8717, 11 February 2020.
[181] The resolution referred to the following two principles that together expound the mentioned formula: '(i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict; (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force'. See S/RES/242, 22 November 1967, para 1.
[182] S/RES/338, 15 August 1973, paras 2–3.
[183] S/RES/476, 30 June 1980, paras 3–4.

and decided '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'.[184]

Resolution 497, adopted after the ratification by Israel of the Golan Heights Law, which extended Israeli law to the Golan Heights and is widely considered as effectively amounting to an act of annexation, reads:

> The Security Council,
> …
> 1. Strongly condemns Israel for its failure to comply with Security Council Resolution 497 (1981) and General Assembly Resolution 36/226 B (1981);
> 2. Determines that Israeli measures in the occupied Syrian Golan Heights, culminating in Israel's decision of 14 December 1981 to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights, constitute an act of aggression under the provisions of Article 39 of the Charter of the United Nations.[185]

Sweden, intervening before the Council, condemned the United States decision on Jerusalem, not only because it increases instability in the area and it risks prejudging the outcome of negotiations on final-status issues,[186] but first of all because:

> … it contradicts international law and Security Council resolutions. Jerusalem is a final-status issue, and can therefore be resolved only through negotiations agreed upon between the parties. In 1947, the United Nations attributed to Jerusalem a special legal and political status as corpus separatum. In 1980, when Israel attempted to declare Jerusalem its capital, the Council stated, in resolution 478 (1980), that it was a violation of international law. Furthermore, the Council declared that attempts to change the character and status of Jerusalem were null and void, and called upon all States to accept that decision, as well as to withdraw their missions from Jerusalem. Until now, all States have abided by the Council's call.[187]

The same argument was echoed by the other members of the Security Council, except of course by the United States, which in contrast emphasized the connection between Jerusalem and the Jewish people and clarified that in any case the United States had not taken a position on the definitive borders of Israel and Palestine including Jerusalem.

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[184] S/RES/478, 20 August 1980, paras 3, 5.
[185] S/RES/497, 17 December 1981, paras 1–2.
[186] The resolutions just mentioned reaffirmed also that the Israeli conduct in question constitutes a serious obstruction to achieving a comprehensive, just and lasting settlement.
[187] S/PV.8128, 8 December 2017, 4. See also A/ES-10/PV.37, 21 December 2017 and A/RES/ES-10/19, 22 December 2017.

Similarly, many States voiced their objections to the United States recognition of Israeli sovereignty over the Golan Heights. The intervention by the United Kingdom before the Security Council for its clarity warrants full quotation of the relevant paragraphs:

> [T]he United Kingdom's position has not changed: the Golan Heights is territory occupied by Israel. The turbulent history of the region is of course well known. Following the 1967 Six Day War, Israel took control of the Golan, including the disputed Shaba'a farmlands, deciding to annex the territory in 1981. The United Kingdom did not recognize that annexation then. We do not recognize it today. The annexation of territory by force is prohibited under international law, including the Charter of the United Nations. In addition, under the law of State responsibility, States are obliged not to recognize the annexation of territory as a result of the use of force. Turning to Security Council resolutions, it is important that we uphold the relevant resolutions. Resolution 242 (1967), which the British delegation at the time had the honour to pen, was adopted unanimously by the Council on 22 November 1967. British sponsored, it called on all parties to end territorial claims, acknowledge the sovereignty, territorial integrity and political independence of every State in the area, and, in paragraph 1, called for "withdrawal of Israel armed forces from territories occupied in the recent conflict". We recall that resolution 497 (1981), adopted unanimously on 17 December 1981, decided, in paragraph 1, that the Israeli Golan Heights Law, which effectively annexed the Golan Heights, is "null and void and without international legal effect". It further demanded that Israel rescind its action. The decision by the United States to recognize Israeli sovereignty over the Golan heights is in contravention of resolution 497 (1981). In terms of the international order, the United Kingdom firmly believes that the rules-based international system has increased States' ability to resolve their differences peacefully and provided a framework for the greatest sustained rise in prosperity that humankind has seen. That is why the United Kingdom thinks we should work hard with our international partners to nurture and protect those rules.[188]

Similar views were expressed by the other members of the Council,[189] while United States reiterated once again the need to ensure Israel's security.[190] Talmon, with reference to the recognition of the Golan Heights as an integral part of Israel, characterizes Preseident Trump as the gravedigger of international law and notes that:

> The attacks on international institutions and courts are nothing, however, compared to the recognition of Israeli sovereignty over the Syrian Golan. With this recognition, President Trump applied the axe to two fundamental principles of the international legal order: the territorial integrity of States and the prohibition of the use of force.[191]

[188] S/PV.8495, 27 March 2019, 5–6.
[189] ibid 5–19.
[190] ibid 4.
[191] Stefan Talmon, 'The United States under President Trump: Gravedigger of International Law' (Bonn Research Papers on Public International Law, Paper No 15/2019, 7 October 2019) 19–20.

Also as for the lawfulness of Israeli settlements in the West Bank within the international community there is a clear consensus over their unlawfulness. In this regard, Council Resolution 446 determined that 'the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity'.[192] The same resolution also called upon Israel:

> to abide scrupulously by the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories.[193]

The already mentioned Council Resolution 2334, which as is well-known was not vetoed by the United States, reiterated these points.[194] Many Assembly Resolutions over time have taken the very same stances such as recent Resolution 74/243,[195] which was adopted by 160 votes to 6, with 15 abstentions.[196]

It is hardly surprising then that two days after the press release announcing the new change to previous administrations' policies relating to the Jewish settlements the Security

[192] S/RES/446, 22 March 1979, para 1.
[193] ibid para 3. See also S/RES/452, 20 July 1979 and S/RES/465, 1 March 1980.
[194] S/RES/2334, 23 December 2016. With this resolution the Council: '1. Reaffirms 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 a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace; 2. Reiterates its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respect all of its legal obligations in this regard; 3. Underlines that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations; 4. Stresses that the cessation of all Israeli settlement activities is essential for salvaging the two-State solution, and calls for affirmative steps to be taken immediately to reverse the negative trends on the ground that are imperilling the two-State solution; 5. Calls upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967'. This was not the first time that the United States decided not to veto a Security Council Resolution condemning Israel or a Resolution somehow detrimental to the Israeli cause. See S/RES/605, 22 December 1987, which reaffirmed the application of the Geneva Convention to the Palestinian and other Arab territories occupied since 1967 including Jerusalem and called upon Israel to respect this legal instrument, and S/RES/1515, 19 November 2003, which endorsed the Roadmap to Peace presented by the Quartet which, in turn, was asking to dismantle settlements erected after March 2001 and to freeze settlement activity.
[195] A/RES/74/243, 19 December 2019.
[196] A/74/PV.52, 19 December 2019, 26. Canada, Israel, Marshall Islands, Micronesia, Nauru, and the United States did not support the resolution while Australia, Brazil, Cameroon, Côte d'Ivoire, Guatemala, Honduras, Kiribati, Papua New Guinea, Rwanda, Samoa, Solomon Islands, Togo, Tonga, Tuvalu, and Vanuatu abstained.

Council met and most of the member States reiterated that settlements in the occupied Palestinian territories are illegal.[197]

As for the question of refugees the landmark UN documents are Assembly 194 (III) adopted in 1948, which established that '[r]efugees … should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property'[198] and Security Council 242, which affirmed the necessity '[f]or achieving a just settlement of the refugee problem'.[199] However, some have noted that starting from the aftermath of the Six-day War the problem of refugees has no longer been considered as a humanitarian problem that should be solved in a just way, but rather as a legal problem connected with the principle of self-determination.[200] Accordingly, the Assembly has begun treating the question of the return of Palestinian refugees (both refugees from the 1948 and the 1967 wars) as a veritable 'inalienable right'.[201] In contrast with the other questions sketched above, the Council has refrained from tackling directly this question.

2.3. The *Wall* advisory opinion

Most of the points raised by international actors and legal scholars were also tackled by the ICJ in the *Wall* advisory opinion,[202] which, in fact, is reaffirmed by both UN political organs.[203] Given its relevance with regard to the conflict itself and to the question of non-recognition,

[197] S/PV.8669, 20 November 2019, 8–22. See also A/RES/74/139, 18 December 2019.
[198] A/RES/194 (III), 11 December 1948, para 11. See also A/RES/513 (VI), 26 January 1952.
[199] S/RES/242, 22 November 1967, para 2 (b). See also S/RES/237, 14 June 1967, para 1.
[200] Ruth Lapidoth, 'The Right of Return in International Law, with Special Reference to the Palestinian Refugees' in Yoram Dinstein and Fania Domb (eds), *The Progression of International Law: Four Decades of the Israel Yearbook on Human Rights – An Anniversary Volume* (Martinus Nijhoff Publishers 2011) 38.
[201] A/RES/3236, 22 November 1974, para 2.
[202] See the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136.
[203] A/RES/74/243, 19 December 2019, preamble and para 4 and S/RES/2334, 23 December 2016, preamble.

which is specifically addressed by the Court, below the aspects of this opinion that are more relevant to non-recognition are shortly illustrated.[204]

Allegedly because of considerations of security, during the second intifada, the Israeli Government decided to build a barrier separating Israel and the West Bank, but as is well known this construction is built mostly *inside* Palestinian territory. On 14 October 2003, the Council met with the aim of discussing a draft resolution that would have declared that such construction is illegal and must be ceased and reversed, which however was vetoed by the United States.[205] Eventually, a few days later, the General Assembly adopted a similar resolution, which also requested the Secretary-General to report on compliance by the parties and called them to fulfil their obligations under the relevant provisions of the roadmap.[206] Incidentally, it is worthwhile to note that after that the Assembly adopted this resolution, the Council endorsed the road-map with Resolution 1515 *refraining* from mentioning at all the wall.[207] Afterwards the Secretary-General submitted a report that concluded that Israel had not complied with the abovementioned resolution.[208] Therefore the Assembly requested the ICJ to render an opinion on the following question:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?[209]

[204] For a detailed analysis of the opinion, see Arthur Watts and Remy Jorritsma, 'Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)' in Wolfrum Rüdiger (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press online version) and the contributions published in Lori Fisler Damrosch and Bernard H Oxman (eds), 'Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory' (2005) 99 American Journal of International Law 1, 1–141.
[205] S/PV.4842, 14 October 2003. Bulgaria, Cameroon, Germany, and United Kingdom abstained.
[206] A/RES/ES-10/13, 21 October 2003. The roadmap, presented to the parties by the Quartet on 30 April 2003 and presented to the Security Council on 7 May of the same year, was labelled as a performance-based and goal-driven plan in as much as its gist was to set a timeline for the implementation of the plan itself and to subject to negotiations the permanent status issues.
[207] S/RES/1515, 19 November 2003. For the text of the proposal, see S/2003/529, 7 May 2003, Annex.
[208] A/ES-10/248, 24 November 2003.
[209] A/RES/ES-10/14, 8 December 2003.

The opinion was rendered in 2004 and has acquired over time a significant degree of relevance. The reason is that, even if the question posed was rather precise, the Court had to address the wider legal framework. It follows that for the first time an international court took a position on the Israeli–Palestinian conflict as a whole. It is noteworthy to note that the Court relied decisively on UN resolutions and that, in turn, the General Assembly subsequently relied on this opinion firstly by endorsing it[210] and then by simply reaffirming it together with the aforementioned UN resolutions.

The Court deals with the substance of the case starting from the legal status of Palestine. In this regard, Security Council Resolutions 242, 298, and 478, the agreements with Jordan and the PLO, and several IHL instruments, suggest that all what is beyond the pre-1967 lines has a separate and distinct legal status. This territory is an occupied territory with all the consequences that this entails with regard to the parts of the wall built thereto.[211] The Court goes on by illustrating the material characteristics of the wall and the consequences flowing from such construction including the creation of a series of enclaves.[212] The Court analyses the applicable norms of international law[213] and eventually argues that the construction of the wall violates the rules on the use of force, the right to self-determination, international humanitarian law, and international human rights law.[214] More specifically, the Court conflates the violation of the prohibition of forcible acquisition of territory and the right to self-determination. In this regard, it recalls the above-mentioned report by the Secretary-General that contends that such a construction is an attempt to annex parts of Palestinian territory,[215] which is contrary to international law since it interferes with both the territorial integrity of Palestine and with the right to self-determination of the Palestinian people.

[210] A/RES/ES-10/15, 2 August 2004.
[211] ibid paras 70–78.
[212] ibid paras 79–85.
[213] ibid paras 86–113.
[214] ibid paras 114ff.
[215] It should be noted that eventually the Court refrained from making an explicit reference to annexation rather it referred to the concept of 'fait accompli', ibid para 121

The Court subsequently emphasizes several aspects in support of its argument. For instance, the true purpose of the wall would be to lead to the *de facto* annexation rather than to respond to security considerations. The Court recalls that forcible acquisition of territory as reaffirmed *inter alia* by Resolution 242 is inadmissible. In any case, the Court raises another point, namely that 'the wall will prejudge the future frontier between Israel and Palestine'.[216] Further, the wall not only reduces the territory of Palestine, but also fragments it.[217]

It follows that the construction in question impedes the exercise of the right to self-determination by Palestinians. The Court clarifies that the fact that Palestinians constitute a people in the sense of international law is uncontroversial. Moreover, the Court connects the wall with the problem of the settlements, whose illegality under international law has been routinely reaffirmed in various international *for a* and more specifically derives on Article 49 of the Fourth Geneva Convention.[218]

Accordingly, the Court determines the legal consequences of such an unlawful construction for Israel, for third States, and for the UN.[219] Israel, so to comply with the international obligations breached, has to cease the construction of the wall and to dismantle what already built, it has to repeal the acts adopted in connection with the construction, and it has to fulfil the obligations of restitution and reparation.[220] The UN political organs, on the other hand, should consider what further action is required to bring to an end the illegal situation in question. As for third States the Court argues 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'.[221]

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[216] ibid.
[217] ibid para 122. The Court stressed that 'the planned route would incorporate in the area between the Green line and the wall more than 16 per cent of the territory of the West Bank. Around 80 per cent of the settlers living in the Occupied Palestinian Territory, that is 320,000 individuals, would reside in that area, as well as 237,000 Palestinians. Moreover, as a result of the construction of the wall, around 160,000 other Palestinians would reside in almost completely encircled communities'.
[218] ibid para 125.
[219] ibid paras 143ff.
[220] ibid paras 149–153.
[221] ibid para 159. The Court added: 'They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and

The reasoning of the Court for such a conclusion is based on the *erga omnes* nature of the obligations breached by Israel in the sense that all States have a legal interest in the protection of both the right to self-determination and the rules of international humanitarian law. Concerning the former, it recalls that there are no doubts over the *erga omnes* nature of this right.[222] As for international humanitarian law, it recalls the opinion on the *Legality of the Threat or Use of Nuclear Weapons* and common Article 1 to the Geneva Conventions by means of which States undertake to respect and to ensure respect for the Conventions in all circumstances.

A few aspects of this opinion deserve a further comment since they concern the doctrine of non-recognition. The first feature of interest is somewhat preliminary and concerns the discretion of the Court to render an opinion. Zappalà, after having clarified that States have in principle a duty of non-recognition, observes that the case of the Israeli–Palestinian conflict suggests that violations of peremptory norms by Israel, which have been reaffirmed routinely by the international community, cannot be conceived as preventing any compromise, otherwise there would not be any margin for an actual negotiation.[223] Admittedly, Zappalà envisages a series of conditions so that the recognition by the international community of a situation originally unlawful can eventually occur, such as for instance the acknowledgement that there has been an illegality. Leaving aside by now to what extent this view is persuasive,[224] a number of States have argued before the Assembly and in their written submissions to the ICJ that it would have been appropriate to avoid the involvement of the ICJ on the assumption that the parallel peace process could have been undermined by the findings of the Court. The unwritten

international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention'.

[222] This point was already clarified by the Court in the *East Timor* case and it was supported by Assembly Resolution 2625 (XXV) where it states that every States has a duty to promote the principle of self-determination.

[223] Salvatore Zappalà, *Effettività e Valori Fondamentali Nella Comunità Internazionale* (Editrice CUSL 2005) 117–118.

[224] See also below ch 6, s 2.5.

concern was that if the Court would have taken a clear position on one of the permanent status issues then the peace process envisaged by the Quartet in their roadmap plan, and in particular its third phase based specifically on political negotiations on these issues, would have been undermined.[225]

Within the General Assembly it is possible to see a cleavage between, on the one side, the Arab group and the Non-Aligned Movement (NAM) and, on the other side, the European Union, Russia, and the United States, that is three members of the Quartet.[226] The argument raised by the former group of States was that an opinion would have provided an independent and impartial pronouncement on the legal consequences arising from Israeli conduct and, consequently, would have contributed to a settlement based on justice and peace. In contrast, the argument raised by the latter group of States was that a negotiated settlement was irremediably in contrast with the involvement of the ICJ. Eventually, the resolution asking an opinion to the ICJ passed by 90 votes to 8, with as many as 74 abstentions, which in itself suggests that the question was to a certain extent controversial. In particular this can be noted looking at the degree of agreement reached in the case of previous resolutions on the conflict in question, which was significantly wider.[227]

The very same divide can be observed in the written and oral proceedings. Almost all the States intervening tackled the issue of judicial propriety and stressed in particular the role of the recent rounds of negotiations. Concerning in general the issue of judicial propriety the Court observes that it has never refused to answer to a request and, on the specific issue of the interplay between the involvement of the Court and negotiations, the ICJ merely states that the consequences of its opinion on negotiations are not clear.[228]

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[225] In other words, and more in general, if one the parties to a legal dispute has a right and the other one has been acting in contravention with this right, and this is confirmed by the principal judicial organ of a given legal order, then the former party unlikely would agree to a compromise on the right in question notwithstanding the previous agreement to settle the dispute by way of political negotiation.

[226] A/ES-10/PV.23, 8 December 2003.

[227] For instance, Assembly Resolution ES-10/13, which passed by as many as 144 votes to 4, with only 12 abstentions. A/ES-10/PV.22, 21 October 2003.

[228] See the Advisory Opinion on the *Wall* (n 196) para 54.

In contrast, Aust argues that such consequences could be easily anticipated. More in general, Aust distinguishes what he labels as 'housekeeping' and politically sensitive matters. In the latter category are included, besides the question of the Wall, the unilateral declaration of independence issued by Kosovo and the lawfulness of nuclear weapons. Issues as these ones, in contrast to the former that pertain to the proper functioning of the requesting organ, 'relate to long-standing problems that will not be resolved by any Advisory Opinion … but only by lengthy political negotiations between States'.[229] The presence of a political controversy cannot have the effect to prevent the Court to render an opinion, but it is difficult to contend that the Court can limit itself to recall that it has never refused to render an opinion and that it is not persuaded that there are not compelling reasons to do so. Otherwise, it would be difficult to imagine a case in which the Court could refuse to render its opinion. Aust adds that:

> such Advisory Opinions can in fact exacerbate the problem by giving the impression that the last word on the legal aspects has been said … This is dangerous, particularly when the judges of the ICJ state an important rule of international law quite wrongly … One should be very aware that Advisory Opinions are not judgments, but their influence, especially when they are on a politically controversial matter, can be disproportionate to their status.[230]

The concern raised by Aust seems justified. One may take Abi-Saab's remark on the role that the *Wall* opinion shall play in the Middle East Peace Process.[231] In fact, according to Abi-Saab, the opinion in question draws the red lines that cannot be bypassed and confirms that rights held by the Palestinian people cannot be abridged or waived away and that any territorial change or change in the demographic composition of the occupied territory is unlawful. It follows that:

> in the search for a solution, any arrangement which would ignore one of these elements would not legally stand. It would in fact contravene *jus cogens* rules of international law, rules which create *erga omnes* obligations that not only confer

[229] Anthony Aust, 'Advisory Opinions' (2010) 1 Journal of International Dispute Settlement 123, 131.
[230] ibid 150. Aust referred to the way in which the Court shortly addressed whether Israel has acted out of self-defence, as maintained by Israel, or out of necessity. According to the Court, the former counterargument is rebutted by the fact that in the case in question the armed attack, or more precisely the series of terrorist acts, is not imputable to a foreign States and moreover it originates from the territory under the control of Israel itself. As for the counterargument based on necessity, on the basis of the *Gabčíkovo-Nagymaros Project* case and on Article 25 ARSIWA, the Court argues that it is not persuaded that there were no other means to reach the same aim. See the *Wall* advisory opinion (n 202) paras 138–142.
[231] Nassib G Ziadé and others, 'Is There a Role for International Law in the Middle-East Peace Process?' (2005) 99 Proceedings of the Annual Meeting (American Society of International Law) 213, 215–217 (remarks by Georges Abi-Saab).

> on every member of the international community the right or *locus standi*, but even impose on these members the duty to act to uphold them.[232]

Abi-Saab adds that international law has also the role of a 'facilitator' in the sense that it may provide for a series of ways aimed to settle a dispute, such as negotiations, conciliation, and arbitration. He concedes that international law leaves a margin within the possible solutions provided by international law itself, but a solution shall be within the above-mentioned red lines. Thus, 'the Roadmap and the efforts of the Quartet are well and good, but the outcome of the final status negotiations, if and when they take place, cannot deviate from, i.e., has *imperatively* to fall within, the above-mentioned red lines'.[233] However, it is difficult to understand whether there are any actual margin for negotiations as for final status issues.

Separate opinions too deal with the question of judicial propriety and, more precisely, with the interplay between international law and negotiations. For instance, Judge Al-Khasawneh, after having observed that there is nothing wrong in calling for negotiations between the parties, maintains that:

> The discharge of international obligations including *erga omnes* obligations cannot be made conditional upon negotiations … it is of the utmost importance if these negotiations are not to produce non-principled solutions, that they be grounded in law and that the requirement of good faith be translated into concrete steps by abstaining from creating faits accomplis on the ground such as the building of the wall which cannot but prejudice.[234]

Similarly, Judge Elaraby, after having reaffirmed that there is a consensus over the relevance of Security Council Resolutions 242 and 338, which together represent the only acceptable basis for establishing a viable and just peace, argues that:

> The obligations emanating from these resolutions are obligations of result of paramount importance. They are synallagmatic obligations … It is legally wrong and politically unsound to transform this obligation of result into a mere obligation of means, confining it to a negotiating process. Any attempt to tamper with such solemn obligation would not contribute to an outcome based on a solid foundation of law and justice.[235]

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[232] ibid 216.
[233] ibid (emphasis added).
[234] See the Separate Opinion of Judge Al-Khasawneh in the *Wall* advisory opinion (n 202) 238–239, para 13.
[235] See the Separate Opinion of Judge Elaraby in the *Wall* advisory opinion (n 202) 259.

The second feature of interest is the wording of the paragraph of the opinion that deals with non-recognition. In this regard the opinion is particular important because it if the first time that the ICJ deals with this issue after the *Namibia* opinion and after the finalization of the ARSIWA.[236]

It is worthwhile to note that the Court referred to the violation of *erga omnes* norms rather than of *ius cogens* norms as it is done by Article 41(2) ARSIWA. This is even more noteworthy in the light of the fact that many intervening States in their submissions maintained that there was a duty of non-recognition, referred explicitly to the mentioned article, and accordingly, talked of serious violations of *ius cogens* norms.[237] Nevertheless the ICJ preferred not to follow this line of argument. It is also noteworthy that the Court decided to link non-recognition with the violation of a specific kind of rules and not merely to an 'ordinary' unlawful situation. In contrast, Judge Higgins argued that non-recognition does not rest on the concept of *erga omnes*, but instead derives from the objective illegality of the situation in question. This argument, according to Judge Higgins, is based on the *Namibia* opinion and on the *Haya de la Torre* case, in which it was held that an 'illegal act "entails a legal consequence, namely that of putting an end to an illegal situation"'[238]. Thus, it could be argued that *any* illegal act entails consequences and that according to the concrete circumstances these consequences may vary.

Admittedly, except for the reliance on the *erga omnes* concept, it is worthwhile to note that the wording, but also the list of specific consequences emerging apparently from the breach of international law—namely, the obligation of non-recognition and non-aid/assistance and the

[236] The Court referred to non-recognition also in the *East Timor* case, but in that instance the Court only said that the resolutions adopted by the Security Council did not entail a mandatory policy of non-recognition, thus the Court did not address the consequences of such a policy. The same goes for the subsequent opinion in the *Kosovo* case in which the Court merely maintained that the unilateral declaration of independence *per se* did not amount to a breach of international law and that declarations of independence were regarded as unlawful because of a related breach.

[237] See for instance the written statement of the League of Arab States para 11.9. and that of Palestine paras 634–636, 640–644.

[238] See the Separate Opinion of Judge Higgins in the *Wall* advisory opinion (n 202), 216, para 38.

obligation to bring to end the unlawful situation—clearly echoes the provisions of the ARSIWA. Unfortunately, it is not clear why the Court decided to rely on the *erga omnes* character of the obligations breached.[239] It is true that for many purposes *ius cogens* and *erga omnes* norms can be assimilated and that, in any case, rules as the prohibition of the use of force and the right to self-determination have both characters. However, the concept of *erga omnes* in itself does not automatically entail the impossibility of derogation of the norm, which is a crucial difference given what said above on the incompatibility between solutions dictated by international law and solutions dictated by pragmatic considerations ultimately leading to the validation of a breach in the sense of above.

A third relevant aspect of the opinion is the way in which the Court refrained from outlining the content of the obligation of non-recognition. This is especially interesting by way of comparison with the *Namibia* opinion. In fact, in that case the Court delineated rather precisely the content of the specific obligations for third States even if, at least to a certain extent, the Council had already done this. The question in both cases was on the legal consequences flowing from a violation of international law, it is thus rather striking that the Court in the *Wall* opinion did not bother elaborating further this topic. Indeed, the Court observed, as already done in the *Namibia* opinion, that 'the Court is of the view that the United Nations … should consider what further action is required to bring to an end the illegal situation'.[240] Moreover, if from a certain point of view what non-recognition of a territorial situation can entail is self-evident, as it was in the case of Namibia, non-recognition of a fact poses more problems.

While the opinion in a few passages expresses its concerns that the construction of a wall is instrumental to the annexation of the territory, ultimately it does not talk of a proper annexation and, accordingly, it addressed the consequences for third States with regards to the

[239] On the Court's restraint towards the concept of *ius cogens*, see Gleider I Hernandez, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"' (2013) 83 British Yearbook of International Law 13, 51ff.
[240] The *Wall* advisory opinion (n 202) para 160.

situation resulting from the construction of a wall, rather than the consequences resulting from an act of annexation. But what is precisely this situation is let unclear. Judge Koijmans raised this point in his separate opinion stating that: 'I have great difficulty … in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part of operative subparagraph (3) (D) supposed to do in order to comply with this obligation?'.[241]

Kooijmans raised another point in connection with the content of the duty, which is considered as an 'obligation without real substance'.[242] The argument goes that while 144 States had already expressed their opinion on the unlawfulness of the wall, the remaining States evidently did not share this opinion. Thus, it is not clear what conduct these States shall undertake. The problem evidenced by Kooijmans is actually analogous to the question already mentioned of what precisely triggers the duty of non-recognition.

A fourth aspect that deserves attention is that it is not clear what makes non-recognition binding. Surely judges were aware of the discussions whether a central assessment is required or whether non-recognition is an automatic consequence. Above it was noted that Higgins contended that non-recognition derives from the objective illegality of the situation, but in line with the *Namibia* opinion, she also adds that this illegality is ascertained through a binding determination made by a competent organ of the UN.[243] Given the Court's position as the principal judicial organ of the UN, it can be considered as a competent organ and its findings can be equated to a Council decision even if done in an advisory opinion. However, the extent to which an opinion of the ICJ can be binding is controversial, thus whether the findings concerning the unlawfulness of Israeli conduct as well as concerning the consequences flowing from this conduct are *res iudicata* is controversial too.

Kolb, in this regard, observes that in general an opinion is not binding on the requesting organ or on the States whose dispute is the subject of the opinion and this observation is based

[241] See the Separate Opinion of Judge Kooijmans in the *Wall* advisory opinion (n 202) 232, para 44.
[242] ibid.
[243] Supra n 238.

on the fact that as for opinions there is not an article of the Statute of the Court amounting to Article 59 for the contentious cases.[244] On the other hand, the requesting organ has the legal duty to take account of the opinion and, in addition, in the case the requesting organ decides to settle the dispute resorting to international law, then it has the duty to resort to the legal findings of the ICJ, which in this case constitute *res iudicata*. This argument is based on the fact that UN political organs do not have the competence or the authority to contest the points of law decided by the Court which indeed is the principal judicial organ of the UN. Judge Koroma, in this regard, held that:

> The Court's findings are based on the authoritative rules of international law and are of an erga omnes character. The Court's response provides an authoritative answer to the question submitted to it. Given the fact that all States are bound by those rules and have an interest in their observance, all States are subject to these findings.[245]

Kolb adds that States remain free to dispute the interpretation given by the Court, which is not binding on them and most importantly that UN political organs remain free to settle the dispute not resorting to international law but to various political considerations.[246]

As seen above some have interpreted this opinion in a rather radical way in the sense that it would have given an answer to many legal questions revolving around the Palestinian question. Accordingly, in a similar way to many resolutions adopted by the General Assembly and, to a lesser degree by the Security Council, it is clearly possible to identify a wrongdoer and a victim and between them arguably there can be no negotiation. As Imseis puts it:

> Just as most municipal legal systems do not countenance common thieves negotiating the return of stolen property, international law does not contemplate states negotiating the terms of whether and how their internationally wrongful conduct is brought to an end. This is particularly so where the conduct is the result of a composite series of wrongful acts that violate peremptory norms.[247]

[244] Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar 2014) 276–278.
[245] See the Separate Opinion of Judge Koroma in the *Wall* advisory opinion (n 202) 205–206, para 8.
[246] Supra n 244.
[247] Ardi Imseis, 'Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020' (2020) 31 European Journal of International Law 1055, 1081.

However, the Court dealt with the role of negotiations also in the final part of the opinion. More specifically, the opinion ends by reaffirming that '[i]llegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions'. The Court continued this reasoning by holding that:

> The Court considers that it has a duty to draw the attention of the General Assembly … to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.[248]

Overall it is not clear to what extent there are margins for a meaningful negotiation when the legal framework seems so clear. It is now time to deal specifically with this question looking at the State practice.

2.4. The quest for a just and lasting solution in the Middle East

The disdain for international law showed by the Trump administration is probably unprecedented. Thus, it is hardly surprising that the President Trump's peace plan has received widespread criticism. However, the idea that a certain amount of pragmatism is required in order to settle intractable conflicts is not a novel one.

As for the novelty, many have observed that for instance what characterized the Oslo process was the limited role assigned to international law. Indeed, the whole point of the Oslo process was that direct negotiations between the parties were necessary in order to achieve a just, lasting and comprehensive peace settlement. However, some have argued that such direct negotiations prevented the international community from verifying that the disparity in power between the parties themselves would have not caused a radical departure from the principles of international law.[249]

[248] The *Wall* advisory opinion (n 202) para 162.
[249] See for instance Quigley (n 157) 356.

As for the merit of such an approach, some have made a parallel between negotiations occurring in the context of family disputes and negotiation occurring in the international context. Zwier, after having described the advantages of negotiation in the context of disputes arising among family members, holds that:

> Rather than suggesting that Israel be charged in an international court with the violations described earlier, a principled mediator could set aside the legal issues and try to move the parties to look at the future. In other words, by making an appeal, the parties shared security interests and long-term interests in living in a state where everyone has respect and dignity regardless of religion or political affiliation, the parties can start to focus on attaining these joint interests rather than holding on to the past.[250]

Zwier goes on by noting that what a good mediator does is to legitimize the original motive of the opposing parties, which in the specific case means to take seriously both Israel's considerations on security and the claim to self-determination by Palestinians. Along similar lines, in the context of divorce disputes, some have used the expression of 'bargaining in the shadow of the law'.[251] Weiler, writing *before* the beginning of the Oslo process and starting from a similar assumption—ie, that when the parties shall continue living side by side and that they have mutually exclusive claims then a solution of compromise that can *accommodate* the interests of both the opposing parties is required—advocated a transnational policy on the model of the European Community.[252] In any case, the bottom line according to these scholars is that a right-versus-wrong approach may not be the best approach if the final aim is the settlement of an intractable conflict such as the conflict in question. In more general terms, Aron, criticising a certain kind of idealism, puts it as follows:

> Idealistic diplomacy slips too often into fanaticism; it divides states into good and evil, into peace-loving and bellicose. It envisions a permanent peace by the punishment of the latter and the triumph of the former. The idealist, believing he has broken with power politics, exaggerates its crimes.[253]

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[250] Paul J Zwier, *Principled Negotiation and Mediation in the International Arena: Talking with Evil* (Cambridge University Press 2013) 118.
[251] Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' 88 Yale Law Journal 950.
[252] Joseph H Weiler, 'Israel and the Creation of a Palestinian State: The Art of the Impossible and the Possible' in Sanford R Silverburg (ed), *Palestine and International Law: Essays on Politics and Economics* (McFarland 2009) 57, 62. Originally published in (1982) 17 Texas Journal of International Law 287 (emphasis added).
[253] Raymond Aron, *Peace & War: A Theory of International Relations* (First published 1966, Transaction Publishers 2003) 579.

It seems that a consistent part of the international community, perhaps aware of this problem, all along the Oslo process has showed a certain degree of support to negotiations between the parties thus renouncing to a narrowly legalistic approach with reference to the final status issues. A full analysis of the Oslo process is outside the purpose of this work, it follows that the next paragraphs describe those aspects of this process from which it is possible to infer something on the tension between international legality and negotiations between the parties.[254]

Genuine direct negotiations, that is between two formally equal parties, have begun only with the exchange of letters between Israel's Prime Minister Rabin and the PLO Chairman Arafat on 9 September 1993.[255] By means of this exchange the PLO recognised the right of the State of Israel to exist, Israel recognized the PLO, and the resolve to settle the dispute by way of negotiations was confirmed.[256]

After a few days, the two political leaders signed the Declaration of Principles on Interim Self-Government Arrangements (DOP).[257] This legal document would have become the first major agreement concluded as part of the Oslo Accords, which is the reason why it is also known as Oslo I. In general terms, the DOP reaffirmed the mutual recognition of Israel and the PLO and established that aim of the agreed political process was the achievement of a peaceful

[254] On the Oslo process see in general Geoffrey R Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000).

[255] The invitation to the Madrid Peace Conference jointly issued by the United States and the Soviet Union, whose text is reproduced in full in Paul Claussen and Evan M Duncan (eds), *American Foreign Policy Current Documents 1991* (William S. Hein & Co., Inc. 2008) 589–590, emphasized that the mediators 'are prepared to assist the parties to achieve a just, lasting and comprehensive peace settlement, through direct negotiations along two tracks, between Israel and the Arab States, and between Israel and the Palestinians, based on United Nations Security Council Resolutions 242 and 338'. However, on the one hand, the Israeli Government had not recognized yet the PLO and the PLO had not recognized yet Israel. On the Madrid Peace Conference see Robert P Barnidge, *Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine* (Hart Publishing 2016) 101–105.

[256] The integral text of the letters is available at <https://unispal.un.org/UNISPAL.NSF/0/36917473237100E285257028006C0BC5>. See also Eyal Benvenisti, 'The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement' (1993) 4 European Journal of International Law 542, 542–544.

[257] Declaration of Principles on Interim Self-Government Arrangements (Washington, 13 September 1993). The texts of the Declaration and of the subsequent treaties are available at <www.jewishvirtuallibrary.org/israel-negotiations-with-the-palestinians>. The other agreements part of the Oslo Accords are the Agreement of the Gaza Strip and the Jericho Area (4 May 1994), the Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip (28 September 1995, known also as Oslo II), the Hebron Protocol (17 January 1997), the Wye River Memorandum (23 October 1998), and the Sharm-el-Sheik Memorandum (4 September 1999).

settlement by the implementation of Security Council Resolutions 242 and 338. This aim was to be achieved, on the one hand, through a gradual transfer of authority to the Palestinians and a contextual redeployment/withdrawal of Israeli forces and, on the other hand, through subsequent bilateral negotiations concerning the final status issues. But to what extent international law has been taken into account in the context of Oslo I and, more in general, of the Oslo Process?

A first aspect that deserves consideration is the nature of Oslo I, as well as the subsequent treaties, as a legally binding treaty or as a political agreement. Its title together with the lack of precise legal terms in the preamble and in Article I, which is the article that defines the aim of negotiations, and the fact that the agreement is between 'The Government of the State of Israel' and 'the PLO team (the "Palestinian Delegation"), representing the Palestinian people' may suggest that Oslo I is not a treaty.

However, besides that the title given to a certain international agreement is not conclusive on its legal or political nature, the wording of its whole text suggests that it is not only a set of vague political goals, but rather a set of binding legal principles. Elements that support this view are the use the future tense, the use of the modal verb shall, the ending clause concerning the entry into force, and a series of rather detailed annexes. Cassese, more specifically, notes that it is possible to distinguish three kind of obligations: obligations that become operative upon the entry into force of the Declaration, obligations *de contrahendo*, that is obligations to conclude agreements, and obligations *de negotiando*, that is obligations to negotiate future agreements.[258]

As for the parties to the agreement, some have argued that since one of the parties is not a State then Oslo I cannot be a treaty in the meaning of the Vienna Convention on the Law of Treaties. In fact, according to this convention the only subjects that can conclude treaties are

[258] Antonio Cassese, 'The Israel-PLO Agreement and Self-Determination' (1993) 4 European Journal of International Law 564, 565–566.

States.[259] However, this does not mean that the agreement has not binding force at all, but only that it does not fall within the material scope of the Vienna Convention.[260]

In any case, even assuming that Oslo I is a set of binding legal principles,[261] it could be still argued that international law is absent in another sense, that is from a substantive point of view. This is most visible when it comes to the obligations *de negotiando* since, as Cassese notes, the parties agree to negotiate future agreements without having agreed beforehand what is their basic content.[262] In other words, it could be argued that Oslo I cannot be seen as an instrument of realization of international law. On the contrary, it implements a shift like the one endorsed starting from 2000 by the Council in the case of Western Sahara. In fact, the ultimate aim of the Oslo peace process is the achievement of a peace plan that from the outset being based on negotiation cannot be in absolute compliance with each and every norm of international law.

Already the wording of the preamble is significant in as much as it implicitly supports a compromise between the parties. In this regard, the parties agree that:

> [I]t is time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process.

This passage clearly echoes the narrative underlying the Council resolutions adopted in the case of Western Sahara.[263]

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[259] Anthony Aust, *Modern Treaty Law and Practice* (2nd ed, Cambridge University Press 2007) 61–62.
[260] See artt 2–3 Vienna Convention on the Law of Treaties. See also Aust (n 259) 8 and Watson (n 254) 55–67.
[261] In this sense see the Separate Opinion of Judge Elaraby in the *Wall* advisory opinion (n 202) 252–254 who considered the various agreements adopted during the peace process as veritable treaties.
[262] Cassese (n 258) 566.
[263] The representative of United States at the 8246th meeting of the UN Security Council on the situation of Western Sahara held: 'The United Nations Mission for the Referendum in Western Sahara (MINURSO) is a peacekeeping mission that should have finished its job a long time ago … It is a mission that was designed to help achieve a specific purpose—one that it has not yet completed. That is not the fault of MINURSO. The fact is that we, as a Security Council, have allowed Western Sahara to lapse into a textbook example of a frozen conflict. And MINURSO is a textbook example of a peacekeeping mission that no longer serves a political purpose. So this year, the United States has taken a different approach with this renewal. Our goal is to send two messages. The first is that there can be no more business as usual with MINURSO and Western Sahara. The second is that the time is now to lend our support — our full support — to the Personal Envoy of the Secretary General for Western Sahara, Mr. Horst Köhler, in his efforts to facilitate negotiations with the parties. The United States wants to see progress

Additionally, it seems that the role reserved to the international community is overall limited. Indeed, the approach of the Declaration is clearly a bilateral approach that does not assign any specific role to the international community at large. This is an important change of paradigm. For long time, in fact, there was the idea that the conflict was to be settled though an international peace conference. For example, Security Council Resolution 338, in particular the expression 'under appropriate auspices', was intended as if it was requiring the convening of a conference under the auspices of the UN.[264] Eventually in 1973 a peace conference was held in Geneva at which Egypt, Israel, Jordan, the Soviet Union, and the United States participated, but it did not lead to any meaningful outcome. Afterwards, there have been a few attempts to revive this kind of format. In any case, the international community continued until the beginning of the Oslo process to invoke the convening of such a conference.[265]

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at last in the political process meant to resolve this conflict. That is why we have renewed the MINURSO mandate for six months, instead of one year … The United States emphasizes the need to move forward towards a just, lasting, and mutually acceptable political solution that will provide for the self-determination of the people of Western Sahara. We continue to view Morocco's autonomy plan as serious, credible and realistic, and it represents one potential approach to satisfying the aspirations of the people of Western Sahara to run their own affairs with peace and dignity. We call on the parties to demonstrate their commitment to a realistic, practicable and enduring political solution based on compromise by resuming negotiations without preconditions and in good faith. Entrenched positions must not stand in the way of progress'. See S/PV.8246, 2.

[264] S/RES/338, 22 October 1973, para 3.

[265] See for instance A/RES/38/58 C, 13 December 1983. Paragraph 3 reads as follows: 'Welcomes and endorses the call for convening an International Peace Conference on the Middle East in conformity with the following guidelines:

(a) The attainment by the Palestinian people of its legitimate inalienable rights, including the right to return, the right to self-determination and the right to establish its own independent State in Palestine;

(b) The right of the Palestine Liberation Organization, the representative of the Palestinian people, to participate on an equal footing with other parties in all efforts, deliberations and conferences on the Middle East;

(c) The need to put an end to Israel's occupation of the Arab territories, in accordance with the principle of the inadmissibility of the acquisition of territory by force, and, consequently, the need to secure Israeli withdrawal from the territories occupied since 1967, including Jerusalem;

(d) The need to oppose and reject such Israeli policies and practices in the occupied territories, including Jerusalem, and any de facto situation created by Israel as are contrary to international law and relevant United Nations resolutions, particularly the establishment of settlements, as these policies and practices constitute major obstacles to the achievement of peace in the Middle East;

(e) The need to reaffirm as null and void all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purported to alter the character and status of the Holy City of Jerusalem, including the expropriation of land and property situated thereon, and in particular the so-called "Basic Law" on Jerusalem and the proclamation of Jerusalem as the capital of Israel;

(f) The right of all States in the region to existence within secure and internationally recognized boundaries, with justice and security for all the people, the sine qua non of which is the recognition and attainment of the legitimate, inalienable rights of the Palestinian people as stated in subparagraph (a) above'.

See also the report prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, The Need for Convening the International Peace Conference on the Middle East in accordance with Assembly Resolution 38/58 C, 11 January 1989 < https://unispal.un.org/DPA/DPR/unispal.nsf/1ce874ab1832a53e852570bb006dfaf6/1b0cef605b8c99fc85256dc200688c37?OpenDocument> and, for a wider perspective, Barnidge (n 255) 80ff.

In accordance with these two aspects, namely the implicit support to a compromise between the parties and the bilateral approach, the Declaration provides for only a limited role for international law itself. Article I merely establishes that the aim of negotiation is the permanent settlement based on Resolutions 242 and 338, while Article V postpones to a final phase of the peace process negotiations over 'Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest'. Overall, however the text of the Declaration does not provide any substantive 'anticipation' on these issues. Some of them are actually further discussed, but when this is done there is always a certain ambiguity coupled with weak implementation mechanisms.

A case at hand is the redeployment envisaged by Article XIII and the withdrawal envisaged by Article XIV and further detailed in Annex II. Watson talks of the redeployment/withdrawal as of 'one of the most striking example of constructive ambiguity'.[266] Similarly, Weinberger in this regard talks of 'super ambiguities'.[267]

As to this question, it is necessary to briefly illustrate the legal meaning of Resolution 242, that is whether Israel has to withdraw from the whole or from only a part of the territories occupied. This, that is the territorial scope of the withdrawal, is one of the most contentious matter emerging from this resolution.[268] Three positions have been taken overtime. Some have contended that this resolution is the emblem of constructive ambiguity. Others have maintained that there is no ambiguity at all because the preamble clearly reaffirm the prohibition of forcible acquisition of territories and because the absence of the determinative article preceding the word withdrawal is irrelevant.[269] Additionally, many States before the Council clarified that their interpretation was that the resolution required the integral withdrawal and the French text

[266] Watson (n 254) 105.
[267] Peter E Weinberger, *Co-opting the PLO: A Critical Reconstruction of the Oslo Accords, 1993–1995* (Lexington Books 2007) 10.
[268] See in general Charles D Smith, *Palestine and the Arab-Israeli Conflict: A History with Documents* (9th edn, Bedford/St. Martin 2017) 443 ff and Omar M Dajani, 'Forty Years without Resolve: Tracing the Influence of Security Council Resolution 242 on the Middle East' (2007) 37 Journal of Palestine Studies 24.
[269] Michael Lynk, 'Conceived in Law: The Legal Foundations of Resolution 242' (2 July 2007) <http://ssrn.com/abstract=1411698>.

does contain the determinative article. Others have maintained the exact opposite, that is that there is no ambiguity at all in the sense that the resolution does not ask the integral withdrawal.[270] The argument is that the absence of the determinative article was a conscient choice, that the text had been discussed in English language, which makes the resort to the French text irrelevant, and, in any case, that it is difficult to build such a sentence in French without the determinative article. It follows that when the Declaration refers to the resolution in question as providing the framework to the peace settlement but refrains from providing any additional specification it adds another layer of ambiguity.

Article XIII uses the term 'redeployment' with reference to Israeli military forces in the West Bank and the Gaza Strip and the term withdrawal with reference to the Gaza Strip and Jericho Area. Redeployment, as the term itself suggests, indicates the mere relocation of Israeli armed force from one place to another one, but not a withdrawal. More specifically, according to this article, Israeli armed force should be redeployed outside populated areas. The temporal scope of the redeployment too is not clearly defined since it should be carried out 'after the entry into force of this Declaration of Principles, and not later than the eve of elections for the Council' while '[f]urther redeployments to specified locations will be gradually implemented commensurate with the assumption of responsibility for public order and internal security by the Palestinian police'. In contrast, the territorial and temporal scope of the withdrawal term are specified in Annex II, which contains obligations *de contrahendo*.[271]

The scope of the redeployment was further addressed in subsequent agreements, such as the Gaza–Jericho agreement and in Oslo II, which divided the West Bank into three administrative divisions.[272] This prompts an observation regarding another ambiguous aspect

[270] Ruth Lapidoth, 'Jerusalem: Some Jurisprudential Aspects' (1996) 45 Catholic University Law Review 27.
[271] For instance, Article 1 of the Annex II reads 'The two sides will conclude and sign within two months from the date of entry into force of this Declaration of Principles, an agreement on the withdrawal of Israeli military forces from the Gaza Strip and Jericho area. This agreement will include comprehensive arrangements to apply in the Gaza Strip and the Jericho area subsequent to the Israeli withdrawal'. Supra n 257.
[272] These agreements are available at <www.jewishvirtuallibrary.org/gaza-jericho-agreement-annex-i> and at <www.jewishvirtuallibrary.org/interim-agreement-on-the-west-bank-and-the-gaza-strip-oslo-ii>.

of the Oslo process, namely the scope of the self-determination of the Palestinian people. The term self-determination does not appear in the text of the DOP and of the subsequent agreements, neither there are indirect references to it. However, Cassese notes that 'the Declaration has clearly been agreed upon in the perspective of self-determination'.[273] It is in this sense that the reference to the 'realization of the legitimate rights of the Palestinian people and their just requirements' should be read. However, all the agreements of the Oslo process are silent when it comes to the possibility of external self-determination and on the final legal status of Palestine, which evidently falls within the permanent status issues.

What here is important to underline is that the Declaration as well as the whole Oslo Process have been supported by virtually *all* States and that all along this process the red thread that emerges within the international community is the effort towards the settlement of the conflict into question by way of compromise. The problem of the question of the compatibility of a compromise with legal provisions having peremptory character has not gone unnoticed. Falk notes in general that '[t]here is a strong tendency in international law to respect whatever framework parties to a conflict choose to resolve their differences, especially if undertaken against a background of prolonged warfare and with the encouragement of the international community'.[274] Similarly, Lovatt and Dajani, with reference to the Oslo process, observe that: 'The international community, ever fearful of darkening the atmosphere around peace talks, has generally acquiesced to the Oslo Accords' muddying of international norms and marginalisation of multilateral institutions'.[275] In any case this kind of criticism of the Oslo process was rather common.[276]

[273] Cassese (n 258) 568.
[274] Richard Falk, 'Some International Implications of the Oslo/Cairo Framework for the PLO/Israeli Peace Process' (1994) 8 Palestine Yearbook of International Law Online 19, 24–26.
[275] Dajani and Lovatt (n 268) 2.
[276] See for instance the first chapter of Said's book on the peace process in which it is noted that in the name of the peace process many aspects of the conflicts, in the first-place Palestinian self-determination, have been set aside. This contention actually reemerges all over the book. See Edward W Said, *The End of The Peace Process: Oslo and After* (Vintage Books 2001).

With regards to such support, it is meaningful that the General Assembly, starting from 1993, had begun adopting resolutions whose item was the Middle East peace process. Resolution 48/58, which was introduced by Norway, Russia, and the United States and sponsored by 108 States and which was adopted with 155 votes in favour, three against (Iran, Lebanon, and Syria) and one abstention (Libya),[277] stresses 'the importance of, and the need for, achieving a comprehensive, just and lasting peace in the Middle East' and expresses the full support of the General Assembly to bilateral negotiations between the parties.[278] The voting pattern recorded the almost unanimous support for a comprehensive, just and lasting solution wished by the representative of Norway[279] and overall realized the hope of the American representative that was that the General Assembly would have spoken with one voice.[280]

Two other aspects are somewhat relevant. On the one hand, this resolution calls upon States to provide economic, financial, and technical assistance to the Palestinian people as well as to the States of the region. For instance, the American representative talked of the 'tangible improvements in people's lives.[281] Additionally, this resolution reaffirms that 'an active United Nations role in the Middle East peace process and in assisting in the implementation of the Declaration of Principles can make a positive contribution'. Roughly the same elements were already mentioned while addressing the cases of Western Sahara and we will see that the same goes for the other cases taken into consideration. More in general, this resolution seems to link the Oslo process to a general improvement of the situation for the Palestinians. At the same time, the resolution is silent over the principles for the achievement of a comprehensive, just and lasting peace in the Middle East which, consistently with the spirit of the Oslo process, are left to the negotiation between the parties. Therefore, the above-mentioned elements sound almost as a justification for the setting aside of legal considerations. The statement of the

[277] A/48/PV.79, 14 Dec 1993, 7.
[278] A/RES/48/58, 14 December 1993, paras 2–3.
[279] A/48/PV.79, 14 December 1993, 2.
[280] ibid 3.
[281] ibid.

representative of Russia captures well the spirit of compromise underlying this Resolution when holds that 'the point is not to dwell on the past, but to look to the future and to work towards that future calmly and constructively, here and now'. The statement continues by characterizing the resolution as a constructive, balanced and non-confrontational text.[282]

On the other hand, it is interesting to read the statements of the States that were not in favour of Resolution 48/58. Iran, for instance, clearly expressed the contention that the full restoration of legitimate rights of the Palestinian people is unconditional.[283] Libya specified that a just peace can be defined as such only if it:

> would bring about Israel's withdrawal from the occupied Arab territories and would guarantee the achievement of all the legitimate rights of the Palestinian people: its right to return to its land to exercise self-determination, and to establish its own independent State in Palestine, with Al-Quds as its capital.[284]

Actually, also some of the States favourable to the adoption of this resolution added some specifications. Sudan, for example, specified that 'a just, permanent and comprehensive peace … cannot be established except after a full Israeli withdrawal from all territories occupied since 1967 … and by the full respect of the legitimate rights of the Palestinian people and the implementation of all relevant … resolutions'.[285] Canada specified that the compromise should regard the *timing* of Israel's withdrawal from the occupied territories rather than the *withdrawal* itself.[286]

Thus, it seems that there is a cleavage between those States, the majority, which consider the Oslo Process as a positive development in as much as it allows to set aside the most rigid and uncompromising positions (namely, the positions of the Palestinians, which are arguably better founded in international law)[287] and those which, for the very same reason, consider it as a negative development.

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[282] ibid 2–3.
[283] ibid 9.
[284] ibid.
[285] ibid 5.
[286] ibid 9.
[287] Supra n 277.

Nonetheless, it should be noted that the wording of other General Assembly resolutions paints a more complex picture. For instance, General Assembly Resolution 48/158 D, which concerns the Question of Palestine, expresses its support for the ongoing peace process, but also lists a series of principles that shall be considered during negotiations for the achievement of a final settlement and comprehensive peace, namely:

> (a) The realization of the legitimate national rights of the Palestinian people, primarily the right to self-determination;
> (b) The withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and from the other occupied Arab territories;
> (c) Guaranteeing arrangements for peace and security of all States in the region, including those named in resolution 181 (II) of 29 November 1947, within secure and internationally recognized boundaries;
> (d) Resolving the problem of the Palestine refugees in conformity with General Assembly resolution 194 (III) of 11 December 1948, and subsequent relevant resolutions;
> (e) Resolving the problem of the Israeli settlements, which are illegal and an obstacle to peace, in conformity with relevant United Nations resolutions;
> (f) Guaranteeing freedom of access to Holy Places and religious buildings and sites.[288]

It is not surprising then that Israel underlined a contradiction between the principles for the achievement of a comprehensive peace and the support of the peace process mentioned above and these principles. In fact, the latter principles clearly predetermine the outcome of the peace process thus rendering almost useless any substantive negotiation.[289]

However, it should be noted that in the meanwhile the call for an international peace conference, which was present in earlier resolutions with the same item, has been dropped.[290] Moreover, Assembly Resolution 47/64 D adopted only one year earlier used the stronger verb 'to dismantle' with reference to Israeli settlements rather than the weaker 'to resolve'.[291]

[288] A/RES/48/158 D, 20 December 1993. Similarly, the Assembly has continued to adopt specific resolution, reaffirming the right of all persons displaced as a result of the June 1967 to return in their homes, the status of Jerusalem and of the Golan Heights, the right to external self-determination. See respectively A/RES/48/40 F, 10 December 1993, A/RES/48/59 A + B, 14 December 1993, A/RES/48/94, 20 December 1993 and A/RES/48/212, 21 December 1993.
[289] A/48/PV.85, 20 December 1993, 32. The American and the Russian representatives as well raised this point. ibid 32–33.
[290] A/RES/47/64 D, 11 December 1992, para 4 referred to the convening of an international peace conference.
[291] ibid para 5.

It is also interesting to look at the previous General Assembly resolutions on the question of the Middle East, the wording of which specify in a rather careful manner what is unconditional and, *a contrario*, what can be presumably settled by way of compromise.[292]

The reaction of condemnation by the international community after the 1978 Camp David Accords and the ensuing 1979 Egypt–Israel Peace Treaty is significant too especially when compared to the supportive response to the Oslo process. The General Assembly in that occasion connected the just and lasting peace in the Middle East with 'the attainment of the *inalienable rights* of the Palestinian people, including the right of return and the right to national independence and sovereignty in Palestine, in accordance with the Charter of the United Nations'.[293] In addition, the Assembly explicitly stated that 'agreements purporting to solve the problem of Palestine requires that they be within the framework of the United Nations and its Charter' and declared that 'the Camp David accords and other agreements have no validity in so far as they purport to determine the future of the Palestinian people and of the Palestinian territories occupied by Israel since 1967'.[294]

After 1993, the Assembly has continued to adopt, on the one hand, a resolution dedicated to the Middle East peace process in support of the Oslo process characterized by the

[292] A/RES/46/82 A, 16 December 1991. The relevant paragraphs read: 'The General Assembly … 3. Declares once more that peace in the Middle East is indivisible and must be based on a comprehensive, just and lasting solution of the Middle East problem under the auspices of the United Nations and on the basis of its relevant resolutions, which ensures the complete and unconditional withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and the other occupied Arab territories, and which enables the Palestinian people, under the leadership of the Palestine Liberation Organization, to exercise its inalienable rights, including the right to return and the right to self-determination, national independence and the establishment of its independent sovereign State in Palestine … 4. Considers the Arab peace plan adopted unanimously at the Twelfth Arab Summit Conference, held at Fez, Morocco, on 25 November 1981 and from 6 to 9 September 1982, which was confirmed by subsequent Arab summit conferences, including the Extraordinary Arab Summit Conference held at Casablanca, Morocco, from 23 to 26 May 1989, as an important contribution towards the realization of the inalienable rights of the Palestinian people through the achievement of a comprehensive, just and lasting peace in the Middle East; 5. Condemns Israel's continued occupation of the Palestinian territory occupied since 1967, including Jerusalem, and the other occupied Arab territories, in violation of the Charter of the United Nations, the principles of international law and the relevant resolutions of the United Nations, and demands the immediate, unconditional and total withdrawal of Israel from all the territories occupied since 1967; 6. Rejects all agreements and arrangements which violate the inalienable rights of the Palestinian people and contradict the principles of a just and comprehensive solution to the Middle East problem to ensure the establishment of a just peace in the area'.

[293] A/RES/33/28 A, 7 December 1978, para 2 (emphasis added).

[294] ibid para 4. For the positions expressed by States see 'Questions relating to the Middle East' (1979) The Yearbook of the United Nations 316, 354ff. See also Resolution 34/70, 6 December 1979, and Resolution 34/65 B, 12 December 1979.

a similar wording to Resolution 48/58[295] and, on the other hand, a resolution dedicated to the Question of Palestine, which in contrast reaffirms the five principle mentioned above.[296] Starting from 1997, that is while the Oslo process slowed down, the Assembly has begun adopting only resolutions modelled on the latter.[297]

Assembly resolutions concerning the peaceful settlement of the Question of Palestine reflect the failure of the 2000 Camp David initiative and the outbreak of the Second intifada. For instance, Resolution 55/55 adopted in 2000 '[c]alls upon … the entire international community to exert all the necessary efforts and initiatives to reverse immediately all measures taken on the ground since 28 September 2000'.[298] Resolution 57/110 adopted in 2002 '[w]elcomes the Arab Peace Initiative adopted by the Council of the League of Arab States at its fourteenth session, held in Beirut on 27 and 28 March 2002'.[299] Resolution 58/21 adopted in 2003 '[c]alls upon both parties to fulfil their obligations in implementation of the road map by taking parallel and reciprocal steps in this regard, and stresses the importance and urgency of establishing a credible and effective third-party monitoring mechanism'.[300]

Afterwards, there are mainly minor changes in the wording of resolutions. For instance, Resolution 59/31 adopted in 2004:

> Reaffirms its commitment, *in accordance with international law*, to the two-State solution of Israel and Palestine, living side by side in peace and security within recognized borders, based on the pre-1967 borders; Reiterates its demand for the *complete cessation of all Israeli settlement activities* in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, and calls for the implementation of the relevant Security Council resolutions.[301]

Resolution 60/39 adopted in 2005 welcomed Israeli disengagement from Gaza and demanded that Israel immediately cease its construction of the wall in Palestinian territory and that third

[295] See for instance A/RES/49/88, 16 December 1994.
[296] See for instance A/RES/49/62, 14 December 1994.
[297] See for instance A/RES/52/52, 9 December 1997.
[298] A/RES/55/55, 1 December 2000, para 4.
[299] A/RES/57/110, 3 December 2002, para 3.
[300] A/RES/58/21, 3 December 2003, para 4.
[301] A/RES/59/31, 1 December 2004, paras 8–9 (emphasis added).

States comply with their legal obligations.[302] Resolution 62/83 adopted in 2007 welcomed the resumption of the Arab Peace Initiative and welcomed the international conference convened at Annapolis.[303]

Resolutions adopted are gradually longer and longer and indeed they cite all the diplomatic initiatives aimed to settle the conflict. This however makes it increasingly difficult to infer any idea on what is the precise material scope of negotiations between parties on the final status issues.[304] What it can be said is that starting from 1993 it is possible to perceive a *supportive* response by the General Assembly, as well as even if to a smaller degree, by the Council,[305] to the approach underlying the Oslo process, which largely reflects what has been here defined as a pragmatic approach. Indeed, Imseis observes that:

> The temporal correlation between the onset of the Oslo process and the cessation of the Assembly's characterization of Israel's occupation as 'illegal' and/or in 'violation of the UN Charter' is notable. It can be reasonably assumed that this change in practice resulted from Oslo's promise that a negotiated resolution based on the two-state formula was on the horizon.

However, this supportive response is not uncontroversial and to what extent final status issues can really be solved by way of negotiations without preconditions is far from clear.

2.5. The Peace to Prosperity Plan

A similar mixed picture characterizes the international response to the peace plan unveiled by former US President Donald Trump on 28 January 2020 and officially entitled 'Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People'.[306] The title as well as the subtitle of the plan implicitly clarifies that the whole point of this proposal is to lead

[302] A/RES/60/39, 1 December 2005, paras 5, 11.
[303] A/RES/62/83, 10 December 2007, paras 3–4.
[304] Imseis (n 247). Imseis talks, with regard to the UN position over the question of Palestine, as of an inconsistent, contradictory, incongruous, and incoherent position and he elaborates as follows: 'While some UN organs began consideration of the matter with a principled approach, their positions have become diluted or legally confused over time. Still other organs have remained silent altogether'.
[305] On the support for the Oslo process see S/RES/904, 18 March 1994 and S/RES/1073, 28 September 1996. Particularly interesting is S/RES/1850, 16 December 2008, para 1, which defined bilateral negotiation as irreversible.
[306] See also above at 166ff.

to an improvement of the opposing parties' conditions being other considerations somewhat residual. The introduction of the plan too recalls that 'Israelis and Palestinians have both suffered greatly from their long-standing and seemingly interminable conflict'[307] and that 'the time has come to end the conflict, and unlock the vast human potential and economic opportunity that peace will bring to Israelis, Palestinians and the region as a whole'.[308] This wording clearly echoes that used in support to the Moroccan peace plan for Western Sahara as well the wider approach underlying the Oslo process.

Among the considerations that are sacrificed in the name of peace there are first of all legal considerations. For instance, when referring to the Palestinian people the plan refrains from talking of any rights, but instead talks of '*aspirations* that have not been realized, including self-determination'.[309] Interestingly enough the plan refers to both the efforts undertaken by the UN and to the Oslo process. As for the former, the plan mentions the necessity of 'learning from past errors' in the sense that the mere recital of resolutions, on the one hand, has not worked and, on the other, it has dragged on the ambiguities of the peace process. What is needed is, on the contrary, a pragmatic approach that takes into account current realities and that refrains from 'reciting past narratives'.[310] As for the latter, the plan specifies that the Oslo process failed because it left to the end the negotiations on permanent status issues. In contrast, the proposal in question advocates a comprehensive agreement coupled with a strong economic plan so to make the parties accept compromise.[311]

In principle, the plan asks compromises to both the opposing parties. Palestine should get a State, but should renounce to some of its territorial claims. Israel should get security, but should renounce to some of the territories it is administering. However, notwithstanding the

[307] Supra n 160.
[308] ibid 1.
[309] ibid 3 (emphasis added).
[310] ibid 5ff.
[311] ibid 3.

caveat that both parties have to renounce to some of their claims, the plan ends up by asking real compromises only to *one* of the opposing parties, that is to Palestinians.

As for borders, the argument endorsed by the plan is that Israel has not legally the duty to provide to the emerging Palestinian State the whole of the pre-1967 territory and that a redrawing of boundaries is compatible with the wording of Security Council Resolution 242.[312] Such redrawing is based on a series of considerations such as the security requirements of Israel, the delivery of a significant territorial expansion of Palestine, Israel's 'valid *legal* and historical claims' (interestingly enough this is the only reference to a proper legal claims), the attempt to avoid forced population transfers, and a series of economic considerations. As a matter of fact, the plan proposes a series of territory swaps with the clear purpose of keeping Israeli settlements located in the West Bank as well as in the Jordan valley under Israeli sovereignty. The future Palestinian State would then comprise the remaining part of the West Bank, the Gaza Strip, and, additionally, two large enclaves in the Negev desert that would be connected to the Gaza Strip by a road, while the Gaza Strip itself would be connected to the West Bank by a tunnel. However, inside the territory of Palestine there would be a number of Israeli exclaves so to retain under Israeli sovereignty over the settlements located thereto.

As for Jerusalem,[313] its legal status would be that of the capital of Israel. According to the plan, West Jerusalem, the Old City, and a large part of East Jerusalem would be under Israeli sovereignty, while a section of East Jerusalem would be the capital of Palestine. More specifically, the section in question is the section of East Jerusalem situated to the east and to the north of the wall, which will remain in place serving as a border between the two capitals.

When it comes to the question of refugees, the plan excludes from the outset any right of return. In this regard the plan starts off by holding that '[p]roposals that demand that the State of Israel agree to take in Palestinian refugees, or that promise tens of billions of dollars in

[312] ibid 11ff
[313] ibid 14ff.

compensation for the refugees, have never been realistic and a credible funding source has never been identified'.[314] The plan in contrast, envisages three not mutually exclusive options, the first of which is the absorption of Palestinian refugees in the future State of Palestine. However, such absorption is subjected to two limitations, namely the immigration of refugees has to occur under the terms of agreed security arrangements and the rate of movement has to be agreed to by the parties so to prevent that an excessively high rate of movement does not affect negatively the economy of Palestine and Israeli security. The second option is local integration in current host countries provided that such countries do agree to the integration. The third option is the acceptance of 5.000 refugees per year for up to ten years in member States of the Organisation of Islamic Cooperation (OIC) provided that such States do agree to the Palestinian refugee settlement scheme. In addition to this, some form of compensation would be available through a dedicated refugee trust that would be administered by two trustees appointed by Palestine and by the United States.

Finally, security considerations have an impact on the statehood of Palestine in the sense that its statehood is significantly limited so to guarantee Israel's security. More specifically, Palestine would be a demilitarized State and Israel would maintain overriding security responsibility. Moreover, it is primarily for security reasons that, as said, the Jordan valley would be under the sovereignty of Israel.[315]

From a cursory review of the responses by third States, international organizations and legal scholars, it appears that the plan was met with harsh criticisms. Mahmoud Abbas, speaking as President of the Observer State of Palestine, held before the Security Council that:

> The broad rejection of this deal is the result of its unilateral positions and the fact that it flagrantly violates international legitimacy and the Arab Peace Initiative. It annuls the legitimacy of the Palestinians' rights to self-determination, freedom and independence in their own State. It legitimizes illegality, settlements and the confiscation and annexation of Palestinian territories. I reaffirm that this deal or any part thereof cannot be considered an international reference for negotiations … It is tantamount to a rejection of all

[314] ibid 31.
[315] ibid 13. See also the Appendix 2A.

> signed agreements based on the establishment of two States along the 1967 borders. This deal will not bring peace or stability to the region, and therefore we will not accept it.[316]

Indeed, most of international organizations adopted a rather critical position and condemned the plan.[317] Similarly, from a reading of the records of the meeting of the Council it is possible to perceive a wide condemnation of the plan.[318] However, on a closer inspection, the response of a significant part of the international community is not that firm.

The High Representative of the European Union for Foreign Affairs and Security Policy Josep Borrell declared that:

> Today's initiative by the United States provides an occasion to re-launch the urgently needed efforts towards a negotiated and viable solution to the Israeli–Palestinian conflict. The European Union will study and assess the proposals put forward. This will be done on the basis of the EU's established position and its firm and united commitment to a negotiated and viable two-state solution that takes into account the legitimate aspirations of both the Palestinians and the Israelis, respecting all relevant UN resolutions and internationally agreed parameters.[319]

Indeed, in a subsequent statement Josep Borrell, after having reiterated the traditional position supported by the Union, held that the United States initiative 'departs from these internationally agreed parameters'.[320] However, the Foreign Affairs Council, chaired by the High

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[316] S/PV.8717, 11 February 2020, 4. Reportedly, President of the Palestinian National Authority Mahmoud Abbas held that the United States proposal deserve to be relegated to the dustbin of history. See 'What does Trump's Middle East plan say on key issues?', BBC News, 29 January 2020 <www.bbc.com/news/world-middle-east-51299145>.

[317] See the statement adopted by the Arab League, 1 February 2020 <www.reuters.com/article/us-israel-palestinians-arabs/arab-league-rejects-trumps-middle-east-plan-communique-idUSKBN1ZV3QV>, the statement adopted by the Organization of Islamic Cooperation, 3 February 2020 <www.reuters.com/article/us-israel-palestinians-oic/organization-of-islamic-cooperation-rejects-trump-peace-plan-statement-idUSKBN1ZX1BH>, and the Declaration on the Situation in Palestine and the Middle East, 9–10 February 2020 <https://au.int/sites/default/files/decisions/38180-assembly_au_dec_749-795_xxxiii_e.pdf>.

[318] S/PV.8717, 11 February 2020.

[319] Declaration by the High Representative Josep Borrell, 28 January 2020 <www.consilium.europa.eu/en/press/press-releases/2020/01/28/declaration-by-the-high-representative-josep-borrell-on-behalf-of-the-eu-on-the-middle-east-peace-process>. North Macedonia, Montenegro, Serbia, Albania, Bosnia and Herzegovina, Moldova, and Georgia align themselves with this declaration.

[320] The traditional position consists of the support to 'a negotiated two-State solution, based on 1967 lines, with equivalent land swaps, as may be agreed between the parties, with the State of Israel and an independent, democratic, contiguous, sovereign and viable State of Palestine, living side by side in peace, security and mutual recognition'. Statement by the High Representative Josep Borrell, 4 February 2020 <https://eeas.europa.eu/headquarters/headquarters-homepage_en/73960/MEPP:%20Statement%20by%20the%20High%20Representative/Vice-President%20Josep%20Borrell%20on%20the%20US%20initiative>. See also the speech by Borrell at the European Parliament, 11 February 2020 <https://eeas.europa.eu/headquarters/headquarters-homepage/74514/mepp-speech-hrvp-josep-borrell-ep-us-middle-east-initiative_en>.

Reperesentative himself, did debate the United States initiative, but was not able to approve any resolution condemning explicitly the initiative, reportedly for the 'veto' of at least six member States.[321]

Some European States refrained from clearly condemning the peace plan. Italy, for instance, right after the official publication of the plan, after having reaffirmed the traditional stance of Italy on the question, welcomed the attempt to reinvigorate the peace process and added that the proposal would have been carefully assessed against the background provided by the relevant UN resolutions. However, this declaration was not followed by another one more detailed, at least in an official forum.[322] France adopted a similar position,[323] which was then confirmed during a Council meeting, in which France reiterated its longstanding position (a position similar to that expressed by Italy), but, on the other hand, welcomed the plan and held that '[t]he plan announced by the United States is the fruit of efforts that have been under way for several months, which we have recognized as such'.[324]

Similarly, Germany in a first instance reiterated the commitment to a two-State Solution adding that the United States proposal would have been studied further.[325] Later, before the Council, Germany adopted a more critical stance, at least when compared to the statements adopted by France or Italy. However, in the end Germany merely held that the United States proposal departs from the internationally agreed parameters, but still refrained from condemning the peace plan.[326]

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[321] See the record of the 3747th council meeting, 17 February 2020 <www.consilium.europa.eu/media/42603/st06117-en20_v2.pdf>. See also '6 countries block EU resolution that would have condemned Trump plan, annexation', Times of Israel, 17 February 2020 <www.timesofisrael.com/eu-reportedly-blocked-from-resolution-condemning-trump-plan-annexation>

[322] More specifically, it was reiterated that Italy supports in principle the two-State solution and that Italy is ready to support a negotiated solution that take into account the legitimate aspirations of the parties. See the statement adopted on 29 January 2020 <www.esteri.it/mae/it/sala_stampa/archivionotizie/comunicati/2020/01/medio-oriente-italia-per-soluzione-due-popoli-due-stati.html>.

[323] Statement adopted by the spokesperson of the Ministry for Europe and Foreign Affairs of France, 29 January 2020 <www.diplomatie.gouv.fr/fr/dossiers-pays/israel-territoires-palestiniens/processus-de-paix/evenements/article/plan-de-paix-du-president-des-etats-unis-d-amerique-declaration-de-la-porte>.

[324] S/PV.8717, 11 February 2020, 14.

[325] See the statement adopted by the Minister of Foreign Affairs of Germany, 28 January 2020 <www.auswaertiges-amt.de/en/newsroom/news/-/2296906>.

[326] S/PV.8717, 11 February 2020, 17–18.

Other European States welcomed and supported the plan. Poland, for instance, reaffirmed the importance of the 'internationally agreed parameters'[327] and the 'respect for the international law', but stressed also the importance of the political and of the economic components of the plan with the aim the achieve an 'agreement which would satisfy the legitimate aspirations of both Israel and Palestine' and specifies that this agreement in order to led to real peace shall be based on a voluntary basis by the parties.[328] Hungary and Estonia expressed their support without any further specification.[329] United Kingdom in the first instance defined the plan as a 'clearly a serious proposal, reflecting extensive time and effort' and encouraged the parties to 'give these plans genuine and fair consideration, and explore whether they might prove a first step on the road back to negotiations'.[330] Then, before the Council, United Kingdom held that:

> The United Kingdom's long-standing position on the Middle East peace process is clear and has not changed. We support a negotiated settlement leading to a safe and secure Israel living alongside a viable and sovereign Palestinian State based on the 1967 borders, with agreed land swaps, Jerusalem as the shared capital of both States and a just, fair, agreed and realistic settlement for refugees.

However, it is added that:

> Our American colleagues have offered proposals to break the deadlock that represent genuine desire to resolve the conflict. The United Kingdom does not believe the proposals are the end of the road, but we hope that they may lead to a first step. Both Israeli and Palestinian leaders owe it to their people to give them due consideration.[331]

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[327] Pertile and Sondra observe: 'Some states even speak of "internationally agreed parameters" recalling the idea that a sort of (express or tacit) worldwide agreement exists on the issue of Jerusalem and Palestine, more broadly'. Pertile and Faccio (n 166) 640. On the Israeli-Palestinian issue at large they note:'A number of states (127) refer expressly to the existence of some agreed parameters concerning the settlement of the Israeli-Palestinian issue'. Se ibid 143.

[328] Statement of the Minister of Foreign Affairs Jacek Czaputowicz on the peace plan proposal for Israel and Palestine, 29 January 2020 <www.gov.pl/web/diplomacy/statement-of-the-minister-of-foreign-affairs-jacek-czaputowicz-on-the-peace-plan-proposal-for-israel-and-palestine>.

[329] Press release by the Ministry of Foreign Affairs and Trade of Hungary, 30 January 2020 <www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/hungary-supports-all-efforts-aimed-at-resolving-the-israeli-palestinian-conflict>. Press release by the Foreign Minister of Estonia, 30 January 2020 <https://vm.ee/en/news/estonia-supports-middle-east-peace-process>.

[330] Statement of the United Kingdom Secretary of State for Foreign and Commonwealth Affairs, 28 January 2020 <www.gov.uk/government/news/foreign-secretary-statement-on-release-of-us-proposals-for-middle-east-peace>.

[331] S/PV.8717, 11 February 2020, 19–20.

What is interesting is that on the one hand, the United Kingdom clearly reaffirms many of the tenets that define the Palestinian position (including the illegality of the settlements, the two-State solution, the respect of pre-1967 borders), so much so that it clearly condemned the proposal expressed by Israel in connection with the possibility of annexations of parts of the West Bank, but on the other hand it refrained to directly condemn the peace plan. Similar positions were adopted by Australia,[332] Japan,[333] and South Korea.[334]

The Security Council discussed the item but, as the European Foreign Council did, it did not take any resolution. It is worthwhile to add that President of the Palestinian National Authority Abbas failed in gaining the majority of votes of the Council members necessary to adopt a resolution rejecting the plan and so the United States had no need to use its veto power.[335]

The response of some Arab States, States allied to the United States, is overall similar given that these States expressed their appreciation for the American effort, encouraged the parties to bilateral negotiations, and reaffirmed the importance of Palestinian legitimate rights. Each of these States, however, emphasized different aspects. Saudi Arabia recalled the relevance of the Arab peace initiative.[336] Qatar, in addition to that, stressed the importance to preserve international law and accordingly added that '[t]he State of Qatar notes in this context that peace cannot be sustainable if Palestinians rights in their sovereign state within the 1967 borders, including East Jerusalem, and the right of return are not preserved'.[337] Bahrein connected a comprehensive and just peace with the emergence of an independent Palestinian

[332] Statement adopted by Minister for Foreign Affairs of Australia, 29 January 2020 <www.foreignminister.gov.au/minister/marise-payne/media-release/united-states-vision-peace>.
[333] See the statement adopted by Japanese Chief Cabinet Secretary, 30 January 2020 <www.arabnews.jp/en/japan/article_9745>.
[334] See the statement adopted by the Ministry of Foreign Affairs of South Korea, 30 January 2020 <www.mofa.go.kr/eng/brd/m_5676/view.do?seq=320937>.
[335] See Oded Eran, Pyrrhic Victories: Israel and the Palestinians in the International Arena (Institute for National Security Studies Insight No. 1267, 3 March 2020) 3–4.
[336] See the statement of the Ministry of Foreign Affairs of Saudi Arabia, 28 January 2020 <www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2027848#2027848>.
[337] See the press release issued on 28 January 2020 <https://news.qna.org.qa/lang/en/w/article/1580250375011598800>.

State.[338] The United Arab Emirates stressed the importance of the support of the international community in additional to a mere bilateral agreement.[339] Morocco, in addition to the appreciation for 'the constructive peace efforts … with a view to achieving a just, lasting and equitable solution to this conflict' emphasized:

> [E]lements of convergence with the principles and options that it [ie, Morocco] has always defended in this matter: these include the two-State solution. It is also about negotiation between the two parties as the preferred approach to reach any solution, while maintaining an openness to dialogue.

As for Jerusalem, Morocco held that 'the status of Jerusalem must be preserved' and that '[t]he final decision must be discussed between the parties in accordance with international legality'. The statement ends by expressing:

> The wish that a constructive peace process be launched from now on, with a view to a realistic, applicable, equitable and lasting solution to the Israeli–Palestinian question, satisfying the legitimate rights of the Palestinian people for an independent, viable and sovereign State, with East Jerusalem as its capital, and enabling the peoples of the region to live in dignity, prosperity and stability.[340]

What can be inferred from this array of statements is that there are some internationally agreed parameters, but there is still a margin for negotiation. The President Trump's peace plan departs in significant measure from these parameters and the criticisms of third States emerge from the imbalance of this departure. In contrast, the general premise that the conflict must be settled by means of a bilateral negotiated solution does not seem in discussion. This is somehow confirmed by the international response to the proposed Israeli annexation of parts of the West Bank. Such a proposal has attracted widespread criticisms from the international community.[341]

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[338] See the statement of the Ministry of Foreign Affairs of Bahrein, 29 January 2020 <www.mofa.gov.bh/Default.aspx?tabid=7824&language=en-US&ItemId=12286>.

[339] See the statement by United Arab Emirates ambassador to the United States and Minister of state, 28 January 2020 <www.uae-embassy.org/news-media/ambassador-yousef-al-otaiba-statement-peace-plan>.

[340] Press Statement by the Minister of Foreign Affairs, African Cooperation and Moroccan Expatriates, 29 January 2020 <https://twitter.com/Marocdiplo_EN?ref_src=twsrc%5Etfw%7Ctwcamp%5Eembeddedtimeline%7Ctwterm%5Eprofile%3AMarocDiplomatie&ref_url=http%3A%2F%2Fwww.diplomatie.ma%2Findex.php%2Fen>.

[341] See the remarks by the Secretary-General and by the Special Coordinator for the Middle East Peace Process, which were echoed by many members of the Security Council, 24 June 2020, available at: <www.un.org/press/en/2020/sc14225.doc.htm#_ftn1>, the remarks by the European Union High Representative Borrell on the possible Israeli annexation in the West Bank, 18 June 2020, available at: <https://eeas.europa.eu/headquarters/headquarters-homepage_en/81104>, and Resolution 8522 adopted by the

Such an outright annexation is clearly considered as unacceptable and international actors refrain from leaving any margin for discussions.

2.6. A comparison with the response to the recognition of the Golan Heights

As mentioned above, the American recognition of the Golan Heights as an integral part of Israel has attracted widespread criticism from international actors and from legal scholars. Apparently, such response does not differ considerably from the response to the American stance towards the Israeli–Palestinian conflict. However, between them there is a significant difference. More specifically, as maintained before, the peace plan proposed by the Trump administration was criticized, but it seems that third States have left open the possibility of a negotiated settlement. In contrast, the response to the United States recognition of Israeli sovereignty over the Golan Heights seems much firmer and, more specifically, this response does not leave any margin for a negotiation on the sovereignty of the territory in question.

The United Kingdom's statement before the Security Council has already been cited above.[342] In fact, each State participating to the Council meeting, which originally had as subject the renewal of the UN Disengagement Observer Force established with the aim of contributing to the implementation of Security Council 338, unambiguously condemned the United States decision. The exceptions are the United States for reasons that are obvious and Côte d'Ivoire, which limited itself to reaffirm its support for the UN mission deployed in the Golan Heights.[343] The same goes for States participating to the debate before the General Assembly: almost each State condemned along similar lines the United States unilateral act. It is worthwhile to note that also those States that are widely considered as allies of the United States, such as Kuwait,

Council of the League of Arab States on 30 April 2020, enclosed to the Annex to the Letter dated 1 May 2020 from the Permanent Representative of Oman to the United Nations addressed to the Secretary-General, 12 May 2020, UN Doc. A/74/835–S/2020/356.

[342] Supra n 188.

[343] S/PV.8495, 27 March 2019, 4–5 (United States) and 11–12 (Côte d'Ivoire).

Egypt, Saudi Arabia, Bahrain, and Jordan,[344] adopted the very same stance. It is worthwhile to mention that these are the same States that aligned themselves with the United States position over Western Sahara and that were overall supportive towards the President Trump's peace plan.[345]

When it comes to non-recognition, the situations of the Golan Heights and of Palestine are largely comparable. Indeed, relevant UN resolutions have used the same terms and expressions. We saw that Security Council Resolutions 476 and 478 reaffirmed the prohibition of forcible acquisition of territory and established that the measures adopted by Israel that purport to alter the character and the status of Jerusalem have no legal validity and are considered as null and void.[346] The same goes for Palestine at large. Resolution ES-10/2, which is the first resolution adopted in the context of the Tenth emergency special session of the General Assembly, reaffirmed the above-mentioned prohibition and reaffirmed that Israeli settlements in all the territories occupied by Israel are illegal. The subsequent Resolution adopted on this matter by the Assembly reaffirmed that 'all illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, especially settlement activity, and the practical results thereof cannot be recognized, irrespective of the passage of time'.[347] Almost identical terms and expressions have been used with reference to the Golan Heights. Security Council Resolution 497 reaffirmed once again that the acquisition of territory by force is inadmissible, and that measures take to consolidate such acquisition are null and void and without international legal effect.[348] Yearly the Assembly adopts a resolution that reiterate this long-standing position.[349]

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[344] ibid 5ff. Also Pakistan, which to a certain extent can be considered as a friendly State towards the United States, clearly condemned the American recognition of Israeli sovereignty over the Golan Heights. See the statement adopted by Pakistan on 27 March 2019 <http://mofa.gov.pk/us-decision-on-syrian-golan-heights>.
[345] See above ch 4, s 1.7.
[346] A/RES/ES-10/2, 25 April 1997, preamble and para 3.
[347] A/RES/ES-10/3, 15 July 1997, preamble and para 3. As for the settlements, see also S/RES/2334, 23 December 2016, para 1.
[348] S/RES/497, 17 December 1980, preamble and para 1.
[349] See, for instance, A/RES/75/99, 10 December 2020. This resolution was adopted by a vote of 142, 7 (Canada, Hungary, Israel, Marshall Islands, Micronesia, Nauru, and the United States), and 14 (Australia, Brazil, Cameroon,

It follows that logically these two situations shall be treated in the same way. However, it is possible to perceive a cleavage between the international response to the approaches of the Trump administration towards these situations. Initially, the decisions over Jerusalem and over the settlements have been criticized. Nonetheless, the international response to the peace plan proposed by the American administration suggests that also an original unlawful situation can hypothetically be accommodated.[350] The international response to the unilateral American action on the sovereignty over the Golan Heights is significantly firmer.

The two situations are indeed similar, but the question of the Golan Heights regards more closely the prohibition of conquest when compared to the situation of Palestine. It should be noted that almost all States condemning the Trump administration's initiative do not only regret or condemned the unilateral action in question or state that their position is unchanged, but they clearly mention a legal ground, recall this prohibition, and accordingly consider non-recognition as a duty. The same goes for international and regional organizations.[351] At the same time there is nothing to suggest that the question can be settled by way of compromise.[352]

Colombia, Guatemala, Honduras, Kiribati, Malawi, Papua New Guinea, Serbia, Solomon Islands, Togo, Uruguay, and Vanuatu). See A/75/PV.41, 10 December 2020.

[350] See above ch 4, s 2.5.

[351] See the statement adopted by the European Union and of Turkey, Macedonia, Montenegro, Serbia, Albania, Bosnia, Iceland, Liechtenstein, Norway, Ukraine, Moldova and Armenia on 27 March 2019 <www.consilium.europa.eu/en/press/press-releases/2019/03/27/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-golan-heights>, by the NAM movement on 26 March 2019 <https://mnoal.org/wp-content/uploads/2019/06/26.03.2019-Communique-Occupied-Syrian-Golan.pdf>, by the Organisation of Islamic Cooperation on 26 March 2019 <www.oic-oci.org/topic/?t_id=20762&ref=11766&lan=en>, by the Arab League on 31 March 2019 <www.france24.com/en/20190331-arab-summit-expected-reject-usa-decision-golan-heights-israel>.

[352] As for the statements issued before the Security Council see S/PV.8495, 27 March 2019 (Kuwait, Poland, Russia, Peru, Dominican Republic, Belgium, Germany, China, Equatorial Guinea, Indonesia, and France). It is possible to find similar statements adopted on occasion of two other meetings, see S/PV.8489, 26 March 2019 and S/PV.8493, 27 March 2019. As for the statements issued before the General Assembly, see A/74/PV.37, 3 December 2019 (Libya, Cuba, Iran, and Argentina), A/74/PV.38, 3 December 2019 (Egypt, Russia, and Argentina). See also the statements adopted by Italy on 12 April 2019 <www.camera.it/leg18/410?idSeduta=0162&tipo=stenografico>, by Saudi Arabia, 26 March 2019 <www.spa.gov.sa/viewfullstory.php?lang=en&newsid=1904004#1904004>, by Bahrain on 26 March 2019 <www.mofa.gov.bh/Default.aspx?tabid=7824&language=en-US&ItemId=10427>, by Jordan on 25 March 2019 <http://petra.gov.jo/Include/InnerPage.jsp?ID=14307&lang=en&name=en_news>, by Pakistan on 27 March 2019 <http://mofa.gov.pk/us-decision-on-syrian-golan-heights>, by Turkey on 25 March 2019 <www.mfa.gov.tr/no_77_-isgal-altindaki-golan-tepeleri-hk.en.mfa>, by Canada on 25 March 2019 <www.canada.ca/en/global-affairs/news/2019/03/statement-on-the-golan-heights.html>, by Japan on 10 April 2019 <www.mofa.go.jp/me_a/me1/sy/page24e_000240.html>, by Venezuela on 25 March 2019 <www.mppre.gob.ve/comunicado/venezuela-eeuu-altos-del-golan>, by Malaysia on 27 March 2019 <www.kln.gov.my/web/guest/-/press-release-statement-by-the-ministry-of-foreign-affairs-on-united-states-recognition-of-israel-s-sovereignty-over-the-occupied-syrian-golan-

3. The 'tolerance' by the international community of the Turkish Republic of Northern Cyprus

3.1. Features of interest of the Cyprus question when it comes to non-recognition

Some have noted that Turkish Cypriots and Turkey have consistently framed the Cyprus question as a dispute between two communities, even if it seems more appropriate to frame it as a dispute that emerged from a problem of foreign military intervention and occupation, and thus as an unlawful situation in the sense of Article 41(2) ARSIWA.[353] Indeed, there is a policy of collective non-recognition towards the TRNC and this case recently, in contrast with the cases of Western Sahara and of Palestine, has not attracted much international attention in the sense that no State has recognized the TRNC or the legitimacy of its claims. It follows that arguably in this case States are holding fast to their duty of non-recognition towards this political entity. However, on a closer glance, this argument does not tell the whole story. In fact, it seems that Turkish Cypriots, notwithstanding the original unlawfulness that characterizes the emergence of the TRNC, have overall succeeded to be considered by the international community on an equal standing with Greek Cypriots and, more in general, to set aside discussions on such unlawfulness.

For instance, Security Council Resolution 1250 (1999), which expresses the endorsement of the Council to the efforts of the Secretary-General that would have led to the Annan plan, openly recognizes that 'both sides have legitimate concerns that should be addressed through comprehensive negotiations covering all relevant issues'. Thus, the

heights?inheritRedirect=true&redirect=%2Fweb%2Fguest%2Fpress-releases>, by Vietnam <www.mofa.gov.vn/en/tt_baochi/tcbc/ns190409093349>, by Spain on 25 March 2019. <www.exteriores.gob.es/Portal/en/SalaDePrensa/Comunicados/Paginas/2019_COMUNICADOS/20190325_COMU060.aspx>, and by Ireland on 25 March 2019 <www.dfa.ie/news-and-media/press-releases/press-release-archive/2019/march/statement-by-the-tanaiste-on-irelands-position-on-the-golan-heights.php>.

[353] Andrew Jacovides, *International Law and Diplomacy: Selected Writings* (Brill 2011) 296, 308–309. Similarly, Souter observes that 'Greek Cypriots emphasise the international aspect of the problem, notably the continued presence of Turkish troops, while Turkish Cypriots stress the intercommunal dimension' and adds that for Turkish Cypriots the Cyprus problem has been resolved by partition, which in itself does not predispose them to do any concession. See David Souter, 'The Cyprus Conundrum: The Challenge of the Intercommunal Talks' (1989) 11(2) Third World Quarterly 76, 77–79.

resolution calls upon both sides 'to give their full support to such a comprehensive negotiation, under the auspices of the Secretary-General' and to commit themselves to a series of principles including 'no preconditions' and 'all issues on the table'.[354] Conversely, it makes no mention to the original unlawfulness or to the legal consequences resulting from such unlawfulness. It should be noted that a similar stance is taken in both preceding and subsequent UN resolutions.[355]

Further, after the rejection by Greek Cypriots of the Annan plan, Greek Cypriots, without regard to their principled position, have been depicted somehow as the 'culprits' for having refused to settle the conflict. In this regard, Michael notes that 'as far as Western and international opinion was concerned, Greek Cypriot rejection of the Annan Plan absolved Turkey's 1974 invasion and nullified their sharp moral stance regarding the demographic partition of the island'.[356]

To sum up, Turkish conduct is generally considered as the legal ground for the policy of non-recognition towards the TRNC. In other words, it is contended that the Council adopted a resolution that bars the recognition of this entity on the assumption that this intervention amounts to a serious breach of a peremptory norm.[357] However, what noted above suggests that the case of the TRNC too witnesses the tendency of States to gradually weaken the duty of non-recognition or, at least, to deprive it of most practical consequences.

Further, there are two additional features of interest that call into question the prevailing understanding of duty of recognition. First, it is curious that between the original unlawful conduct and the call for non-recognition there is a considerable lapse of time given that the

[354] S/RES/1250, 29 June 1999, paras 5, 7. Two additional principles were mentioned, namely the 'commitment in good faith to continue to negotiate until a settlement is reached' and the 'full consideration of relevant United Nations resolutions and treaties'.
[355] See below ch 4, ss 3.3–3.5, 3.7.
[356] Michális S Michael, *Resolving the Cyprus Conflict: Negotiating History* (Palgrave Macmillan 2009) 181.
[357] See for instance Aristoteles Constantinides, 'The Cyprus Problem in the United Nations Security Council' (2017) 19 Austrian Review of International and European Law 29, 51–52 and Marina Mancini, *Statualità e non riconoscimento nel diritto internazionale* (Giappichelli 2020) 91. For the stance adopted by the Security Council, see below ch 4, s 3.4.

unlawful conduct occurred in 1974 and non-recognition was invoked at least within the UN only in a second instance. Moreover, not only the Council resolutions but also the various statements adopted before the Council by third States on the question at hand do not support the contention that the unlawful conduct of Turkey is really the ground for non-recognition. Second, the way in which European Courts have dealt with the northern Cyprus question too does not shine a light over this obligation, especially when it comes to its content and to the effect of the passing of time. In contrast, it should be noted that the international reaction to the attempt of Turkey to exploit the natural resources located in the continental shelf that extends from the coastline of the unrecognized entity by means of an agreement with the latter have been met with strong resistance, even if it is not completely clear to what extent the duty of non-recognition explains this resistance.

3.2. The factual and legal background to the Cyprus question

As other intractable conflicts, the roots of the Cyprus question do not date back to 1974, which is the year that marked the partition of the island, but can be traced at least to the annexation of the island by the Ottoman Empire in 1571. The Ottoman rule lasted for more than 300 years and had far-reaching consequences. Most importantly, a considerable Turkish minority settled thereto and, conversely, as put it by Dodd:

> Greek Cypriots came easily to regard themselves as the rightful, because original, rulers of Cyprus, looking back essentially to the long centuries when they in Cyprus were part of the Byzantine world, sharing in its culture and religion. They were conscious of the fact that they were not only a majority, but even in Ottoman times a partly self-ruling majority.[358]

In 1878, when the Russian Empire was fighting against the already declining Ottoman Empire over the naval domination of the Eastern Mediterranean, the latter and the United Kingdom concluded an agreement by means of which Cyprus became a British protectorate and after a few years it became a proper colony. The end of the Ottoman rule, together with the

[358] Clement Dodd, *The History and Politics of the Cyprus Conflict* (Palgrave Macmillan 2010) 2. The following historical account is based on this book as well as on Michael (n 356).

integration to another empire that however was ruled by a liberal State, persuaded Greek Cypriots that *enosis*—ie, the reunification with Greece—would have been possible.

Starting from the aftermath of the First World War, which ended with the defeat of the Ottoman Empire, a proper struggle for reunification with Greece begun. Turkish Cypriots, with the support of the newly emerged Turkish State, resisted these attempts and, conversely, supported the union with Turkey or, at least, the partition of the island. Tensions gradually increased after the Second World War until they reached their maximum in 1955 when they escalated in a series of armed clashes between the two communities. Roughly at the same time, Greek Cypriots attempted to internationalize the question by raising an argument based on the principle of self-determination before the General Assembly. However, mainly for geo-political reasons, neither the United Kingdom nor the United States supported this attempt and, eventually, the Assembly refrained from adopting any specific resolution.[359] In contrast, both these States and the NATO at large supported independence of Cyprus without *enosis*. When gradually Turkey begun supporting such a solution, Greeks were 'compelled' to renounce, at least publicly, to reunification of Cyprus with Greece.[360]

In 1958, Greek and Turkish Foreign ministers, in consultation with the respective leaders of the two Cypriot communities, entered into negotiations and the following year together with the United Kingdom they agreed in principle on what would have been the basic structure of the future State of Cyprus as well as on the content of a series of agreements to be concluded subsequently. On 16 August 1960, two international agreements were adopted by the United Kingdom, Greece, Turkey, and Cyprus, namely the Treaty of Guarantee and the Treaty of Establishment.[361] By means of the former Cyprus undertook 'not to participate … in any political or economic union with any State whatsoever' and it declared 'prohibited any activity likely to promote … either union with any other State or partition of the Island'. The

[359] Dodd (n 358) 36–38.
[360] ibid.
[361] On the same occasion, also the Treaty of Alliance was adopted by Greece, Turkey, and Cyprus, whose gist was to enhance cooperation between the parties. For a detailed account of these negotiations, see ibid 20–40.

other three parties, in addition to the very same prohibition just mentioned, recognized and guaranteed 'the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution'. Finally, the three guaranteeing Powers agreed in the event of a breach of the provisions of the treaty in question to enter into consultations and, if this proved not to be possible, to take action to re-establish the *status quo ante*.[362] By means of the Treaty of Establishment the State of Cyprus was set up on the territory of the island except for two areas on which military bases of the United Kingdom were located.[363]

On the same day, the Constitution of Cyprus, whose text had been already agreed by the parties during previous consultations, was ratified; its gist was to create a dualist system of governance that was described as 'bi-communal'.[364] Here it is enough to note that such an arrangement is clearly based on the assumption that in Cyprus there was one single State for two communities and that, in this regard, it was possible to distinguish a *majority* and a *minority* with a series of consequences on the concrete functioning of the State.[365]

However, almost from the very beginning, a series of issues concerning broadly the relations between the two communities became controversial. The situation escalated in 1963 when President of Cyprus, Archbishop Makarios III, proposed a series of constitutional amendments aimed to render the system of governance less cumbersome. The problem is that

[362] Treaty of Guarantee (adopted 16 August 1960, entered into force 16 August 1960), 382 UNTS 5475.
[363] Treaty of Establishment (adopted 16 August 1960, entered into force 16 August 1960), 382 UNTS 5476.
[364] For the factual background and a legal examination of these events see Frank Hoffmeister, *Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession* (Martinus Nijhoff 2006) 1–11 and Dodd (n 358) 20–40.
[365] Ann Van Thomas and Thomas describe the agreed constitutional arrangement as follows: 'The Constitution provided for a Greek Cypriot President elected by the Greek Cypriot majority and a Turkish Cypriot Vice President elected by the Turkish Cypriot minority. Each had a right of veto over foreign affairs, defense and internal security. A Council of Ministers composed of members from both communities in a 30%-70% ratio was to be established by the respective communities, but with the stipulation that a Turkish Cypriot official should hold one of the three important ministries: foreign affairs, defense or finance. In addition, the Constitution guaranteed a number of posts for the Turkish minority in the army (40%), the police force (30%), and the civil service (30%). It called for a unicameral legislative body of 50 members with a 70-30% ratio of Greek Cypriot to Turkish Cypriot representatives. The minority community was also given legislative and administrative autonomy in matters of personal estates, local taxation, and control over religious, educational and cultural affairs'. See Wynen Ann Van Thomas and Aaron J Thomas, 'Cyprus Crisis 1974–75 Political-Juridical Aspects' (1975) 29 Southwestern Law Journal 513, 515.

this aim would have been achieved by altering the equilibrium between the communities in favour of the Greek Cypriots in a larger degree than what was already established by the constitution. The practical difficulties that characterized the arrangement and the such proposals led to a series of political crises, negotiations, armed clashes, and ceasefires as well as to the abandonment by the Turkish Cypriots of their positions in the institutions of Cyprus. This phase lasted from 1963 to 1974, with the military intervention by Turkey, which led to the partition of the island.[366] Here it is enough to note that already in 1964, with Security Council Resolution 186, a UN mission was set up with the aim of 'to use its best efforts to prevent a recurrence of fighting and, as necessary, to contribute to the maintenance and restoration of law and order and a return to normal conditions'.[367] This resolution considers that the Cyprus question may threaten international peace and security and, accordingly, it also recalls Article 2(4) of the UN Charter.[368] Indeed, in this phase, especially in 1964 and 1967, the threat of use of force by Turkey was a concrete threat and indeed there were some relatively minor acts of intervention.[369]

3.3. The 1974 Turkish intervention

On 25 November 1973, a *coup d'état* was organized in Greece by a military officer, Dimitrios Ioannidis, in an attempt to perpetuate the Greek junta, which was facing a period of public unrest. On 15 July 1974, Ioannides inspired a *coup d'état* on the island of Cyprus with the ultimate aim of annexing the island to Greece. Only five days later, Turkey intervened military motivating this intervention with the article of the Treaty of Guarantee that allowed a guaranteeing Power to act in case of breach of the provisions of the treaty itself. Turkey started consultations with the United Kingdom, while Greece decided not to participate. However, besides the fact that it is doubtful to what extent there were really no margins for further

[366] Dodd (n 358) 67–109.
[367] S/RES/186, 4 March 1964, paras 4–5.
[368] ibid preamble and paras 1, 5. See also A/RES/ 2077 (XX), 18 December 1965.
[369] Jacovides (n 353) 290–291 and Constantinides (n 357) 36.

negotiations, it appears that Turkey already before consultations had started the military operations. Moreover, it seems that from the beginning the intervention was not aimed to re-establish the *status quo ante* and this would have been proved by subsequent factual developments. Indeed, because of these reasons, the Turkish intervention is generally considered as unlawful.[370]

In any case, on the same day, the Security Council adopted a resolution that called upon States to respect the sovereignty of Cyprus and that demanded to put an end to foreign military intervention.[371] Subsequent resolutions also asked the parties to observe a ceasefire and to enter into negotiations.[372] The first peace talks however came to nothing so much so that on 14 August Turkey launched a second offensive. Eventually on 16 August, after that Turkish armed forces conquered roughly 37% of the island, a ceasefire was agreed.

Notwithstanding the subsequent Council resolutions, which called upon the parties to act in such a way as to promote comprehensive and peaceful negotiations and to act with the utmost restraint,[373] on 13 February 1975 Turkish Cypriots established the Turkish Federated State of Cyprus (TFSC), which arguably consolidated the partition of the island. As noted by Dodd, in contrast with the future TRNC, already the denomination of this political entity 'implied that it could become part of a federal republic of Cyprus'.[374] Indeed, that this was the intention of Turkish Cypriots can be inferred also by statements issued by Rauf Denktas—ie,

[370] For a detailed review of the relevant legal arguments, see Ronald St J Macdonald, 'International Law and the Conflict in Cyprus' (1982) 19 Canadian Yearbook of International Law 3, Benjamin M Meier, 'Reunification of Cyprus: The Possibility of Peace in the Wake of Past Failure' (2001) 34 Cornell International Law Journal 455, 463–465, Hoffmeister (n 364) 39–47, and Oliver Dörr, 'Turkey's Intervention in Cyprus—1974' in Tom Ruys, Olivier Corten, and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018) 206–211.
[371] S/RES/353, 20 July 1974, paras 1, 3. See also S/RES/354, 23 July 1974, S/RES/355, 1 August 1974, S/RES/357, 14 August 1974, S/RES/358, 15 August 1974, S/RES/359, 15 August 1974, and S/RES/360, 16 August 1974.
[372] See for instance S/RES/353, 20 July 1974, paras 2, 5.
[373] See for instance S/RES/361, 30 August 1974, para 7 and S/RES/364, 13 December 1974, para 3. See also A/RES/3212 (XXIX) 1 November 1974 (adopted unanimously). The Security Council endorsed the latter resolution. See S/RES/365, 13 December 1974.
[374] Dodd (n 358) 131.

the leader of the Turkish Cypriots and future president of the TFSC and of the TRNC—as well as by the constitutional proposals submitted on the same occasion to the UN.[375]

The Council, after having requested again all States to 'refrain from any action which might prejudice that sovereignty, independence, territorial integrity and non-alignment, as well as from any attempt at partition of the island or its unification with any other country', regretted:

> the unilateral decision of 13 February 1975 … as, *inter alia*, tending to compromise the continuation of negotiations between the representatives of the two communities on an equal footing, the objective of which must continue to be to reach freely a solution providing for a political settlement and the establishment of a mutually acceptable constitutional arrangement, and expresses its concern over all unilateral actions by the parties which have compromised or may compromise the implementation of the relevant United Nations resolutions.[376]

In addition, the Council affirmed that this decision does not prejudge the final political settlement of the problem of Cyprus even if it had taken note that apparently this was not the aim of the unilateral decision. It is noteworthy that the Council stopped short of calling upon States not to recognize this political entity. The reason could simply be that, as already mentioned, the TFSC had not been established on the assumption that it could be an independent State.

However, it should be noted that the situation was from the beginning rather serious given that Turkey, in all likelihood unlawfully, had intervened militarily and its armed forces remained in northern Cyprus,[377] that this intervention led to the partition of the island, and that many Council resolutions, which had asked to withdraw foreign military personnel and to

[375] S/11624, 18 February 1975, Special Report of the Secretary General on Developments in Cyprus, Annex B (Statement by Vice-President Denktash dated 13 February 1975) and Annex C (Constitutional proposals submitted by Mr. Denktash on 13 February 1975).
[376] S/RES/367, 12 March 1975, paras 1–3. See also the statement issued by the representative of Turkey who recalled that 'we have never asked, and I do not think the Turkish Cypriots have ever asked, that the Federal State that has been established should be recognized'. S/PV.1817, 27 February 1975, para 211.
[377] The continued presence of Turkish armed force too is unlawful. See for instance Macdonald (n 370) 30–37. See also Constantinides (n 357) 48.

refrain from acting in any way that might prejudice that sovereignty of Cyprus and from any attempt at partition, were openly violated.[378]

Nonetheless, the Council preferred to refrain from calling upon States not to recognize this political entity and instead called upon the opposing parties to negotiate 'on equal footing'.[379] This expression actually had already been used by the General Assembly,[380] while previously the Council had talked more in general of 'negotiations for the restoration of peace in the area and constitutional government of Cyprus'[381] and of negotiations to be resumed 'in an atmosphere of constructive cooperation' and 'whose outcome should not be impeded or prejudged by the acquisition of advantages resulting from military operations'.[382]

The elements mentioned above that prove the seriousness of the situation were indeed emphasized by many States before the Council. Before looking at the relevant statements it should be noted that during the debates following the unilateral decision of 1975 by Turkish Cypriots to establish the TFSC a consensus was reached on a number of points, including that the international community continued to recognize only one legitimate Government of Cyprus, that territorial integrity of Cyprus and its sovereignty shall be preserved, and that the unilateral declaration was deemed undesirable.[383]

It should also be noted that in the context of these debates, it is possible to identify a relatively clear-cut political divide. The Cyprus dispute is primarily a dispute between Greek Cypriots and Turkish Cypriots and the respective kin States, but many international actors have

[378] In addition to the elements mentioned, it is worthwhile to note that Turkey encouraged actively immigration to the occupied part of Cyprus. See the reports of the Committee on Migration, Refugees and Demography of the Parliamentary Assembly of the Council of Europe 'demographic structure of the Cypriot communities', 27 April 1992, and 'Colonisation by Turkish settlers of the occupied part of Cyprus', 2 May 2003. The reports are available respectively at <www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6916&lang=EN> and <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10153&lang=EN>.
[379] S/RES/367, 12 March 1975, para 2.
[380] A/RES/3212 (XXIX), 1 November 1974, para 4. Admittedly, the idea of negotiations between the opposing parties on equal footing derives directly from the idea underlying the 1960 Cyprus Constitution that in Cyprus there were two politically equal communities. Hoffmeister (n 364) 10–11,
[381] S/RES/353, 20 July 1974, para 5.
[382] S/RES/360, 16 August 1974, para 3.
[383] The statement by the representative of Costa Rica summarized the many points of agreements during the meeting preceding the voting. S/PV.1819, 5 March 1975, paras 28–33.

been constantly involved including the United States, the United Kingdom, the NATO at large, the Soviet bloc, the NAM, and albeit later the European Union too. On the one hand, both Turkey and Greece are members of the NATO and Cyprus itself is located in a strategic position in the Eastern Mediterranean and, moreover, it hosts in its territory two military bases of the United Kingdom. On the other hand, Cyprus was one of the participants in the conference that established the NAM. These elements explain why States belonging to the NAM as well as States of the Soviet bloc were generally more vocal in support of the cause of Greek Cypriots.[384] More specifically, these States have consistently emphasized the risk of factual consolidation of the unlawful situation also referring to the Turkish intervention, while other States expressed a more general condemnation towards the establishment of the TFSC.

The Soviet Union, after having described the Turkish intervention as a flagrant example of external intervention in the internal affairs of Cyprus,[385] held that:

> The steps taken by the leadership of the Turkish community in Cyprus will inevitably lead to a separation of the Cyprus communities from each other and to their estrangement. Those steps, which will lead to the *de facto* partition of the Cyprus State, are in direct contravention of the decisions of the Security Council and the General Assembly aimed at preventing partition of the Republic of Cyprus and confirming its sovereignty, independence and territorial integrity.[386]

These and other elements that are mentioned by other States clearly prove the seriousness of the situation in Cyprus and indeed the Soviet Union felt the need to recall that it 'recognizes the only lawful Government of the Republic of Cyprus headed by President Makarios.[387] Similarly, Guyana referred to the danger deriving from the 'resort to unilateral action purporting to create a new reality'.[388] Bulgaria linked the gravity of the situation to a series of conducts including 'to bring about the *de facto* partition of the island and to eliminate the sovereign State of Cyprus'

[384] On the international dimension of the Cyprus question, see Ann Van Thomas and Thomas (n 365) 519–529 and John Sakkas and Nataliya Zhukova, 'The Soviet Union, Turkey and the Cyprus Problem, 1967–1974' (2013) 10 Les cahiers Irice 123. Indeed Constantinides observes that the debates before UN political organs are characterized by a distinct 'Cold War Flavour'. See Constantinides (n 357) 65.
[385] S/PV.1813, 20 February 1975, para 177.
[386] ibid para 182.
[387] ibid paras 199–200.
[388] S/PV.1815, 24 February 1975, para 27.

and to 'impose unilateral decisions, to pursue a policy of *fait accompli* and of dealing from a position of strength'.[389] Cameroon maintained that 'the principle of the non-acquisition of the territory of a State by force should be unambiguously reaffirmed in the present case'.[390] Tanzania highlighted that no other country has been 'so continuously threatened with partition since it attained independence' and 'whose independence has been so precarious as a result of its constantly being a victim of interference by external forces'.[391] Finally, Belarus stated that the disruptive situation in Cyprus 'was the result of steps taken by the leadership of the Turkish community to create a separate state structure in the northern part of the territory of Cyprus occupied by Turkish forces' and specified that 'those steps were designed to make permanent a state of affairs which arose as a result of armed intervention from outside in the affairs of the Republic of Cyprus'.[392]

Other States, as mentioned, expressed a more general concern that such a unilateral decision would have halted negotiations and, presumably, would have made them more difficult. These States, in any case, did add that the unilateral action was at odds with previous UN resolutions and reaffirmed that they recognized only one government in Cyprus.[393]

A Council Resolution was eventually adopted, but as already mentioned, this resolution refrained from determining the unlawfulness of the factual situation created in northern Cyprus and thus refrained from calling upon States to implement a policy of non-recognition. Rather, the Council merely regretted the unilateral decision adopted by the Turkish Cypriots.[394]

The following period, thanks also to the input by the Council, was a period of intense negotiations between the two communities. It is worth mentioning that after the 1974 Turkish

[389] ibid paras 132–133.
[390] S/PV.1816, 25 February 1975, para 37.
[391] S/PV.1817, 27 Febrarury 1975, para 9.
[392] S/PV.1818, 4 March 1975, paras 28–29.
[393] See for instance the statement issued by the representatives of France on behalf of the European Community (S/PV.1815, 24 February 1975, para 55), Japan (S/PV.1816, 25 February 1975, paras 7ff), China (S/PV.1817, 27 February 1975, paras 23–24) and the United States (S/PV.1817, 27 February 1975, 25ff). See also the declarations issued after the vote S/PV.1820, 12 March 1975.
[394] Supra n 376.

intervention the very same issues—broadly pertaining to the international and the intercommunal dimension—were discussed on occasion of each rounds of negotiations. These issues include the constitutional structure, territorial arrangements, a set of freedoms (ie, freedoms of movement, of settlement, and of property ownership throughout the whole island), security issues, and confidence-building measures.[395]

The most important agreements reached between the Turkish intervention and the next turning point—ie, the establishment of the TRNC in 1983—were the high-level agreements concluded by the opposing parties in 1977 and in 1979. The importance of these agreements derives from the fact that they shaped the following attempts to settle the dispute. The former marked the renunciation by Greek Cypriots to struggle for *enosis* and introduced the principle of bi-zonality in addition to the idea of a bi-communal political entity; the latter added a series of further provisions including the commitments to abstain from any action that might jeopardize the outcome of the talks, to ensure the demilitarization of the State of Cyprus, and to preserve the independence, sovereignty, territorial integrity, and non-alignment of Cyprus against union, partition, or secession.[396]

3.4. The establishment of the Turkish Republic of Northern Cyprus

Eventually, these negotiations would have been fruitless. One of the reasons was a certain scepticism on the part of Greek Cypriots to negotiate with Turkish Cypriots, which were considered as the 'wrongdoers' and, in any case, as mere settlers rather than as the original inhabitants of the island.[397]

[395] Souter (n 353) 82ff.

[396] On the high-level agreements, see Dodd (n 358) 134–142. The agreements are available respectively at <www.pio.gov.cy/en/agreements-high-level-agreement-of-12-february-1977.html> and <www.pio.gov.cy/en/agreements-the-10-point-agreement-of-19-may-1979.html>.

[397] Supra n 358. In this regard, Michael notes that: 'Papandreou [ie, Prime Minister of Greece] did not have much confidence in the ongoing intercommunal talks, which, in his view, disengaged the Cyprus problem from its essence, namely, as a question of invasion and occupation. He therefore favored its internationalization as a strategy of refocusing attention on Turkey as the aggressor'. See Michael (n 356) 80. For a similar remark, see also Jacovides (n 353) 296

It is hardly surprising then that Greek Cypriots attempted to internationalize again the Cyprus question by involving the General Assembly. Actually, already starting from 1975, the Assembly adopted a series of resolutions, which however overall reaffirmed the previous UN resolutions on the matter.[398] However, the Assembly adopted a resolution in 1983 that was markedly different compared to the previous ones in the sense that it was much more straightforward. For instance, it included a paragraph dedicated to the problem of the exploitation of natural resources, it considered the withdrawal of Turkish forces as the 'essential basis for the solution of the problem of Cyprus', it openly labelled these forces as 'occupation forces', and it considered that 'the *de facto* situation created by the force of arm should not be allowed to influence or in any way affect the solution of the problem of Cyprus'.[399]

Evidently in response to this renewed commitment by the Assembly to the sovereignty, independence, territorial integrity, unity, and non-alignment of Cyprus,[400] on 15 November 1983, Turkish Cypriots authorities adopted a veritable unilateral declaration of independence. Only Turkey supported the newly established TRNC and indeed recognized it, while no other State has done the same. The response of the Council on this occasion was firmer in as much as it considered the declaration as 'legally invalid' and it called upon States not to recognise 'any Cypriot State other than the Republic of Cyprus'.[401] It is worthwhile to note that the unlawfulness of the situation, and thus the policy of non-recognition too, is generally linked to the Turkish military intervention carried out in 1974, which is considered as a serious breach of a *ius cogens* norm.[402]

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[398] A/RES/3395 (XXX), 20 November 1975, A/RES/31/12, 12 November 1976, A/RES/32/15, 9 November 1977, A/RES/33/15, 9 November 1978, and A/RES/34/30, 20 November 1979.
[399] A/RES/37/253, 13 May 1983, paras 2, 7, 8, and 12.
[400] On the connection between this resolution and the adoption of the declaration of independence, see Dodd (n 358) 145–147.
[401] S/RES/541, 18 November 1983, paras 2, 7. Indeed Constantinides talks of a 'prompt and quite strong' and of a 'quite robust' response especially if compared to the 'lukewarm' response taken in 1974. Constantinides (n 357) 47–49, 65. See also S/RES/550 (1984), 11 May 1984, paras 2–3. This Resolution reiterated the call for non-recognition and condemned all secessionist actions, which are considered as illegal and invalid, including the exchange of ambassadors between Turkey and the TRNC.
[402] Supra n 357.

However, the Council resolution in question does not make such a connection. Instead, it referred only to the Treaty of Guarantee and to the Treaty of Establishment, whose violation certainly does not amount to a serious breach of a peremptory norm. More specifically, the Council maintained that the declaration is incompatible with these treaties and therefore the creation of the TRNC is invalid and contributes to the worsening of the situation.[403] It could be speculated that, notwithstanding the explicit terms of the resolution, the Council resolution was dealing with the result of the unlawful Turkish intervention and of the protracted occupation of the northern part of Cyprus, which thus are the *true* legal grounds for non-recognition. However, it is significant that during the debates before the Security Council these aspects—ie, the military intervention and the protracted occupation—were mentioned only by a few States.

In this regard, the cleavage noted above between NAM States and the Soviet bloc and, on the other hand, other States, which was previously relatively noticeable, grew and only the former have tended to make mention of the role of Turkey. The latter, in contrast, have mentioned only other aspects of the unilateral action undertaken by Turkish Cypriots, such as the impact of this action of the peace talks.[404] Greece summed up the situation in the following terms:

> In 1974, in violation of all norms of international law, the Turkish army invaded the Republic of Cyprus. Since then Turkey has continued to impose its military occupation … in spite of repeated resolutions of the United Nations … For all practical purposes, the northern part of the Republic of Cyprus is totally controlled by Turkey through its army of occupation. It now appears that the already unacceptable state of affairs was not enough for Turkey. Continuing his policies of disregard for international law and morality, Turkey's puppet, Mr. Denktash, has proceeded to the purported declaration of independence of a so-called Turkish Republic of Northern Cyprus on the territory of the Republic of Cyprus occupied by Turkey … The decision which purports to declare the independence of a so-called Turkish Republic of Northern Cyprus falls within the context of the continued violation of the sovereignty of the Republic of

[403] ibid preamble.

[404] The only exception is the statement issued by the representative of Pakistan that reaffirmed the sentiments of sympathy towards the cause of Turkish Cypriots. Pakistan was isolated on this matter, but the Organisation of Islamic Cooperation subsequently would have assumed the same position, see below ch 4, s 3.6.

> Cyprus by Turkey. More particularly, it is in itself an undeniable breach of the Treaty of Guarantee.[405]

Even if Greece mentioned several problematic aspects—eg, the fact that the abovementioned declaration of independence is at odds with the continuation of negotiations, with previous UN resolutions, and with the Treaty of Guarantee—non-recognition of the TRNC is clearly linked to the violation of Cyprus territorial integrity occurred originally with the 1974 Turkish intervention, which is defined as an 'artificial product of illegality and brute force', and with the longstanding occupation of northern Cyprus by Turkey.[406]

The same goes for a few other States. Nicaragua defined the invasion and occupation of northern Cyprus as 'the root-cause of the problem' and added that the unilateral declaration of independence is 'one more act in the dramatic escalation' occurred in Cyprus and that these acts are flagrant violations of the 'rights of peoples and States to live in peace free from foreign interference and of the duty of all States to refrain from the use of force in the settlement of disputes'.[407] India, after having referred to the attempt to 'consolidate illegitimately, through measures that go beyond mere physical occupation and are unacceptable under the Charter and in international law, the hold that it exercises over a large part of the territory of Cyprus with the assistance of foreign troops', cited a series of declarations adopted in the context of the NAM, which in turn referred to the attempt to consolidate illegitimately a '*de facto* situation created by the force of arms'.[408] Sri Lanka observed that the unilateral declaration in question 'has been made possible by the continued presence of foreign forces in that area'; moreover, it made a comparison with the situation of Southern Rhodesia and the unilateral declaration of independence 'sustained with foreign military assistance'.[409] Cuba referred to the 'military undertaking against Cyprus in 1974 … which endangered the independent, sovereign and non-aligned existence' and to the declaration of independence, which created a 'stalemate in the

[405] S/PV.2497, 17 November 1983, paras 94–96.
[406] ibid para 99.
[407] S/PV.2498, 17 November 1983, 43–45.
[408] ibid 53, 54–55.
[409] S/PV.2499, 18 November 1983, paras 27, 33.

situation, making it even more serious given the attempt at secession, *manu militari*, which the Turkish Cypriot leaders, backed by the foreign occupation forces, are trying to impose on us as a *fait accompli*'.[410] Yugoslavia considered the unilateral action of Turkish Cypriots as 'another link in a chain of critical situations in international relations caused by use of force'.[411] Guyana labelled the unilateral action of Turkish Cypriots as the 'attempt to consolidate and give legitimacy to a situation created by invasion and occupation'.[412] Finally, Yemen observed that '[t]he seeds of the partition of the non-aligned Republic of Cyprus were sown when Turkish forces invaded and occupied northern Cyprus in 1974'.[413]

In contrast, other States have refrained from mentioning at all the 1974 Turkish intervention and the prolonged occupation. Rather, these States have linked non-recognition of the TRNC with a series of other aspects.[414] For instance, Australia maintained that the establishment of the TRNC is unlawful, but apparently this unlawfulness derives from the violation of previous UN resolutions; moreover, it added that the establishment of this political entity endangers the peace and security of this troubled area.[415] Algeria considered the 'regrettable' and 'alarming' development as a violation of the international consensus on the question of Cyprus that, in addition, risks to increase the tensions in the area.[416] Togo mentioned the Constitution of Cyprus and the Treaty of Guarantee.[417] Egypt addressed the violation of human rights and of fundamental freedoms.[418] Zaire referred to a policy of forcible secession.[419]

In these regards, a couple of aspects should be emphasized the first of which is that the statements issued after the 1974 Turkish intervention and those adopted after the 1983

[410] ibid paras 38, 41. See also S/PV.2499, 18 November 1983, paras 17–18 (Soviet Union).
[411] ibid para 51.
[412] S/PV.2500, 18 November 1983, para 5.
[413] ibid para 49.
[414] S/PV.2498, 17 November 1983, 70 (Canada), S/PV.2499, 18 November 1983, para 61 (Netherlands), S/PV.2500, 18 November 1983, para 18 (Zimbabwe), ibid para 25 (Poland), ibid 75–79 (France), ibid 85 (United Kingdom), ibid 94 (Jordan), and ibid 108–109 (China).
[415] S/PV.2498, 17 November 1983, 61.
[416] ibid 67.
[417] S/PV.2500, 18 November 1983, para 39.
[418] ibid 55–58.
[419] ibid 43.

declaration of independence are nearly identical given that they all raise a series of concerns regarding the harmful effects of both the unilateral actions on the intercommunal talks. Thus, it is difficult to understand why a resolution invoking non-recognition was not adopted already in 1974,[420] that is when a serious breach of the prohibition of the use of force was committed, or in 1975 taking into account that from the beginning Turkey supported and recognized the TFSC. It seems that the most persuasive explanation is that there was the hope that negotiations could eventually solve the issue. In other words, even if a serious breach had occurred, the organized international community preferred to *manage* the crisis by waiting and by insisting on the support to intercommunal talks.

Second, these statements also suggest a certain confusion on the actual legal grounds for non-recognition. States, as noted, have tended to blame Turkish Cypriots for a variety of reasons and, more importantly, only some States have considered non-recognition as a response to the violation of territorial integrity caused by the invasion and occupation by Turkish armed forces. However, even these statements are to a certain extent ambiguous. For instance, Sri Lanka did make a connection between the unilateral declaration in question and the continued presence of foreign forces, but then held:

> My delegation was heartened by the statements made by all those who have spoken so far. All of them, bar one, have lent no support for this self-styled "Turkish Republic of Northern Cyprus". It was even more satisfying to learn that up to yesterday only one State, Turkey, has extended recognition. Member States have reacted with understandable caution. Few Member States could claim … the absence of minorities and the attendant problems. The territorial integrity of many States would be in peril if the right of self-determination applicable in the colonial context was interpreted as a right to secede. the Council must therefore, as in the past, reaffirm the territorial integrity of the Republic of Cyprus.[421]

This one is clearly an argument on the scope of the right to self-determination, which is *not* dependant on the military intervention of a third State.

[420] Turkey actually made this point S/PV.2498, 17 November 1983, 34–35.
[421] S/PV.2499, 18 November 1983, para 32.

Finally, not only those States that condemned only politically the 1983 unilateral action,[422] but also those States that made an argument that echoes the duty of non-recognition as it is understood nowadays, appear to consider non-recognition as a non-mandatory measure. For instance, Greece *declared* its intention not to recognize,[423] India and Seychelles *urged* third States not to recognize,[424] Cuba and Yugoslavia expressed their *belief* that the international community *should* withhold recognition,[425] and Guyana *appealed* States not to recognize.[426] Besides the fact that all these States used a clearly exhortative language, it seems significant that no State has explicitly contended that non-recognition is not a discretionary choice. It seems equally significant that some States have exhorted the Council to act by adopting a resolution mandating non-recognition, which in turn could imply that it is up to the Council to take such a decision, rather than to single States.[427]

3.5. The efforts to settle the conflict by Secretary-Generals of the United Nations

Subsequently, the Security Council adopted a series of resolutions that cyclically extended the stationing of the UN mission established back in 1964, requested the Secretary-General to continue the mission of good offices, and called upon the parties to co-operate with the UN

[422] S/PV.2498, 17 November 1983, 61–62 (Australia), ibid, 69–70 (Canada), S/PV.2499, 18 November 1983, para 62 (Netherlands), and S/PV.2500, 18 November 1983, paras 76 (France) and 85 (United Kingdom).
[423] S/PV.2497, 17 November 1983, para 101.
[424] S/PV.2498, 17 November 1983, 57, 59–60.
[425] S/PV.2499, 18 November 1983, paras 44. 56.
[426] S/PV.2500, 18 November 1983, para 11.
[427] S/PV.2498, 17 November 1983, 51, 52 (Nicaragua) and ibid 68 (Algeria). The representative of Nicaragua said that 'That decision must not have any international legal effect whatsoever. This Council must declare it null and void and call upon Member States to adopt a line of conduct in keeping with the resolutions of this Council and the General Assembly - and this includes non-recognition of the State thus created. Anything else would constitute recognition and indirect perpetuation of an unlawful military occupation' and read a previous statement of its Government that reads as follows: 'The Government of Rational Reconstruction most strongly condemns that proclamation and reaffirms its unswerving solidarity with the Government and people of Cyprus. and it expresses its firm resolve not to recognise that unilateral declaration of independence, since it is harmful to the efforts to achieve unity in Cyprus'. The representative of Algeria stated that 'This Council is called upon to declare, with responsibility and calm, what is demanded by international legality in the face of this new situation, and we are certain that it will not fail to do so unanimously and to point out to the States Members of the United Nations all measures which could ensure the primacy of law and which could put to constructive use the energies available for a solution to the crisis consistent with the international consensus on this issue'. See also S/PV.2499, 18 November 1983, para 23 (Soviet Union), 42 (Cuba), and 56 (Yugoslavia).

mission.[428] Over the following years, many rounds of negotiations have taken place. Michael emphasizes an important difference between the negotiations held *before* 1983 and those held *after* the establishment of the TRNC: while the former were held directly between the two opposing parties, in the context of the latter each of the opposing parties was turning directly to the UN Secretary-General rather than to the counterpart.[429] However, while Secretary-Generals have changed, the outcome has not. In fact, three different Secretary-Generals, namely Javier Pérez de Cuéllar, Boutros Boutros-Ghali, and Kofi Annan, dealt in turn with the Cyprus question and each of them, after lengthy negotiations, proposed a new settlement plan, which however would have not been successful.

Here it is enough to note that all these plans were characterized by the idea that there are not a victim and a wrongdoer—ie, a party whose rights were violated and a party that violated those rights—but rather there are two equal parties. For instance, the 1984 Draft Framework Agreement presented by Secretary-General de Cuéllar implemented the main concepts of the high-level agreements of 1977 and 1979 between the two communities, in particular the concepts of a bi-communal and bi-zonal political entity. Constantinides, in this regard, observes that this agreement 'was pivotal in introducing the concept of a bi-zonal state, acknowledging the *de facto* separation of the two communities that had resulted from the Turkish occupation of northern Cyprus'.[430]

Another example is Resolution 649, unanimously adopted by the Security Council,[431] that brought up concepts such as the goodwill and the flexibility required from the parties, which are considered as being on an equal footing and are called upon to 'pursue their efforts to reach freely a mutually acceptable solution'.[432] Similarly, the report of the Secretary-General

[428] See for instance S/RES/553, 15 June 1984, S/RES/559 (1984), 14 December 1984, S/RES/565, 14 June 1985, and S/RES/578, 12 December 1985.
[429] Michael (n 356) 82.
[430] Constantinides (n 357) 55.
[431] S/PV.2909, 12 March 1990.
[432] S/RES/649 (1990), 12 March 1990, preamble and para 3. See also S/RES/716, 11 October 1991, para 4, with its accent on 'two politically equal communities'.

on the Cyprus question, released a few days before the adoption of this resolution, witnesses the strong support within the UN to a compromise between the parties.[433] One, by reading only this resolution and this report, would never imagine that part of the territory of Cyprus was illegally occupied after a full-blown military intervention by another State. The same goes for the statements adopted by third States. For instance, Soviet Union, which softened its previous stance, held that political will, realism, patience and flexibility are required so to reach a reasonable and mutually acceptable solution.[434]

A similar attitude pervades the attempts to settle the conflict under the secretariats of Boutros-Ghali and of Annan. The latter attempt, however, deserves further scrutiny for at least two reasons. First, Secretary-General Annan's diplomatic initiative was intermingled with the prospect of accession of Cyprus to the European Union, which, together with Turkey's European aspirations, gave to Greek Cypriots some leverage. Second, this initiative almost succeeded to settle the conflict since the opposing parties agreed in principle on a formula for the settlement and the plan was eventually rejected at the very last moment by Greek Cypriots on occasion of a referendum.

The plan was presented in November 2002 and the original draft was modified after a series of rounds of negotiations. The final text was ready in April 2004.[435] The plan is divided into six appendixes, the first of which is the so-called Foundation Agreement, which in turn consists of ten main articles, which provide a summary of the Foundation Agreement, and nine annexes. The plan has been described as a 'delicate attempt to appease both communities'

[433] S/21183, 8 March 1990, paras 4–6. See also S/21393, 12 July 1990, para 25, which affirms that 'the time has come to stop mutual recriminations and to concentrate efforts of promoting reconciliation'. We have seen above that such a call has often anticipated justifications such as that there are no credible alternative to the validation of a certain factual situation even if unlawful. For instance, with reference to Israel and Palestine, see above at 165.
[434] S/PV.2928, 15 June 1990, 11.
[435] For a description of the plan, see Andrekos Varnava and Hubert Faustmann (eds), *Reunifying Cyprus: The Annan Plan and Beyond* (Tauris 2009). See also S/2004/437, 28 May 2004, paras 42ff. The text of the plan is available at <https://web.archive.org/web/20040726112651fw_/http://194.154.157.106/Comprehensive_Settlement_of_the_Cyprus_Problem.pdf>.

demands about sovereignty'.[436] In this regard, Yakinthou reports the following passage from an interview with a member of the UN negotiating team:

> The Turkish Cypriots had the arms on the ground and the Turkish soldiers on the ground and the Greek Cypriots had international legality on their side. So that's why the Greek Cypriots are excessively touchy about anything that could imply even a scratch on this thing that they are the government of Cyprus and the others are a nothing.[437]

This passage is relevant in as much as it highlights the consistent stance of Greek Cypriots who have always attempted to connect the settlement of the Cyprus question to what they perceived as its origin—ie, the violation of the territorial integrity and sovereignty of Cyprus—and it explains, at least to a certain extent, the feeling of uneasiness towards this plan, which eventually led to its rejection.

In fact, the plan established a *new* state of affairs by guaranteeing the independence, the international legal personality, and sovereignty of Cyprus and prohibiting any form of union, partition, or secession.[438] However, it also curtailed Cyprus' sovereignty by consolidating the *old* state of affairs. First, under the terms of the plan the three treaties concluded in 1960 shall remain in force. Second, in addition to the principle of bi-communality, the plan put forward the principle of bi-zonality, which as mentioned above, was perceived by Greek Cypriots as problematic. The principle had been defined as follows: 'The bi-zonality … should be clearly brought out by the fact that each federated State will be administered by one community which will be firmly guaranteed a clear majority of the population and of land ownership in its area'.[439] Koktsidis explains in the following terms why the bi-zonality was viewed in a bad light:

> The idea of a BBF [ie, bi-zonal and bi-communal federal] solution to the Cyprus conflict has been practically laid down at the negotiating table by Turkey and the Turkish Cypriot delegations during the 1974 Geneva talks, which took place during the onset of military operations in Cyprus. The proposal, seen by the Greeks as an outright blackmail under the force of Turkey's arms, was initially met with fear and disdain … However, it was only until President Makarios had

[436] Christalla Yakinthou, 'Consociational Democracy and Cyrpus: The House that Annan Built?' in Andrekos Varnava and Hubert Faustmann (n 435) 35.
[437] ibid.
[438] See in particular the wording of Articles 1 and 2.
[439] S/21183, 8 March 1990, Report of the Secretary General on His Mission of Good Offices in Cyprus (Annex I), 8.

> safely returned to Cyprus that this unappealing to the Greek Cypriot side option was ultimately accepted as a broad basis for restoring Cyprus' territorial integrity and for reducing the tragic effects of warfare.[440]

More in general, the Annan plan marks the culmination of a process of consolidation in the sense that, all over the years, settlement proposals were more and more supportive of the Turkish Cypriots' claims.[441]

Eventually, the Annan plan arrived at the last stage, that is to a referendum held in both the northern and the southern part of the island, but in the end was rejected by Greek Cypriots. Michael refers to a joint letter written by Martti Ahtisaari and Gareth Evans which:

> warned that rejection would "mean years of further stalemate" and contained a massage directed at the Greek Cypriots that international sympathy would be "non-existent" for the side that rejected the plan. On one level, as far as Western and international opinion was concerned, Greek Cypriot rejection of the Annan Plan absolved Turkey's 1974 invasion and nullified their sharp moral stance regarding the demographic partition of the island.[442]

3.6. Developments after the rejection of the Annan Plan

Subsequently, the way in which the international community approached the TRNC has become similar to the stance adopted towards Western Sahara. More specifically, two aspects confirm that the existence of the TRNC is somehow tolerated, the first of which consists of the relation between the TRNC and the OIC. From the outset it should be noted that starting from 1979, the TRNC has been an observer member of the OIC. It is worthwhile to add that while between 1979 and 2004 this political entity was referred as to the 'Turkish Muslim community of Cyprus', in 2004 it was decided to name it in the context of the works of the organisation 'Turkish Cypriot State', that was the name used in the Annan plan.[443] This is noteworthy also because this plan was explicitly mentioned in the Istanbul Declaration adopted by the 31st

[440] Pavlos I Koktsidis, 'Negotiating Ethno-federal Design in Cyprus: A Reflection of Competitive Security Postures' (ECPR Conference Paper, September 4-7/2019).
[441] See in this regard James Ker-Lindsay, 'A History of Cyprus Peace Proposal' in Andrekos Varnava and Hubert Faustmann (n 435) 20.
[442] Michael (n 356) 178. This actually was not a novel attitude by the international community. Already staring from 1986 Greek Cypriots were criticised for not being enough cooperative. See Souter (n 353) 80–81.
[443] Resolution no. 2/31-P adopted by the 31st session of the Islamic Conference of Foreign Ministers, 14–16 June 2004, para 8.

session of the Islamic Conference of Foreign Ministers. The relevant passage reads as follows: 'In view of the fundamentally changed circumstances in Cyprus following the 24 April 2004 referenda, we decide to take steps in putting an end to the unjust isolation of the Turkish Cypriots. In the same vein, we look forward to similar action by the international community and bodies'.[444] Even though this change does not imply any recognition by individual States, it still witnesses a positive stance of the organisation and its members towards the TRNC. Indeed, since 2004 this organization has consistently urged its member States to show solidarity towards the TRNC and to help it to cope with the 'inhuman isolation' which has been imposed by the rest of the international community.[445] Recently, the relevant paragraph of the final communiqué of the 14th Islamic Summit Conference reads as follows:

> The Conference reaffirmed all previous support resolutions of the Islamic Conferences on the question of Cyprus, which expressed firm support for the rightful cause of the Muslim Turkish Cypriots, and for the constructive efforts to attain a just and mutually acceptable settlement. It called upon all Member States to demonstrate solidarity with the Turkish Cypriot State as a constituent state, and to associate Turkish Cypriots closely in order to help them materially and politically to overcome the inhuman isolation imposed on them and increase and expand their relations in all fields.[446]

Other statements suggest that the support of the OIC is not limited to an abstract expression of support. Already, back in 2004 the above-mentioned resolution urged member States 'to strengthen *effective* solidarity' with Turkish Cypriots 'with a view to helping them materially and politically' and requested 'the Secretary-General to carry out the necessary contacts with the Islamic Development Bank with a view to seeking the ways and means of the latter's

[444] Istanbul Declaration adopted by the 31st session of the Islamic Conference of Foreign Ministers, 14–16 June 2004, para 10.
[445] Resolution no. 2/31-P adopted by the 31st session of the Islamic Conference of Foreign Ministers, 14–16 June 2004, para 4.
[446] Final Communiqué of the 14th Islamic Summit Conference, 31 May 2019, para 41 <www.oic-oci.org/docdown/?docID=4496&refID=1251>. See also the Address of Secretary General at the inauguration of the senior officials meeting preparatory to the 33rd session of the Islamic conference of foreign ministers, 6 May 2006 <www.oic-oci.org/topic/?t_id=2317&ref=1019&lan=en >, the Final Communiqué of the 11th Islamic Summit Conference, 13–14 March 2008, para 61 <www.oic-oci.org/docdown/?docID=32&refID=9> and the Final Communiqué of the 12th Islamic Summit Conference, 6–7 February 2013, para 68 <www.oic-oci.org/docdown/?docID=19&refID=7>.

assistance for the development projects of the Turkish Cypriot side'.[447] Further, ministers of the TRNC have consistently met with the Secretary-General of the organization and on occasion of these meetings the Secretary-General has encouraged members of the organization to increase their support for the TRNC for example by improving economic cooperation in the areas of trade, agriculture, tourism and finance.[448] The present writer could not find any information on States other than Cyprus criticising these rather benevolent stance of the OIC and its member States towards northern Cyprus.[449]

The second aspect is the shift occurred within the Security Council. In fact, the Council adopted a series of resolutions that routinely extended the mandate of the UN mission established in Cyprus and gradually expressed support for a mutually acceptable political solution thus setting aside discussions on the original unlawfulness.

For instance, Resolution 1642, besides extending the mandate of the mission, merely regrets that 'progress towards a political solution has been negligible', urges 'both sides to work towards the resumption of negotiations for a comprehensive settlement', and reaffirms previous resolutions on Cyprus.[450] Subsequent resolutions mentioned different reasons why to settle the conflict such as that the time has come to settle the dispute since 'the status quo is unacceptable',[451] that a comprehensive and durable Cyprus settlement would lead to 'many important benefits',[452] that such a settlement would improve the economic situation,[453] etc. As in the cases of Western Sahara and Palestine, the list of the positive aspects that can be expected

[447] Resolution no. 2/31-P adopted by the 31st session of the Islamic Conference of Foreign Ministers, 14–16 June 2004, paras 4, 6.
[448] See the OIC Secretary General Comments TRNC's Participation in Intra-OIC Affairs, 16 March 2013 <www.oic-oci.org/topic/?t_id=7843&ref=3185&lan=en>, the press release on the meeting between the OIC Secretary General and the Minister of Foreign Affairs of Northern Cyprus, 14 April 2017 <www.oic-oci.org/topic/?t_id=13413&ref=5853&lan=en>, and the press release on the meeting between the Secretary General and the Deputy Prime Minister & Foreign Affairs Minister of Northern Cyprus, 10 April 2018 <www.oic-oci.org/topic/?t_id=18555&ref=10294&lan=en>.
[449] On the stance adopted by the OIC towards the TRNC, see Günter Seufert 'Turkey's Cyprus Policy in the Context of Nicosia's Presidency of the European Council' (German Institute for International and Security Affairs, SWP Comments 34, October 2012) 5–7.
[450] S/RES/1642, 14 December 2005, preamble and paras 1–2
[451] S/RES/1728, 15 December 2006, preamble.
[452] S/RES/1847, 12 December 2008, preamble.
[453] S/RES/2058, 19 July 2012, preamble.

from the settlement of the dispute in question, 'predicts' a gradual shift towards the support of a political solution prescinding from international legality. It is no accident that Council Resolutions 541 and 550 are no longer expressly recalled, that no paragraph reaffirms the sovereignty of Cyprus, that there are no references to the invasion, to the protracted occupation, and to the establishment of the TRNC. Overall, in these resolutions there is no longer any commitment to the enforcement of international legality. Actually, it is significant that already Resolution 1758, after having recalled that the UN has a primary role 'in assisting the parties to bring the Cyprus conflict and division of the island to a comprehensive and durable settlement', notes that 'responsibility of finding a solution lies first and foremost with the Cypriots themselves'.[454]

Indeed, subsequently similar expressions to those used by the Council with reference to Western Sahara and Palestine are used in the resolutions on the question. For example, Resolution 1847 referred to 'the need for *flexibility* in order to secure them, to both communities well in advance of any eventual referenda' and called the parties to engage 'in the process in a *constructive* and open manner'.[455] Similarly, Resolution 1873 emphasized 'the importance attached by the international community of all parties engaging *fully, flexibly and constructively* in the negotiations'.[456] Overall similar resolutions were adopted routinely until 2018,[457] while afterwards the Council referred to the increase of tensions in the area. Resolution 2453 expressed 'serious concern at the increased number of violations of the military status quo',[458] Resolution 2483 expressed 'concern at the increased tensions in the eastern Mediterranean over hydrocarbons exploration' and called 'for a reduction of tensions in the Eastern Mediterranean'.[459] Despite this, the Council continued to invoke negotiations aimed to reach an acceptable solution; for instance, Resolution 2561 supported:

[454] S/RES/1758, 15 June 2007, preamble.
[455] S/RES/1847, 12 December 2008, preamble and para 3 (emphasis added).
[456] S/RES/1873, 29 May 2009, preamble (emphasis added).
[457] See for instance S/RES/2430, 26 July 2018, paras 1–2.
[458] S/RES/2453, 30 January 2019, para 15.
[459] S/RES/2483, 25 July 2019, preamble and para 2. See also S/RES/2506, 30 January 2020, preamble.

> the Secretary-General's decision to convene an informal "five plus UN" meeting between the leaders of the two Cypriot Communities and the Guarantor Powers at the earliest opportunity, and urges the sides and all involved participants to approach these talks in the spirit of *openness, flexibility and compromise* and to show the necessary political will and commitment to freely negotiate a *mutually acceptable* settlement under United Nations auspices.[460]

It is perhaps interesting that in this resolution, which as noted somehow puts aside international law as for the settlement of the conflict, international law re-merges as for the problems that affect the Eastern Mediterranean and the resources located there.[461]

3.7. The problem of maritime delimitation

The problem in question is somehow connected with the wider Aegean dispute between Greek and Turkey that concerns *inter alia* the following matters: sovereignty over some disputed islands, the demilitarization of the Eastern Aegean islands, the breadth of the territorial sea, the air defence zones around Greek islands, the flight information region, and passage rights.[462] As for Cyprus, the problem is twofold. The first problem, which *per se* does not regard directly the doctrine non-recognition, is that while Cyprus entered into agreements on the delimitation of the exclusive economic zone with Egypt, Lebanon, and Israel by means of which Cyprus and each of these State consented to the use of the equidistance principle,[463] no such agreement has been adopted with Turkey.

The second problem is that while Cyprus contends that the continental shelf that extends from the coastal baseline of the *whole* island is entitled to Cyprus, Turkey contends that exploration and exploitation activities in the continental shelf that extends from the coastal baseline of the TRNC by Cyprus constitutes a violation of the rights and interests of Turkish

[460] S/RES/2561, 29 January 2021, para 2 (emphasis added).
[461] ibid para 3.
[462] For a comprehensive analysis of these matters, see Jon M Van Dyke, 'An Analysis of the Aegean Disputes under International Law' (2005) 36 Ocean Development & International Law 63.
[463] The equidistance principle implies that the delimitation of the exclusive economic zone between two States with opposite or adjacent coasts is effected by the median line of which every point is equidistant from the nearest point on the baseline of the two States.

Cypriots.[464] Leaving aside whether and to what extent Turkish Cypriots have a positive right on the natural resources located in the area in question, here it is worthwhile to note that in 2011 Turkey and the TRNC concluded a delimitation agreement and that subsequently Turkey brokered an agreement between the Turkish Petroleum Corporation—ie, Turkey's national oil company—and the TRNC.[465]

Ioannidis contends that by means of the former agreement Turkey reaffirmed its longstanding position that Turkey has rights to the economic exploitation of resources on and under the sea-bed of the Aegean Sea, which is considered as the natural prolongation of Turkey's territory.[466] In fact, Turkey has consistently argued that islands located in this sea, because of its particular conformation, are not entitled to claim rights on the continental shelf beyond their territorial sea. Accordingly, the agreement resorts to the equitable principle,[467] and thus attributes to Turkey a bigger continental shelf than that attributed to the TRNC.[468]

On the assumption that towards the TRNC there is a mandatory policy of non-recognition, such an agreement is invalid under international law. Indeed, the international response to the Turkish conduct seems in full compliance with this assumption as well as its

[464] Turkish Minister for Foreign Affairs, 'Press Release Regarding the efforts of the Greek Cypriot Administration of Southern Cyprus to sign bilateral agreements concerning maritime jurisdiction areas with the countries in the Eastern Mediterranean', 30 January 2007 <www.mfa.gov.tr/_p_30-january-2007_-press-release-regarding-the-efforts-of-the-greek-cypriot-administration-of-southern-cyprus-to-sign-bilateral-agreements-concerning-maritime-jurisdiction-areas-with-the-countries-in-the-eastern-mediterranean_br___p_.en.mfa> and Statement by Prime Minister Erdogan following the signing of continental shelf delimitation agreement between Turkey and the TRNC, 21 September 2011 <www.mfa.gov.tr/statement-by-prime-minister-erdogan-following-the-signing-of-continental-shelf-delimitation-agreement-between-turkey-and-the-tur.en.mfa>.

[465] On this agreement see Nikolaos Ioannidis, 'The Continental Shelf Delimitation Agreement Between Turkey and "TRNC"' (EJIL:Talk! 26 May 2014) <www.ejiltalk.org/the-continental-shelf-delimitation-agreement-between-turkey-and-trnc> and Marco Pertile and Enrico Broggini, 'Maritime Delimitation in the Eastern and Central Mediterranean: The Position of Italy with Respect to Turkish Exploration Activities Offshore Cyprus and the Memorandum of Understanding Between Turkey and Libya' (2020) 29 Italian Yearbook of International Law 474.

[466] Ioannidis (n 465). On the longstanding Turkish position, see Aurelia A Georgopoulos, 'Delimitation of the Continental Shelf in the Aegean Sea' (1988) 12 Fordham International Law Journal 90, 115ff.

[467] The equitable principle implies that the delimitation of the exclusive economic zone between two States with opposite or adjacent coasts is effected by an agreement that, by taking into account various factual circumstances, does not lead to an unfair delimitation.

[468] Indeed, Turkey refers to two dimensions of the same problem: 'As we have repeatedly emphasized in the past, our hydrocarbon activities in the Eastern Mediterranean have two dimensions: the protection of our rights on our continental shelf, and the protection of the equal rights of the Turkish Cypriots, who are co-owners of the Island, over the hydrocarbon resources of the Island'. See the press release issued on 16 July 2019 <www.mfa.gov.tr/no_206_-ab-disiliskiler-konseyi-nin-aldigi-kararlar-hk.en.mfa>.

consequences. More specifically, the Turkish initiative was met with widespread criticism, especially in connection with seismic surveys conducted in the waters adjacent to the waters of the TRNC by the Turkish Petroleum Corporation as well as in connection to action of the Turkish armed forces aimed to prevent other economic actors to do conduct exploration activities in the waters adjacent to Cyprus.

Criticisms have come from the United States[469] but mostly from Europe and its member States, which are more directly involved. Statements taken in response to such conduct became gradually more and more specific. In an initial phase it was possible to detect only a generic condemnation of Turkey for not recognizing Cyprus.[470] This is true even when Turkey started to carry out surveys in Cyprus's exclusive economic zone. Even at the direct question posed by members of the European Parliament, the reply of the Council merely holds that Turkey as a candidate country must unequivocally commit 'to good neighbourly relations and to the peaceful settlement of disputes in accordance with the United Nations Charter'.[471] In addition, the reply recalls that the Union had already 'urged Turkey to avoid any kind of threat, source of friction or action which could damage good neighbourly relations and the peaceful settlement of disputes' and had already 'stressed the sovereign rights of all EU Member States, which include … entering into bilateral agreements, in accordance with the EU acquis and international law, including the UN Convention on the Law of the Sea'.[472] An essentially identical reply was furnished even after the agreement mentioned above was concluded.[473]

[469] US Department of State, Office of the Spokesperson, Statement by Morgan Ortagus, Spokesperson, 9 July 2019 <https://cy.usembassy.gov/turkish-drilling-in-cypriot-claimed-waters>.
[470] Declaration by the European Community and its Member States, 'Enlargement: Turkey', 21 September 2005 <www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/d-tr20051123_13/d-tr20051123_13en.pdf>.
[471] See the written question E-3994/09 to the Council by Anni Podimata (S-D) and Maria Eleni Koppa (S-D) to the Council, 10 August 2009, and the reply, 19 October 2009.

[472] ibid.
[473] Question for written answer E-011665/2011 to the Council, Rule 117, Nikolaos Salavrakos (EFD), 14 December 2011, and the reply, 1 February 2012. See also question for written answer P-010382-14 to the Commission, Rule 130, Eva Kaili (S&D), 8 December 2014, and the answer given by High Representative/Vice-President Mogherini on behalf of the Commission, 30 January 2015.

Starting roughly from 2018, that is when the conducts described above, especially the actions aimed to obstruct exploration and exploitation in Cyprus' waters by third States' oil companies, became more common and more impacting, the European Council began to routinely adopt statements on the actions by Turkey.[474]

For instance, the relevant paragraphs of the conclusions adopted by the European Council meeting held in March 2018 read as follows:

> The European Council strongly condemns Turkey's continued illegal actions in the Eastern Mediterranean and the Aegean Sea and underlines its full solidarity with Cyprus and Greece. Recalling its conclusions of October 2014 and the Declaration of 21 September 2005, the European Council urgently calls on Turkey to cease these actions and respect the sovereign rights of Cyprus to explore and exploit its natural resources in accordance with EU and International Law. In this context, it recalls Turkey's obligation to respect International Law and good neighbourly relations, and normalize relations with all EU Member States including the Republic of Cyprus.[475]

Similarly, the Council of the European Union, when addressing the enlargement and stabilisation and association process, reaffirmed that 'Turkey must … respect the sovereignty of all EU Member States over their territorial sea and airspace as well as all their sovereign rights' and added that 'it remains crucial that Turkey commits and contributes to a comprehensive settlement of the Cyprus problem, including its external aspects, within the UN framework in accordance with relevant UNSC resolutions'.[476]

Subsequently, when Turkey continued its activities in the Eastern Mediterranean, the European Council envisaged the possibility that the Union could adopt 'appropriate measures without delay, including targeted measures'.[477] Indeed afterwards a series of measures short of

[474] On this evolution, see Sara Poli and Anna Pau, 'La reazione dell'Unione europea di fronte alla crisi del Mediterraneo orientale: tra misure restrittive e la proposizione di "un'agenda politica positiva" alla Turchia' (2020) 5 European Papers 1511.

[475] European Council meeting, Conclusions, 22 March 2018, paras 12–14. See also European Council meeting, Conclusions, 24 October 2014, para 24, which reads as follows: 'The European Council expressed serious concern about the renewed tensions in the Eastern Mediterranean and urged Turkey to show restraint and to respect Cyprus' sovereignty over its territorial sea and Cyprus' sovereign rights in its exclusive economic zone … Under the current circumstances, the European Council considered it more important than ever to ensure a positive climate so that negotiations for a comprehensive Cyprus' settlement can resume'.

[476] Council of the European Union, Council Conclusions, 26 June 2018, para 33. See also Council of the European Union, Council Conclusions, 18 June 2019, para 35.

[477] European Council meeting, Council Conclusions, 20 June 2019, para 17.

restrictive measures were adopted. First, the European Council decided to suspend negotiations on the Comprehensive Air Transport Agreement and not to hold high-level meetings between the Union and Turkey. Second, it endorsed the Commission's proposal to reduce the pre-accession assistance and invited the European Investment Bank to review its lending activities in Turkey.[478]

Given that the requests of the Union fell on deaf ears the Council 'agree[d] that a framework regime of restrictive measures targeting natural and legal persons responsible for or involved in the illegal drilling activity of hydrocarbons in the Eastern Mediterranean is put in place'.[479] Accordingly, a Council's decision in this sense was adopted in November 2019.[480] Subsequently, the same stance was reaffirmed.[481] Indeed, the High Representative and the Commission issued a joint-communication on the state of play of EU–Turkey political, economic and trade relations in which it is held that: 'The Cyprus settlement issue is a core element of Turkey's strong disagreements with the EU in the Eastern Mediterranean'.[482]

[478] Council of the European Union, Council Conclusions, 20 June 2019, para 4. Reportedly the Union withdrew $164 million in foreign aid to Turkey. In this regard, see Todd Carney, 'The Legal Issues Regarding Drilling Off the Northeast Coast of Cyprus' (OpinioJuris, 23 September 2019) <http://opiniojuris.org/2019/09/23/the-legal-issues-regarding-drilling-off-the-northeast-coast-of-cyprus>.

[479] Council of the European Union, Statement on Turkey's illegal drilling activities in the Eastern Mediterranean, 14 October 2019 <www.consilium.europa.eu/en/press/press-releases/2019/07/15/turkish-drilling-activities-in-the-eastern-mediterranean-council-adopts-conclusions>.

[480] See Council Decision (CFSP) 2019/1894 of 11 November 2019 concerning restrictive measures in view of Turkey's unauthorised drilling activities in the Eastern Mediterranean, OJ L 291/47 and Council Regulation (EU) 2019/1890 of 11 November 2019 concerning restrictive measures in view of Turkey's unauthorised drilling activities in the Eastern Mediterranean, OJ L 291/3. The first two persons have been added to the list of Annex I to the mentioned regulation in February of the following year, see Council Implementing Regulation (EU) 2020/274 of 27 February 2020 implementing Regulation (EU) 2019/1890 concerning restrictive measures in view of Turkey's unauthorised drilling activities in the Eastern Mediterranean, OJ LI 56/1 and Council Decision (CFSP) 2020/275 of 27 February 2020 amending Decision (CFSP) 2019/1894 concerning restrictive measures in view of Turkey's unauthorised drilling activities in the Eastern Mediterranean, OJ LI 56/15.

[481] See for instance European Council meeting, Council Conclusions, 12 December 2019, para 19. See also the Statement of the EU Foreign Ministers on the situation in the Eastern Mediterranean, 15 May 2020 <www.consilium.europa.eu/en/press/press-releases/2020/05/15/statement-of-the-eu-foreign-ministers-on-the-situation-in-the-eastern-mediterranean>, Council of the European Union, Outcome of the 3765th meeting of the Foreign Affairs Council, 13 July 2020, 4, European Council, Conclusions of the Special meeting of the European Council, 2 October 2020, paras 18–20, European Council, Council Conclusions, 16 October 2020, paras 22–23, European Council, Council Conclusions, 11 December 2020, paras 30, 32–33, and Statement of the Members of the European Council, 25 March 2021, paras 10, 15 <www.consilium.europa.eu/media/48976/250321-vtc-euco-statement-en.pdf>.

[482] European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Council on the state of play of EU–Turkey political, economic and trade relations, 22 March 2021.

The response of the European Union, as well as of the United States, is clearly favourable to Greek Cypriots. However, it does not seem that this response clearly supports the doctrine of non-recognition. The condemnation of the drilling activities by Turkey is based more on the use of resources located in Cyprus' territory rather than on a mandatory policy of non-recognition. The two aspects are clearly connected since the premise is that the TRNC is an unrecognized entity. However, on the one hand, this response does not say anything about a specific duty not to recognize and, on the other hand, it does not seem that such response is at odds with the argument that all over the years there has been a gradual process of accommodation of the facts on the ground.

The situation is somehow similar to the cases before the ECJ and the ECtHR that are analysed below. These judgments are overall favourable to Greek Cypriots, but they are not at odds with the idea that the law has to accommodate certain factual situations (actually they support this idea to a certain degree) and moreover it is not clear to what extent the Court took into account the doctrine of non-recognition or more in general the sovereignty of Cyprus.

3.8. The judicial practice of the ECJ and the ECtHR

It is often contended that a series of cases before the ECJ and the ECtHR broadly dealing with international trade and with the protection of human rights supports the customary character of the duty of non-recognition.

As for international trade, in 1972 an association agreement between the European Economic Community and Cyprus was concluded. The agreement provided for two successive stages, the first of which was aimed to progressively eliminate obstacles to trade between the parties. The second stage did not see the light as it was originally planned because of the events of 1974. Instead, in 1977, that is *after* the partition of the island, an additional protocol that complemented the agreement was concluded. This protocol defined the products that originate from Cyprus and concerned the methods of cooperation between the parties.

The fact that after 1974 some States simply accepted the certificates of origin and the phytosanitary certificates issued by the Turkish Cypriot authorities if these certificates had the stamps of Cyprus, triggered the so-called Anastasiou saga, that is three judgements rendered by the ECJ dealing with international trade with an unrecognized entity.[483] Producers and exporters of citrus fruits and the national marketing board for potatoes from southern Cyprus brought proceedings against the Ministry of Agriculture, Fisheries and Food of the United Kingdom concerning the importation of products from northern Cyprus. The ECJ summed up the question posed by the domestic Court as follows:

> The essence of these questions … is whether the Association Agreement and Directive 77/93 should be interpreted as precluding acceptance by the national authorities of a Member State, when citrus fruit or potatoes are imported from the northern part of Cyprus, of movement and phytosanitary certificates issued by authorities other than the competent authorities of the Republic of Cyprus, or conversely, as requiring acceptance of such certificates, and whether the answer would be different if certain circumstances connected with the special situation of the island of Cyprus were taken as established.[484]

The Court held that the agreement does preclude such acceptance.[485] A few aspects regarding this judgment are relevant.

As in the case of Western Sahara, the Court refrained from making an argument based on international law and, more specifically, on the duty of non-recognition. This is noteworthy

[483] The ECJ explained the situation in the following terms: 'The UK Customs and Excise, which is responsible for checking movement certificates concerning imported goods, have refused to accept certificates issued by, or bearing a customs stamp referring to, the TRNC. They have continued to accept movement certificates accompanying goods exported from the northern part of Cyprus which bear a stamp in the name of the "Cyprus Customs Authorities" but do not originate from the authorities of the Republic of Cyprus'. ECJ, Judgement of the Court, Case C-432/92, 5 July 1994, para 13(e). See also ibid para 13(f), which reads as follows: 'Similarly, the UK authorities do not accept phytosanitary certificates issued in the name of the TRNC. They do accept phytosanitary certificates issued in the northern part of Cyprus accompanying products consigned by exporters from that part. Some of those certificates have been issued in the name of the "Republic of Cyprus ° Turkish Federated State of Cyprus". In practice, since 1991 at least, all phytosanitary certificates for produce exported from the northern part of Cyprus have been issued only in the name of the "Republic of Cyprus ° Ministry of Agriculture"'. See on these cases Nikolas Kyriacou, 'The EU's trade relations with northern Cyprus obligations and limits under public international and EU law' in Duval and Kassoti (n 107) 90ff and more in general Stefan Talmon, 'The Cyprus Question before the European Court of Justice' (2001) 12 European Journal of International Law 727, 727–742.

[484] ECJ, Judgement of the Court, Case C-432/92, 5 July 1994, para 15. The Directive 77/93 concerns protective measures against the introduction into the Member States of organisms harmful to plants or plant products and establishes *inter alia* that their introduction into the Member States should be accompanied by a phytosanitary certificate.

[485] ibid 67.

also because the United Kingdom and the Commission referred to this duty. In fact, they argued that to accept certificates issued by authorities other than the competent authorities of Cyprus does not amount to an implicit recognition of the TRNC. Conversely, they argued that to accept such certificates falls within the Namibia exception since not to accept them would go to the detriment of the inhabitants of northern Cyprus. In this regard the ECJ merely held that the situation of Namibia is not comparable with the situation of the TRNC.[486] Arguably, however, the two situations are comparable given that they can both be understood as unlawful situations, what is not comparable is the extent to which humanitarian concerns are relevant. While the ICJ was guided by a strictly humanitarian concern, and thus resorted to a narrow understanding of this exception, the United Kingdom and the Commission were maintaining that the Namibia exception covers also trade, which affects the whole of the population in a more indirect way compared to the acts and treaties mentioned by the ICJ.[487]

Besides the reference to the Namibia exception, it is noteworthy that the Court refrained from dealing with other matters of international law. There is no reference to the invasion and to the subsequent protracted occupation of the island (instead the Court talked only of an unqualified 'intervention' and of its outcome, that is the '*de facto* partition'), to the Council resolutions adopted on this question, and to the doctrine of non-recognition. When it comes to matters of recognition the ECJ referred only to the fact that the Community and its member States do not recognise the TRNC.

Conversely, the Court based its main argument on the 'principle of mutual reliance and cooperation between the competent authorities of the exporting State and those of the importing

[486] ibid para 49.

[487] The ECJ refers to the opinion of the Advocate General Gulmann, who made a similar argument to the one just mentioned. Opinion of Advocate General Gulmann, 20 April 1994, paras 58–59. More specifically, he observed that the case at hand 'concerns a question of the extent of the entitlement of the Member States of the Community - in breach of the express rules of an existing international law agreement on the matter - to accept "official acts" the purpose of which is to enable trade to take place with businesses from the area which is not to be recognized under the Security Council's resolutions. The present case thus concerns the question of recognition of official documents which are not of a type covered by the ICJ's Opinion concerning official acts issued in the population' s interest and where the situation regarding the position of the population groups in question is not comparable'.

State',[488] which is at odds with the acceptance of certificates not issued by Cyprus. Similarly, the system of protection against the introduction of harmful organisms in plant products imported from non-member States 'is based … on a system of checks carried out by experts lawfully empowered for that purpose by the Government of the exporting State'.[489] Such a system, according to the Court, can be implemented *only* by the authorities of Cyprus.

The Court dealt again with these issues when the same applicants demanded an order restraining the Minister for Agriculture, Fisheries and Food of the United Kingdom from allowing citrus fruit imported from northern Cyprus after a port call in Turkey.[490] During the domestic proceedings, the case was referred to the Court since the matter ultimately dealt with the interpretation of European Union law. The Court reformulated the questions as follows:

> whether, and if so, under what conditions, the Directive [ie, the Directive 77/93, which was addressed in the previous case] permits a Member State to allow into its territory plants originating in a non-member country, to which special requirements apply and which, under the Directive, must undergo an inspection evidenced by the issue of a phytosanitary certificate, where those plants are accompanied only by a phytosanitary certificate drawn up by the authorities of a non-member consignor country which is not the country of origin of the plants.[491]

The Court maintained that under certain conditions such importation is possible.[492] Again, in the judgement there are no references to matters of international law and, more importantly, this time the Court adopted a more permissive approach in the sense that it did not address whether such an importation is at odds with the duty not to recognize.[493] Instead, it addressed

[488] ECJ, Judgement of the Court, Case C-432/92, 5 July 1994, para 38.
[489] ibid para 61.
[490] ECJ, Judgement of the Court, Case C-219/98, 4 July 2000, para 11. More specifically, the ships carrying such items were staying in Turkey for 24 hours so to allow Turkish authorities to inspect the cargo and issue the relevant certificates.
[491] ibid para 14.
[492] ibid para 38. The Court specified the following conditions: 'the plants have been imported into the territory of the country where checks have taken place before being exported from there to the Community', that 'the plants have remained in that country for such time and under such conditions as to enable the proper checks to be completed', and that 'the plants are not subject to special requirements that can be satisfied only in their place of origin'.
[493] In this regard, Advocate General Fennelly was more explicit since he noted that 'the Directive is exclusively concerned with the protection of the health of Community plants. If its requirements can be satisfied, the fact that the goods originate in a part of Cyprus controlled by an entity not recognised by the Community is of no relevance. Such goods enjoy access to the Community market on the same terms as those from the southern part of Cyprus, provided that the various conditions imposed by Community law can be satisfied'. See opinion of Advocate General Fennelly, 24 February 2000, para 33.

only the conditions necessary so to respect the rationale of the directive, which in the words of the Court is 'to protect the territory of the Community from the introduction and spread of organisms harmful to plants'.[494] Thus, the Court could conclude that, provided that the way in which the products in question are imported is compatible with this rationale, such importation is lawful. Kyriacou in this regard holds that this judgement 'paved the way for the establishment of indirect trade between northern Cyprus and Member States' and averted potentially harmful consequences to the economy of the TRNC.[495]

The Court handed over a third judgement on this question, which however is not particularly relevant.[496] The Court again did not deal with international law, rather it based its reasoning on the rationale of the above-mentioned directives and on the previous two judgments. Given the premises of the reasoning of the Court, questions concerning the duty of non-recognition did not arise in this judgement.[497]

Concerning the Anastasiou saga, Kyriacou observes that:

> [T]he Court oscillated between accepting and rejecting phytosanitary certificates for goods originating in northern Cyprus. However, the apparent change of the Court's position can be fully understood and be justified from the point of view of ensuring the full and effective application of EU law, preserving the integrity of the EU legal order and safeguarding the strict application of a set of technical rules established by the EU legislator. In all three cases, the conclusions reached by the Court ensured these three aims and did not seek to accommodate any other consideration, especially relating to the legality, under public international law, of the "TRNC" authorities.[498]

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[494] ibid para 32.
[495] Nikolas Kyriacou (n 483) 93.
[496] ECJ, Judgement of the Court, C-140/02, 30 September 2003, para 25. The question was the same as in the previous case but with regards not to the certificates but to the origin mark that shall be stamped on the packaging of certain citrus fruits according to Directive 77/93 as amended by subsequent directives.
[497] The Court reaffirmed that the rationale of Directive 77/93 is to guarantee a 'high level of phytosanitary protection against the bringing into the Community of harmful organisms in products imported from non-member countries'. See ibid para 45. Thus, in principle, these certificates have to be issued by authorities of the products' country of origin. However, provided that some conditions are fulfilled it is also possible to accept certificates issued by authorities of the exporting country that is not the products' country of origin. See ibid paras 45–47. As for the mark of origin, the Court specified that the rationale is to 'certify the origin of products, could be issued outside the country of origin' See ibid para 60. Thus, it makes no sense that authorities other than the products' country of origin may issue and stamp such a mark. In other words, while phytosanitary certificates certify a factual characteristic of the products in question, which can be verified also at a later stage with an inspection by for instance Turkish authorities, the stamps of origin certify only the origin of the products that cannot be verified by means on an inspection.
[498] Kyriacou (n 483) 128.

However, the extent to which the Court relied on international law and the extent to which it is possible to infer any argument based on international law from these judgements has been controversial. On the one hand, Vedder and Folz contend that the Court applied international law 'in an exemplary way'.[499] Elias maintains that the Court 'denied the lawfulness of the acceptance of certificates of origin and physiosanitary [sic] health issued by the Turkish Republic of Northern Cyprus, because of the non-recognition policy adopted by the international community'.[500] Talmon argues that even if these judgments did not deal directly with the issue of non-recognition it is possible to infer that, according to the Court, the duty of non-recognition implies the prohibition not to deal with the unrecognized entity.[501] However, Talmon adds that this stance is not persuasive given that State practice suggests that the duty of non-recognition does not bar every kind of cooperation with the unrecognised entity.[502]

These commentators overall have contended that the Court made an argument based on international law and that the Court argued that the duty of non-recognition bars cooperation with the TRNC authorities, but they disagree as to the Court's assessment. However, Cremona notes a key aspect that is that what the Court did is merely to argue that 'in the absence of recognition, the Community and Member States cannot relate to the Northern Cyprus authorities *with the necessary degree of cooperation*'.[503] Indeed, it seems that the Court was not raising the argument that non-recognition bars any kind of cooperation, but it simply contended that the fact that the TRNC is not recognized prevents the *close* cooperation required by the above-mentioned directives.

[499] Christoph Vedder and Hans-Peter Folz, 'The International Practice of the European Communities: Current Survey' (1996) 7 European Journal of International Law 112, 122. They however concede that 'sometimes it might seem hard to follow the Court's line of reasoning through the abundance of arguments'.
[500] Olufemi Elias, 'General International Law in the European Court of Justice: From Hypothesis to Reality?' (2000) XXXI Netherlands Yearbook of International Law 3, 23.
[501] Talmon (n 483) 741–742.
[502] ibid 742ff. Talmon refers to the State practice on Manchukuo, German Democratic Republic, and Taiwan.
[503] Marise Cremona, 'Case C-432/92, R. v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd. and Others, Judgement of 5 July 1994' (1996) 33 Common Market Law Review 125, 129 (emphasis added).

As for the ECtHR there are a few relevant judgements which similarly oscillated between different considerations. Some of them regard the issue of property rights and, in this regard, it is worthwhile to note that in the case-law of the Court it is possible to identify a trend towards the acknowledgement of the factual situation.

The *Loizidou* case concerns the violation of property rights and, more specifically, of the right of access to property located in northern Cyprus and to enjoy it given that the constitution of the TRNC, as put it by the Court, provides that:

> All immovable properties … which were found abandoned on 13 February 1975 when the Turkish Federated State of Cyprus was proclaimed or which were considered by law as abandoned or ownerless after the above-mentioned date … situated within the boundaries of the TRNC on 15 November 1983, shall be the property of the TRNC notwithstanding the fact that they are not so registered in the books of the Land Registry Office; and the Land Registry Office shall be amended accordingly.[504]

The Court in the judgement on the preliminary objections, addressing questions of jurisdiction,[505] held that the overall control of Turkey over the TRNC, which results from the presence of the armed forces of Turkey, entails the responsibility of the latter for the acts carried out by the TRNC authorities.[506] Accordingly, it is not necessary to assess the lawfulness of the 1974 Turkish intervention, what really matters is that the international community does not recognize the TRNC and considers Cyprus as the sole legitimate Government of the island.[507] The key paragraph of the judgment on merits is the following one: 'Against this background [ie, that the TRNC is not recognized and only the Republic of Cyprus is] the Court cannot attribute legal validity for purposes of the Convention to such provisions as Article 159 of the fundamental law'.[508] The Court adds that it 'does not consider it desirable, let alone necessary

[504] ECtHR, Case of Loizidou v. Turkey (merits), Application no 15318/89, 18 December 1996, para 18.
[505] The Court also addressed the objection *ratio temporis* raised by Turkey, that is that Turkey recognised the jurisdiction of the Court only on 22 January 1990. This objection was rejected arguing that the violation in question is a continuous violation that thus was still occurring and not an instantaneous violation occurring on the day of adoption of the TRNC Constitution. ECtHR, Case of Loizidou v. Turkey (preliminary objections), Application no 15318/89, 23 March 1995, paras 99ff.
[506] ibid para 56.
[507] ibid.
[508] ECtHR, Case of Loizidou v. Turkey (merits), Application no 15318/89, 18 December 1996, para 44.

… to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the "TRNC"'.[509] Nonetheless, it felt compelled to pre-empt the argument that the Namibia exception may be applied. However, according to the Court this is not the case in as much as evidently the Constitution of the TRNC as a whole is not a legal agreement whose effects can be ignored only to the detriment of the inhabitants of the territory.[510]

The dissenting opinions are particularly noteworthy. Dissenting Judges Bernhardt and Lopes Rocha contended that '[t]he case of Mrs Loizidou … is the consequence of the establishment of the borderline in 1974 and its closure up to the present day'. This however is a 'complex historical development' that turned into a 'no less complex current situation'. Accordingly, Turkey cannot be blamed alone setting aside previous acts as the 1974 *coup d'état* and the wider geopolitical climate. It follows that it does not seem possible to draw a clear legal conclusion over the responsibility for the situation of Cyprus.[511]

Similarly, Judge Petitti contended that the facts of the case were a consequence of 'international events for which responsibility cannot be ascribed on the basis of the facts of the Loizidou case but has to be sought in the sphere of international relations'. The dissenting Judge further noted that the UN itself has refrained from determining the illegality, which makes the lawfulness of Turkish conduct and of the subsequent factual situation uncertain. Moreover, he noted that after the 1974 events, many rounds of negotiations have been undertaken without success. It follows that it is inappropriate to blame only one of the parties for this situation.[512]

Dissenting Judge Jambrek too pointed at the complexity of the factual and of the legal situation and contended that the Court is not in the position to assess the lawfulness of Turkish conduct. He adds that a judge:

> before making a decision to act in an activist or a restrained way, will as a rule examine whether the case is focused in a monocentric way and ripe for decision, and whether it is not overly moot and political. Given that efforts are under way

[509] ibid para 45.
[510] ibid.
[511] Dissenting opinion of Judge Bernhardt joined by Judge Lopes Rocha, para 1.
[512] Dissenting opinion of Judge Petitti.

> to arrive at a peaceful settlement of the Cyprus problem within UN, CE and other international bodies, a judgment of the European Court may appear as *prejudicial*.[513]

The dissenting Judges made another comment concerning the duty of non-recognition. While the Court simply asserted that the Constitution of the TRNC does not fall within the Namibia exception, these judges contended that the Court should have at least deepened the question of the legal consequences of the duty of non-recognition and, more specifically, what legal arrangements cannot be recognized. Judge Petitti for instance observed:

> The problem of the status and responsibilities of the "TRNC" should have been examined more fully. It is true that the United Nations General Assembly has not admitted the "TRNC" as a member, but the lack of such recognition is no obstacle to the attribution of national and international powers … Moreover, the Court accepted the validity of measures adopted by the "TRNC" authorities in the fields of civil law, private law and the registration of births, deaths and marriages, without specifying what reasons for distinguishing between these branches of law and the law governing the use of property justified its decision.[514]

In any case, despite these doubts, the findings of the Court in the *Loizidou* case were later reaffirmed in an inter-state case. In 1994 the first inter-state between Cyprus and Turkey case was eventually referred to the Court and the judgement was rendered in 2001.[515] The case concerned the situation existing in Cyprus brought about by the military operations of Turkey in 1974. The Court dealt with a variety of aspects but mainly with alleged violations of human rights. Indeed, the Court concluded that Turkey violated a series of human rights including the right to life, the prohibition of degrading treatment, and the right to property. The Court, after having recalled the *Loizidou* case, reiterated that:

> it notes that it is evident from international practice and the condemnatory tone of the resolutions adopted by the United Nations Security Council and the Council of Europe's Committee of Ministers that the international community does not recognise the "TRNC" as a State under international law. The Court reiterates … that the Republic of Cyprus has remained the sole legitimate

[513] Dissenting opinion of Judge Jambrek, paras 5, 7 (emphasis added).
[514] Dissenting opinion of Judge Petitti. See also the dissenting opinions of Judge Jambrek, para 5, and of Judge Baka.
[515] Three applications have been previous filed. In 1975, two applications (ie, no. 6780/74 and 6950/75) were joined by the Commission and led to the adoption of a report. In 1977, another application was filed (ie, no. 8007/77), which led to the adoption of a second report.

> government of Cyprus and on that account their locus standi as the government of a High Contracting Party cannot therefore be in doubt.[516]

Sands observes that this case provides a 'strong signal that the passage of time will not diminish the consequences or costs of illegal occupation'.[517] Grant adds that the Court clarified that 'the passage of time does not weaken the potential remedies' and that this judgement 'provide[s] a bulwark against the "normative force of the factual"'.[518] These scholars have referred to the judgement on compensation, which was rendered after 13 years the judgement on merits, but at least indirectly to the judgement on merits, which was rendered respectively 27 and 18 years after the invasion of the island and the establishment of the TRNC.

However, it is noteworthy that some passages of the latter judgement raise some doubts over the Court's understanding of non-recognition. In fact, in the *Loizidou* case a cautious approach was adopted as for non-recognition and possible exceptions to such a duty.[519] In this case, even if the Court held that it embraces this cautious approach, the stance is significantly different.[520]

More specifically, Turkey had argued that the Greek Cypriots living in northern Cyprus could have brought proceedings before the courts of the TRNC. In contrast, Cyprus argued that the '"TRNC"'s constitutional and legal order disregarded the context of total unlawfulness in which the "constitution and laws" were created'.[521] In other words, the unlawfulness of the establishment of the TRNC entails the unlawfulness of its courts. The only courts established by law in the territory in question are the courts of Cyprus. In any case, it is added that the courts of the TRNC are not impartial courts. It follows that these courts do not guarantee the

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[516] *Cyprus v. Turkey* (Application no. 25781/94), Judgement, 10 May 2001, para 61.
[517] Cited in Thomas D Grant, 'Crimea after Cyprus v. Turkey: Just Satisfaction for Unlawful Annexation?' (EJIL:Talk!, 19 May 2014) <www.ejiltalk.org/crimea-after-cyprus-v-turkey-just-satisfaction-for-unlawful-annexation>.
[518] ibid.
[519] More specifically, the Court, before excluding that the Constitution of the TRNC falls within the scope of the Namibia exception, held that it 'does not consider it desirable, let alone necessary, in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the "TRNC"'. Supra n 509.
[520] Case of Cyprus v. Turkey (Application no. 25781/94), Judgement, 10 May 2001, para 89.
[521] ibid, para 83.

respect of Article 6 (ie, the article that enshrines the right to a fair trial) and Article 13 (ie, the article that enshrines the right to an effective remedy) of the ECHR. Therefore, the Court had to assess whether the requirement of exhaustion of domestic remedies had been fulfilled. It seems that in this regard the Court resorted to a different approach when compared to the *Loizidou* case.

The Court started its reasoning from the findings of the European Commission of Human Rights, which as to the requirement in question referred to the Namibia exception.[522] The argument goes that, even if the TRNC is not recognized, its existence and the fact that it exercises *de facto* authority under the overall control of Turkey cannot be irrelevant as for 'the question of whether the remedies which the respondent State claimed were available within the "TRNC system" required to be exhausted'.[523] More specifically, the Commission observed that remedies established by the TRNC fall within the scope of the Namibia exception given that their function is to benefit the *whole* population of the TRNC. The effectiveness of such remedies cannot be analysed in the abstract but, on the contrary, must be analysed in the specific circumstances of each case. The Court observed that the Commission, as the Court had already done in the *Loizidou* case, refrained from making a general statement on the validity of the acts of the TRNC. However, while the Court in that case argued that the Constitution, and especially its Article 159, does not fall within the scope of the Namibia exception, in the case at hand the Court took the opposite stance. More specifically, the Court argued that:

> the Advisory Opinion confirms that where it can be shown that remedies exist to the advantage of individuals and offer them reasonable prospects of success in preventing violations of the Convention, use should be made of such remedies. In reaching this conclusion, the Court considers that this requirement, applied in the context of the "TRNC", is consistent with its earlier statement on the need to avoid in the territory of northern Cyprus the existence of a vacuum in the protection of the human rights guaranteed by the Convention.[524]

[522] ibid paras 85ff.
[523] ibid para 86.
[524] ibid para 91.

Accordingly, the non-recognition of the courts implementing such remedies results in depriving the population of the TRNC of these remedies. As a consequence, the applicants have to fulfil the requirement of the exhaustion of domestic remedies. Hypothetically, the question is whether these remedies are effective, but this is an assessment that shall be carried considering the specific circumstances of each case. Therefore, the Court does not deal with this issue.[525]

While in the *Loizidou* case the dissenting judges criticized the Court for having adopted an excessively simplicistic approach that did not consider the complexities of the factual and legal situation, in this case the situation is somehow reversed. In fact, the dissenting judges returned to the topic of non-recognition in connection with the existence of domestic remedies. They argued that the Court should have refrained from elaborating 'a general theory concerning the validity and effectiveness of remedies in the "TRNC"' especially given the 'minimalist' remarks of the ICJ in the *Namibia* opinion.[526] The point is that if the Constitution of the TRNC is invalid, as held by the Court in the *Loizidou* case, which is in accordance with the wider stance of the international community, then it is difficult to understand from where the courts of these political entity derive their legal authority. One thing is, in accordance with the Namibia exception, to recognize certain decisions by these courts in as much as their recognition is in the interests of the inhabitants, another thing is to require

> applicants in northern Cyprus… to exhaust these possible avenues of redress … before it has jurisdiction to examine their complaints … To require those subject to the exigencies of an occupying authority to have recourse to the courts as a precondition to having their complaints of human-rights violations examined by this Court is surely an unrealistic proposition given the obvious and justifiable lack of confidence in such a system of administration of justice.[527]

Accordingly, a cautious approach is needed or:

[525] The Court does not deal with the effectiveness of the remedy offered by the courts of the TRNC but observes on the impartiality that: 'nothing in the institutional framework of the "TRNC" legal system which was likely to cast doubt either on the independence and impartiality of the civil courts or the subjective and objective impartiality of judges, and, secondly, those courts functioned on the basis of the domestic law of the "TRNC" notwithstanding the unlawfulness under international law of the "TRNC"' s claim to statehood'. ibid para 231.
[526] Partly dissenting opinion of Judge Palm, joined by Judges Jungwiert, Levits, Panţîru, Kovler, and Marcus-Helmons.
[527] ibid.

> such a general conclusion has, as a direct consequence, that the European Court of Human Rights may recognise as legally valid decisions of the "TRNC" courts and, implicitly, the provisions of the Constitution instituting the court system. Such an acknowledgment, notwithstanding the Court's constant assertions to the contrary, can only serve to undermine the firm position taken by the international community which through the United Nations Security Council has declared the proclamation of the "TRNC"'s statehood "legally invalid" and which has stood firm in withholding recognition from the "TRNC". It also runs counter … to the terms of various resolutions calling upon States "not to facilitate or in any way assist the illegal secessionist entity".[528]

Katselli Proudaki notes that the *Cyprus v. Turkey* case, by holding that the remedies of the TRNC authorities fall within the Namibia exception, deviated from the *Loizodou* case, which she considers as the most compelling stance when it comes to public international law. A subsequent case, that is the *Demopoulous* case further deviated from these cases.[529] The Court joined eight applications that revolved again around the claim to property in the northern part of Cyprus by Greek Cypriots. Turkey was required by a previous judgement of the Court—ie, *Xenides-Arestis v. Turkey*—to introduce a mechanism of redress so to avoid that a large number of overall similar cases would have been filed before the Court itself. Thus, the TRNC established the Immovable Property Commission (IPC), whose task is to adjudicate the claims from natural and legal persons concerning rights to property located in the territory in question. The applicants however decided for a variety of reasons not to submit any claim before the IPC but to bring proceedings before the ECtHR claiming that they had been deprived of their right of property and access as a consequence of the 1974 invasion.[530]

Before dealing with the substantive questions emerging from the applications, the Court observed that:

> the arguments of all the parties reflect the long-standing and intense political dispute between the Republic of Cyprus and Turkey … some thirty-five years

[528] ibid. See also the partly dissenting opinion of Judge Marcus-Helmons, ad-hoc judge by Cyprus, who raised overall similar remarks.
[529] Elena Katselli Proukaki, 'The Right of Displaced Persons to Property and to Return Home after Demopoulos' (2014) 14 Human Rights Law Review 701, 704. cfr. Rhodri C Williams, 'The European Court of Human Rights: Demopoulos v. Turkey' (2010) 49 International Legal Materials 816. Williams underlines a certain continuity between the above-mentioned inter-state case and the *Loizodou* case and contends that the real turning point is the Demopoulous case.
[530] Demopoulos and others v. Turkey (Application nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04), admissibility, 1 March 2010, paras 4ff.

> have elapsed since the applicants lost possession of their property … Generations have passed. The local population has not remained static. Turkish Cypriots who inhabited the north have migrated elsewhere; Turkish Cypriot refugees from the south have settled in the north; Turkish settlers from Turkey have arrived in large numbers and established their homes. Much Greek Cypriot property has changed hands at least once … Thus, the Court finds itself faced with cases burdened with a political, historical and factual complexity flowing from a problem that should have been resolved by all parties assuming full responsibility for finding a solution on a political level. This reality, as well as the passage of time and the continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances.[531]

Such observations informed the whole judgement. First, as to the requirement to exhaust domestic remedies, the Court rejected the argument that requiring the Greek Cypriots to file an application before the IPC may lent legitimacy to the illegal occupation of northern Cyprus and to the TRNC itself.[532] The question revolves again around the relevance of the Namibia exception. The Court noted that the case of Namibia is not comparable with the case of the TRNC. In the former case the local population was 'living under occupation in a situation in which basic daily reality requires recognition of certain legal relationships', while in the latter case Greek Cypriots 'are … seeking to vindicate, from another jurisdiction, their rights to property under the control of the occupying power'.[533] However, the Court, reaffirming a finding done in the inter-state case, observed that the gist of the Namibia exception is that 'the mere fact that there is an illegal occupation does not deprive all administrative or putative legal or judicial acts therein of any relevance under the Convention'.[534]

Then the Court echoed another observation that was done in the inter-state case, that is that it would be paradoxical to contend that Turkey is accountable for violations of human rights that take place within the territory on which it has jurisdiction and, at the same time, to contend

[531] ibid paras 83–85.
[532] This was not the only argument raised by the applicants; however, it is the only one relevant to matter of non-recognition. For a comprehensive analysis of the judgement and of the arguments raised by the applicants as well as by the respondent Government, see ibid paras 87–91, 99–103.
[533] ibid para 94.
[534] ibid.

that the mechanisms implemented by the TRNC to protect the very same rights are invalid.[535] It follows that while the Cyprus question remains unsettled individuals' human rights must be protected, hypothetically also by the TRNC. Conversely, the rule of exhaustion applies under Article 35(1) of the ECHR must be respected. Most importantly, the Court ended its reasoning by contending 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'.[536]

In a similar way the Court rejected the argument that the IPC is not an adequate redress touching upon matter somehow relevant to non-recognition. In this regard, the Court reaffirmed the finding that Article 159 of the TRNC Constitution is invalid and thus it cannot be held that Greek Cypriots lost their property rights in 1985, that is when the Constitution was adopted. It follows that ownership has never changed and that 'Greek Cypriot owners claimed only in respect of pecuniary damage for loss of use of their properties, not compensation for the loss of the properties themselves of which they continued to be regarded as the legal owners'.[537] However, the Court observed that:

> [M]any decades after the loss of possession by the then owners, property has in many cases changed hands … those claiming title may have never seen, or ever used the property in question. The issue arises to what extent the notion of legal title, and the expectation of enjoying the full benefits of that title, is realistic in practice. The losses thus claimed become increasingly speculative and hypothetical … it must be recognised that with the passage of time the holding of a title may be emptied of any practical consequences.[538]

The Court clarifies that the applicants did not lose their ownership since military occupation cannot lead to the transferring of property from the occupied to the occupants. Nonetheless:

> it would be unrealistic to expect that as a result of these cases the Court should, or could, directly order the Turkish Government to ensure that these applicants obtain access to, and full possession of, their properties, irrespective of who is now living there or whether the property is allegedly in a militarily sensitive zone or used for vital public purposes.[539]

[535] ibid para 95.
[536] ibid para 96.
[537] ibid para 110.
[538] ibid para 111.
[539] ibid para 112.

Even if the Court restricts the scope of this finding to the nature of redress (ie, compensation rather than restitution),[540] the Court ended up assigning to the facts on the ground a crucial importance that goes beyond the nature of redress. The contention that it is unrealistic to demand to Turkey to evict inhabitants from their homes clearly affects the margin for negotiations on the dispute in question.[541]

The Court did not acknowledge any deviation from the previous cases, however the *Demopolous* case compared to the previous ones leaves the door open to considerations of realism to a much greater extent. Overall, it seems that while previously the balance was pending towards legal considerations, thus embodying the principle *ex iniuria ius non oritur*, it gradually shifted towards practical considerations, thus embodying the rival principle so much so that Sanger contends that this judgement 'suggests the longer an occupation lasts, the more likely the Court will consider its consequences as being a *fait accompli*'.[542]

In *Güzelyurtlu* the facts from which the case originated were completely different in as much as they revolved around the killing of three persons living in the territory controlled by Cyprus, but of Turkish Cypriot origin, allegedly committed by "TRNC" citizens residing in northern Cyprus. More specifically, the question that the Court had to deal with was whether the authorities of Cyprus, of the TRNC, and of Turkey violated their obligation to conduct an effective investigation. The opposing parties did start an investigation, but the situation arrived at a stalemate. On the one hand, the authorities of Cyprus were not able to execute the arrest warrants in the TRNC, neither Turkey, responsible for what occur in the occupied areas, accepted to extradite the suspects to a State that it does not recognize. On the other hand, the authorities of the TRNC and of Turkey, after having detained and questioned the suspects, concluded that there was not enough evidence for charging the suspects given that the

[540] ibid para 113.
[541] ibid paras 116–117.
[542] Andrew Sanger, 'Property Rights in an Occupied Territory' (2011) 70 Cambridge Law Journal 7, 8. See also Alexia Solomou, 'Demopoulos & Others v. Turkey (Admissibility)' (2010) 104 American Journal of International Law 628.

authorities of Cyprus were not willing to provide any evidence and, conversely, insisted on requiring the extradition of the suspects. The consequence is that the suspects have never been tried and the applicants, who were family members of the three persons deceased, claimed that there was a violation of Article 2 of the ECHR for the failure by the authorities of Cyprus and of the TRNC (together with the authorities of Turkey) to cooperate with each other, which in turn prevented them to conduct an effective investigation.

In the judgment of first instance rendered by the Chamber it was held that both the respondent States violated the above-mentioned article. One of the arguments raised by Cyprus was that the Convention cannot be read as imposing to a State party 'to cede part of its sovereignty and part of its legal right as a State to prosecute and try crimes committed on its territory to the authorities of a separatist local administration'.[543] Cyprus stressed that in the case at hand what was asked to Cyprus was not a matter of 'simple police cooperation' but was the renounce to the 'administration of criminal justice with regard to crimes committed on its territory not under military occupation by Turkey'.[544]

The applicants raised an argument based on non-recognition and argued that the refusal to cooperate with the authorities of the TRNC violates the obligation to conduct an effective investigation given that such refusal is not mandated by international law. In this regard, it is argued that 'disclosing evidence to the "TRNC" police … did not in law amount to recognition of or support for the "TRNC" … Nor did international law prohibit cooperation in police matters with unrecognised police entities'.[545] They added that in the past police forces have cooperated with those of the TRNC without apparently contradicting the position of the respective States towards the TRNC.[546] Turkey echoed the same argument: to cooperate with

[543] Case of Güzelyurtlu and Others v. Cyprus and Turkey (application no. 36925/07), 4 April 2017, para 238.
[544] ibid.
[545] ibid para 226.
[546] ibid.

police forces of the TRNC does not amount to recognition and indeed similar cooperation has already occurred.[547]

The Chamber, however, reaffirmed the findings of the *Cyprus v. Turkey* case and cited the passages according to which the international community does not recognise the "TRNC" and that to deny recognition from domestic courts of the TRNC would go to the detriment also of the Greek-Cypriot community. Evidently, according to the Court the logical consequences of these two contentions is that cooperation in criminal matters does not amount to implicit recognition.[548] In addition, the Court agreed with the applicants and with Turkey that the cooperation of authorities of the United Kingdom with those of the TRNC without apparently contradicting the longstanding position of the latter State towards the TRNC confirms the interpretation of the Court.[549]

Judge Serghides pointed out that such a reasoning proves that 'time works in favour of the occupying power and this is clear from the evolution of the recognition, express or implicit, by this Court, of the *de facto* jurisdiction of the courts of the "TRNC"'.[550] Judge Vilanova in his partly dissenting opinion recalled the reasons for the non-recognition of the TRNC, that is the 1974 Turkish intervention, and contended that 'it is the duty of our Court to defend the "force of law" and condemn any recourse to the "law of force"'.[551]

Eventually, the Grand Chamber overturned this judgment and assigned responsibility only to Turkey. The Grand Chamber, differently from what done in previous cases, did not limit itself to note the fact that the TRNC is not recognized, but it dealt extensively with the duty of non-recognition mentioning also the ARSIWA.[552] Moreover, it stressed some relevant

[547] ibid para 244.
[548] ibid para 291.
[549] ibid.
[550] Partly dissenting opinion of Judge Georgios A. Serghides, para 74. On the more and more marked tendency of the ECtHR to limit the scope of the duty of non-recognition as for the TRNC, see also Alice Ollino, 'Sull'obbligo di non-riconoscimento degli enti sorti in violazione di norme internazionali fondamentali: Il caso Güzelyurtlu e altri c. Cipro e Turchia' (2018) 101 Rivista di diritto internazionale 811, 811–812, 817ff.
[551] Partly dissenting opinion of Judge Pastor Vilanova, para 3.
[552] Case of Güzelyurtlu and Others v. Cyprus and Turkey (application no. 36925/07), 29 January 2019, paras 157–158.

differences between its previous case law and the case at hand. More specifically, the Court noted that in the previous cases '[t]he key consideration … was to avoid a vacuum which would operate 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'.[553] In contrast, in the *Güzelyurtlu* case the question was 'whether the Republic of Cyprus … can cooperate with the *de facto* authorities set up within … the "TRNC" without implicitly lending legitimacy or legality to them'.[554] It is not self-evident that such a consideration applies to the case at hand given that arguably the lack of cooperation in question *per se* does no go to the detriment of the population of the unrecognized entity.

The change of approach of the Grand Chamber can be seen as interrupting the gradual extension of the Namibia exception operated by the Court. Ollino, writing after the judgement of first instance, contended that this judgement confirmed the stance of the ECtHR to assign to non-recognition a value that is purely formal.[555] Indeed, this judgement was effectively depriving Cypriots authorities of any meaningful way to exercise leverage on Turkish Cypriots.[556]

It could be argued that with the appeal judgement the Court recognized the relevance of the doctrine of non-recognition. However, some doubts remain. It is not clear to what extent the Grand Chamber judgement is really different from previous cases. In fact, it seems that the Court judged the behaviour of the TRNC authorities somewhat *unreasonable*. In fact, they were asking *all* the evidence from the investigation file apparently with the aim to prosecute and try the suspects in the territory of the TRNC given that on the other hand extradition was barred by domestic law of the TRNC.[557] Such a conduct would not be a mere cooperation with TRNC police force but would amount to the transfer of criminal jurisdiction from the courts of Cyprus

[553] ibid para 250.
[554] ibid.
[555] Ollino (n 550) 817ff.
[556] ibid 822ff.
[557] Case of Güzelyurtlu and Others v. Cyprus and Turney (n 552) para 252.

to those of the TRNC with the consequence that 'Cyprus would thereby be waiving its criminal jurisdiction over a murder committed in its controlled area in favour of the courts of an unrecognised entity set up within its territory'.[558] Moreover, the Court observed that in the case at hand the problem is not the cooperation between the non-recognised political entity and a random third State, but between the non-recognised political entity and the legitimate government of Cyprus.[559] Thus, the conduct of Cyprus, that is the refusal to waive its criminal jurisdiction to the authorities of the TRNC, is defined as reasonable.

A relevant point emerges from the partly dissenting opinion of Judges Karakaş and Pejchal, who noted that:

> There is simply no support under international law (and the Court is therefore unable to back this claim with reference to international law), nor does it stem from the practice of other States, that such a cooperation would have been taken as recognition, implied or otherwise, of the "TRNC".[560]

In fact, the Court again reiterated as in the previous cases that it 'does not consider it desirable or necessary … to elaborate a general theory concerning the lawfulness of cooperation in criminal matters with unrecognised or de facto entities under international law'.[561] Ultimately, the Court rather than making an argument on non-recognition arrived at a more general finding which does not really clarify to what extent cooperation with the police force of an unrecognized entity amount to implicit recognition. Indeed, the Court resorted to a standard of 'reasonableness' giving a certain weight to a series of factual circumstances that are unrelated with the doctrine of non-recognition. Besides the weight of the conduct of the authorities of the TRNC perceived as excessively uncompromising, the crucial factor seems to be that cooperation should have been between the authorities of the unrecognized entity and the legitimate authorities of Cyprus as well as that the facts from which the case originated took place in the territory administered by the latter. However, it is noteworthy that the doctrine of

[558] ibid para 253.
[559] ibid para 250.
[560] ibid, partly dissenting opinion of Judges Karakaş and Pejchal, para 11.
[561] Case of Güzelyurtlu and Others v. Cyprus and Turkey (n 552) para 250.

non-recognition is directed to the 'wrongdoer', but is concerned primarily with the international community rather than with the 'victim', and on this aspect the Court remained silent.

4. The acquiescence of the international community to the incorporation of East Timor into Indonesia and the unexpected reversal of the unlawful territorial situation

4.1. The Indonesian invasion of East Timor and the initial response of the international community

Timor is an island in the Malay Archipelago; the western part of the island belongs to Indonesia, while the eastern part belongs to East Timor, which became a sovereign State in 2002. Previously this part of the island too was administered by Indonesia. Also the East Timor question can be seen as a by-product of the decolonization process. In fact, the territory of nowadays Indonesia, including the western part of the island of Timor, was a colony of the Netherlands and the eastern part of the island was a colony of Portugal. Indonesia gained its independence in 1949, while the eastern part of the Island continued to be a part of the Portuguese colonial territories. In 1974 Portugal acknowledged the right to self-determination and independence of the territories under Portuguese colonial rule and, accordingly, withdrew from this territory. Subsequently, an armed conflict began in East Timor between different factions that were pursuing opposite outcomes of the process of decolonization—ie, integration with Indonesia or independence. In 1975, after the victory of the factions supporting independence and the adoption of a declaration of independence, Indonesia intervened militarily and incorporated this territory, which became one of the provinces of Indonesia.

It seems that the legal question is absolutely clear in the sense that Indonesia by invading and annexing the territory in question violated at the same time the prohibition of forcible acquisition of territory and the right to self-determination of the East Timorese people.[562]

[562] Roger S Clark, 'The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression' (1980) 7 Yale Journal of World Public Order 2, 11ff and 32ff. See also Lauri Hannikainen, 'The Case of East Timor from the Perspective of Jus Cogens' in International Catholic Institute for International Relations

Indeed, already in the 60s UN political organs had clarified that the latter had the right to self-determination. More specifically, Assembly Resolution 1542 established that Portuguese colonial territories, including thus East Timor, were non-self-governing territories and Security Council Resolution 180 called upon Portugal to implement the immediate recognition of the right of the people under Portuguese colonial rule to self-determination and independence.[563]

Right after the military intervention by Indonesia both the Assembly and the Council adopted a resolution on the question. The terms used by these resolutions are relatively strong, at least when compared with the resolutions adopted just one month earlier by the Council with reference to Moroccan conduct in Western Sahara. More specifically, by looking at the wording of UN resolutions, it can be inferred that UN organs were cognizant that the Indonesian conduct was at odds with both the abovementioned norms. Indeed, the preamble of Assembly Resolution 3485 referred explicitly to both of them. Accordingly, the operative paragraphs called upon States to respect the right of the East Timorese people to self-determination and independence[564] and called upon Portugal and the parties in Portuguese Timor to make every effort to find a peaceful solution so to make possible the orderly exercise of the right to self-determination.[565] In addition, the resolution deplored the military intervention of Indonesia and called upon the latter State 'to desist from further violation of the territorial integrity of Portuguese Timor and to withdraw without delay its armed force in order to enable the people of the Territory freely to exercise their right to self-determination and independence'.[566] Finally, it called upon all States to respect the unity and territorial integrity of this territory.[567] Security Council Resolution 384, adopted unanimously a few days after, reaffirmed this resolution as

and International Platform of Jurists for East Timor (ed), *International Law and the Question of East Timor* (CIIR/IPJET 1995).

[563] A/RES/1542 (XV), 15 December 1960, para 1 and S/RES/180, 31 July 1963, para 5(a). The Assembly adopted a series of resolutions deploring the non-compliance by Portugal, such as A/RES/1699 (XVI), 19 December 1961 and A/RES/1807 (XVII), 14 December 1962. Eventually in 1974 the Assembly welcomed the above-mentioned change in the policy of Portugal concerning its colonies. A/RES/3294 (XXIX), 13 December 1974.

[564] A/RES/3485 (XXX), 12 December 1975, para 1.

[565] ibid paras 2– 3.

[566] ibid paras 4–5

[567] ibid para 7.

well as Assembly resolutions on the right to self-determination, called upon States 'to respect the territorial integrity of East Timor and the inalienable right of its people to self-determination', and called upon Indonesia 'to withdraw without delay all its forces from the Territory'.[568] Moreover, it urged States 'to co-operate with the efforts of the United Nations to achieve a peaceful solution to the existing situation and to facilitate the decolonization of this Territory'.[569]

However, given the seriousness of the events occurring in East Timor, which emerged from the debates before UN political organs that are illustrated below, the response of the international community can be considered as a weak response. In the first place, the condemnation expressed by these resolutions is at best a mild political condemnation since these resolutions merely *deplored* the conduct of Indonesia. Neither they qualified in legal terms the conduct of Indonesia as a threat to peace, as a breach of peace, or as an act of aggression. The resolutions did reaffirm the right to self-determination of the East Timorese people as well as the territorial integrity and unity of this territory and, accordingly, they did call upon Indonesia to withdraw. However, they refrained from clearly arguing that the conduct of Indonesia had *already* violated these rights. Accordingly, these resolutions did not qualify the situation in the territory of East Timor as unlawful, they did not call upon States not to recognize this unlawful situation neither they decided to impose any other additional obligations for third States.

It could be held that, at that time it was not that clear what was the intention of Indonesia. More specifically, it was not clear whether the aim of Indonesia was really the annexation of this territory. However, the response of the international community would have not changed even when it became obvious that Indonesia did not comply with these resolutions and, on the contrary, it incorporated East Timor to its territory. Actually, subsequent resolutions adopted

[568] S/RES/384, 22 December 1975, preamble and paras 1–2.
[569] ibid para 4.

by UN organs became even milder. In addition, the number of States that supported resolutions on this question would have diminished and, starting from 1976, the Security Council would have no longer adopted any resolution on the question and the same goes, starting from 1982, for the General Assembly.

Council Resolution 389 adopted with 12 votes in favour, 0 against, and 2 abstention (ie, Japan and United States),[570] did not take a more confrontational stance with Indonesia and essentially reiterated the content of the above-mentioned UN resolutions on the question.[571] Afterwards, as mentioned, the Council refrained from dealing with East Timor again.

The Assembly began adopting a yearly resolution on the matter. The resolution adopted in 1976 deplored that Indonesia had refused to comply with previous UN resolutions and rejected the claim raised by Indonesia and by a few third States that East Timor had been integrated into Indonesia through an act of self-determination by the East Timorese people.[572] More importantly, it recommended that the Council 'should take all effective steps for the immediate implementation of its resolutions … with a view to securing the full exercise by the people of East Timor of their right to self-determination and independence'.[573] Subsequent Assembly resolutions[574] reiterated these terms with, however, an increasing attention to the humanitarian needs of the people of East Timor rather than to the original unlawful conduct. It is worthwhile to note that starting from 1977 the express demand to withdraw Indonesian armed forces disappeared. Starting from 1979 previous UN resolutions were no longer recalled and the reference to Article 2(4) of the UN Charter disappeared too.[575]

[570] Benin did not participate in the voting.
[571] S/RES/389, 22 April 1976.
[572] A/RES/31/53, 1 December 1976, paras 4–5.
[573] ibid para 7.
[574] A/RES/32/34, 28 November 1977, A/RES/33/39, 13 December 1978, A/RES/34/40, 21 November 1979, A/RES/35/27, 11 November 1980, and A/RES/36/50, 24 November 1981.
[575] Also the reference to Article 11(3) of the UN Charter—ie, the article that establishes that the Assembly may call the attention of the Security Council to situations likely to endanger international peace and security—disappeared.

Another change occurred in 1982 when the wording of the resolution adopted was markedly different. It requested the Special Committee on Decolonization to keep the situation under consideration and dealt almost exclusively with a variety of provisions concerning humanitarian relief to the East Timorese people.[576] The Assembly did not reiterate the political condemnation of the military intervention, did not ask Indonesia to withdraw, and did not deplore the refusal to comply with this demand. The right to self-determination too is considerably downplayed given that this resolution included only a general reference to this principle, which moreover was included in the preamble, while previously the operative paragraphs of the resolutions explicitly considered the free exercise of self-determination as the ultimate aim of negotiations. Instead, this resolution requested 'the Secretary-General to initiate consultations with all parties directly concerned, with a view to exploring avenues for achieving a comprehensive settlement of the problem'.[577]

This is a crucial aspect given that, as noted above, calls for political solutions are often a way to set aside international law. Indeed, Chinkin suggests that 'reference to the good offices of the S-G implies *mediation* and *compromise*, and emphasis on a "political solution" indicates *conciliation* rather than enforcement'.[578] Notwithstanding the inclusion in the provisional agenda of the 38th session of the Assembly the question of East Timor,[579] the resolution adopted in 1982 would have been the last Assembly resolution on the matter. Interestingly enough, the resolution in question mentioned again previous UN resolutions on the question at hand (while it refrained from doing so between 1979 and 1981). However, instead of 'recalling' them, the resolution used the term 'to bear in mind', which seem to have a different meaning. Arguably, while to recall a previous resolution means to reaffirm its content, to bear in mind a resolution does not imply anything on the content of the resolution except for acknowledging its existence.

[576] A/RES/37/30, 23 November 1982, paras 2–3.
[577] ibid para 1.
[578] Christine Chinkin, 'The Security Council and Statehood' in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press 2015) 160 (emphasis added).
[579] A/RES/37/30 (n 576) para 4.

Not only the wording of the resolutions adopted by the Assembly became weaker, but also the voting pattern and the degree of support changed. Actually, it is worth noting that already the support to Assembly Resolution 3485 was far from unanimous given that only half of the member States supported its adoption, while the other half voted against or abstained. It is thus possible to perceive a precise political divide.

Member States of the Association of Southeast Asian Nations (Malaysia, Philippines, Thailand, and, at a later stage, Singapore) and other regional players (India, Japan, New Zealand, and later Australia too) openly supported Indonesia. Western States (United States, Canada, and many European States) supported Indonesia in a more ambiguous way even if some have argued that through their actions these States were actually encouraging Indonesia. On the one hand, the question of East Timor should be framed in the cold war context and Indonesia was seen as a barrier to the spread of communism in East Asia. On the other, there was the belief that East Timor was too small to be independent, and thus it was not unreasonable to be part of Indonesia.[580] In contrast, while some NAM States, such as Pakistan, Saudi Arabia, Syria, Argentina, Egypt, Morocco, and Turkey, supported Indonesia, other NAM States, particularly African States, were vocally supporting the cause of the East Timorese people.[581]

In any case beside the political divide, resolutions recorded less and less support. While Assembly Resolution 3485 was adopted with 72 votes, 10 against, 43 abstention, and 19 absent, Assembly Resolution 37/30 was adopted with 50 votes, 46 against, 50 abstention, and 11 absent. This means that the percentage of positive votes gradually passed from 50% in 1975 to 31.8% in 1982.[582]

[580] Brad Simpson, '"Illegally and Beautifully": The United States, the Indonesian Invasion of East Timor and the International Community, 1974–76' (2005) 5 Cold War History 281; Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan UK 2012) 58ff.
[581] The position of single States is illustrated in the next subsection.
[582] The voting behaviour concerning the Assembly Resolutions on the situation in East Timor between 1975 and 1982 is reported in Heike Krieger (ed), *East Timor and the International Community: Basic Documents* (Cambridge University Press 1997) 129–133.

4.2. The debates before the UN political organs

The records of the meetings taking place before UN political organs confirm that the reason for the negative votes and abstentions is not that draft resolutions were too weak but, on the contrary, that draft resolutions were not balanced. The argument was that these resolutions were condemning, even if mildly, Indonesia and 'blaming' Indonesia would have undermined the peaceful settlement of the situation.[583] In addition, the records clarify what were the grounds for the support, or for the lack of support, to the relevant resolutions. Thus, they allow us to verify whether States made any references to the duty of non-recognition.

Many States explained their vote for Assembly Resolution 3485 by reaffirming that the East Timorese people have the right to self-determination. At the same time these States emphasized the complexity of the factual situation too. The argument goes that this complexity requires a careful assessment of the situation and, accordingly, the need of refraining from blaming Indonesia. For instance, Costa Rica, which abstained from voting on the resolution in question (and subsequently abstained or did not participate in the voting), expressed its concerns for the Indonesian intervention and for the subsequent violation of territorial integrity of East Timor. However, it also described the situation as 'delicate' and the decolonization of this territory as 'atypical' and, accordingly, it argued that the Council should be involved.[584] Kuwait voted in favour (but later did not support subsequent resolutions) and called for an 'improved and milder language … particularly with regard to operative paragraph 4 of the draft resolution'—that is, the paragraph that strongly deplored the military intervention of Indonesia.[585] Australia voted in favour (but changed its stance over the years) and justified its vote by making reference to the self-determination of the East Timorese people and expressed regret for the use of force by Indonesia. However, it also highlighted the position of regional

[583] Benin in this regard constitutes an exception. The representative of this State clarified that the negative vote of its country derived by the fact that the draft resolution did not reflected that East Timor proclaimed its independence and that Indonesia 'carried out a military aggression against and occupation of independent Timor'. A/PV.2439, 12 December 1975, paras 60–62.
[584] ibid paras 46–50.
[585] ibid para 52.

players, who did not support the draft resolution, and held that Australia too would have preferred a 'generally acceptable text'.[586] In contrast, the text of the draft resolution voted 'appear[s] to prejudge the careful assessment relating to the intervention of Indonesia … an assessment which can only be made by the Council after it has considered the facts and the circumstances in which elements of the Indonesian forces landed'.[587] Similarly, Sri Lanka's reason for abstention was that the wording of the draft resolution should have been 'more moderate and realistic so as to gain the support of the Indonesian delegation itself in bringing about a peaceful solution to the problem'.[588] Japan consistently voted against Assembly resolutions given the concerns expressed by regional players. It also expressed its preference for a well-balanced text even if it supported the withdrawal of armed forces from the territory in question so as to allow the East Timorese people to freely exercise self-determination.[589] India unsuccessfully introduced another draft resolution and accordingly voted against this resolution and all the subsequent Assembly resolutions. The Indian draft called for the withdrawal of Indonesian armed forces, but avoided expressing even a mild condemnation of Indonesian conduct. Accordingly, India observed that it was absurd to condemn a State and at the same time to demand its collaboration.[590]

Before the Council, Malaysia, as many other States who more or less supported Indonesia, rather than expressing a condemnation of Indonesian conduct, argued that it was Portugal that should have been held responsible and that should have sought the assistance of regional powers. Malaysia also recalled that Indonesia had to move into East Timor given the chaotic situation and that such intervention was not aimed at annexation. Nevertheless, it specified that the East Timorese people have the right to self-determination.[591]

[586] ibid para 56.
[587] ibid para 57.
[588] ibid para 68.
[589] ibid paras 72–74.
[590] ibid para 76.
[591] S/PV.1864, 15 December 1975, paras 140–156. Malaysia was not a member of the Council, but had been invited to participate to the meeting on the situation in East Timor.

China, in contrast, referred to the violation of both the rules on the use of force and of the right to self-determination. It characterized the Indonesian conduct as a 'naked aggression' aimed to the annexation of this territory and argued that such conduct amounted to 'a gross violation of the purposes and principles of the Charter of the United Nations'.[592] In addition, it was observed that the 'large-scale armed aggression' and the 'military occupation' were clearly at odds with the principle of self-determination.[593] As for the principle of self-determination, China held that '[t]he desire clearly expressed by the people of East Timor is … the complete realization of their national independence and the resolute defence of their sovereignty and territorial integrity'.[594] It finally added that Assembly Resolution 3485 with 'unequivocal language' strongly deplored Indonesian conduct, called upon Indonesia to withdraw, and called upon all States to respect the territorial integrity of East Timor.[595]

Australia criticized the Council for apportioning blame for the situation at hand to a single party and instead proposed practical measures and actions that would enable the East Timorese people to exercise their right to self-determination.[596] It added that it supported the idea that regional players should have a role and was available to provide humanitarian aid.[597]

Tanzania expressed the fear that inaction by the Council could have a long-lasting effect in the sense that it would contribute to convince powerful States that they can do whatever and indeed held that: 'We believe … that the Security Council must act decisively against this intervention as it must act against all interventions which violate the Charter and threaten peace and security, irrespective of who the perpetrators may be'.[598]

In contrast, other States praised the response of the Council. Cameroon described it as 'a balanced decision of … conciliatory nature which will be likely to reduce tension and to

[592] S/PV.1865 16 December 1975, para 4.
[593] ibid para 5.
[594] ibid para 7.
[595] ibid para 8.
[596] ibid para 99.
[597] ibid.
[598] S/PV.1867, 18 December 1975, para 19. See also the statement adopted by Guinea-Bissau which talks of the risk of accepting a 'fait accompli'. See ibid para 39.

promote conditions which will make for a calm and normal evolution of events' and it stressed that: 'It was … deliberately—that is, in a spirit of realism—that the Council finally did not feel it should energetically condemn the intervention of Indonesian armed forces'.[599] Similarly, Sweden conceded that 'the Council cannot … disregard the political realities behind threats to international peace, even though … they may be related to the process of decolonization'.[600]

After four months, the Council met again to address this question and subsequently it adopted Resolution 389, passed with the abstention of the United States and Japan. Overall, on this occasion, the positions of States consolidated. Some continued to vocally support the right to self-determination. The Soviet Union, for instance, had some regrets about the final wording of the resolution, considered not sufficiently strong and clear.[601] Similarly, China argued that the resolution should have condemned Indonesian refusal to implement the relevant UN resolutions and it should have required Indonesia to fully respect the right to self-determination by withdrawing from the territory.[602] Sweden clarified that the presence of Indonesian armed forces in East Timor was illegal since it was preventing the exercise of self-determination.[603] Sweden further specified that:

> We for our part have sought to contribute to a broad solution, as far as possible without compromising with the basic positions of principle that we have always defended. The resolution does on some points represent compromise between the various positions. The fact that some formulations are compromise solutions should, however, in no way be interpreted as a weakening of the stand the Council has previously taken.[604]

Many African States focused their interventions on the principle of self-determination and condemned the attempt by Indonesia of consolidating a *fait accompli*.[605] Other States supported

[599] S/PV.1869, 22 December 1975, 17–18. See also the statement adopted by Mauritania which refers to an objective approach that will contribute to bringing about a climate of dialogue and negotiation. See ibid para 68.
[600] ibid para 39. See also the statements of Italy and France, which respectively highlighted that the Council had chosen 'the most realistic and proper course of action' and that historic situations are rarely simple enough for good and evil to be discerned from a single vantage point'. See ibid paras 84, 91.
[601] S/PV.1915, 22 April 1976, para 26.
[602] ibid para 49.
[603] ibid para 34.
[604] ibid para 38.
[605] See the statements adopted by Guinea-Bissau, S/PV.1911, 20 April 1976, para 13, by Mozambique, S/PV.1912, 20 April 1976, paras 22–27, by Guinea, ibid, para 40, by Benin, S/PV.1914, 22 April 1976, paras 25–28, and by Tanzania S/PV.1915, 22 April 1976, para 6.

East Timor in a more nuanced way, for example by reaffirming the relevance of self-determination and by welcoming at the same time the *partial* withdrawal of some elements of the Indonesian armed force.[606]

Some interventions, in contrast, were more problematic. Japan, for instance, called for a realistic and constructive decision.[607] France held that it was not appropriate to unilaterally place responsibility on one of the parties, but there was the need to take into account 'the various points of view and the facts of life'.[608] The United States simply argued that there was no need for a new resolution.[609] Other States argued that the self-determination process was proceeding or had already happened.[610] Be that as it may, the resolution adopted by the Council, which merely reaffirmed the content of previous UN resolutions, was indeed a compromise solution that however, contrary to the wishes of Sweden, set aside precisely the right to self-determination of the East Timorese people.

As for subsequent debates before the General Assembly (during both the plenary meeting of the Assembly and the meetings of the Fourth Committee), it is worthwhile to note that Indonesia voiced its objection to the inclusion of the question of Timor East in the agenda of the Assembly.[611] Indeed, some States, confirming their previous stance, argued that an act of self-determination had already happened and, in addition, they mentioned other elements that instead should have more importance. India, for example, argued that people of East Timor had already freely exercised their right to self-determination in 1976 and praised the Indonesian effort to rehabilitate the economy.[612] Other States changed their previous attitudes, which

[606] See the statement by Australia, S/PV.1909, 14 April 1976, paras 36–42, by Japan S/PV.1910, 15 April 1976, paras 21–29, and by the United States, S/PV.1915, 22 April 1976, para 41.
[607] S/PV.1914, 22 April 1976, para 12.
[608] S/PV.1915, 22 April 1976, para 16.
[609] ibid paras 41–44.
[610] See the statement by Philippines, S/PV.1909, 14 April 1976, para 52 and the statement by Malaysia, S/PV.1911, 20 April 1976, paras 22–25. Compare with the statement by the United Kingdom according to which no self-determination act has occurred S/PV.1915, 22 April 1976, para 29.
[611] A/32/PV.5, 23 September 1977, para 18. Compare with the statements by Benin ibid para 19 and China ibid paras 20–21, which rejected the Indonesian objection.
[612] A/34/PV.75, 21 November 1979, paras 81–84. Malaysia, Philippines, and Thailand expressed their conviction that the process of decolonization had already been carried out in East Timor and their concern on the humanitarian

consisted in the support for East Timor, and raised similar argument to those raised by India and emphasized the Indonesian effort to improve the material situation in East Timor.[613]

In contrast, other States held fast to their commitment towards the free exercise of the right to self-determination of the East Timorese people. These States openly spoke of aggression, of the commission of genocidal acts, of the continuous degrading of the humanitarian situation. For instance, Capo Verde referred to the 'deliberate aggression' of Indonesia and to the 'shameful integration' of East Timor into Indonesia, which had no legal basis, and emphasized that 'near one third of the population of East Timor had been wiped out by war, famine, and disease'. The statement goes on with a parallel between the situation in East Timor and the situation in Rhodesia and Namibia, but Capo Verde eventually refrained from arguing that States that States were under an obligation not to recognize the situation.[614] Only Ghana, after making a parallel between East Timor and Western Sahara, argued that 'the international community could under no circumstances accept that occupation as a *fait accompli*' and that it 'could not accept or recognize a situation brought about by the use of force'.[615] Still, it does not seem that according to Ghana there is legal obligation in this sense, but rather that Ghana decided autonomously not to recognize the situation.

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situation and or praise for Indonesian efforts. See the statements adopted by these States respectively in A/C.4/34/SR.16, 24 October 1979, paras 34–36, ibid paras 54–55, and A/C.4/34/SR.17, 25 October 1979, para 38.

[613] See the statement by Papua Nuova Guinea, A/34/PV.5, 21 November 1979, para 88, which observed that the reality of the situation is that East Timor is now part of Indonesia, the statement by Suriname, A/C.4/34/SR.13, 22 October 1979, which referred to the 'real interests' and the 'material needs' of East Timorese, the statement by Singapore, A/C.4/34/SR.15, 24 October 1979 para 43, which praised the improvement in 'education, social amenities and health care' as well as the conscious efforts [that] had been made to develop the economy', and the statement by Bangladesh, A/C.4/34/SR.17, 25 October 1970, paras 27–28, which mentioned the improvements in roads and in the education system and the investments in agriculture.

[614] A/C.4/34/SR.18, 26 October 1979, paras 31–36. See also the statement by Mozambique, A/C.4/34/SR.19, 30 October 1979, paras 13–14, which openly talked of 'genocide' and used the terms invasion and annexation emphasizing that in the aftermath of these acts the people of East Timor were living in the most degrading conditions, the statement by Sierra Leone, ibid para 77, which observed that More than 200 000 people including woman and children have died starting from 1975, the statement by Angola, A/C.4/SR.20, 31 October 1979, para 6, which referred to the invasion and occupation by Indonesia and observed that Indonesian conduct 'had decimated the civilian population and had brought it to the point of starvation', the statement by Uganda, A/C.4/34/SR.21, 31 October 1979, para 32, which referred to an holocaust, and the statement by Benin, A/C.4/34/SR.23, 2 November 1979, para 43, which called the alleged integration of East Timor into Indonesia a 'fraudulent deception'. Actually, most States intervening, with the exception of those explicitly mentioned above and below, did condemn Indonesian conduct.

[615] A/C.4/34/SR.22, 1 November 1979, para 24.

Finally, a number of developed States supported Indonesia, not much on the basis that self-determination had already occurred, but rather that the reality on the ground was the factual control of Indonesia over East Timor and that there were not reasonable alternatives. Japan argued that self-determination should be realized taking into account the actual conditions in each area and through realistic measures, but according to Japan the resolutions adopted by the Assembly did not reflect the reality currently prevailing, which was the effectiveness of Indonesian government.[616] Similarly, France argued that these resolutions 'appeared to ignore the reality of the situation' and, on the other hand, '[m]entioning the right to self-determination prejudges the outcome of the exercise of that right'.[617] Belgium expressed its concerns for the East Timorese people, but supported 'the search for a solution demanded a political dialogue, preferably direct, between Indonesia and Portugal', which however seems to downplay the legal arguments supporting East Timorese claims and to condone the conduct of Indonesia.[618] Sweden 'recognized that there was in East Timor today a *de facto* situation to which there was no realistic alternative'.[619] Australia held that the resolutions adopted by the Assembly were unrealistic and 'served no practical purpose'. Similarly, with regards to the resolution adopted in 1979, it held that this resolution 'ignored East Timor's incorporation into Indonesia, which was a fact and the reality on which any consideration of the matter had to be served' and added that 'Australia had recognized that reality'.[620] Canada expressed its 'strong doubts about the value of the futile and repetitious debate … The integration of Timor was an accomplished and irreversible fact and an annual succession of Committee resolutions would not change the situation'. Canada openly admitted that 'the evolution of events in East Timor had not allowed for an expression of self-determination that would perfectly satisfy all standards' but 'simplistic statements in the draft resolution did not reflect the complexities of events in Timor'. The

[616] A/C.4/34/SR.16, 24 October 1979, paras 38–41.
[617] A/C.4/34/SR.23, 2 November 1979, para 100.
[618] ibid para 97.
[619] ibid para 101
[620] ibid para 98.

statement went on by considering the right to self-determination of the East Timorese people as unrealistic and unattainable political goal which in turn prevents the improvement of the humanitarian and economic situation.[621]

In the debates taking place in 1982, when the last Assembly resolution was adopted on this question, the trends already identified continued. The number of States accepting the Indonesian claim that people of East Timor had freely chosen integration increased,[622] while only a smaller number of States continued to wholeheartedly support the East Timorese people's right to self-determination. Among the latter, some of them made a parallel with other unlawful situations. These States, however, did not push such a contention so far as arguing that third States had a duty not to recognize the incorporation. Mozambique, after talking of invasion and annexation, observed that the international community should not yield 'to the pressure of the countries which wished to delete the question of East Timor from its agenda' so not 'to lose all moral authority to deal with similar situations, particularly the Israel [sic] in annexation of the West Bank and Gaza Strip and the Golan Heights'.[623] Zimbabwe held that 'the consistent refusal by the United Nations to endorse Indonesia's annexation of East Timor by force was a reminder that the organization was not prepared to reward aggression', which is the rationale underlying a policy of non-recognition.[624] Vanuatu compared the situation is East Timor with that in Palestine and in South Africa and criticized the 'voice of reason' that, if blindly followed, would have prevented even the beginning of the process of decolonization.[625]

Significantly, other States, mostly developed States, began calling for a political solution. Germany expressed its conviction that the situation in East Timor was improving and

[621] A/C.4/34/SR.24, 2 November 1979, paras 62–63.
[622] See for instance the statements of Iraq, A/C.4/37/SR.14, 8 November 1982, para 10, and Turkey, A/C.4/37/SR.22, 12 November 1982, para 9. Both these States in the beginning had refrained from taking explicitly a position.
[623] A/C.4/37/SR.20, 11 November 1982, para 53.
[624] A/C.4/37/SR.21, 12 November 1982, para 8. See also the statement by Rwanda, A/C.4/37/SR.23, 15 November 1982, para 81, that refers to the 'policies of fait accompli and might makes right in international relations'.
[625] A/C.4/37/SR.23, 15 November 1982, paras 17–19.

voiced its appreciation for the call for consultations between the parties.[626] Italy affirmed that 'it believed that it was preferable not to take a position on the substance of the question which could be more easily resolved through direct dialogue between the parties concerned'.[627] The United Kingdom held that 'it was convinced that a solution which was fair and acceptable to all could be found by diplomatic means'.[628] Finally, Australia held that 'the Territory had come to be part of Indonesia and that to ignore that fact would be to ignore reality'.[629] One may compare these statements with those adopted by Senegal[630], Cyprus, [631] Nicaragua,[632] and Guatemala.[633] These States too called for negotiations, but at the same time they clarified that the final aim of negotiations was the free exercise of self-determination.

It is noteworthy that even if many States supported, at least implicitly, the East Timorese people and pointed out that Indonesia by invading and occupying East Timor was violating two important rules of international law, these States did not suggest that third States had a duty not to recognize the situation. This is hardly surprising since the resolutions on the question did not ask States not to recognize neither they qualified the situation as unlawful. Only one State (ie, Ghana) among those that intervened in the debates before UN organs raised an argument clearly connected with non-recognition, however, as seen, this was more a political commitment rather than a legal obligation.[634] Similarly, some States did compare the situation with Namibia, Rhodesia, and other unlawful situations in which a mandatory policy of non-recognition was implemented, but refrained from making a similar argument on the situation at hand.[635] In contrast, some States recognized the incorporation even if it is not always easy to understand the precise meaning for example of recognition of a 'new reality'.[636] Other States, in addition,

[626] A/C.4/37/SR.23, 15 November 1982, paras 72–73.
[627] ibid para 74.
[628] ibid para 79.
[629] ibid 78.
[630] A/C.4/37/SR.20, 11 November 1982, para 24.
[631] ibid para 39.
[632] A/C.4/37/SR.23, 15 November 1982, para 4
[633] ibid para 75.
[634] Supra n 615.
[635] Supra nn 623–625. See also supra n 615.
[636] See above at 276.

expressed their support to political negotiations not always specifying the scope of negotiations.[637]

Besides these explicit interventions, it is the wording of the resolution adopted in 1982 and the fact that the UN refrained from continuing to adopt new resolutions on the question that suggests that there was a form of acquiescence to the situation. Significantly, in 1980 Clark ended his article on the interruption of the process of decolonization of East Timor by saying that 'East Timorese must take some comfort from the retention of the item on the international agenda'.[638] The reason is that '[a]s long as the item remains on the agenda of the General Assembly as a decolonization issue it is hard for the Indonesians to claim that their annexation has been accepted by the world community'. Retention of the matter on the agenda of the Assembly is defined as a kind of sanction to back up the norm that prohibits territorial conquest.[639] *A contrario* the disappearance of this question from the Assembly's agenda arguably implies a certain degree of acceptance by the international community of such acquisition of territory.

4.3. Subsequent State practice

The acquiescence of the international community is confirmed also by the subsequent State practice in the sense that it attests the same attitude of acceptance of the fact that East Timor was at this point part of Indonesia. In the first place, the United States, as late as 1992, clearly recognized East Timor as an integral part of Indonesia. During a hearing before the committee on Foreign relations the Assistant Secretary for East Asian and Pacific Affairs affirmed unequivocally that the United States recognize the incorporation of East Timor into Indonesia even if it was specified that '[t]he process by which it was incorporated was not, in our view, a legitimate act of self-determination'.[640] The Assistant Secretary added that issues such as that

[637] Supra n 626–629.
[638] Clark (n 562) 44.
[639] ibid.
[640] Krieger (n 582) 319–320.

of East Timor are to be resolved through by way of negotiations between Portugal and Indonesia within the framework of the UN and clarified that 'I cannot say that we would accept everything we would come out of that; but whatever those discussion would produce, we would be inclined to look at with favor'. This statement refrains from setting a clear red line and leaves the question of the final aim of negotiations unanswered. After mentioning the cases of Goa and Macao, he raised also the often-heard argument that when it comes to self-determination '[e]ach issue takes place in its own political and historical context'.[641]

In 1991, the Secretary of State for External Affairs of Canada, asked whether Canada would have supported East Timor notwithstanding the substantial bilateral aid and private investments in Indonesia, stated that 'Canada considers that Indonesian sovereignty over East Timor is a fact' and added that 'there has never been any history of independence or self-determination or self-government in that territory'. The Secretary of State, however, clarified that Canada does not condone the manner of incorporation and that in any case Canada supports the 'UN-sponsored dialogue between Portugal and Indonesia as the most promising means to reach an understanding in that very unfortunate and unhappy circumstance'.[642]

In addition to similar statements, Australia, with the aim of making possible the exploration and exploitation of the natural resources located in the Timor Gap, which is the area of the Timor Sea between Australia and Timor Island, negotiated and concluded with Indonesia the Timor Gap Treaty. This conduct arguably implied recognition of the Indonesian incorporation of East Timor by Australia. On 20 January 1978, the Minister for Foreign Affairs, Andrew Peacock, after having clarified that Australia had deplored the use of force by Indonesia and also that however the control of Indonesia over East Timor was effective and was covering all major administrative centres, affirmed that 'it would be unrealistic to continue to refuse to recognise *de facto* that East Timor is part of Indonesia'.[643] On 15 December 1978, the Minister,

[641] ibid 323–324.
[642] ibid 326. See also the statement issued by the Minister of Foreign Affairs of New Zealand that explaining the voting behaviour of New Zealand referred to the irreversibility of the incorporation, ibid 327.
[643] The announcement is reported in Krieger (n 582) 333.

after having reiterated the Australian opposition to Indonesian conduct, clarified further that '[t]he negotiations when they will start, will signify *de jure* recognition by Australia of the Indonesian incorporation of East Timor'. These negotiations eventually began on 14 February 1979 and culminated with the conclusion of the treaty on 11 December 1989.[644]

The circumstances in which it was negotiated and concluded are important since they implied recognition of East Timor as an integral part of Indonesia but also because in 1991 Portugal instituted proceedings before the ICJ against Australia arguing that the latter had violated *inter alia* the right to self-determination of the East Timorese people with the conduct described above. Before analysing in detail the parties' submission and the Court's judgement, it is worthwhile to note that one of the counter arguments raised by Australia was precisely the acquiescence of the international community towards the incorporation of East Timor by Indonesia.

Australia, in addition, emphasized the relevance of the wording of treaty arrangements involving Indonesia agreed after 1976.[645] On the one hand, Indonesia stipulated a series of bilateral double tax treaties and all of them contained a formula according to which:

> the term "Indonesia" comprises the territory of the Republic of Indonesia as defined in its laws and the adjacent areas over which the Republic of Indonesia has sovereign rights or jurisdiction in accordance with the provisions of the United Nations Convention on the Law of the Sea, 1982.[646]

Such a clause is relevant because arguably the States subscribing it were accepting that the territorial scope of the treaty in question included East Timor. Moreover, Portugal refrained from protesting with the respective third States or with Indonesia and conversely Indonesia ratified or acceded to many multilateral treaties without prompting any formal objection as to the territorial scope of these treaties. Again, it seems that member States had accepted that the

[644] ibid 335.
[645] *East Timor (Portugal v. Australia)*, Counter-memorial submitted by Australia, 1 June 1992, paras 164–174.
[646] ibid para 165.

territorial scope of the treaty in question included the territory of East Timor. And again, Portugal refrained from protesting.

The apparent acquiescence of the international community had been noted by many legal scholars. Antonopoulos observed that 'verbal upholding of the rule of law while actual practice is based on the recognition of a factual situation which in itself negates the rule of law'.[647] Bhuta talked of a victory of realpolitik.[648] Falk observed that 'the legal status of East Timor was left in abeyance, while Indonesia's *de facto* control of the territory was generally accepted as the basis for practical relations with the outside world' and added that '[i]n general, when geopolitical factors push policy in a direction that is in conflict with international law, then the law gives way, at least behaviorally'.[649]

4.4. The question of East Timor before the International Court of Justice

The Court summarized the Portuguese submission as follows:

> Australia, in negotiating and concluding the 1989 Treaty, in initiating performance of the Treaty, in taking internal legislative measures for its application, and in continuing to negotiate with Indonesia, has acted unlawfully, in that it has infringed the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources, infringed the rights of Portugal as the administering Power, and contravened Security Council resolutions 384 and 389.[650]

The submission by Portugal rests on several arguments including the status of Portugal as the administering power of East Timor, the status of the latter as a non-self-governing territory, and the right to self-determination of the East Timorese people. Although implicitly, it rests on an important assumption, which is that Indonesia had no sovereignty on East Timor because this territory was under its control by means of an unlawful conduct. The Court, however, was not

[647] Constantine Antonopoulos, 'Effectiveness v. The Rule of Law Following the East Timor Case' (1996) 27 Netherlands Yearbook of International Law 75, 99.
[648] Nehal Bhuta, 'Great Expectations: East Timor and the Vicissitudes of Externalised Justice' (2001) XII Finnish Yearbook of International Law 165, 165, 169.
[649] Richard Falk, 'The East Timor Ordeal: International Law and Its Limits' (2000) 32 Bulletin of Concerned Asian Scholars 49, 49–50, 51–52.
[650] *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, para 19.

persuaded by this assumption and argued that it 'could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case'.[651]

Therefore, the Court did not consider all of the arguments raised by the parties, neither it examined any of them in depth. However, it is still possible to infer from its judgement some features of interest in connection with the doctrine of recognition. In the first place, it seems that the Court accepted the Australian argument that in international law there is no *automatic* duty of non-recognition. The Court, in this regard, observed that the resolutions adopted by UN political organs merely reaffirmed the right to self-determination of the East Timorese people as well as the legal status of East Timor and of Portugal. However, the Court observed that the Portuguese argument:

> rests on the premise that the United Nations resolutions … 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.[652]

Additionally, the Court mentioned the Australian counter argument that Portugal does not 'take into account the passage of time and the developments that have taken place since then [ie, since 1982]' and referred to the absence of any reservation on the territorial scope of the treaty arrangements between Indonesia and third States and to the silence of Portugal.[653] Therefore, the Court apparently agreed with Australia that the international community had over-time acquiesced to the alleged unlawful situation so that Australia could lawfully enter into negotiations and conclude a treaty with Indonesia over the use of the natural resources located in the Timor Gap.[654]

[651] ibid para 29.
[652] ibid para 31.
[653] ibid paras 30–32.
[654] ibid.

As for the memorial of Portugal, it should be kept into account that the whole submission is characterized by the attempt to avoid the counterargument that the real party to the dispute was Indonesia or, in any case, to prevent a counterargument relying on the Monetary Gold Principle.[655]

In the first place, it is noteworthy that in the memorial the term 'recognition' is used in a variety of meanings. For instance, it refers to the recognition of East Timor as a State by Portugal,[656] to the recognition of the right to self-determination by the East Timorese people,[657] to the recognition of Portugal as the administering power,[658] to the recognition of Indonesian sovereignty over East Timor by Australia,[659] to the recognition of the incorporation of East Timor into Indonesia by Australia,[660] to the recognition of the duty that all States have to respect the East Timorese people's right to self-determination,[661] to the recognition that Indonesia intervention was an unlawful use of force,[662] and to the recognition of East Timor as a non-self-governing territory.[663] However, it is not always clear when the term 'recognition' is used in a more technical sense or in a more ordinary sense.

More importantly, it is rather confusing that while Portugal clearly condemns the recognition by Australia, it apparently uses two different terms for non-recognition, namely '*non réconnaissance'* and '*méconnaissance*'. Portugal subsequently tried to clarify the meaning of these terms. In the reply to the Australian counter-memorial, Portugal argued that: '*L'obligation que le Portugal accuse l'Australie d'avoir violé et qui est en cause c'est l'obligation de traiter un territoire non-autonome et sa Puissance administrante comme tels, c'est un devoir de non méconnaissance, et non pas un devoir de non reconnaissance*'.[664] In the

[655] Andrew J Grotto, 'Monetary Gold Arbitration and Case' in Wolfrum Rüdiger (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press online version).
[656] *East Timor (Portugal v. Australia)*, Memorial submitted by Portugal, 18 November 1991, para 1.18.
[657] ibid para 1.59.
[658] ibid para 1.71.
[659] ibid para 2.14.
[660] ibid para 2.17.
[661] ibid.
[662] ibid.
[663] ibid para 2.25.
[664] ibid para 6.16.

oral proceedings too Portugal tried to clarify that the translation of the term '*méconnaissance*' is not 'non-recognition' or 'misrecognition', as it was translated by Australia, but rather 'disregard'. Portugal specified further that '*méconnaître ne signifie pas reconnaître ceci au lieu de cela, méconnaître signifie plutôt agir en ne tenant pas compte de qualités ou droits que l'on devrait respecter, en somme, comme si ces qualités et ces droits n'existaient pas*'.[665] The Portuguese argument was that Australia by merely recognizing the incorporation of East Timor into Indonesia disregarded '*par nécessité logique absolue*' the East Timorese people's right to self-determination.[666] In other words, the right to self-determination of the East Timorese people *per se* implies a duty for third States not to recognize the Indonesian incorporation.

On a similar line, Portugal clarified that the question raised in the submission does not deal with the '*validité*' of the Timor Gap Treaty, since to assess the validity of this treaty involves the rights and the obligations of Indonesia, which was impossible given that Indonesia was not participating to the proceedings. Conversely the question regards its '*liceité*'. Accordingly, the submission of Portugal does not concern the treaty as a meeting of wills apt to produce legal effects, but rather the treaty as a fact. The submission thus concerns only the conduct of Australia of having negotiated and concluded the treaty in question.[667]

Portugal noted already in its memorial that Australia had maintained that recognition is absolutely discretionary. While Australia did accept that the East Timorese people had not exercised their right to self-determination and that their territory had been occupied by force, Australia was arguing that in international law there is no duty not to recognize forcible acquisitions of territory.[668] This passage suggests that there is a 'mismatch' between the Portuguese argument and the Australian counterargument. In other words, while the former is referring to a duty not to disregard the right to self-determination by recognizing the

[665] Intervention by Mr. Galvao Teles, 30 January 1995, in the case concerning *East Timor (Portugal v. Australia)*, 45–46, para 5
[666] *East Timor (Portugal v. Australia)*, Reply submitted by Portugal, 1 December 1992, para 6.11. See also the memorial submitted by Portugal (n 656), para 2.25.
[667] Memorial submitted by Portugal (n 656), para 3.06.
[668] ibid para 8.23.

incorporation to East Timor, the latter is referring to the discretionary character of the act of recognition. Significantly, the Portuguese memorial goes on by saying that it is not necessary to investigate whether recognition is a discretionary act, whether international law limits this discretion, and whether Australian recognition is lawful. Rather, it is enough to investigate the effects of such recognition, which in itself implies the disregard of the above-mentioned '*trilogie*'.[669] In any case, to admit the counterargument of Australia, according to the Portuguese memorial, would mean to allow one State to unilaterally free itself from its obligations in disregard of the existence itself of the international legal order, which distinctly reminds the rationale of the doctrine of non-recognition.[670]

Besides the specific questions relating to the recognition and non-recognition, there is another feature of interest in the memorial of Portugal. In fact, again to prevent a counterargument based on the Monetary Gold Principle, Portugal argued that UN political organs had already undertook a legal assessment of the situation. More specifically, the argument goes that the resolutions adopted by these organs had already recognized the legal status of East Timor and of Portugal and they had already ascertained that the East Timorese people have the right to self-determination.[671]

The contention is that the resolutions adopted by the Council are binding on the basis of Articles 39 and 24 of the UN Charter. As for the former, Portugal maintains that, even though the Council did not explicitly determine the existence of a threat to the peace, of a breach of the peace, or of an act of aggression, the situation created by Indonesia did directly and immediately put at risk the maintenance of international peace and security. At the same time, the Council was exercising its power in accordance with Article 24, which assigns to the Council itself a general responsibility when it comes to the maintenance of international peace and security.[672]

[669] ibid para 8.25.
[670] ibid.
[671] ibid paras 6.08ff.
[672] ibid paras 6.40ff.

The resolutions of the Assembly were equally binding since by qualifying the territory in question as a non-self-governing territory the Assembly had as simply exercised its right to take the necessary measures aimed to allow and promote the free exercise of the right to self-determination.[673] The Court, according to Portugal, being the principal judicial organ of the UN, had to consider these legal qualifications undertaken by UN organs, which moreover were opposable *erga omnes*.[674]

Even if Portugal tried to set aside the argument based on the duty of non-recognition of unlawful situations and, instead, referred to a more general duty not to disregard the legal status of East Timor and of Portugal as well as the right to self-determination of the East Timorese people, at some points the memorial does refer to the duty of non-recognition. For instance, Portugal, while addressing the question of the obligations binding third States that derives from the right to self-determination, recalled the *Namibia* advisory opinion and argued that UN member States have a duty to abstain from any act that would imply the recognition of the legality of a situation brought about by a violation of this right.[675] As it will be mentioned below, Australia in its submissions would have taken advantage of this confusion.

The counter-memorial submitted by Australia revolves mostly around questions of recognition and non-recognition and the main argument is based on the legal significance of UN resolutions. The argument goes that recognition is discretionary and that the only limit to State discretion is an authoritative decision made by the competent organs of the UN, which in this case is lacking.[676] This is actually the main argument of the Australian submission. Indeed, the counter-memorial observes that the wording of UN resolution does not support the contention that there was a duty not to deal with Indonesia with respect to East Timor and that

[673] ibid paras 6.52ff
[674] ibid para 6.64.
[675] ibid para 4.62 (b). An additional source of confusion is that sometime the memorial refers to the '*non réconnaissance du Territoire du Timor oriental en tant que territoire non autonome*' (para 2.25) and other times refers to the fact that '*[l]'Australie a méconnu et méconnait, en premier lieu: le caractère de territoire non autonome du Timor oriental*' (para 8.26 (I)). However, in both case the argument is that Australia is disregarding the status of Timor East as a non-self-governing territory.
[676] Counter-memorial submitted by Australia (n 645) paras 68ff.

'*this alone* defeats Portugal's case'.[677] Accordingly, the counter-memorial emphasizes the differences between the resolutions adopted in the cases of Rhodesia, Namibia, Transkei, the TRNC, Kuwait, and Jerusalem[678] and, on the other hand, the resolutions adopted in the case of East Timor. While the former resolutions qualified the respective situations as unlawful and, accordingly, called upon States not to recognize, the latter refrained from doing the same.[679]

Further, according to Australia it is not possible to infer from these resolutions an *unexpressed* duty of non-recognition. Not only the relevant UN organs refrained from imposing a duty not to recognize, but they considered the situation, they did not decide any collective sanction or any other specific additional measure, and they called upon the parties to negotiate.[680] Accordingly, it is difficult to infer an unexpressed duty not to recognize.

Finally, Australia maintained that it is not possible to find in international law a *general* duty of non-recognition. This argument partially overlaps with what was already said above. In fact, on the one hand, Australia pointed again at previous Council resolutions and argued that the basis of a policy of non-recognition was not a pre-existing legal obligation, but rather such binding resolutions.[681] As argued by the ICJ the *Namibia* advisory opinion:

> The precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter.[682]

In the case of East Timor given that the relevant resolutions did not contain an express duty of non-recognition, it is impossible to know which behaviours are allowed and which are prohibited. On the other hand, Australia argued that the duty to respect and promote self-determination did not amount to a prohibition not to recognize the incorporation neither it

[677] ibid para 347 (emphasis added).
[678] ibid para 348.
[679] ibid para 349.
[680] ibid paras 356–359. In the counter-memorial a considerable place is allotted for the argument of the acquiescence of the international community of the incorporation of East Timor. See ibid paras 368ff.
[681] ibid para 365.
[682] Cited in ibid.

amounted to a prohibition not to deal with the entity that violated the principle of self-determination and that was at the origin of the unlawful situation, which as specified in the submission was Indonesia and not Australia.[683]

Besides these more general points, Australia explicitly contested the above-mentioned distinction between validity and legality.[684] Essentially, Australia contended that this distinction is not well-founded and it amounted to a smoke screen to avoid dealing with what Australia argues is the real matter—ie, the validity of the Timor Gap Treaty. In this regard, Australia held that for the Court to judge the negotiation, the conclusion, and the application of the Timor Gap Treaty it was necessary to assess firstly its lawfulness. Moreover, the hypothetical decision by the Court in favour of Portugal would render the treaty inoperative. These aspects would have required the participation to the proceeding of Indonesia.

The reply of Portugal and the rejoinder of Australia mainly reiterate the arguments already raised in the parties' submissions. However, in these texts the mismatch between the Portuguese and the Australian arguments stands out even more. The reply of Portugal starts by emphasizing a fundamental contradiction contained in the counter-memorial of Australia between, on the one hand, the recognition of the right to self-determination of the East Timorese people and, on the other hand, the *de jure* recognition of the incorporation of East Timor into Indonesia.[685] More specifically, Portugal observes that the counter-memorial of Australia does not deal at all with the legal obligations that UN member States have to respect in accordance with the UN Charter, but deals only with the legal obligations that States have in accordance with Council resolutions.[686] Portugal reiterates that the respect of the right to self-determination of the East Timorese people, which ultimately derives from the UN Charter, and the *de jure* recognition of the incorporation of East Timor into Indonesia, which Australia argues has not

[683] ibid paras 366–367.
[684] 'Légitimité' in the Portuguese memorial. See ibid paras 5–9, 221–223.
[685] Reply submitted by Portugal (n 666) para 1.05.
[686] ibid para 1.10.

been prohibited by any Council resolution, are inseparable. Merely by recognizing the incorporation, Australia had disregarded the right to self-determination of the East Timorese people.[687] In addition, Portugal specifies again that:

> *L'obligation que le Portugal accuse l'Australie d'avoir violé et qui est en cause c'est l'obligation de traiter un territorie non-autonome et sa Puissance administrante comme tels, c'est un devoir de non méconnaissance, et non pas un devoir de non reconnaissance. La reconnaissance par l'Australie contraire à la qualité du territoire du Timor oriental comme territoire non-autonome, même si elle était libre, tout simplement ne dégagerait pas l'Australie des obligations qu'elle a vis-à-vis de ce territoire, de son peuple et de sa Puissance administrante*.[688]

Conversely, the rejoinder of Australia reiterates that both the distinctions between '*validité*' and '*liceité*' and between '*non réconnaissance'* and '*méconnaissance*' are illusory. Australia notes further a peculiar evolution in the position of Portugal. In fact, it is stated that:

> The Court is not requested to determine whether Indonesian military intervention in East Timor was lawful or unlawful, or to determine for itself the legal consequences for States of any such illegality. In particular Portugal does not rely on a duty of non-recognition of Indonesia's sovereignty, but on a duty not to misrecognise Portugal's status (a duty of "non-méconnaissance"). These are important clarifications as to Portugal's claims, which in many cases were not apparent from its Application or Memorial. The Memorial, for example, regularly spoke of a duty of non-recognition of situations resulting from the illegal use of force.[689]

Australia notes also that in its reply Portugal referred to the illegality of Indonesian conduct and that Indonesia has violated *ius cogens* norms.[690] However, besides the fact that Portugal did not go all the way with this argument,[691] Australia noted that the Court should have assessed the lawfulness of Indonesian conduct, which as noted above was not possible.[692]

Australia adds two other interesting points to its submission on the scope of the alleged obligation not to recognize. First, Australia distinguishes between the recognition of the legality of a forcible acquisition of territory, which is the case envisaged in Resolution 2625 (XXV),

[687] ibid ch VI.
[688] ibid para 6.16.
[689] *East Timor (Portugal v. Australia),* Rejoinder submitted by Australia, 1 July 1993, paras 5–6.
[690] ibid para 92.
[691] Portugal in fact did not clearly claim that Indonesia committed a serious breach of a *ius cogens* norm and that, consequently, Australia has a duty not to recognize the factual situation arising from this unlawful conduct.
[692] ibid paras 113, 13(b).

and the mere dealing with the factual consequences of such an acquisition. Accordingly, Australia did not recognize the legality of the incorporation, but, in order to exercise its right to exploit its own continental shelf in the region, recognized that the territory was factually incorporated into Indonesia.[693] In other words, Australia argues that it recognized the outcome and not the legality of the manner in which this outcome has been reached.

Second, Australia contests the possibility that the obligation not to recognize such an acquisition implies 'an obligation *in perpetuity* never to recognise the consequences of that illegal acquisition' given that:

> The international community may eventually signify its acceptance of a situation, which although brought about by illegal means, is now a *fait accompli* which cannot be ignored. When this occurs, the continuing occupation of the territory by the State in question acquires international legitimacy, even though the original acquisition is never recognised as legal.[694]

The decision of the Court has already been illustrated above. Here it can be added that the Court did distinguish between the argument raised by Portugal based on the disregard of certain obligations and the counter argument raised by Australia based on the absence of a mandatory duty of non-recognition. The Court, in fact, addressed *both* these arguments and accepted only the latter.[695] Admittedly, the Court resorted to a rather formalistic reasoning and did not resort to a teleological interpretation of the relevant norms.[696] In this regard, Chinkin, albeit writing *before* the delivery of the Judgement, emphasized the different roles assigned by the UN Charter to UN political organs and to the ICJ and observed that:

> As the principal judicial organ of the United Nations the Court rules on the basis of law. It would seem unfortunate if it allowed legal consideration of the issue of title to territory and resources to be avoided through reliance on the notion of the passage of time and consequent refusal to accord standing. The United Nations is a world of political negotiations and compromise. It is undesirable that because the United Nations has not passed certain resolutions (for example that there is a positive duty not to recognize Indonesia's presence in East Timor), or has failed to reiterate a legal position for a long period of time (for example

[693] ibid paras 218–219.
[694] ibid para 219 (emphasis added).
[695] *East Timor (Portugal v. Australia)* (n 627) paras 25, 31.
[696] Dissenting opinion of Judge Tanaka in *South West Africa, Second Phase*, Judgment, ICJ Reports 1966, 6, 278. See also John Dugard, 'Namibia*(South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future' 11 Columbia Journal of Transnational Law 14, 16ff.

> the right of the people of East Timor to self-determination) that these silences should be used to assume the legality of the position.[697]

However, while it is *unfortunate* that the UN organs refrained from adopting a stronger stance vis-à-vis Indonesia and, accordingly, refrained from calling upon States not to recognize the incorporation of East Timor, it should be considered that the General Assembly and the Security Council are political organs whose decisions bear important legal consequences. It seems problematic to contend that since the UN is 'a world of political negotiations and compromise' then the resolutions adopted by its organs are devoid of any legal meaning.

In this respect one should consider that the whole system of collective security under the UN Charter is based on the assumption that the resolutions adopted by the Council have a precise legal relevance. More in general, UN resolutions do have a legal significance. Besides being routinely mentioned as a possible evidence either of *opinio iuris* or of State practice, they are often regarded as authoritative assessment of the state of the law as well as of how the law is applied to the particular facts. One may take as an example the *Wall* advisory opinion, which on various matters simply referred to previous UN resolutions[698] so much so that it can be said that the legal consensus that has consolidated within the international community is reflected in UN resolutions. Another example is the case of Crimea. Scholars have routinely mentioned as relevant Assembly Resolution 68/262 (2014)[699] and even a draft Council resolution[700] that were calling upon States not to recognize any alteration of the status of Crimea. Some have considered that, in the lack of a Council resolution, this Assembly resolution '*constitue … une*

[697] Christine M Chinkin, 'East Timor Moves into the World Court' (1993) 4 European Journal of International Law 206.
[698] The Court while addressing the right of movement and freedom to choose a residence added that Assembly Resolution 181 (II) guarantees the liberty of access to, visit of and transit through the Holy Places, religious buildings and sites. See the *Wall* advisory opinion (n 202) para 129. Moreover, the basis for the Court assertion that the right of self-determination of Palestinian people is no longer an issue cite not only the statements in this sense by Israeli authorities but also a series of Assembly resolutions such as Resolution 58/163 (2003). See ibid para 118. Similarly, as for the Israeli settlements the Court does not refer only to the Fourth Geneva Convention but recalls that in many resolutions the Council held that policy and practices undertaken by Israel with the aim of establishing settlements in Palestine have no legal validity. ibid para 120. More in general, Security Council Resolutions 267 and 338 are regarded as providing for the legal framework for a settlement of the Israeli-Palestinian conflict in compliance with international law.
[699] A/RES/68/262, 27 March 2014.
[700] S/2014/189, 15 March 2014.

constatation centralisée de l'illicite par cent États au sein de l'ONU'. As a consequence '*[l]'obligation de non-reconnaissance s'impose d'ailleurs … non seulement à ces États mais aussi à ceux qui n'ont pas voté, pour des motifs divers, en faveur de cette résolution*'.[701]

Moreover, as seen, most of the State practice on the duty of non-recognition is based on specific UN resolutions and indeed the customary character of this obligation is generally connected with UN practice. It follows that, when it comes to non-recognition, it is difficult to give to UN organs *only* a political role. As a minimum, the resolutions that are adopted by them illustrate what is the opinion of States on the matter, which *per se* has a certain legal relevance. *A contrario*, it is evident from the wording of UN resolutions and from the debates before UN organs that in the case of East Timor States decided to refrain from finding a violation of the principle of self-determination or of another international norm by Indonesia and, accordingly, it was not appropriate to call upon States not to recognize the situation, which has never been characterized as unlawful. This is suggested also by the clear call contained in relevant resolutions for negotiations between the parties.

Additionally, the response of the international community is relevant in connection with another point raised by Chinkin in the above-mentioned quotation, which is that it is not the lapse of time in itself that makes it possible to set aside legal considerations, rather it is the attitude of States. States opted for a non-confrontational stance in 1975, reiterated this stance continuing to use gradually weaker terms, and starting from 1983 opted for silence. In a decentralized legal order this shift is a crucial factor, given that there is no centralized characterization of illegality, each State has to carry out its own assessment. The Court apparently 'bought' the Australian argument that the international community had acquiesced to the situation.

[701] Théodore Christakis, 'Les conflits de sécession en Crimée et dans l'Est de l'Ukraine et le droit international' (2014) 141 Journal du droit international 733, 746.

Crawford, while addressing different cases in which collective non-recognition has been taken into consideration by the Court, considers the case of East Timor and contends that it cannot be seen as a countervailing example. He offered two 'justifications':

> First, the Court was evidently sensitive to the equivocal position taken by the political organs of the United Nations in relation to East Timor. Had they given a stronger lead (as they had done prior to the Namibia Opinion) the decision might well have been different. The second point is that the Court was not assisted by the approach of Portugal, which relied exclusively on the right of self-determination as the basis for an obligation of non-recognition, thereby necessarily calling on the Court to find, as against Indonesia, that the right was being violated. The position might have been different had Portugal relied on the obligation not to recognize a change of territorial sovereignty procured by the use of force.

The first point has already been addressed above. Here it is enough to observe that to connect the concrete application of the duty of non-recognition to the stand of the Security Council seems to confirm that whether to resort or not to this duty ultimately is a discretionary choice that depends on a series of political evaluations. As for the second point, it is worthwhile to recall that the parties, at least to a certain extent, discussed this duty in their submissions. As seen above, Australia in its counter-memorial observed that it was difficult to understand what Portugal was arguing since indeed the latter State made a variety of arguments including that of a mandatory non-recognition even if admittedly this one was not the main argument of the Portuguese submission. In any case, Australia did counterargue to such an argument. In other words, there was a foothold for the Court to discuss non-recognition also because the principle *ius novit curia* is valid also under international law.[702] It follows that even if the contending parties would have not raised an argument on non-recognition the Court could have raised such an argument, especially if it was based on a well-established principle of law as some have maintained the duty of non-recognition is.[703]

[702] Luigi Fumagalli, 'Evidence Before the International Court of Justice: Issues of Fact and Questions of Law in the Determination of International Custom' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law* (Springer 2013) 143.

[703] That this principle is relevant is confirmed by the Court itself. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. ICJ Reports 1986, 14, 24, para 29.

Two judges appended dissenting opinions both dealing with questions of recognition and non-recognition. According to both of them, Australia, by negotiating and concluding the Timor Gap Treaty with Indonesia, recognized the incorporation of East Timor into Indonesia, which *per se* is considered as a violation of international law. The two judges, however, disagreed as to the norm violated by Australia.

Judge Weeramantry argued that there is an incompatibility between recognition of Indonesian sovereignty over East Timor and the right to self-determination of the East Timorese people. This incompatibility does not derive from the original unlawfulness of the Indonesian conduct, but rather from the status of East Timor. To disregard this status amount in itself to a violation of the principle of self-determination. Thus, as argued by Portugal, it is not a question of non-recognition of an unlawful situation, but of disregard of rights of the East Timorese people.[704]

Interestingly enough, Judge Skubiszewski, the *ad hoc* judge chosen by Portugal, dealt to a great extent with the duty of non-recognition of an unlawful situation. He strongly criticised the reasoning of the Court in the sense that he connected the 'quasi-total rejection of Portuguese claims' to the fact that the Court did not decide on the basis of 'the demands of justice'.[705] On the contrary, judgements in which 'basic elements of the constitution of the organization' and 'fundamental principles of international law' are at stake, 'cannot be reduced to legal correctness alone'.[706] International law have to be understood so to 'restore dignity' to the peoples of newly emerged States and to put an end to colonial domination.[707] In contrast, the

[704] Indeed, that Judge Weeramantry added a 'juristic perspective' on the correlativity between rights and duties—ie, the rights of the East Timorese people and the corresponding duties of third States including Australia. See the separate opinions of Judge Weeramantry in *East Timor (Portugal v. Australia)* (n 622) paras 193ff and, on the correlativity of rights and duties, paras 208ff. Cfr James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2007) 172.
[705] See the separate opinions of Judge Skubiszewski in *East Timor (Portugal v. Australia)* (n 622) para 43.
[706] ibid.
[707] ibid para 44.

Court, according to Judge Skubiszewski, refused to 'look ahead' and did not remain 'in touch with the great currents of contemporary development'.[708]

More importantly, according to the dissenting judge, one of the most important arguments raised by Portugal rejected by the Court deals precisely with the non-recognition of the unlawful situation. In this regard, he observes that the Court 'preferred not to consider the problem of the non-recognition of a situation … which came into being by means contrary to the prohibition of the threat or use of force against the territorial integrity or political independence of any State'.[709] This argument is developed starting from the observation that the policy of non-recognition is an *old policy* that had begun to be transformed into an *obligation* with the issuing of the Stimson note and that, at the time of writing, had already became part of general international law, presumably with the adoption of the Friendly Relations Declaration in 1970. Without mentioning any legal basis except this legal document, it is stated that the rule is self-executory.[710]

It is interesting that the Stimson doctrine is only mentioned in a single note of the Portuguese reply.[711] It could be speculated that if a norm had already crystallized there would have been such an argument in the Portuguese submission. Arguably, Portugal mentioned the duty of non-recognition only in support of the *main* argument on the disregard of other norms by Australia. However, the Court did refer to the duty not to recognize in addition to the duty not to disregard, but eventually refrained from making any reference to its customary character let alone to its self-executory character.

In any case, Judge Skubiszewski argues that recognition was barred by the call upon States by the Security Council to respect the territorial integrity of East Timor and it was barred by the reference to this principle by the General Assembly. Australia's recognition does not

[708] ibid para 46.
[709] ibid para 124.
[710] ibid para 125.
[711] Reply submitted by Portugal (n 666) para 6.30 (at n 434). Additionally, it is not clear to what extent Portugal was claiming that both the prohibition of forcible acquisition of territory and also the prohibition of recognition of such acquisitions were customary. See ibid.

relieve Australia from respecting the duty of non-recognition since 'the problem cannot be reduced to "practical considerations"'. The dissenting judge in this regard adds that '[t]he argument, if put forward without any qualification, is unacceptable; admitted unconditionally, it could sap the foundation of any legal rule'.[712] However, as seen above, this is only a part of the Australian argument. Ultimately, Judge Skubiszewski did not consider the Australian argument on the lack of any decision by the relevant UN organs, he limited himself that the duty of non-recognition operates in a self-executory way.[713]

Interestingly enough, Judge Skubiszewski conceded that:

> The attitude of non-recognition may undergo a change by virtue of a collective decision of the international community. In law, there is a fundamental difference between such a decision and individual acts of recognition … But up till now nothing of the sort has happened with regard to East Timor. Nor is there any consolidation of the Indonesian "title" through other means.[714]

Therefore it seems that even if a norm as the right to self-determination is at stake, that is a norm of *jus cogens*, there could well be recognition of an unlawful situation if there is collective decision of the international community. However, in the case at hand there was not any such collective decision.

The section of the dissenting opinion on recognition and non-recognition ends with a reminder on the relevance of international law and on its constraining power. It holds that:

> [I]t would be too simple to dismiss the continued United Nations status of East Timor and of Portugal as being remote from the facts. Whenever it comes to an unlawful use of force, one should be careful not to blur the difference between facts and law, between the legal position and the factual configuration. Even in apparently hopeless situations respect for the law is called for. In such circumstances that respect should not mean taking an unrealistic posture … Contemporary history has shown that … the so-called "realities", which more often than not consisted of crime and lawlessness on a massive scale, proved to be less real and less permanent than many assumed. In matters pertaining to military invasion, decolonization and self-determination, that peculiar brand of realism should be kept at a distance.[715]

[712] ibid paras 126–128.
[713] On the relation between self-determination and recognition, see also paras 134–141.
[714] ibid para 132. See also para 167(3) where Judge Skubiszewski contended that '[a]ny change in the status of East Timor can only take place by virtue of a United Nations decision. According to the law of the United Nations no use of force nor any act of recognition by an individual State or States could of itself effect a change in the status of the Territory'.
[715] ibid para 133.

Indeed, in 1999, that is only four years after the rendering of the judgement by the ICJ, a referendum was hold in East Timor by means of which the East Timorese people expressed their preference for independence and in 2002 East Timor became a sovereign State, thus reversing the situation created by Indonesian invasion.

4.5. East Timor's path to statehood

It was noted that, after the last resolution adopted by the Security Council, except for the attempt described in the previous section by Portugal, the presence of Indonesia in East Timor was unchallenged so much so that many have talked of a victory of realpolitik over legal considerations. The incorporation had been recognized by Australia (and other developed States showed a forgiving stance towards Indonesian conduct), the States belonging to the Association of Southeast Asian Nations pursued a policy of non-interference, and, in any case, there was a general acquiescence by the rest of the international community. Bhuta in this regard talks of a 'normalisation of Indonesian rule' taking place between after 1983.[716]

This 'normalisation' took place in the international and in the domestic context. As for the latter, Indonesian authorities adopted a policy of pacification by pursuing a strong development policy and, for instance, opened the territory to tourism with the ultimate aim to gain the support of East Timoreses by improving their conditions of life.[717] However, the widespread violations of human rights did not stop. The despicable conduct by Indonesia culminated in 1991 with the shooting of more than 250 East Timorese demonstrators in Dili, the 'capital' of East Timor.[718] This event drew the attention of the international community back to this territory and many States and international organizations, given the seriousness of this event, had to take a position. Some States condemned the massacre but also welcomed the steps

[716] Bhuta (n 648) 169.
[717] John Ballard, *Triumph of Self-Determination: Operation Stabilise and United Nations Peacemaking in East Timor* (Praeger Security International 2008) 12ff.
[718] ibid 13.

undertaken by Indonesian authorities aimed to punish the responsible of the massacre. Other States condemned the massacre and linked it to the wider East Timorese question. For instance, in the already mentioned hearing before the committee on Foreign Relations, the United States Assistant Secretary recalled that the United States had already expressed publicly their condemnation and welcomed the formation of a national investigatory commission, but recalled also that the United States accepted the Indonesia's incorporation of East Timor.[719] The Assistant Secretary after a direct question by a Senator specified that no additional consequences would have come from the mentioned event.[720]

On the other hand, the stance of European States evolved. For instance, the Swedish Minister for Foreign Affairs coupled the condemnation of the Dili massacre with a reminder that Sweden had never accepted Indonesia's annexation of East Timor, which is regarded as a breach of international law.[721] The same goes for the Council of Europe, which expressed the support of foreign ministers of the member States for a 'just, comprehensive, and international acceptable settlement of the issue' in accordance with the principles of the UN Charter, the human rights, the fundamental freedoms, the legitimate interests, and the aspirations of the population of this territory.[722] Actually, a few months before, even before the Dili massacre, the Parliamentary Assembly of the Council of Europe adopted a much stronger resolution that was clearly condemning both the human rights violations and the annexation of the territory. Additionally, the resolution was calling on the Council of Europe to insist on a political solution negotiated within the UN, to urge countries that have economic links with Indonesia to bring pressure on Indonesia, and to implement an arm embargo.[723] In any case, the resolution eventually adopted by the Council of Europe has the merit of recalling the unlawfulness of the Indonesian annexation of East Timor. On a similar plane, also the decision to award the Nobel

[719] Heike Krieger (n 582) 316–318. The same goes for Australia ibid 335, 337–339.
[720] ibid 323.
[721] ibid 300. See also the statement issued by the Minister of State, Foreign and Commonwealth Office on 10 February 1993 ibid 302.
[722] ibid 303.
[723] ibid.

Peace Prize to Carlos Filipe Ximenes Belo and José Ramos-Horta—ie, the two most prominent leaders of the East Timorese people for their efforts towards a just and peaceful solution to the conflict—contributed to maintain alive the interests of the international community in the question of Timor.[724]

However, this renewed interest did not change by itself the situation, which would have evolved only after a wider development of the geopolitical climate caused by end of the cold war and by the subsequent growth of importance of the UN.[725] Moreover, the Asian financial crisis destabilised the Indonesian regime, the society at large, and the regime's grasp on East Timor.[726] It should also be kept into account that foreign aid had already been limited when Indonesia, even after the Dili massacre, failed to show any improvement on the respect of human rights.[727] All these events contributed in 1998 to the fall of the authoritarian regime that ruled Indonesia since 1967, which in turn made possible the progress of the UN-sponsored negotiations between Indonesia and Portugal.

Indeed, in 1998 the parties discussed a new draft constitutional framework that was envisaging a wide degree of autonomy to East Timor. While Indonesia insisted that the autonomy regime envisaged by the constitutional framework would have been the definitive solution to the question of East Timor, Portugal insisted that the autonomy regime was only transitional and that it should have been followed by a genuine act of self-determination under UN auspices so to decide the final status of this territory. The deadlock was unexpectedly broken in 1999 by the new government of Indonesia led by Bacharuddin Habibie, who announced that in the case of rejection by the East Timorese people of the constitutional framework they would have been allowed to secede.[728]

[724] Ballard (n 717) 14.
[725] ibid 25ff.
[726] Jones (n 580) 177.
[727] Ballard (n 717) 25.
[728] ibid 26.

4.6. The New York Accords and the subsequent referendum

On 5 May 1999, Indonesia and Portugal entered into a series of agreements (New York accords) that led to the organization of a referendum by means of which the East Timorese people eventually exercised their right to self-determination. The parties agreed that Indonesia would have carried out a referendum on the constitutional framework that was attached as an annex to first agreement. The parties and the UN Secretary-General agreed also the modalities of the abovementioned referendum and as to how to guarantee a secure environment.

Drew notes that many, with reference to this sudden development, have talked of a triumph of self-determination, but a closer analysis shows a different picture. More specifically, she contends that what happened in East Timor was a *shift* from legal formalism to institutional pragmatism, which, in turn, lead to a solution of compromise, and the concession made is precisely the full respect of the right to self-determination.[729] Drew's argument is mainly intended to show that within the international community there is a tendency towards understanding self-determination as a process rather than a right implying a series of substantive values.

For instance, the Security Council resolution that welcomed this agreement focused on the fact that an agreement had been finally reached setting aside any substantive legal entitlements.[730] We have already seen while addressing Western Sahara that the right to self-determination is respected only if this right is exercised freely. It follows that in the case self-determination is carried out through an act of popular consultation, this consultation shall have certain characteristics aimed to guarantee that it is a *free* act of self-determination. For instance, in that case, the expression routinely used was free, fair and impartial referendum. It is doubtful whether the referendum envisaged in the New York agreements could fulfil these requirements.

[729] Catriona Drew, 'The East Timor Story: International Law on Trial' (2001) 12 European Journal of International Law 651, 673–674.
[730] S/RES/1236, 7 May 1999.

In this regard, it is worthwhile to note that this question cannot be assessed in the light of the actual outcome—ie, the rejection of the plan and the establishment of an independent State.

Drew raises two problems concerning the ballot question and the conditions for the choice.[731] The former problem consists in the way in which the ballot question was formulated. Electors were asked to approve or to reject the autonomy plan proposed by Indonesian authorities. Therefore, the option for independence was presented only indirectly, which arguably is at odds with a free, fair, and impartial referendum. More importantly, the problem is whether a referendum hold in a territory that is occupied can be defined as a free act of self-determination. The New York agreements did not contain any obligation to withdraw or to temporary redeploy the Indonesian army. Conversely, there was not a provision allowing the deployment of a UN peacekeeping force.[732] It follows that the Indonesian Government itself was the sole responsible for safety and security during and in the aftermath of the referendum.[733] Another aspect that is in contradiction with the right of self-determination as it is generally understood is that the East Timorese people's representatives did not participate to the UN-sponsored negotiations that led to the New York accords.[734]

Eventually, the autonomy plan was rejected and, subsequently, East Timor assisted by a dedicated UN mission began its transition to independence that ended in 2001 when it became a sovereign State. Two aspects are relevant. First, Security Council Resolution 1264 authorized 'the establishment of a multinational force under a unified command structure, pursuant to the *request* of the Government of Indonesia'.[735] As noted by Zappalà, that the Council in some way asked the consent of Indonesia when authorizing the establishment of a UN mission seems to

[731] Drew (n 729) 674ff.
[732] However, the Security Council with Resolution 1246 established a mission with the aim of organizing a conducting the referendum in question. See S/RES/1246, 11 June 1999.
[733] Security Council Resolution 1236, which is the resolution that welcomed the agreements between Indonesia and Portugal, in this regard stressed 'responsibility of the Government of Indonesia to maintain peace and security in East Timor in order to ensure that the consultation is carried out in a fair and peaceful way and in an atmosphere free of intimidation, violence or interference from any side and to ensure the safety and security of United Nations and other international staff and observers in East Timor'. S/RES/1236, 7 May 1999, para 5.
[734] Drew (n 729) 682–683.
[735] S/RES/1264, 15 September 1999, para 3.

suggest that Indonesia was at least functionally the sovereign.[736] Second, such an outcome is somehow immaterial since the international community had already welcomed the New York accords, and thus it was willing to recognize *any* outcome as legitimate.[737] Moreover, the humanitarian consequences, that is the violence triggered by the rejection of the plan by elements of Indonesian armed forces, were directly attributable to the aforementioned characteristics of the New York accords.[738] This is not directly connected with the duty of non-recognition. However, it confirms again the attempt to side-line legal considerations in order to favour a definitive peaceful settlement of the East Timor question. The eventual reversal of the situation in East Timor does not contradict that for a considerable number of years the international community had acquiesced to the incorporation of East Timor into Indonesia or, in any case, decided not to resort to a policy of collective non-recognition.

5. Concluding remarks

5.1. Tentative conclusions on the first research question

In the case of Western Sahara, the international community has implemented a policy of collective non-recognition. Even so, from the beginning, the response of the Security Council was a *mild* response. Besides the lack of an unambiguous political condemnation, there was no determination of unlawfulness, neither, accordingly, there was any call for non-recognition. Actually, non-recognition was not even discussed before the Council. It could be argued that in 1975 it was impossible to anticipate that the actual intention of Morocco was an outright annexation. However, even later, when the unlawful situation had consolidated and the intention of Morocco had become obvious, also because it was openly acknowledged by Moroccan authorities, the Council did not modify its stance.

[736] Salvatore Zappalà, *Effettività e valori fondamentali nella comunità internazionale* (Editrice CUSL 2005) 113–114.
[737] Supra n 730.
[738] Drew (n 729) 680.

It could be argued that, even in the lack of a specific Council resolution mandating non-recognition, States have refrained from recognizing Western Sahara as an integral part of Morocco. Still, it should be underlined that the lack of a specific resolution was not without effect. In fact, it is not clear what precisely States are allowed to do with reference to this territory. Concretely the problem emerged with the agreements between Morocco and third parties over natural resources located in Western Sahara. The judgements of the ECJ are in this regard paradigmatic. In fact, even if the Court refrained from dealing with the duty of non-recognition and to international law at large, it used in its judgements a wording that clearly echoes the duty of non-recognition and the Namibia exception. Even more importantly, the ECJ interpreted this exception in a rather liberal way in the sense that the judgements in question regard the conclusion of international trade agreements as falling within the scope of the Namibia exception even if hardly such agreements fall within, as put it by the ICJ, 'certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect' the local population.[739] In the end, the scope of the Namibia exception is stretched to the point of making non-recognition absolutely irrelevant.

The lack of a such a resolution may have a second far-reaching effect. It was noted above, and it will be further discussed in the following section, that gradually the international community's support for a strict policy of non-recognition has been replaced by the support for a mutually acceptable political solution, which ultimately may lead to the validation of the original breach of peremptory norms by Morocco. In this regard, it may be speculated that the lack of a determination of unlawfulness and accordingly of a call for non-recognition may have facilitated the process of accommodation of law to reality. It seems meaningful that the United States recognition of Moroccan sovereignty over Western Sahara received only scant attention on the international plane and, actually, other States had expressed their support for the

[739] Indeed, Advocate General Wathelet in his opinion on the case C-266/16, 10 January 2018, paras 288–292 regarding the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco criticised the broad interpretation of the Namibia exception given by the ECJ.

territorial integrity of Morocco, which by force of circumstances implies the recognition of Moroccan territorial claims over this territory, even before the United States' decision. The lack of international condemnation towards this act of recognition and similar acts by a few States does not speak in favour of a well-established customary duty.

As for the Israeli-Palestinian conflict, it was noted that within the international community it is possible to identify a consensus on many aspects of this conflict, including more relevantly on the violation of a series of peremptory norms by Israel. At the same time there is a wide support for the peace process and also for bilateral direct negotiations. In this regard, it should be noted that the statements adopted by States as well as the resolutions adopted by UN political organs do not clarify what precisely is negotiable with a view to achieve peace. More importantly, it is noteworthy that during the Oslo process, and to a certain extent also afterwards, to reach a peaceful settlement has appeared as the overriding concern of the international community *notwithstanding* the peremptory nature of the norms allegedly breached by Israel. The Trump administration's controversial stances on the conflict in the Middle East were met with widespread criticisms. However, the proposed peace plan, as well as the Abraham Accords, was met much more favourably. More in general, it may be speculated that if agreed by the opposing parties, and at least implicitly by the international community at large, almost any solution is acceptable.

In contrast, the response to the American recognition of Israeli sovereignty over the Golan Heights was rather different in the sense that it was a much firmer response and left no margin for negotiations. Incidentally, it is about this case that there was the clearest statement in favour of a customary duty of non-recognition.[740] More specifically, States before the UN political organs and, more in general, by taking a stance over this question have frequently reaffirmed the prohibition of forcible acquisition of territory as well as the unlawfulness of acts

[740] The representative of the United Kingdom held that 'under the law of State responsibility, States are obliged not to recognize the annexation of territory as a result of the use of force'. S/PV.8495, 27 March 2019, 5–6.

of recognition of such acquisitions leaving no room for any substantive negotiation over the territorial integrity of Syria. In the case of Jerusalem and of Palestine similar remarks were made but the international response to the Oslo Peace Process as well as even if to a different extent to the President Trump's peace plan leaves room for bilateral negotiations. Arguably, the different response to these cases derives from the fact that only the recognition of Israeli sovereignty over the Golan Heights would radically call into question the above-mentioned prohibition. This question—ie, the difference between a case such as the Golan heights and other cases such as Palestine, is further illustrated below. Here it is enough to note that these radically different responses too do not speak in favour of a well-established customary duty.

The ICJ in the *Wall* advisory opinion eventually found that States do have a duty not to recognize the illegal situation resulting from the construction of the wall. Thus, it seems that this opinion supports the prevailing understanding of the doctrine in question. However, it should be noted that even if this opinion was rendered in 2004, that is three years after that the ILC adopted the ARSIWA on second reading and even after that the General Assembly took note of the adoption of this instrument,[741] the ICJ did not rely on the provision of the ARSIWA concerning non-recognition.[742] Actually, the opinion suggests the existence of a cleavage between the theory underlying non-recognition endorsed by the ILC in the ARSIWA and the one endorsed by the ICJ in the opinion in question. The Court in fact referred to *erga omnes* norms rather than to *ius cogens* norms even if intervening States did rely on the latter concept in connection with non-recognition. Moreover, overall it seems that for the Court the additional legal consequences deriving from a breach of international law are precisely those identified by the ILC. In other words, except for the reference to *erga omnes* norms, the Court resorted to the same framework envisaged by the ILC. Given the relevance attributed by some intervening States and by some of the Judges who appended a separate opinion to the idea that in case of

[741] A/RES/56/83, 12 December 2001, para 3.
[742] It seems significant that previously the ICJ had no problem to rely even of the draft articles. See for instance *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7, para 47.

serious breach of a peremptory norm no deviations can be permitted, even by consent of the parties, it could have been expected that the Court would have framed the question as a violation of a *ius cogens* norm, which do possess such a characteristic. In this regard it is also interesting to note that the advisory opinion ends with a reminder on the importance of a negotiated solution. Thus, the Court aligned itself to the UN at large.

From another point of view, the ICJ did not clarify the content of the obligation of the duty of non-recognition. The difference is rather striking when looking at the *Namibia* opinion, which shares with the opinion at hand an almost identical question. Neither it clarified other aspects concerning the policy of non-recognition such as from where it acquires binding character. In the case of the *Wall* there is not a proper authoritative determination of illegality except for the advisory opinion itself, which prompts an observation concerning those States that legitimately regard the conduct of Israel as lawful. From another point of view, the ICJ did refer to the Security Council resolutions that asked not to recognize any measure purported to change the legal status of the territories in question, but it is not that clear what the precise role of such resolutions is and to what extent these and other UN resolutions are determinative of the legal status of the territories in question.

With regard to the TRNC too the international community has maintained a policy of non-recognition. In this case, unlike in the case of Western Sahara and as in the cases of Palestine and of the Golan Heights, the Security Council did call upon States to implement such a policy. Moreover, it is generally contended that such implementation clearly supports the argument that non-recognition is a well-established customary norm. However, on closer glance, there are some significant aspects that may contradict this contention.

First, it is generally held that the legal ground for the policy of non-recognition of the TRNC is the 1974 military intervention by Turkey and the subsequent protracted occupation. However, the call for non-recognition was made by the Security Council only some years later, after that Turkish Cypriots adopted a declaration of independence by means of which the TRNC

was established. Moreover, the Council with the resolution in question did not expressly link the unlawfulness of the situation and non-recognition to the intervention and to the continued presence of Turkish armed forces, but rather to other aspects of the Cyprus question such as the violation of the Treaty of Establishment and of the Treaty of Guarantee.

Arguably, notwithstanding these two observations (that is, first that a considerable lapse of time between the violation of the primary norm and the call for non-recognition and second that in the relevant resolution there is no reference to any violation of a *ius cogens* norm), it could be argued that the context in which the Council has acted was the factual situation created by the Turkish unlawful conduct. However, this argument finds no support by looking at statements issued before the Security Council.

The grounds mentioned by States are many and only a few States made a reference, and sometime only a vague reference, to the unlawful Turkish conduct. Moreover, concerning the lapse of time between the military intervention and the call for non-recognition, it could be argued that the Council took such a decision only when Turkish Cypriots established a purportedly independent State given that the TFSC, in contrast with the TRNC, was intended to be part of a future federated State. However, States already right after the 1974 military intervention noted that the situation on the ground was extremely serious and was already consolidating. Nonetheless, they refrained from invoking non-recognition and the Council acted accordingly. It is worthwhile to note that statements adopted in 1974 and in 1983 are almost undistinguishable in as much as the very same grounds are mentioned. It seems that the Council in 1974 simply decided to wait with the hope that the situation would have sorted itself out. Indeed, the two opposing parties agreed on a series of principles (ie, the 1977 and the 1979 high-level agreements), but eventually Turkish Cypriots took another step towards the consolidation of the situation, thus, the Council had to intervene more incisively. Admittedly, no State recognized the TFSC notwithstanding the lack of a Council resolution in this sense. However, looking at the debates before the Council it does not seem that non-recognition was

implemented out of a legal duty and, in any case, no relation with military intervention was clearly expressed. Overall looking at this response it seems that the Security Council is the 'master' of the situation and the flexible approach chosen by this organ apparently confirms that there is not an automatic duty of non-recognition.

Finally, the case of East Timor, as the case of Western Sahara, could have been a textbook example as for the collective response by the international community to serious breaches of *ius cogens* norms. As in that case, both the facts and the norms of international law at stake seems remarkably clear in the sense that a State invaded a political entity having the right to self-determination and eventually annexed it. Nonetheless, from the very beginning the response of the international community was limited to a mild political condemnation and UN political organs simply refrained from adopting a more confrontational stance.

Admittedly, the wording of the relevant resolutions is perhaps stronger when compared to that of the resolutions adopted with reference to Western Sahara, but it is still rather weak since that these resolutions merely condemned Indonesian conduct without any reference to a specific violation of international law. Most importantly, no State before UN political organs has ever contended that the duty of non-recognition applies to this case neither actually that a policy of non-recognition was mandatory. At best, some States recalled the rationale of this duty or mentioned some previous cases in which non-recognition was invoked. Capo Verde referred to the cases of Rhodesia and Namibia, Ghana mentioned to the case of Western Sahara,[743] and Mozambique referred to the West Bank, to the Gaza Strip, and to the Golan Heights. These, however, were lonely voices. Indeed, States individually and collectively at the time refrained from taking any further action and the situation simply fell into oblivion.

Portugal did bring the question before the ICJ, but the judgement, as seen, was not favourable to Portugal and to the East Timorese people. The 'question' posed to the Court in

[743] Ghana actually was the only State that made an argument implying a policy of non-recognition even if it sounded more a moral commitment rather than a legal obligation.

the case at hand was not whether third States have a duty of non-recognition of East Timor an integral part of Indonesia, and thus the Court does not provide such an answer. However, this case is relevant when it comes to non-recognition. More specifically, if anything, the Court denies that Security Council resolutions adopted with reference to East Timor were mandating a duty not to recognize. *A fortiori* it could be argued that States do not have a general and abstract duty to withhold recognition in absence of any Council resolutions. Christakis considers the relevant passage of the judgement as a mere *obiter dictum*.[744] But this view does not seem persuasive. The Court did not make this remark just in passing, but, on the contrary, the Court dedicated a full paragraph to it and with good reasons since both the written and oral submissions of the parties had dealt with the question of the legal significance of UN resolutions, and more specifically to what extent they could be interpreted as implying a mandatory policy of non-recognition, as well as with a general duty of non-recognition.

Often, more than the case itself, is the dissenting opinion of *ad hoc* Judge Skubiszewski that is mentioned, since he made an argument based on a customary duty of non-recognition. However, a couple of aspects should be noted. First, the Court did not 'buy' this argument and the opinion of Judge Skubiszewski remains a dissenting opinion. Second, it could be speculated that the topic of a mandatory policy of non-recognition was raised also during the drafting of the decision of the Court and not only by the contending parties. Third, in any case, it is noteworthy that the opinion of the dissenting judge lets a window open for the collective recognition procedure by the international community. However, Judge Skubiszewski specified that, in the case at hand, the international community did not act in this sense and thus the alleged acquiescence cannot have such an effect. As seen, such an opinion is in contradiction with the prevailing scholarly understanding of this norm.

[744] Théodore Christakis, 'L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales' in Jean-Marc Thouvenin and Christian Tomushat (eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 135.

Overall, these elements confirm that, at that time, there was not yet a clear customary duty of non-recognition. Incidentally, it is perhaps significant that two scholars writing at that time on this case observed that there was no such a duty.[745]

To sum up, it does not seem that the international practice on these four cases clearly supports the existence of a customary duty of non-recognition.

5.2. Tentative conclusions on the second research question

As for the international practice it is noteworthy that States have not consistently relied on the rights-based approach and, in contrast, are overall supportive of a more pragmatic approach. More specifically, the international community, in the four cases taken into consideration in this chapter, has expressed, mainly through UN organs, its endorsement over negotiations between the opposing parties even if a 'legalistic' approach would have implied the rejection of any negotiated solution that is not in full compliance with international legality. This endorsement, together with the fact that the opposing parties are treated on an overall equal stand, suggests that third States may be willing to recognize unlawful situations that originally emerged from serious breaches of *ius cogens* norms.

The fact that some of these conflicts have not been settled yet, and thus no unlawful situation has been recognized, does not rebut this argument. In fact, States have *already* expressed their stance by adopting a positive attitude towards negotiations even aware that their outcome likely impinges on a *ius cogens* norm. These cases suggest that the international community does not exclusively rely on one of these approaches. What can be seen is a tension between them, but the way in which this tension has concretely operated is different.

As for Western Sahara, the initial mild response of the Security Council, with the passing of time, has become even milder. In fact, this organ began adopting resolutions that

[745] Jean-Pierre L Fonteyne, 'The Portuguese Timor Gap Litigation before the International Court of Justice: A Brief Appraisal of Australia's Position' (1991) 45 Australian Journal of International Affairs 170, 177 and Maria Clara Maffei, 'The Case of East Timor before the International Court of Justice–Some Tentative Comments' (1993) 4 European Journal of International Law 224, 233.

apparently implied that there is not only one exclusive way to solve the dispute—ie, to allow Sahrawi people to freely exercise their right to self-determination, which in turn can hypothetically lead to independence—but instead that there are a variety of ways. Afterwards, the Council expressly called for a 'mutually acceptable political solution'. This expression had already been used in the past, but only with reference to the process to reach a certain outcome (that is, the settlement of the conflict) rather than the outcome itself. In other words, it merely concerned the organization and the concrete holding of a referendum by means of which the Sahrawi people would have exercised their right to self-determination. However, arguably, what is being negotiated nowadays is the outcome of the conflict itself, that is the right to self-determination. The clause requiring that such a political solution shall provide for the self-determination of the people of Western Sahara included in Security Council resolutions on the matter is meaningless in the absence of any reference to the *free* exercise of self-determination by the Sahrawi people. After all, how they could freely exercise this right while under occupation? At the same time, the Council is supporting a peace plan that, being a mere autonomy plan, expressly excludes the possibility of an independent Western Sahara. In the case this plan or any other plan that does not allow Sahrawi people to freely exercise their self-determination will be carried out, its outcome would be recognized by States and it could be contended that this recognition would lead to the validation of a *ius cogens* breach.

The statements by means of which States supported the resolutions in question suggest that this shift can be explained, on the one hand, with the observation that there are no credible alternatives to the Moroccan autonomy plan and, on the other hand, that, after all, such a political solution may lead to the development of the area in question as well as of the whole Maghreb. More in general, it seems that for the sake of peace the rigidity of international law can be set aside. It follows that the American recognition seems the culmination of this process rather than yet another controversial decision adopted by a 'dying' presidency. In this regard

the mild response mentioned above by the international community to this decision seems significant in as much as it supports this contention.

In the case of Western Sahara the above-mentioned tension is particularly visible. In fact, it was a *gradual* development and States justified it with a rather *explicit* language. In this regard the other cases are slightly different. For instance, the case of Palestine too reflects this tension even if the tendency of States to support the peace process at the cost of setting aside international law is less marked than in the case of Western Sahara. In fact, on the one hand, there was a wide support for such a negotiated solution mostly in the context of the Oslo process. Indeed, the Trump administration's recognition of Jerusalem as the capital of Israel and of the lawfulness of Israeli settlement in Palestine, as well as of the Golan Heights as integral part of Israel, have been met with widespread criticism, which proves that the international community is not willing to completely renounce to international law. Moreover, even in this limited period of time, that is during the Oslo process, it was not clear to what extent the outcome of negotiations could eventually impinge on some of the relevant *ius cogens* norms. Indeed, afterwards, the plethora of UN resolutions on this question have continued to support a negotiated solution, but at the same time they have continued to rely, at least partially, on what was labelled as rights-based approach. For instance, it is noteworthy that the wording of Security Council Resolution 2334—ie, the resolution condemning the settlements as illegal that was not vetoed by the United States—compared to that used in Security Council Resolution 242 as well as that used in some of the subsequent resolutions is more restrictive in relation to the possible outcomes of the conflict. Afterwards, the General Assembly has adopted resolutions that reiterated this more restrictive wording. Thus, not only the tendency to adopt a more pragmatic approach to the settlement of the conflict is less marked than in the case of Western Sahara but there is not a gradual shift towards this approach.

It is impossible to draw a clear-cut answer to the question of the extent to which international law mandates a certain outcome also because the resolutions adopted by UN

political organs refer at the same time to most of the diplomatic initiatives launched by different international actors to solve the conflict even if each of these initiatives can be situated in a different position on the spectrum between the two approaches mentioned above. The situation is somewhat reversed to that in Western Sahara. In the latter case, all recent resolutions support negotiations without preconditions and, at the same time, the same resolutions include only a single abstract reference to the principle of self-determination. In the case of Palestine, all resolutions support the relevance of international law and, at the same time, these same resolutions include only a single abstract reference to a negotiated solution.[746]

The case of the TRNC too supports the argument that the duty of non-recognition is not an open-ended obligation. It was noted that already after the Turkish intervention the organized international community attempted to 'channel' its effort to settle the conflict. Even if the situation was serious, which was witnessed *inter alia* by a military intervention, which was preceded by minor interventions, by the factual partition of the island of Cyprus, by the recognition of Turkey of the new political entity, by the policy of encouraging settlers in the occupied area, the Security Council refrained from adopting a more confrontational stance and preferred to encourage the parties to reach a negotiated settlement. Accordingly, it decided not to call for non-recognition and it continued calling for negotiation on an *equal* footing. Only in 1983, after that the declaration of independence was adopted, the Council determined the unlawfulness of the situation and called for non-recognition. It is noteworthy that the Council waited almost ten years to act in this way. This can be seen as part of the process of accommodation of law to reality that was mentioned above. It is the organized international community that decided *how* and *when* to act, which suggests that non-recognition is not an automatic consequence. Besides what has been said in the previous sub-section, it is also worth mentioning that many States explicitly took this position. These States clarified that they were not recognizing the TRNC and urged the Council to adopt a resolution in this sense. *A contrario*

[746] See above respectively at 142–143 and at 195ff.

it can be argued that before that the Council acts in this sense such a decision by individual States is discretionary.

In any case after 1983 again the international community called upon the parties to negotiate between on an equal footing and to reach a mutually acceptable political solution. In the relevant Security Council resolutions no reference at all is made to the original unlawful conduct that created the unlawful situation. Two additional points should be mentioned. First, it is noteworthy that the idea itself of a bicommunal *and* bizonal State came originally from Turkish Cypriots who succeeded to address negotiations towards this aim. Second, it is possible to identify a marked tendency by part of the international community to see unfavourably the party interrupting them even if this is true for both Turkish and Greek Cypriots.

As for East Timor it was noted that even if Indonesia did not comply with the demands of the organized international community, the response by the UN political organs with the passing of time grew even milder. In particular the Security Council at an earlier stage opted for a 'managerial' approach, thus attempting to manage the various problems posed by the tragic humanitarian situation on the ground. Subsequently, it refrained from coming back on the question. Apparently, the international community at large acquiesced to the new unlawful situation imposed by Indonesia and subsequently some States openly recognized this unlawful situation. The reasons set forth by a majority of States were the overriding concern for a peaceful settlement of the conflict and, more specifically, a series of considerations such as the possibility of economic development of East Timor, as well as for the whole area, and a better protection of human rights. However, there was also the idea that realistically there was nothing else to do and that it was overall appropriate that such a small territory, having some historical ties with Indonesia, would have been administered by the latter.

A similar deference to the peace process was manifest in a later phase of the East Timor question that is when the implementation of self-determination finally occurred. In fact again the role of international law was neglected with the tacit consent of the international

community. The argument goes that the international community has set aside the free exercise of self-determination so to finally reach a settlement. It can be speculated that the international community would have recognized also the opposite outcome of the referendum given that the New York accords were welcomed by the Security Council and by the international community at large even if the concrete modalities of the referendum were at odds with the principle of self-determination. Finally, it seems relevant that the referendum occurred with the agreement of Indonesia which suggests that an important political role was recognized to Indonesia by the international community.

Chapter 5 – The cases of Kosovo and of the post-Soviet breakaway republics

This chapter looks at the international practice on Kosovo and on the post-Soviet breakaway republics, namely Transnistria, Nagorno-Karabakh, and South-Ossetia and Abkhazia. The extent to which all these situations amount to unlawful situations in the sense of Article 41(2) ARSIWA is somehow controversial.

On the one hand, a significant part of the international community, including two permanent members of the Security Council, has still not recognized Kosovo as an independent State. Kosovo however, in contrast to the cases considered in the previous chapter, is usually not considered as an unlawful situation. The reason underlying the policy of non-recognition of Kosovo as an independent State implemented by a number of States seems to be the unlawfulness of the unilateral secession of Kosovo from Serbia *per se* rather than the different question of the unlawfulness of the NATO intervention against the Federal Republic of Yugoslavia. However, at least in theory, this intervention can be seen as the first step of the process eventually leading to the unilateral secession of Kosovo. Indeed, some legal scholars wondered whether the unlawfulness of this intervention may render the unilateral declaration of independence legally invalid. However, these scholars, as well as States, have discarded such an argument on the basis of a variety of reasons.[1] Here it is contended that these reasons are not persuasive especially if a comparison is done with the post-Soviet breakaway republics.

While the breakaway republics and Kosovo are not readily comparable with one another, it is still possible to make a few observations on the understanding of the duty of non-recognition. More specifically, it is contended that, by force of circumstances, the very same reasons on the basis of which it is excluded that Kosovo can be considered as an unlawful situation should exclude that breakaway post-Soviet republics can be considered as such or in any case if these situations are

[1] See below at 339ff.

compared when it comes to the doctrine of non-recognition some contradictions emerge. From another perspective it is noteworthy that the international response towards the political entities emerged in the post-Soviet area does not fall within the typical pattern of non-recognition in the sense that it does not seem that the policy of non-recognition followed the commission of a serious breach of a peremptory norm and was motivated with such breach. Thus, even if the four breakaway republics are often considered as unlawful situations in the sense of Article 41(2) ARSIWA, elements of State practice suggest the contrary and, in any case, they suggest an understanding of the duty of non-recognition different from the prevailing one within the scholarship.

1. Kosovo as an unlawful territorial situation?

1.1. The break-up of the Socialist Federal Republic of Yugoslavia and the reaction of the European Community

The NATO bombing of the Federal Republic of Yugoslavia and the adoption by Kosovo of the unilateral declaration of independence from Serbia have caused a serious blow to the relevance of international law in the contemporary world order. Or, at least, these events have contributed to dismiss the belief that after the end of the Cold War multilateralism would have replaced unilateralism in particular as for to the settlement of disputes and to the maintenance of international peace and security.[2] Two aspects are relevant as for the law of recognition. First, the response of third States to the mentioned secession to a certain extent challenged the law governing State recognition. Indeed, some legal scholars, noting the diversity of reactions of third States, have talked of 'politics of recognition'.[3] This response suggests that third States enjoy a degree of discretion so broad that it is possible to talk of 'arbitrariness' rather than of 'discretion', but arbitrariness is at odds with the contention that there is a law governing State recognition. Second, the two above-mentioned events

[2] Rein Müllerson, 'Ideology, Geopolitics and International Law' (2016) 15 Chinese Journal of International Law 47.
[3] Jessica Almqvist, 'The Politics of Recognition, Kosovo and International Law' (2009) Real Instituto Elcano Working Paper 14/2009, 1.

are connected to one-another since the NATO bombing of the Federal Republic of Yugoslavia, which arguably amounts to a serious breach of a *ius cogens* norm, can be seen as the first step of the process that eventually ended with the secession of Kosovo. In turn this secession can be seen as a new factual situation deriving from the above-mentioned breach. It follows that the subsequent recognition of Kosovo by many third States may well amount to the validation of such a breach. Thus, arguably, the case of Kosovo amounts to an unlawful situation in the sense of Article 41(2) ARSIWA even if it should be noted from the outset that neither legal scholars nor States have resorted to such an argument.

Before dealing with these two aspects, it seems necessary to shortly illustrate the wider framework of the break-up of the Socialist Federal Republic of Yugoslavia (SFRY). In fact, the dissolution of this federal State caused the emergence of several new States thus posing a new set of problems in connection with recognition. In this regard, the guidelines over recognition adopted by the EC are relevant since the departure from international law, which has arguably occurred in the case of Kosovo, can already be perceived by reading these legal instruments.

It was observed above that in principle State recognition is discretionary.[4] This discretion finds a limit only in two specific circumstances, the first of which is the premature recognition of a seceding entity from an already established State, which is prohibited by the principle of non-intervention in the domestic affairs of States. The second one is the recognition of a territorial situation created by a serious violation of a peremptory norm of international law, which is prohibited by the duty of non-recognition.

We saw that the support for the latter case of non-recognition derives mostly from the wide consensus that has consolidated within the international community on the prohibition of forcible acquisition of territory and on the principle of self-determination in the colonial context[5], which are

[4] See above at 30–31.
[5] See John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo* (Brill Nijhoff 2013) 41–42.

both embedded in the UN Charter and are reiterated in many legal instruments.[6] The existence of this consensus is what allowed the UN political organs to adopt resolutions calling upon States not to recognize the relevant political entities emerged through a violation of these rules.

However, the break-up of the SFRY, as well as of the Soviet Union, has affected this field of international law and this consistency has partially vanished. Arguably the reason is that the break-up of a federal State and the subsequent recognition of the emerging political entities concern other norms of international law, as in the first place the principle of self-determination in a non-colonial context and, more specifically, the interplay between this principle and the norm protecting States' territorial integrity.[7]

The crisis of the SFRY had begun already in 1980 with Tito's death and one of the causes was the problematic relations between its constituent republics as well as between Serbia and the other republics (incidentally it is in this period that the autonomous status of Kosovo was revoked for a first time).[8] The situation escalated in the beginning of the nineties. Eventually, on 25 June 1991 Slovenia and Croatia declared their independence. This move triggered the Ten-Days-War between Slovenia and Yugoslavia and the Croatian Independence War, which lasted until 1995. In the meanwhile, on 27 August 1991, the EC decided to convene a Peace Conference on Yugoslavia which gathered representatives of the EC itself, of its member States, of the SFRY, and of the six constituent republics of Yugoslavia.[9] In this framework the EC adopted on 16 December 1991 two declarations,[10] the first of which was the 'Declaration on the Guidelines on the recognition of new States in eastern Europe

[6] Such as A/RES/375 (IV), Draft Declaration on Rights and Duties of States, 6 December 1949, Article 9, and A/RES/26 (XXV), Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970.
[7] Cedric Ryngaert and Sven Sobrie, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24 Leiden Journal of International Law 467, 467–468.
[8] See Stefan Oeter, 'Dissolution of Yugoslavia' in Wolfrum Rüdiger (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press online version) paras 10–19 and Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 American Journal of International Law 569, 569–586.
[9] James Summers, 'Kosovo: From Yugoslav Province to Disputed Independence' in James Summers (ed), *Kosovo – A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-determination and Minority Rights* (Nijhoff 2011) 10.
[10] The two declarations are available in (1992) 31 International Legal Materials 1485, 1485–1487.

and in the Soviet Union' whose purpose was to elaborate a common approach regarding the relations between the member States of the EC and the new emerging States.

The declaration recalled the principle of self-determination and affirmed the readiness of the EC and of its member States:

> to recognise, subject to the normal standards of international practice and the political realities in each case, those new states which … 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.

The declaration listed then a series of political criteria for recognition by the EC and its member States such as the respect of the UN Charter of the United Nations, the Final Act of Helsinki, and the Charter of Paris.[11] The declaration also makes a reference to the doctrine of non-recognition by making clear that the political entities that were the result of aggression would have not been recognized. Then the EC adopted a second declaration concerning specifically the break-up of the SFRY. This declaration established that the EC and its member States would have recognised the previous constituent republics provided that they respect a series of additional political criteria.[12]

From the outset it is worth mentioning that these guidelines do not attest *per se* a veritable practice since member States did not fully abide by them.[13] However, they are still of interest

[11] The criteria were the following ones:

- 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.

[12] The previous constituent republics would have been recognized provided that:

- they wish to be recognised as independent States;
- they accept the commitments contained in the above-mentioned guidelines;
- they accept the provisions laid down in the draft Convention - especially those in Chapter II on human rights and rights of national or ethnic groups - under consideration by the Conference on Yugoslavia;
- they continue to support the efforts of the Secretary General and the Security Council of the United Nations, and
- the continuation of the Conference on Yugoslavia.

[13] Inger Osterdahl, 'Relatively Failed. Troubled Statehood and International Law' (2003) 14 Finnish Yearbook of International Law 49, 51

insomuch as they foreshadow a specific development of the law governing State recognition. They confirmed, in fact, some aspects of the previous understanding of the recognition of States, but they presented some innovative aspects too and this fact explains the heated scholarly debate that was caused by the adoption of these guidelines. [14]

On the one hand, they confirmed that recognition is a matter of policy except for the case of recognition of an unlawful situation in the sense of the above. This is suggested in particular by the introduction and by the conclusion of the former declaration, which referred respectively to the 'normal standards of international practice' and to the 'political realities in each case' and to the withholding of recognition of the political entities created through the use of force.

At the same time, the list of political criteria marks a radical departure from the mentioned standards insomuch as the guidelines do not only ask the respect of some factual criteria, but also of some substantive criteria.[15] On a closer inspection, what is meaningful is that the factual criteria are even not explicitly mentioned. In this regard, Ryngaert and Sobrie observe that the traditional legal framework had never concerned itself with any of these substantive criteria. The reason is that 'this would have been considered an unlawful interference in this state's internal affairs'.[16] They add also that '[t]hese new criteria show international law gaining ground on political discretion in the process of state recognition, since the fairly concise body of rules on state recognition seems to be extended with an impressive list of new, far reaching criteria' however they also contend that 'state practice quickly proved to be not very strict in adhering to this framework.[17]

Rich affirmed that the guidelines made the process of recognition more difficult because they purported to retain the old standards while adding a series of new criteria.[18] However, the fact that the guidelines do not mention at all the traditional criteria and that the subsequent practice of Western

[14] Richard Caplan, *Europe and the Recognition of New States in Yugoslavia* (Cambridge University Press 2005) 63.
[15] ibid 24.
[16] Ryngaert and Sobrie (n 7) 475. Cfr Caplan (n 14) 61 who talked of an unwelcome development.
[17] ibid 475.
[18] Roland Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' (1993) 4 European Journal of International Law 36, 43.

States disregarded them suggest that the new criteria have tended to *supplant* rather than to retain the previous ones.[19]

In contrast, other have maintained that the problem lies in the conduct of States, rather than in the guidelines themselves. After all their aim was not to dictate new requirements for recognition, but merely to announce what criteria the EC and its member States would have used. In this regard Dugard, albeit talking specifically of the recognition of Kosovo, observed that the United States and some European States, which are considered as international players that are normally committed to the rule of law, simply affirmed that recognition is *sui generis* and acted accordingly.[20] Something similar occurred during the Balkan wars: the problem does not lie in the guidelines themselves, but in the fact that there has been a weak and inconsistent implementation of the guidelines by the member States of the EC. Incidentally, some have maintained that the EC legal instruments were already decidedly affected by interests of its member States and, more in general, recognition was understood mainly as an instrument of conflict management.[21]

Additionally, the EC established, as a part of the peace conference, an arbitration commission formed by the Presidents of the Constitutional Courts of French, Germany, Italy, Spain, and Belgium and named after its president Robert Badinter, president of the French Court. Its primary task was to assess whether the States adopting declarations of independence were meeting the criteria mentioned above.[22] The relevance of the Badinter Commission's opinions is residual with regards to State recognition since ultimately the Commission merely verified whether the above-mentioned criteria

[19] Danilo Turk, 'Recognition of States: A Comment' (1993) 4 European Journal of International Law 66, 68.
[20] Dugard (n 5) 43.
[21] Caplan (n 14) 25ff; Rich (n 18) 55.
[22] The underlying aim was that such commission could enhance the rule of law in connection with the process of recognition. See Maurizio Ragazzi, 'Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia' (1992) 31 International Legal Materials 1488. This aim was only partially realized. On the one hand, opinions were not intended to be binding and not all of them have been respected by States. On the other hand, at the time of the creation of the commission, the recognition of Slovenia and Croatia could hardly be avoided because of the prior stance of the EC itself so much so that even if the Commission gave an unfavourable judgement about the recognition of Croatia, Croatia was recognized. See Caplan (n 14) 49. Conversely, even if the Commission gave a favourable judgement of the recognition of Macedonia, member States decided to withhold recognition of Macedonia for the time being. See ibid. For a more critical perspective see Michla Pomerance, 'The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence' (1998) 20 Michigan Journal of International Law 29.

were fulfilled. It has also adopted a series of opinions on more theoretical questions, such as the qualification of the break-up of the SFRY as of the dissolution of a States or as of a series of secessions of political entities from a State, the principle of self-determination in a non-colonial context, and the criteria of statehood.[23] However, the way in which Commission framed these questions, for instance the fact that rather than to answer to the Serbian question on the self-determination it preferred to clarify that what was happening in the SFRY was the dissolution of a federal State, was instrumental to provide European States with a legal justification to their political choices.[24]

There is another aspect of the Balkans wars that is somewhat relevant with regard to to the prohibition of forcible acquisition of territory. Most Security Council resolutions adopted on Bosnia starting from 1991 explicitly reaffirmed this principle together with the principle that no territorial acquisition subsequent to ethnic cleansing can be recognized. These resolutions, conversely, clarify that only a political solution freely negotiated by the parties would have been accepted by the Council.[25] However, starting from 1993, as noted by Corten and Delcourt, the very same organ implemented a veritable turnabout.[26] In fact, the Security Council encouraged, assisted, and welcomed a settlement that ultimately reflected the result of the use of force as well as of campaigns of ethnic cleansing. For instance, the preamble to Resolution 836 reaffirmed that 'any taking of territory by force or any practice of "ethnic cleansing" is unlawful and totally unacceptable' ant that 'the lasting solution to the conflict … must be based on the following principles: … withdrawal from

[23] The opinions 1-3 are available at Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1993) 3 European Journal of International Law 178, 182ff; the opinions 4–10 are available at Danilo Turk, 'Recognition of States: A Comment' (1993) 4 European Journal of International Law 66, 74ff; finally, the opinions 11-15 are available at (1993) 32 International Legal Materials 1586ff. The work of the Badinter Commission has been thoroughly analysed in Matthew C R Craven, 'The European Community Arbitration Commission on Yugoslavia' (1996) 66 British Yearbook of International Law 333, Steve Terrett, *The dissolution of Yugoslavia and the Badinter Arbitration Commission: A Contextual Study of Peace-making Efforts in the Post-Cold War World* (Ashgate 2000), Radan P, *Break-up of Yugoslavia and International Law* (Routledge 2001) 204–243.

[24] Barbara Delcourt and Olivier Corten, *(Ex-)Yougoslavie: Droit international, politique et idéologies* (Bruylant 1997) 152ff.

[25] One may take as an example Resolution 820 that, in addition to the two principles mentioned, reaffirmed 'its endorsement of the principles that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void and that all displaced persons have the right to return in peace to their former homes'. See S/RES/820, 17 April 1993, preamble, para 7. See also S/RES/787, 16 November 1992 , paras 1–3 and S/RES/713, 25 September 1991, preamble, paras 4, 7.

[26] ibid 27–29.

territories seized by the use of force and "ethnic cleansing"; reversal of the consequences of "ethnic cleansing"'.[27] At the same time, the resolution commended the Vance-Owen plan and called upon Bosnia to accept it. This, however, was the first plan of a series that attempted to follow the fortunes of war.[28] Indeed, Bose observes that the failure of this plan was due to the creation of new facts on the grounds through ethnic cleansing and that '[a]ny future settlement would have to accommodate the transformation of Bosnia's political geography and those cruel facts on the ground.[29] Eventually, the Dayton agreement accommodated such transformation. Significantly, Holbrooke in this regard stressed that:

> The basic truth is perhaps not something we can say publicly right now. In fact the map negotiation, which always seemed to me our most daunting challenge, is taking place right now on the battlefield and so far in a manner beneficial . . . In a few weeks the famous 70–30 division of the country [favoring the Bosnian Serbs] has gone to around 50–50 [between Bosnian Serb control on the one hand and Bosnian Muslim and Bosnian Croat territories taken together on the other], obviously making our task easier.[30]

1.2. The factual and legal background to the NATO bombing of Serbia and to the adoption of the UDI by the Kosovar authorities

Six States have emerged from the SFRY, namely Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, Montenegro, and Serbia. The *uti possidetis* principle was respected in the sense that the new borders dividing the new States were the same borders which previously were dividing the different federal republics. In this regard, the case of Kosovo is radically different since Kosovo was not a constituent republic of Yugoslavia, but only an autonomous republic within Serbia. To a certain extent, the degree of autonomy between Kosovo and the SFRY was one of the reasons triggering the war in Kosovo.[31]

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[27] S/RES/836, 4 June 1993, preamble.

[28] This plan was followed by the Vance-Stoltenberg plan, the plan envisaged by the Contac Group, and the Dayton agreement.

[29] Sumantra Bose, *Contested Lands: Israel-Palestine, Kashmir, Bosnia, Cyprus, and Sri-Lanka* (Harvard University Press 2007) 129.

[30] Quoted by Bose ibid 131. See also Steven L Burg and Paul S Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (M E Sharpe, Inc. 1999). Burg and Shoup at 375 noted that: 'The borders of the eight federation cantons delineated in the Vienna map of May 1994, reproduced in chapter 6 … now had to be revised in light of the territorial changes that had taken place in summer and fall 1995'.

[31] Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (Oxford University Press 2009) 28ff. For an historical account see also Summers (n 9).

Ethnic tensions had already begun in the 80s and gradually worsened so much that on 2 July 1990 the Kosovo Assembly declared for the first time Kosovo an independent State. Starting from the second half of the 90s the situation escalated from a military point of view and eventually an armed conflict begun in 1998. There were a series of negotiations aimed to settle peacefully the conflict, namely the Hill negotiations, the Holbrooke agreement, and the Rambouillet conference.[32] However, these negotiations failed. It is worth mentioning that at that time there was the credible fear that the scale of the armed conflict would have reached the one experienced in Croatia and Bosnia, which contributes to explain the proactive approach of NATO.[33] These events led eventually to the NATO intervention against Serbia, which consisted in a series of airstrikes that lasted from 23th March to 9th June. The legality of this military intervention is very controversial and deserves further scrutiny.

Above, it was noted that NATO States acted outside the framework of the law governing the lawful use of force. More specifically, NATO States acted without any authorization by the Security Council and then, as actually now, a customary exception allowing the use of force to prevent alleged violations of human rights had not emerged.[34]

A military technical agreement, the so-called Kumanovo agreement, was signed on 9 June 1999 and concluded the Kosovo war while the following day the Security Council adopted Resolution 1244. This resolution, which reaffirmed the territorial integrity of Serbia, called for substantial autonomy and self-government in Kosovo, and welcomed a series of political principles including that the Kosovo question should be solved through a political process. Moreover, it authorised an international civil and military presence in Yugoslavia and established the United Nations Interim

[32] Marc Weller, 'The Rambouillet Conference on Kosovo' (1999) 75 International Affairs 211.
[33] James Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans* (I B Tauris 2009) 11.
[34] See for instance Alexander Orakhelashvili, 'Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions' in Marc Weller (ed), *The Oxford Handbook on The Use of Force in International Law* (Oxford University Press 2005). See also see Olivier Corten, *The Law Against War: The Prohibition of the Use of Force in Contemporary International Law* (Hart Publishing 2012) 548–549 and Christine D Gray, *International Law and the Use of Force* (3rd ed, Oxford University Press 2008) 51. See, specifically on the case of Kosovo, Dino Kritsiotis, 'The Kosovo Crisis and Nato's Application of Armed Force Against the Federal Republic of Yugoslavia' (2000) 49 International and Comparative Law Quarterly 330.

Administration Mission in Kosovo (UNMIK).[35] There are lots of discussions about what is the precise meaning of this resolution and, more specifically, how it is related with the NATO intervention. Some have contended that the resolution legalized the intervention or at least that it legalized the territorial situation, others have maintained that the resolution merely took note of what happened and endorsed the relevant consequences.[36]

Almost ten years of international administration followed during which, as put it by Warbrick, 'no part of the political process went smoothly'.[37] On the one hand, the parties did not move any closer to an agreement since Serbia insisted that any definitive solution should have envisaged Serbian territorial integrity, while Kosovo insisted that the only acceptable solution was independence.[38] On the other hand, the Serbian representatives expressed their complaints on the manner in which the international administration had been undertaken since it was contended that provisional Kosovar authorities were behaving almost like a State, thus arguably violating the territorial integrity of Serbia,[39] which can be read as yet an attempt to make effective and permanent the separation of Kosovo.

Eventually, on 17 February 2008 the Kosovar authorities adopted a unilateral declaration of independence. From the beginning some States recognized Kosovo,[40] while others have not recognized it yet. Serbia reacted diplomatically and politically and even succeeded in taking the case before the ICJ. More specifically, the General Assembly, on the input of Serbia, asked to the ICJ to

[35] S/RES/1244, 10 June 1999.
[36] These positions are reviewed in Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Nijhoff 2006) 249–250. See also Alain Pellet, 'Brief Remarks on the Unilateral Use of Force' (2000) 11 European Journal of International Law 385, 389.
[37] Colin Warbrick, 'Kosovo: The Declaration of Independence' (2008) 57 International and Comparative Law Quarterly 675, 678.
[38] ibid 678–679.
[39] Morag Goodwin, 'From Province to Protectorate to State? Speculation on the Impact of Kosovo's Genesis upon the Doctrines of International Law' (2007) 8 German Law Journal 1, 7–8.
[40] For instance, Costa Rica, the United States, France, Afghanistan, Albania, Turkey, and the United Kingdom recognized Kosovo immediately. For the dates of these acts of recognition, see <www.kosovothanksyou.com>. According to the Ministry of Foreign Affairs of Kosovo, currently 117 States recognize Kosovo. A dozen of States, after a diplomatic initiative of Serbia, derecognized Kosovo. See Mehdi Sejdiu, 'Tit for Tat? Kosovo Stops Seeking Membership in International Organizations vs. Serbia Stops the Derecognition Campaign' (Group for Legal and Political Studies, 6 October 2020) <www.legalpoliticalstudies.org/tit-for-tat-kosovo-stops-seeking-membership-in-international-organizations-vs-serbia-stops-the-derecognition-campaign>.

render an advisory opinion on whether 'the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [was] in accordance with international law'.[41] The Court did not accept the arguments raised by Serbia and, accordingly, concluded that the declaration of independence did not violate international law. The gist of the opinion is that there is no a specific rule of international law that explicitly prohibits the adoption of a declarations of independence.

The approach adopted by the Court was rather controversial and while some have praised this narrow approach,[42] other have contended that the Court failed in its task of clarifying the legal questions referred to it by General Assembly.[43] In fact, the Court did not consider necessary to depart from the language of the question[44] and indeed it answered to the question even if underlying the question posed by the Assembly there were some of the most controversial norms of international law, including the scope of the right to self-determination and the doctrine of the remedial secession, which the Court chose not to address.[45]

In any case, the opinion of the Court did not end the dispute, neither it triggered a wave of new recognitions. It is worthwhile to note that, when criticising the approach adopted by the Court, Milano observes that the Court gave its approval to the narrative that independence was an *irreversible fact* and it implicitly agreed that in such cases international law is ultimately not relevant.[46] Similarly, Kohen and Del Mar contend that the opinion of the Court was grounded, rather than on legal analysis, on the *realities on the ground* and that the Court ultimately downplayed the

[41] A/RES/63/3, 8 October 2008.
[42] Marc Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion' (2011) 24 Leiden Journal of International Law 127. See also Peter Hilpold, 'The ICJ Advisory Opinion on Kosovo: Different Perspectives of a Delicate Question' (2013) 14 Austrian Review of International and European Law 259.
[43] Cedric Ryngaert, 'The ICJ's Advisory Opinion on Kosovo's Declaration of Independence: A Missed Opportunity?' (2010) 57 Netherlands International Law Review 481 and Thomas Burri, 'The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links' (2010) 11 German Law Journal 881.
[44] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403, paras 50–51. However, the Court, instead of rendering an opinion on whether the UDI was in accordance with international law, ultimately answered to the question whether it was violating international law.
[45] On this paradox, see Marco Pertile, 'Self-Determination Reduced to Silence: Some Critical Remarks on the ICJ's Advisory Opinion on Kosovo' in Louis Balmond and Maurizio Arcari (eds), *Questions de droit international autour de l'avis consultatif de la Cour internationale de justice sur le Kosovo* (Giuffrè 2011).
[46] Enrico Milano, 'Introduzione: Fuga dal Diritto Internazionale (e Ritorno)' in Lorenzo Gradoni and Enrico Milano (eds), *Il parere della Corte internazionale di giustizia sulla dichiarazione di indipendenza del Kosovo: Un'analisi critica* (CEDAM 2011) 2, 4.

role of international law in international relations.[47] It is also noteworthy that Judge Tomka concluded his declaration of dissent by observing that: 'The majority deemed preferable to take into account these political developments and realities, rather than the strict requirement of respect for such rules'.[48]

The Court analysed first of all the compatibility of the declaration of independence with general international law. In this regard, it noted that there have been many declarations of independence over time. While these declarations were opposed by parent States, State practice does not suggest that they were incompatible with international law.[49] The Court equally counterargued the claim raised by a few States in their written proceedings according to which the principle of territorial integrity does imply a prohibition of adopting unilateral declarations of independence.[50] The Court contended that the personal scope of this principle is limited to States in the sense that the principle of territorial integrity is not relevant in the relations between a State and a non-State actor or between non-State actors.[51] Most importantly for the purposes of this work, the Court argued also that the declaration of independence of Kosovo is radically different from those condemned by the Security Council, which urged States not to recognize the respective seceding entities as States.[52] More specifically, the Court recalled the cases of Resolutions 216 and 217 concerning Rhodesia, Resolution 541 concerning northern Cyprus, and Resolution 787 concerning the Republika Srpska.[53] However, the Court observed that 'the illegality attached to the declarations of independence … stemmed not from the *unilateral character* of these declarations as such, but from the fact that they

[47] Marcelo G Kohen and Katherine Del Mar, 'The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of "Independence from International Law"?' (2011) 24 Leiden Journal of International Law 109, 125.
[48] Declaration of Judge Tomka in *Kosovo* advisory opinion para 35.
[49] *Kosovo* advisory opinion (n 44) para 79.
[50] ibid para 80.
[51] Cf Kohen and Del Mar (n 49) 123.
[52] ibid para 81.
[53] The latter resolution, similarly to the other resolutions adopted with reference to Bosnia and in contrast with the other resolutions mentioned by the Court, did not contain an express duty of non-recognition. This resolution, in fact, simply reaffirmed that 'any taking of territory by force or any practice of "ethnic cleansing" is unlawful and unacceptable, and will not be permitted to affect the outcome of the negotiations on constitutional arrangements for the Republic of Bosnia and Herzegovina' and reaffirmed 'its call … to respect the territorial integrity of the Republic of Bosnia and Herzegovina' and affirmed that 'any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted'. S/RES/787 (1992), 16 November 1992, paras 2–3.

were, or would have been, connected with the *unlawful use of force or other egregious violations of norms of general international law*, in particular those of a peremptory character'. In contrast, 'in the context of Kosovo, the Security Council has never taken this position'.[54] The Court did not consider that the unlawfulness of the NATO intervention matters at all. It is noteworthy that the Court dealt with the duty of non-recognition and, apparently, its contention is that a specific resolution by the Security Council is needed so to trigger the additional consequences arising from such violations of international law.

Then the Court assessed the lawfulness of the unilateral action by Kosovar authorities against the background of Resolution 1244. The argument goes that the aforementioned resolution by '[r]eaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2' (which indeed mentions the territorial integrity) and by '[d]eciding that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2' prevents at the outset the independence of Kosovo as a lawful outcome. The Court nevertheless argued that the wording of the resolution is ambiguous and that 'the object and the purpose of the resolution … is the establishment of an interim administration for Kosovo, without making any definitive determination on final status issues'.[55] In any case, the Court noted that the declaration of independence has not been adopted by Provisional Institutions of Self-Government, which were 'bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government' but by the Assembly of Kosovo.[56] Accordingly, it follows that the declaration of independence is compatible with both general international law and with Resolution 1244.

[54] *Kosovo* advisory opinion (n 44) para 81 (emphasis added).
[55] ibid para 118.
[56] ibid para 121.

It is worth mentioning that the precise legal qualification of both the NATO intervention and of the adoption of this declaration are important because, had they been unlawful, they would have posed a serious problem in connection with the recognition of Kosovo by third States. The next sub-section analyses the content and the meaning of the acts by means of which States have declared to recognize or not to recognize Kosovo.

1.3. Legal analysis of the acts of recognition and of non-recognition of Kosovo

Today Kosovo is still only partially recognized. Even though the number of States that recognized it has steadily increased over time, a bit less than 100 States, including two permanent members of the Security Council, have not yet recognized Kosovo.[57] Both Kosovo and Serbia have devoted a considerable diplomatic effort to persuade third States to act in a certain way. However, it is not clear to what extent third States took into account international law when expressing their stance on this matter.

It was noted above that recognition in principle is a matter of policy and that it is barred by international law only in certain circumstances. More importantly, it was also noted that generally States do not clearly make explicit why they do not a given political entity as a State. The case of Kosovo confirms these observations.

Looking at the relevant State practice it is worthwhile to note that most recognising States in their declarations did not refer to international law at all.[58] This is actually hardly surprising given that, since recognition is discretionary, States do not need to justify their position from a legal standpoint.[59] It is perhaps interesting that none of the States that recognized Kosovo advanced a justification apt to counterargue the fact that Kosovo at the moment of the first acts of recognition arguably was not fulfilling the traditional criteria for statehood. In other words, no State has claimed

[57] Margarita Assenova, 'Serbia and Kosovo Restart Dialogue After 18-Month Pause' (Eurasia Daily Monitor Volume: 17 Issue: 104, 16 July 2020) <https://jamestown.org/program/serbia-and-kosovo-restart-dialogue-after-18-month-pause>.
[58] Almqvist (n 3) 10–11.
[59] The French representative held that 'Kosovo declared its independence yesterday. Pursuant to international law, it is up to each State to decide whether or not to recognize the new State'. S/PV.5839, 18 February 2008, 19.

that Kosovo was meeting the criteria for statehood even if some contended that they have been fulfilled only afterwards thanks also to the degree of international support received and to the wide recognition by third States.[60] Equally interesting many States referred to the *sui generis* argument.[61] Such an argument too in itself does not contradict that recognition is discretionary. However, *a contrario* this could imply that recognition generally is not discretionary. It is equally noteworthy that many States have referred to the contention that a new reality has emerged and that there was no other choice than to recognize it. One may consider the following statement adopted by the Italian representative before the Security Council:

> We deeply regret the failure to secure a mutually agreed outcome, and we also deeply regret that the Security Council cannot agree on a way forward. We have long argued, and we continue to believe, that if the *status quo* remains unsustainable, with no room for a negotiated solution, the United Nations Special Envoy's proposal for Kosovo's internationally supervised independence is the only viable option to deliver stability and security in Kosovo and in the region as a whole. Kosovo's independence is today a fact. It is a new reality that we must face and acknowledge.[62]

In this regard, it is noteworthy that while Italy as well as other States connects the irreversibility with the facts on the ground, the representative of the United States connects the irreversibility also with the recognition by a substantial number of members of the European Union, the United States and other States on the very first day of independence of Kosovo. The United States' statement is noteworthy also in as much as it sets aside any legal considerations. Even when the United States' representative addressed legal concerns, the only answer is the uniqueness of the case at hand which in turn is motivated with the fact that is the outcome of a long process.[63] Thus, all events starting from the NATO intervention till the recognition of Kosovo as a State are read as a solution to the suffers

[60] Olivier Corten, 'La reconnaissance prématurée du Kosovo : Une violation du droit international' *Le Soir* (20 February 2008) and Marcelo Kohen, 'Pour le Kosovo: Une solution "made in Hong Kong"' (2008) 15 Revista Electronica de Estudios Internacionales 1. See also the written statement submitted by Cyprus in the context of the proceedings in relation to the *Kosovo* advisory opinion, 3 April 2009, paras 166–183.
[61] S/PV.5839, 18 February 2008, 14 (United Kingdom) and 19 (United States). See also the written statements of Finland, 17 April 2009, 17 and Switzerland, 17 April 2009 para 8.
[62] S/PV.5839, 18 February 2008, 10.
[63] ibid 18.

of Kosovars population. As the representative of the United Kingdom put it '[t]he events of 1999 shape the events we see now'.[64]

In contrast, States which did not recognize Kosovo have usually referred to international law, even if sometime only summarily. For instance, States have generally reaffirmed the territorial integrity and sovereignty of Serbia often adding that Security Council Resolution 1244 and the UN Charter protect both of them.[65] On the one hand, the former would exclude any unilateral outcome and, conversely, mandates that the question of Kosovo shall be solved by means of negotiation. On the other hand, the latter would imply the principle of the inviolability of Serbia's borders and the duty to respect the sovereignty of Serbia. Some States refer to the possibility of remedial secession too. These States admit in principle this doctrine but argue that the relevant requirements are not met.[66] Similarly, the principles of the Helsinki Final Act, which include the sovereign equality, the respect for the rights inherent in sovereignty, the inviolability of frontiers, the territorial integrity of States, the peaceful settlement of disputes, and the non-intervention in internal affairs, are reaffirmed.

It could be claimed that many of these states have not recognized Kosovo because of inner secessionist movements—eg, Spain with reference to Catalunya, Cyprus with reference to northern Cyprus, Romania with reference to Transylvania, or Azerbaijan with reference to Nagorno-Karabakh. This is surely true, but, on the other hand, it could be argued that also the States that recognized Kosovo resorted to political considerations.

On the basis of this variety of views on the acts of recognition and non-recognition, Almqvist observes that 'in the case of Kosovo at least, and until now, it may well be asserted that international law has failed, in a rather blunt way, to offer something like a common framework with the capacity of constraining the range of reactions of third States'.[67] According to Almqvist the problem is twofold in the sense it is both institutional and epistemic. With incomplete institutionalization Almqvist refers

[64] S/PV.5839, 18 February 2008, 1
[65] See the written statements of Russia, 17 April 2009, 20ff and 27ff, of China, 17 April 2009 2–3,
[66] See the written statement of Romania, 14 April 2009, para 132.
[67] Almqvist (n 3) 2.

to the decentralised structure of international law and, more specifically, to the lack of a body that can assess authoritatively the statehood and subsequently recognition. As for the epistemic problem, this is related to the possibility that there are no international law norms relevant to the situation and that, if there are such norms, they do not allow to draw any definite conclusion.

It is interesting that these are the same problems that concerns the duty of on-recognition, that is, who decides and on which legal basis. The case of Kosovo could well be an example of deliberate non application of the duty of non-recognition of unlawful situation on the assumption that firstly the intervention by a group of NATO States amounted to a serious breach of a peremptory norm, and secondly that this intervention is connected with the adoption of the declaration of independence. The following sub-section further analyses this possibility.

1.4. The debate on the recognition of Kosovo

Admittedly, the argument that Kosovo is an unlawful situation in the sense of Article 41(2) ARSIWA and thus cannot be recognized as a State was not raised by States, not even by the participants to the proceedings before the ICJ, including most prominently Serbia. Accordingly, it could be inferred that even Serbia and the other States that have opposed the declaration of independence do not believe that the NATO intervention is connected with its adoption or that the mentioned intervention amounts to a serious breach of a peremptory norm. However, it should be noted that, at least for Serbia and for the other third States contesting the lawfulness of the declaration of independence and of its recognition there may be a couple of reasons. Milanovic, who has been also advisor to the Serbian legal team before the ICJ for the case at hand, notes that not to refer to the NATO intervention has been a precise choice so to avoid an excessively heated debate. Moreover, Milanovic notes that such an argument could have been problematic since Resolution 1244 came after the initial use of force and authorized the presence of international forces. In any case, he concludes this reasoning by noting

that ‘it was highly unlikely that the Court would want to rule on it in the context of the advisory proceedings’.[68]

In addition, in States’ submissions it is possible to identify two different narratives underlying their arguments. On the one hand, the States supporting the independence of Kosovo treated the adoption of the declaration of independence as the finale stage of the process of dissolution of Yugoslavia, or at least as the final stage of the Kosovo crisis.[69] This narrative is fully compatible with the idea of the remedial secession in the sense that these States have argued that there is a link between the egregious violations of minority rights by Serbia and the secession of Kosovo. This, in turn, explains why the independence of Kosovo is the only realistic option since it would be unreasonable to demand Kosovars to continue living under the sovereignty of their ‘oppressors’.

On the other hand, Serbia and the States that were opposing the independence of Kosovo did precisely the contrary. These States attempted to draw a line between the previous conduct of Serbia, which triggered the NATO intervention, and the subsequent conduct of Serbia. The argument goes that Kosovars have no right to remedial secession because the government of Serbia changed and there is no longer any risk of ethnic cleansing.[70] Such an argument seems at odds with the argument that the NATO intervention is linked to the adoption of the declaration of independence.

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[68] Marko Milanovic, ‘Arguing the Kosovo case’ in Marko Milanovic and Michael C Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015) 34.

[69] Poland argued that: ‘lt shall be underlined …that the exercise of the right to self-determination of Kosovo' s people in Serbia was no longer possible and unattainable. That conclusion is validated by the scale of violations of human rights and humanitarian law by Serbia. In such a situation Kosovo could legitimately exercise its remedial right of secession from Serbia in order to protect and preserve most fundamental rights and interests of its people. Therefore, the territorial integrity of Serbia - in the consequence of its own wrongful acts against Kosovo - eroded and was undermined already in 1999. That led to the situation where Serbia lost its effective authority and control over Kosovo and has not regained it within the next years. In the consequence of the Serbian violations of human right and humanitarian law, it may also be argued, that that State could no longer have recourse to the principle of territorial integrity as protecting Serbia from the exercise by the Kosovars of their remedial right to secession’. United Kingdom noted that: ‘The seeds of the events that were to lead to Kosovo’s Declaration of Independence were sown in the period 1989–1999. Three related elements of the developments in this period warrant comment: constitutional changes, the disintegration of the SFRY and the widespread human rights violations committed against the ethnic majority population of Kosovo’. See the written statements submitted by Poland paras 6.11–6.12 and by United Kingdom para 2.1. The United Kingdom, however, does not argue that Kosovars had a right to remedial secession, rather past human rights violations by Serbia merely explain and political justify the adoption of the UDI.

[70] Slovakia held: ‘The Slovak Republic by no means disputes serious violations of international law in the past by the Federal Republic of Yugoslavia in its treatment of the Kosovars. However, officials individually responsible have been indicted and prosecuted for criminal violations of international law in Kosovo at the International Criminal Tribunal for Former Yugoslavia. To trace a right to change the status of Kosovo back to the events of 1999 does not comport with the

Moreover, third States intervening had simply no interest in digging up the question of the relevance of a military intervention. On the contrary their only interest in the dispute was to avoid that the judgement of the Court could have endangered their territorial sovereignty, which is put at risk not by a foreign unlawful armed intervention, but rather by secessionist movements that could hypothetically adopt a unilateral declaration of independence.

The ICJ, as seen above, considered this argument, but discarded it by claiming that in the cases in which the Security Council called upon States not to recognize a given political entity it was not because of the unlawfulness of the UDI *per se*, but because it was connected with an egregious violation of a *ius cogens* norm.

This argument has been supported in the legal scholarship too. Hilpold, for instance, observed that it is not possible to ignore the relationship between the NATO intervention and the subsequent events. In this regard, he added that '[t]ime and again this connection reappears and in particular in these days when autonomy is to be superseded by independence the events of 1999 return to life in a rather compromising light'.[71]

Even if this question has emerged, it seems that such an argument is generally dismissed. For example, Cvijic after having argued that 'it is impossible to decide on the legality of the possible self-determination of Kosovo without firmly linking this question to the debate on the nature and legality of the 1999 humanitarian intervention',[72] refrains from arguing that the unlawfulness of NATO intervention bars the recognition of Kosovo. Instead, he makes a moral political argument based on the connection between the humanitarian intervention of 1999 and the imposition of independence of

law. There is no authority for a rule of law which allows the "punishment" of States, especially by something as a loss of territory, for breaches of the law'. Cyprus maintained that 'even if there were a "right of secession of last resort" this would not have an application to Kosovo. First, the rationale behind any recognition of a right of last resort is to enable â people to protect themselves from destruction by human rights abuses. But the human rights violations by the government of Serbia ended in 1999. Since the Milosevic era there have been extensive changes in the government of Serbia. Some of those persons responsible for the abuses committed in Kosovo have been prosecuted by the International Criminal Tribunal for the former Yugoslavia. Allegations of ill-treatment several years ago cannot be a justification for allowing the dismemberment of a State now'. See the written statements submitted by Slovakia, para 28 and by Cyprus para 146.

[71] Peter Hilpold, 'The Kosovo Opinion of 22 July 2010: Historical, Political, and Legal Pre-Requisite' in Peter Hilpold (ed), *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010* (Nijhoff 2012) 11.

[72] Srdjan Cvijic, 'Self-Determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo' (2007) 8 German Law Journal 57, 60.

Kosovo on Serbia. The argument goes that the whole concept of humanitarian intervention is imperilled by this clearly politically motivated intervention.[73]

Orakhelashvili concedes that 'it is difficult to see how the current factual state of things would be brought about had the NATO states not attacked the FRY in 1999'. However, on the one hand, he observes that the NATO States at the time of their intervention did not claim that Kosovo should be allowed to secede from Serbia. On the other hand, after the intervention, with the adoption of Resolution 1244 and until the Ahtisaari Plan these States claimed to support the territorial integrity of Serbia. But, in any case, such an argument is not relevant '[g]iven that Serbia persistently objects to the independence of Kosovo, the legality of recognition is precluded in any case'.[74] In other words, given that recognition of Kosovo is already barred by the territorial integrity of Serbia *per se* it is not particularly relevant to verify if there are other grounds for non-recognition.

Ryngaert and Sobrie argue that recognition of Kosovo is lawful

> except … if one believes that the presumably illegal use of force by NATO against Serbia in 1999, which led to the creation of a UN transitional administration and ultimately to the independence of Kosovo, has a bearing on the argument: such use of force might violate a norm of *jus cogens* and, *arguendo*, prohibit states from recognizing the ensuing situation, namely Kosovo's statehood.

However, they reject this argument by saying that 'in practical terms, however, the law has taken a back seat in the process of recognizing Kosovo',[75] which witnesses that in many cases law is accommodated into reality.

Christakis observes that 'it should be remembered that what happened in Kosovo after 1999 (and thus after 2008 also) was very much the result of a massive military intervention of NATO states against Serbia'. However, in the end he discards an argument based on the duty of non-recognition

[73] ibid 79.
[74] Alexander Orakhelashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008) 12 Max Planck Yearbook of United Nations Law 1, 31.
[75] Ryngaert and Sobrie (n 7) 479.

on the basis of the lack of a direct causal link between the 1999 intervention and the 2008 adoption of the UDI.[76]

In an uncompleted contribution, which was eventually finalized by Warbrick, Kaikobad notes that '[i]ndirectly, the situation in Kosovo resulted from the use of unauthorised armed force against the Federal Republic of Yugoslavia, March-June 1999'.[77] Thus, to recognize Kosovo as a State might conflict with the duty of non-recognition. Interestingly enough, Warbrick in this regard notes that: 'I am surprised that he puts the matter so mildly, given the strength of his view that unlawful resort to force may not result in changes of status or title to territory'.[78]

Anne Peters tackled the substance of this argument and listed a series of counterarguments. More specifically she observes that:

> The Kosovar secession process was far from perfect, but it arguably respected more or less both the prohibition of the use of force and the prescriptions of self-determination. First, the possibly unlawful use of force by NATO in its Kosovo intervention of 1999 was in terms of time and actors too remote from the declaration of independence of 2008 to count as an integral part of the independence process that could legally taint that process. Most importantly, the consent of Yugoslavia (Serbia) to Resolution 1224 and the ensuing legal framework erected a legal firewall between the prior possible violations of the prohibition on the use of force and the current secession. Second, the declaration of independence was preceded by multiple independence referendums that had periodically been organized since 1991. Most importantly, the declaration was issued by the democratically elected representatives of the people of Kosovo, and manifested that people's will for statehood. The last elections of 17 November 2007 were certified as having been fair and "in compliance with international and European standards" by the UN Secretary-General. The secession process therefore satisfied the minimum procedural conditions of non-use of force and democratic self-determination, when a lenient standard is applied.[79]

The use of expressions such as 'far from perfect' and 'lenient standard', with reference to the Kosovar secession process, and such as 'more or less', with reference to the respect of the prohibition

[76] Theodore Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?' (2011) 24 Leiden Journal of International Law 73, 83. The presence or lack of a causal link is investigated below.
[77] Kaiyan H Kaikobad, 'Another Frozen Conflict: Kosovo's Unilateral Declaration of Independence and International Law' in Summers (n 9) 40.
[78] ibid n 40.
[79] Anne Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom?' (2011) 24 Leiden Journal of International Law 95, 107.

of the use of force, is evidence of a rather flexible approach to the respect for international law, which to a certain extent is confirmed by the other arguments raised by Peters.

First, as for the prohibition of the use of force, in addition to what said above, it is worthwhile to note that a humanitarian exception to this general rule has not consolidated over time. In other words, not only the NATO intervention was clearly illegal when it eventually happened, but it would be illegal now, given that no customary norm has consolidated in the meanwhile and each instance of alleged humanitarian intervention was harshly criticized.[80] Thus 'possibly unlawful' seems an understatement. However, also the other elements mentioned by Peters that should lead to the rejection of a duty of non-recognition in the case at hand are at least debatable.

As for the remoteness in terms of time, it is clear that in most cases the breach of international law immediately precedes the emergence of the unlawful situation since the former creates the latter. A case at hand is the case of East Timor: the invasion and the annexation of East Timor are the acts that create the unlawful situation. However, it is also possible that there is a gap of time between the conduct and the situation. For instance, while Turkey invaded northern Cyprus in 1974, a veritable declaration of independence was adopted only in 1983 and Security Council Resolution 541 adopted right after the adoption of this declaration refrained from identifying the Turkish invasion as the legal basis for the illegality of the declaration of independence and for the policy of non-recognition, but it linked both illegality and non-recognition to the incompatibility of the declaration itself with previous treaties.[81] However, within the scholarship it is generally believed that what made non-recognition a duty is in the place the unlawful use of force by Turkey.[82] In any case, on the assumption that the

[80] Orakhelashvili (n 74) 173–175.
[81] S/RES/541 (1983), 18 November 1983. See also above ch 4, ss 3.4–3.5.
[82] Théodore Christakis, 'Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea' (2015) 75 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 75, Matthew CR Craven and Rose Parfitt, 'Statehood, Self-Determination and Recognition' in Evans Malcolm (ed), *International Law* (5th edn, Oxford University Press 2018), Thomas D Grant and Rowan Nicholson, 'Theories of State Recognition' in Gëzim Visoka, John Doyle and Edward Newman (eds), *Routledge Handbook of State Recognition* (Routledge 2020). This was apparently the opinion of the ICJ, see also supra n 169. Cf Stefan Talmon, 'The Cyprus Question before the European Court of Justice' (2001) 12 European Journal of International Law 727.

passage of time between the unlawful act and the creation of the unlawful situation is relevant, one is left wondering as to how much time is needed so to talk of 'remoteness in terms of time'.

The remoteness in terms of actors also does not seem a relevant aspect. This argument could hypothetically be developed further by considering the psychological intention of the actors that participated to the NATO intervention.[83] More specifically, the argument goes that when NATO States intervened, they had no intention to change unilaterally the borders of Serbia, while this happened only after the adoption of a declaration of independence by another actor, namely the Assembly of Kosovo. However, the text of Article 41(2) ARSIWA does not mention anything about the psychological element of the wrongdoer. Similarly, it does not mention anything as to who committed the wrong. These two aspects are fully compatible with the overall framework Chapter III ARSIWA that is not based on criminal law concepts and conversely concerns violations of peremptory norms *per se*.[84]

As regards the argument that the Kosovo's UDI was supported by the majority of people it is worth mentioning that, first of all, this argument seems lacking any legal basis in as much as the will of the people is irrelevant in the assessment of the lawfulness of a given conduct and is only one of the many aspects which could influence the application of the right to self-determination. Secondly, likely most of the population of the post-Soviet breakaway republics supports respectively independence from the parent States. However, this argument, which has been indeed raised by the secessionist entities, has been discarded by the international community.[85]

Another argument which has been raised by other scholars is that there has not been any resolution of the Security Council calling upon States to withhold recognition from Kosovo.[86] While

[83] For this argument, see Alexander Orakhelashvili, 'The International Court's Advisory Opinion on the UDI in Respect of Kosovo: Washing Away the "Foam on the Tide of Time"' (2011) 15 Max Planck Yearbook of United Nations Law 65, 82.
[84] See above at 47.
[85] Anatoly Kapustin, 'Crimea's Self-Determination in the Light of Contemporary International Law' (2015) 75 ZaöRV 101 and John O'Loughlin and Gerard Toal, 'The Crimea Conundrum: Legitimacy and Public Opinion after Annexation' (2019) 60 Eurasian Geography and Economics 6.
[86] Jure Vidmar, 'Kosovo: Unilateral Secession and Multilateral State-Making' in Summers (n 9) 161–162.

this is true and the reason is obvious since the United States, the United Kingdom, and France would have vetoed any such resolution, this argument seems irrelevant. As seen in the previous chapters there is a consensus in the scholarship that a Security Council resolution is not needed but instead only has a coordinating value.[87] Indeed, there is no Security Council resolution calling for non-recognition with reference to Western Sahara or with reference to the post-Soviet breakaways republics. However, all these unlawful situations are not recognized by the international community allegedly because of the duty of non-recognition.

The soundest argument for not applying the duty of non-recognition to the case of Kosovo is that a causal link between the violation of a peremptory norm of international law and the territorial situation is missing. More precisely, the argument is not that the causal link is missing *per se*, but that Resolution 1244 works as a watershed. In this regard, Milano argues that this resolution provides the legitimacy to the peculiar territorial situation of Kosovo and that this is the element that bridges the gap between effectiveness and legality.[88] In other words, the territorial situation would have been unlawful in the absence of Resolution 1244. However, the argument that the Security Council can validate a certain territorial situation that emerged through a violation of the prohibition of the use of force is debatable or at least is at odds with the prevailing understanding of the duty of non-recognition.

D'Aspremont too tackles the question of the applicability of the duty of non-recognition to Kosovo. Writing, before the adoption of the *Kosovo* advisory opinion, he agrees that the 1999 NATO intervention violated the prohibition of aggression but argues that 'from a general standpoint, recognizing an entity as a state does not amount to recognizing as legal the violation of the peremptory norms that can have paved the way to its independence'.[89] This is more or less the argument raised by Australia in the context of the proceedings before the ICJ in the *East Timor* case: in no way the

[87] See above ch 2, s 4.2.
[88] Milano (n 46) 234ff.
[89] Jean D'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement' (2007) 20 Leiden Journal of International Law 649, 663.

recognizing State is condoning the violation of international law.[90] The argument is somehow out of focus in the sense that in itself it is correct that the recognizing State is not recognizing as legal the violation of the peremptory norms, however the doctrine of non-recognition is not concerned with recognizing a violation of international law, but is concerned with recognizing the situation resulting from a violation. Moreover, he argues that 'it is posited that, in the particular situation of Kosovo, the bombardment of Yugoslavia did not lead directly to the independence of Kosovo, neither was it aimed at ensuring it'.[91] It was already noted that the psychological intent of the wrongdoer is largely irrelevant. The argument on the causal link, notwithstanding the possible argument on the role of Security Council Resolution 1244, is probably the most persuasive even if the *caveat* mentioned above should be considered.

Overall, it does not seem that the arguments raised by Peters and other legal scholars are persuasive. Further contradictions emerge by making a comparison with the post-Soviet breakaway republics.

2. Post-Soviet breakaway republics

The cases of Transnistria, Nagorno-Karabakh, and Abkhazia and South Ossetia share a series of similarities.[92] First of all, they all date back to the early nineties and, more specifically, they have all originated in the beginning of the transition to independence of respectively Moldova, Azerbaijan, and Georgia when a wave of nationalism affected each of these States and caused a resurgence of ethnic tensions. All these States were part of the Soviet Union and they are now in Russia's near abroad, which in turn explains why the latter State has played a role in all these conflicts. Indeed, in all of them, including thus the case of Nagorno-Karabakh, Russia has played a prominent role as an interested mediator. None of these conflicts have been definitely settled notwithstanding a long-

[90] See above at 290.
[91] ibid.
[92] These territorial situations are analysed in great details in Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014).

standing engagement in conflict resolution by third States as well as by various international organizations including in the first place the OSCE. The breakaway republics, also thanks to the support of Russia and, in the case of Nagorno-Karabakh, of Armenia obtained a military victory and, afterwards, they have succeeded in consolidating this victory. On the other hand, the respective parent States succeeded in isolating them from the rest of the international community so much so that some have talked of a 'frozen victory' by the breakaway republics.[93] Even if these political entities are often considered as unlawful situations in the sense of Article 41(2) ARSIWA, such a characterization at a closer look is doubtful.

2.1. The case of Transnistria

Moldova is located between Romania and Ukraine and its territory can be roughly divided in two regions—namely, Bessarabia and Transnistria. Bessarabia[94] is bounded on the west by the Prut river, which forms Romania's border with Moldova, and on the east by the Dniester river. Transnistria is the name of the narrow strip of land between this river and Ukraine. When Moldova gained independence from the Soviet Union, it lost control of this territory, which is since then under the factual control of the Pridnestrovian Moldavian Republic (PMR).

The ethnic composition of Moldova and of Transnistria is similar, but while Romanians make up by far the largest ethnic group of Moldova and Ukrainians and Russians are the largest minorities, Romanians, Ukrainians, and Russians make up about one third of the population of Transnistria.[95] In general terms, it is worthwhile to note that Moldova's history has been particularly troubled since it is located where the Austro-Hungarian, the Ottoman, and the Russian empires clashed. Here it is enough to note that only after the Second World War all the Moldovan territory, thus including both

[93] Dov Lynch, 'Separatist States and Post-Soviet Conflicts' (2002) 78 International Affairs 831, 839.
[94] Hereafter, for the sake of clarity, I refer to this territory simply as Moldova.
[95] For the results of the 2014 census are available at <http://statistica.gov.md/pageview.php?l=en&idc=479>. On the composition of the population of Transnistria, see Piotr Eberhardt, *Ethnic Groups and Population Changes in Twentieth Century Eastern Europe: History, Data and Analysis* (Routledge 2015) 328–329.

Bessarabia and Transnistria, has been united becoming part of the Soviet Union under the denomination of Moldavian Soviet Socialist Republic.[96]

In the period in which Moldova was one of the constituent republics of the Soviet Union, Soviet authorities tried to reinforce a Moldovan identity distinct from that of Romania. It is noteworthy that Moldova and Transnistria remained somewhat separated. First of all, Transnistria when compared to Moldova mainly for historical reasons has a distinct Slavic identity. Moreover, Transnistria was far more 'sovietised' than Bessarabia thus acquiring a prominent position politically, economically, and militarily.[97]

Afterwards, in conjunction with the perestroika, 'reactive-nationalism', together with the re-emergence of the so-called Unionist movement—ie, the movement supporting the political union of Moldova and of Romania—caused a gradual deterioration of the relations between the Romanian majority and the ethnic minorities of Moldova and between the authorities of Moldova and of Transnistria. More concretely, the adoption of new language laws making Romanian the only official language of Moldova[98] and the proposals of unification with Romania (admittedly they were vague proposals, but nonetheless they were done by members of the main political parties) scared the minorities of Moldova.[99] Moreover, Transnistrian authorities feared of losing the prominence acquired in Soviet times.[100]

Starting from the autumn of 1989 there were the first armed clashes between the Moldovan police and Transnistrian armed forces. In this regard, Blakkisrud and Kolstø note that Transnistria lacked a regular armed force and therefore relied on self-defense units mostly composed of ethnic

[96] For a concise historical background, see Pål Kolstø, Andrei Edemsky, and Natalya Kalashnikova, 'The Dniester Conflict: Between Irredentism and Separatism' (1993) 45 Europe-Asia Studies 973, 976–979 and Bill Bowring, 'Transnistria' in Walter, von Ungern-Sternberg, and Abushov (n 92) 159–162. For a detailed history of pre-Soviet Moldova, see Charles King, *The Moldovans: Romania, Russia, and the Politics of Culture* (Hoover Institution Press 2001) 11–88.
[97] King (n 96) 181–184.
[98] Moldovan is essentially a variety of Romanian.
[99] Kolstø, Edemsky, and Kalashnikova (n 96) 979–982.
[100] ibid.

Russians and Ukrainians, paramilitary groups such as those composed by Cossacks, and troops from the 14th Army of the Soviet Union, which was already stationed in the area.[101]

Eventually, Moldova proclaimed its sovereignty on 23 June 1990 and declared its independence from Soviet Union on 27 August 1991 *without* exercising control over Transnistria, where in January 1990 a referendum on the formation of a Transnistrian Republic was held.[102] Given the positive outcome of this popular consultation, Transnistria proclaimed its sovereignty on 2 September 1990 and adopted a declaration of independence on 25 August 1991, that is even before the Moldovan declaration of independence. On 1 December 1991, besides the holding of a presidential election, which was won by Smirnov, who would have ruled the breakaway republic for twenty years, an independence referendum that passed easily. Blakkisrud and Kolstø, as for the adoption of a declaration of 'sovereignty' by Transnistrian authorities, explain that:

> At the time, there was nothing extraordinary about this: 1990 was the year of the "Parade of Sovereignties" in the Soviet Union, and constituent federal units as well as lesser entities were declaring their sovereignty *en masse* … The sovereignty declaration should thus not be confused with a bid for actual secession and independence. In 1990, the MSSR was still a constituent part of the USSR, and the Transnistrian people's deputies did not intend to secede from the USSR. What turned the Transnistrian bid for sovereignty into a secessionist struggle was the collapse of the Soviet Union the following year.[103]

By 1991 most of the Transnistrian territory was no longer under the effective control of Moldova. In the summer of the same year the situation escalated, but thanks to the intervention of the 14th Army on the side of the separatists Moldova was compelled to sign a ceasefire. The role of the 14th Army was thus pivotal. In this regard, a few observations shall be made. Firstly, in 1991 both Moldovan and Transnistrian authorities declared that this army was under the command of the

[101] Helge Blakkisrud and Pal Kolstø, 'From Secessionist Conflict Toward a Functioning State: Processes of State- and Nation-Building in Transnistria' (2011) 27 Post-Soviet Affairs 178, 185.

[102] Actually Moldova had only a limited control also over Gagauzia, which is the territory on which Gagauz people—ie a Turkic-speaking Orthodox Christian people—are predominant. However, Moldovan authorities preserved their sovereignty over Gagauzia by granting to this territory a wide margin of autonomy. See Priit Jarve, 'Gagauzia and Moldova: Experiences in Power-sharing' in Marc Weller and Barbara Metzger (eds), *Setting Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Martinus Nijhoff 2008).

[103] Blakkisrud and Kolstø (n 101) 182–183. For a history of this stage of the conflict see also King (n 94) 184ff. A useful timeline is available at 208.

respective States. Only starting from 1 April 1992 Russia took back control of this army.[104] However, already before that date elements of the 14th Army were siding with Transnistria. On the one hand, troops from the 14th Army were moonlighting for the Transnistrians.[105] Kolstø more specifically talks of a 'revolving-doors' system in the sense that 'officers of the 14th Army put on the Guard uniform when the occasion calls for it'.[106] The reason is simple: the 14th Army was mainly consisting of locals who thus had a strong allegiance towards Transnistria or of soldiers who had settled there from other parts of the Soviet Union and thus had an allegiance towards the latter and also towards Transnistria.[107] After that date, however, not much changed, at least in a first phase. Indeed, some have emphasized the lack of control over the 14th Army by Russia. For instance, Blakkisrud and Kolstø observe:

> As a result of the presence of Russian forces on the left bank, Moscow—probably more by default than by design, being overtaken by the developments on the ground—became entangled in the separatist cause, and has ever since served as the guarantor of the ceasefire and the patron of the secessionist regime.[108]

However, the ceasefire, which went into effect on 21 July 1992, was signed between the President of Moldova Mircea Snegur and the President of Russia Boris Yeltsin.[109] The ceasefire was signed between them given that Moldova had refused to deal directly with Transnistrian authorities, who participated only as observers.[110] The situation since then has stalled. More specifically, there has been a gradual rapprochement between Moldova and Transnistria,[111] but all settlement proposals between them failed to settle the dispute,[112] also because none of the parties has ever been ready to

[104] Bowring (n 96) 161.
[105] Blakkisrud and Kolstø (n 101) 185.
[106] Kolstø, Edemsky, and Kalashnikova (n 96) 993–995.
[107] ibid. In this regard, see also King (n 96) 191–193.
[108] Blakkisrud and Kolstø (n 101) 186. See also King (n 96) 213, who notes that probably the decision to intervene was not taken by the Yeltsin leadership, and Kolstø, Edemsky, and Kalashnikova (96) 995, who note that Russia does not have much leverage on Transnistrian authorities and on the officers of the 14th Army.
[109] For the text of the agreement, see S/24369, 6 August 1992, Appendix (Agreement on the principles for a peaceful settlement of the armed conflict in the Dniestr region of the Republic of Moldova).
[110] Kolstø, Edemsky, and Kalashnikova (n 96) 994.
[111] This rapprochement concerned in particular some technical questions as the re-connection of telecommunication networks, the authentication of Transnistrian university diplomas and some progress on the car license plate issue; See the press release issued by the OSCE Mission to Moldova, 26 July 2016 <www.osce.org/cio/256406>.
[112] For a Comparative summary of provisions in past settlement proposals for the Transnistrian conflict, see Stefan Wolff, 'A Resolvable Conflict? Designing a Settlement for Transnistria" (2011) 39 Nationalities Papers 863, 866

accept any substantive compromise. Moreover, Russia has been continuously involved in this dispute also after the ceasefire so much so that it has maintained its troops in Transnistria. Blakkisrud and Kolstø notes that 'at the onset of the conflict, there were some 9250 Russian soldiers deployed on the left bank. One decade later, the total number of troops was down to less than 1300' and it seems that this number has remained more or less the same.[113] Russian troops are part of the peacekeeping mission established according to the aforementioned ceasefire (ie, the so-called Joint Control Mission), but also as a part of the so-called Operational Group of Russian Forces, which is a military task-force of the Russian armed forces that is deployed *without* the consent of Moldova in Transnistria. On the other hand, Russia conditioned a complete withdrawal to a comprehensive political settlement.[114]

Compared to the other post-Soviet conflicts, the Transnistrian conflict has been described as the one more likely to be solved.[115] First, as mentioned above, the ethnic composition of Moldova and Transnistria is similar except for the proportion between ethnic groups, and thus it can be hardly considered as an ethnic conflict. On the contrary, it is better viewed as a politically motivated conflict in the sense that the interests of the political elites of Moldova and of Transnistria after the break-up of the Soviet Union were radically diverging.[116] Second, even if Russia can be considered as the kin State of Transnistria, it has not recognized the PMR as a State neither it has ever claimed a reintegration of this territory into its own. Further, also as a consequence of these aspects, since the ceasefire signed in 1992 there have been no major clashes between the two opposing parties. In contrast, after many rounds of negotiations mainly in the framework of the so-called 5+2 format—eg

[113] Blakkisrud and Kolstø (n 101) 186.
[114] ibid.
[115] Nicu Popescu, The EU in Moldova: Settling Conflicts in the Neighbourhood (The European Union Institute for Security Studies, Occasional Paper n° 60 October 2005) 5-6.
[116] ibid. However, Blakkisrud and Kolsto observe that the roots of the conflict have been alternatively regarded as ethnic, regional, or elite-driven. See Blakkisrud and Kolstø (n 101) 179.

Moldova, Transdniestria, the OSCE, Russia, Ukraine, the European Union, and the United States—the parties have gradually come closer[117] even if the definitive settlement of their conflict seems far.

It has already been noted that no State has recognized Transnistria as an independent State. In this regard, Vladimir Bodnar, chair of the Security Committee of the Supreme Soviet of Transnistria, maintains that Transnistria fulfils all the criteria for statehood. Accordingly, he goes on by saying that non-recognition by third States is due only to political reasons.[118] Implicitly, the argument is that there are no other criteria for statehood than the Montevideo criteria and that in any case the emergence of Transnistria was not linked to a violation of international law. In addition, Transnistrian authorities have tried to make a positive legal argument since they claim that the Transnistria is a State that emerged through the lawful exercise of self-determination by means of the independence referendum held in 1991 and that one held in 2016.[119] They have also supported a second argument that involves State succession. In fact, Transnistrian authorities claim that when Moldova withdrew from the Soviet Union, it actually withdrew also from the Moldovan Soviet Socialist Republic, and thus there has never been a secession of Transnistria from Moldova.[120] Arguably, on the contrary, the fact itself that no State has ever recognized Transnistria may suggest that third States have an obligation to withhold recognition, otherwise it could be difficult to explain this overwhelming consensus. Indeed, some legal scholars have argued that Transnistria amounts to an unlawful situation *ex* Article 41(2) ARSIWA and that, consequently, its recognition is barred by international law.[121]

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[117] See the statement on the 5+2 Transnistrian settlement process delivered by US Political Counselor Gregory Macris to the OSCE Permanent Council on 14 June 2018 which welcomed substantive progress in the settlement process endorsed at the recent round of 5+2 talks held in Rome on 29–30 May 2018 <www.osce.org/permanent-council/385191?download=true>.

[118] The words of Mr. Bodnar are quoted in Special Committee on European Affairs, 'Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova' (The Association of the Bar of the City of New York 2005) 53 <www.nycbar.org/pdf/report/NYCity BarTransnistriaReport.pdf>.

[119] ibid.

[120] See the official document 'Pridnestrovie: The Legal Foundation of Independence (2017) 12 <http://mfa-pmr.org/en/node/6777>. See also supra n 101.

[121] See Olivier Corten, 'Déclarations unilatérales d'indépendance et reconnaissances prématurées: Du Kosovo à l'Ossétie du Sud et à l'Abkhazie' (2008) 112 Revue générale de droit international public 721, 744ff and Special Committee on European Affairs (n 116). More in general Transnistria, as well as the other post-Soviet breakaway republics, is considered together with other cases that are unanimously considered as unlawful territorial situations, such as those analyzed in the previous chapter. See for instance Dagmar Richter, 'Illegal States?' in Władysław Czapliński and Agata Kleczkowska (eds), *Unrecognised Subjects in International Law* (Wydawn Naukowe 'Scholar' 2019) 28ff and Brad R Roth, 'Bilateral

However, some doubts emerge if we analyse the view expressed by third States. In fact, it is not possible to infer with certainty that the legal basis of non-recognition of Transnistria is the duty of non-recognition. Besides a vague reference to international law the only constant that can be found is the need to respect the territorial integrity and sovereignty of Moldova. In contrast, there are no references to the origin of the conflict or to an intervention by a third State, let alone whether such an intervention was amounting to a serious breach.

As for Moldova, Article 3 of the Moldovan constitution affirms that '[t]he territory of the Republic of Moldova is inalienable' and that '[t]he borders of the country are sanctioned by an organic law, subject to the unanimously recognized principles and norms of international law'. Article 11 states that: 'The Republic of Moldova proclaims its permanent neutrality … [and] does not admit the stationing of any foreign military troops on its territory'.[122] It stands out that the existence of the PMR is hardly compatible with these articles. In fact, the Constitutional Court of Moldova adopted in 2017 a decision in which it affirmed that:

> The fact that the Russian Federation did not withdraw its occupation troops from the Eastern region of the country, but on the contrary, has consolidated its military presence in the Transnistrian region of the Republic of Moldova, this constitutes a violation of constitutional provisions regarding the independence, sovereignty, territorial integrity and permanent neutrality of the Republic of Moldova, as well as of international law.[123]

It is in the context of diplomatic activity that Moldova has denounced the situation in Transnistria. However, the stance of Moldova has not been consistent over time since it qualified the situation in Transnistria in a number of ways. Already on 6 December of 1991, that is two days earlier

Recognition of States' in Gëzim Visoka, John Doyle, and Edward Newman (eds), *Routledge Handbook of State Recognition* (Routledge 2020) 197–198.

[122] The Moldovan Constitution is available in English language at <www.constcourt.md/public/files/file/Actele%20Curtii/acte_en/MDA_Constitution_EN.pdf>. Article 110 affirms that 'Places on the left bank of the Dniester River may be assigned special forms and conditions of autonomy, according to the special statutory provisions adopted by organic law'.

[123] Judgement on the Interpretation of Article 11 of the Constitution, Complaint no. 37b/2014, 2 May 2017, para 181. The decision is available at <www.constcourt.md/public/ccdoc/hotariri/en-Judgment-142017neutralityengfinalrectificat-230620177d380.pdf>. On 22 July 2005, the Moldovan Parliament adopted the Law on Fundamental Regulations of the Special Legal Status of Settlements on the Left Bank of the River Nistru. This law reiterated that Transnistria is an integral, component part of the Republic of Moldova and laid down a dedicated framework for Transnistria as an autonomous part of Moldova. This law is available in English language at <www.osce.org/pc/16208?download=true>.

than the Belovezha Accords (ie, the agreement by means of which Russia, Ukraine, and Belarus announced the dissolution the Soviet Union), Moldova denounced the occupation of a number of Moldovan towns located in Transnistria by the 14th Army, accused Soviet authorities to have initiated those acts and maintained that the military operations carried out by separatists were 'directed' by the 14th Army itself.[124] Afterwards, the Moldovan Parliament reiterated similar condemnations.[125]

Moldova raised the issue before the political organs of the UN too. By reading the interventions done in this context it is possible to perceive a see-sawing strategy aimed, on the one hand, to call the attention of the international community on the Transnistrian issue and, on the other hand, not to antagonize excessively Russia. While sometimes Moldova clearly blamed Russia for its support to Transnistrian forces, other times it claimed that the separatists received an unqualified support from abroad.

In May 1992, before the Security Council, President Snegur denounced the 'flagrant and violent interference of the 14th Army … which is under the jurisdiction of the Russian Federation' in the internal affairs of Moldova. More specifically, he accused the 14th Army of supporting the 'separative antigovernmental forces' by supplying them with military equipment and by supporting the military actions of these forces. He continued by maintaining that '[a]ll this constitutes none other than an act of a military aggression of the Russian Federation against the Republic of Moldova'.[126]

The following month, President Snegur addressed again the Security Council condemning once more the involvement of the 14th Army and observing that 'A dangerous escalation of the conflict took place in the city of Bender … where, after a series of flagrant violations of cease-fire committed by the illegal Guardsmen and other paramilitary units … the latters [sic] had violently attacked the local police premises'.[127]

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[124] The Constitutional Court in the aforementioned decision retraced the first reaction of Moldovan government to the events occurring in Transnistria. See paras 30 and 33.
[125] ibid paras 40ff.
[126] S/24041, 30 May 1992, Annex I (Letter dated 23 May 1992 from the President of the Republic of Moldova addressed to the Secretary-General).
[127] S/24138, 22 June 1992, Enclosure (Letter dated 22 June 1992 from the President of the Republic of Moldova addressed to the Secretary-General).

The complexity of the situation on the ground emerges however in other interventions. For instance, Moldova reiterated the accusation of an aggression committed by Russia and described Russian intervention as a support to 'the paramilitary forces of the pro-communist structures from the city of Tiraspol and the Cossack military units arrived from Russia'.[128] The Minister for Foreign Affairs Țâu in 1992 held emphatically that:

> 'The pro-communist imperialistic forces constituted by the representatives of the old "nomenklatura" the military-industrial complex and the higher echelons of the former Soviet army have unleashed a full-fledged war against the territorial integrity of the Republic of Moldova in order to separate its districts situated on the left bank of the Dniester … At the same time the creation of guards' units, which also include mercenaries from other States, and the involvement in the conflict of the Fourteenth Army, which is under the jurisdiction of the Government of the Russian Federation, are flagrant violations of the Constitution of the Republic of Moldova and of the norms of international law, constituting open aggression against our young State.[129]

In the same year, the Minister stated, in response to a statement by Yeltsin who reportedly had expressed his support for Transnistria, that: 'The political attitude of the Russian President is a flagrant contradiction with the recognized regulations of international law and official commitment to the observance of the integrity of the Republic of Moldova made previously by the Russian Federation'.[130] Similar claims have been repeated afterwards.[131]

While Moldova continued to denounce the 'illegal authorities', the relevance of the alleged Russian intervention and the continued support to Transnistria lost gradually importance. In fact, in subsequent statements of there is no mention at all of Russia[132] or, in any case, the role of Russia is treated as not particularly significant.[133] Actually, for a few years Moldova refrained from addressing at all UN political organs on the question of Transnistria.

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[128] S/24185, 25 June 1992, Annex II (An APPEAL to the Peoples, Parliaments and Governments of the World).
[129] A/47/PV.21, 12 October 1992, 22.
[130] S/24690, 20 October 1992, Annex I (Letter from the Permanent Representative of Moldova to the UN addressed to the Secretary-General).
[131] See, for instance, S/25962, 17 June 1993, Annex (Declaration of the Ministry of Foreign Affairs of the Republic of Moldova) and A/48/PV.22, 8 October 1993, 15–16.
[132] A/49/70, S/1994/118, 4 February 1994, Annex (Letter dated 2 February 1994 from the President of the Republic of Moldova to the Secretary-General).
[133] A/49/78, S/1994/195, 18 February 1994, Annex (Statement issued by the Ministry of Foreign Affairs of the Republic of Moldova on 10 February 1994). A/50/770, S/1995/971, 20 November 1995, Annex (Declaration of the Ministry of Foreign Affairs of the Republic of Moldova, issued at Chisinau on 18 November 1995).

Starting from 1999 the situation evolved and Moldova, together with Georgia, Ukraine, and Azerbaijan,[134] have begun to *systematically* address the Security Council in case of specific events occurring in the breakaway republics such as the holding of an election[135] or a meeting of the leaders of the breakaway republics.[136] Actually, the Kiev Declaration, which established the GUAM—ie, the Organization for Democracy and Economic Development-GUAM, which is an international regional organization including the Republic of Azerbaijan, Georgia, Moldova and Ukraine—declared that one of the aims of the organization is precisely the active cooperation towards the settlement of the conflicts.[137]

Individually, however, the stance of Moldova has depended on a great extent on the State's ruling party. When Vladimir Voronin, head of the Communist Party (traditionally closer to Russia), became President of Moldova the stance expounded before the General Assembly has significantly became milder. President Voronin, who tried to sidestep the 5+2 format and to enter into negotiations directly with Russia and the PMR, said in 2003:

> We have proposed that a new State constitution be drafted and adopted through joint efforts. In the draft that currently is being elaborated, we are insisting on giving up the status of unitary State, which does not take into account the profound specific characteristics of the Transnistrian region. We are laying as the basis of the new State draft the principles of the federative organization of our country … In eliminating the effects of the nationalistic hysteria characteristic of the early 1990s, which divided both the society and the country, Moldova has declared itself determined to build a

[134] The GUAM treaty charter was signed in 2001 but already in 1999 these States, with the addition of Uzbekistan that would have later withdraw from the organization, were acting collectively. See S/1999/518, 6 May 1999, Annex (Statement of the Presidents of the Republic of Azerbaijan, Georgia, the Republic of Moldova, Ukraine and the Republic of Uzbekistan). See also below at 354.

[135] S/2006/794, 3 October 2006, Annex (Statement by the Council of Ministers for Foreign Affairs of the member countries of the Organization for Democracy and Economic Development — GUAM concerning the "referendum" in the Transnistrian region of the Republic of Moldova).

[136] S/2000/1163, 7 December 2000, Annex (Statement of the Ministry of the Foreign Affairs of Georgia). The Minister complained of a meeting held in Transnistria to which Transnistrian, Abkhazian and South Ossetian authorities participated.

[137] S/2006/364, 5 June 2006, Letter dated 24 May 2006 from the Permanent Representatives of Azerbaijan, Georgia, the Republic of Moldova and Ukraine to the United Nations addressed to the Secretary-General (Annex I), para 4. See also the third annex, paras 1–2, in which it is specified how these conflicts shall be solved, that is 'on the basis of respect to sovereignty, territorial integrity and inviolability of internationally recognized borders of these states', and in which it is reminded that 'that the territory of a state may not be a subject of acquisition or military occupation, resulting from the threat or use of force in breach of the relevant norms of international law. No territorial acquisitions and the resulting self-declared entities may be recognized as legal under any circumstances whatsoever'.

> harmonious multiethnic society, based on principles of ethnic and linguistic liberalism and pluralism.[138]

However, the plan mentioned in this statement, the Kozak memorandum, was suddenly set aside in 2004 by the very same Moldovan government also because of the lack of support to this plan by the European Union.[139] This event marked the end of relatively friendly relations between Moldova and Russia.[140]

Afterwards, in 2006, the Minister for Foreign Affairs, Andrei Stratan, held that the Transnistrian conflict 'was unleashed with external support immediately after the collapse of the Soviet Union and the declaration of independence and sovereignty by the Republic of Moldova'. On this occasion, he also affirmed that:

> We take this opportunity to inform the Assembly that on 17 September the separatist Transdniestrian regime held a so-called referendum on the region's future. We condemn this pseudo-referendum, which flagrantly infringes the Constitution of the Republic of Moldova, undermines the country's territorial integrity and defies democratic values and standards.[141]

The Permanent Representative of Moldova to the UN in 2011 said that:

> During the past five years … we have always made the same appeal. Moldova calls for the unconditional resumption of the negotiations on the political settlement of the conflict in the "5+2" format … exactly five days ago … that decision was finally taken. We express our gratitude to the Russian Federation, the Organization for Security and Cooperation in Europe, Ukraine, the European Union and the United States … for their efforts in reaching that result … On this occasion, I would like to reiterate some basic elements of the Moldovan approach towards the problem. A viable and comprehensive political solution can be based only on respect for the sovereignty and territorial integrity of the Republic of Moldova, within its internationally recognized borders. The central question on the agenda of the five plus two negotiations should be the special status of the Transnistrian region within Moldova.[142]

The events in Crimea and Eastern Ukraine had some repercussions on the other post-Soviet frozen conflicts. Prime Minister Filip in 2018 used the following polemic words:

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[138] A/58/PV.8, 23 September 2003, 9
[139] Andreas Johansson, 'The Transnistrian Conflict after the 2005 Moldovan Parliamentary Elections' (2006) 22 Journal of Communist Studies and Transition Politic 507, 510.
[140] ibid.
[141] A/61/PV.20, 26 September 2006, 1.
[142] A/66/PV.29, 27 September 2011, 29.

> The military exercises conducted jointly by the Operational Group of Russian forces in Moldova, which are stationed illegally on our soil, and the paramilitaries of the unconstitutional power structures have increased in scope and frequency, which represents a continued violation of the 1992 Moldovan-Russian ceasefire agreement … We appeal once again to the Russian Federation to discontinue those illegal and provocative activities and to resume, unconditionally and without further delay, the process of withdrawing its troops and armaments, in accordance with its legal commitments under the 1999 OSCE Istanbul summit outcome document and in observance of its obligations under international law and the Charter of the United Nations … the Moldovan authorities are determined to find a political solution to the protracted, externally generated conflict in the eastern part of the Republic of Moldova, within the 5+2 negotiating format. For us, it is extremely important that that solution be based on full respect for the sovereignty and territorial integrity of the Republic of Moldova, with the provision of a special status for the Transnistrian region, as stipulated in the relevant OSCE documents.[143]

While clearly the Security Council did not adopt any resolution on Transnistria, the General Assembly adopted a resolution on this question that was sponsored by Moldova. This resolution, adopted in 2018, urged Russia to 'complete, unconditionally and without further delay, the orderly withdrawal of the Operational Group of Russian Forces and its armaments from the territory of the Republic of Moldova'.[144] The argument that can be inferred is that the continued presence of foreign military forces and armaments on the territory of Moldova without its consent is incompatible with Moldovan independence, sovereignty, territorial integrity and permanent neutrality and also with the rules of international law and the UN Charter.[145] It is worthwhile to note that this resolution does not mention the duty of non-recognition.

The only reference to non-recognition as a mandatory policy can be found in the various statements adopted by the GUAM. One may take as an example the following joint statement:

> We underline the importance of keeping the issue of the unresolved conflicts high on the international agenda, including the non-recognition policy towards the illegal regimes in conflict affected areas, and call upon international community to increase support to GUAM Member States as well as their efforts for a speedy and lasting resolution of the conflicts on the basis of norms and principles of international law, namely sovereignty, territorial integrity and inviolability of internationally recognized

[143] A/73/PV.13, 28 September 2018, 13.
[144] A/RES/72/282, 22 June 2018, para 2.
[145] On this resolution see also the statement that introduced its draft A/72/PV.98, 22 June 2018, 1–4.

borders of states, Helsinki Final Act, the Resolutions of the UN Security Council and other international organizations.[146]

It was mentioned above that the rejection of the Kozak Memorandum in 2004 marked the end of a period of overall good relations between Russia and Moldova and that one of the reasons that persuaded Moldovan authorities to change idea and accordingly not to sign the memorandum was the lack of support from the European Union. This observation prompts a clarification on the wider approach of the Union towards the settlement of the conflict in question. In fact, while in the 90s and until the first half of the 00s its approach was neutral, afterwards it began exercising an increasing political pressure on Russia and it is only in this period that calls for non-recognition have been raised.

This is confirmed first of all by the statements adopted by the European Community in the immediate aftermath of the armed conflict. Indeed, there was a complete lack of condemnation over the events occurring in Moldova. One may compare this passive response with the response to the invasion of Kuwait by Iraq. In this case, a specific joint statement was adopted by member States of the Community that unequivocally condemned the invasion in question, demanded the immediate and unconditional withdrawal of Iraqi forces from the Kuwait, and clarified that they would have 'refrain[ed] from any act which may be considered as implicit recognition of authorities imposed in Kuwait by the invaders'.[147] Similarly, after the ceasefire, Russia was not considered as an aggressor neither there was any indication that Russia in some way supported separatists. Accordingly, there was no argument that a serious breach of the rules on the use of force had occurred. It should be noted that the same goes for a certain number of years until indeed the first half of the 00s.

More specifically, the first statement adopted by the Community and its members States that addressed directly the Transnistrian issue dates back to 1992 and concerns the ceasefire. The statement simply welcomed the ceasefire, urged the parties to respect it and finally 'call[ed] upon them to resolve the dispute without further bloodshed and in accordance with international law and

[146] Joint Statement by the Heads of Government of the GUAM Member States, 5 October 2018 <https://guam-organization.org/en/joint-statement-by-the-heads-of-government-of-the-guam-member-states-2>.
[147] See EC Bulletin 7/8-1990 point 1.5.11.

the CSCE principles'.[148] The subsequent relevant statements on Moldova regards the Ilascu case,[149] but in the meanwhile, the *de facto* control by Transnistrian authorities consolidated and, accordingly, the statements referred to the 'self-proclaimed authorities of Transnistria' and to the 'lawful authorities of Moldova'.[150] Other statements appear equally vague as for the legal status of the breakaway territory.[151]

Afterwards, this conflict and its settlement fell by the wayside and resurfaced only with sporadic resolutions adopted by the European Parliament and with some parliamentary questions. Two of them are particularly interesting. Both the questions dealt broadly with the issue of poverty, however the member of the Parliament addressed also the striking differences in treatment by the Union between Moldova and the Baltic States, which were already on their way to become part of the Union. More specifically, the question asked was whether there was an agreement between the Union and Russia that obliges the former not to concern itself with Moldova. In addition, the question mentioned that poverty could create a 'a breeding ground for internal ethnic conflicts between the Romanian-speaking majority and the Slav minority'. Christopher Patten, European Commissioner for External Relations, held that:

> Nothing in the Union relations with Russia or Ukraine obliges the Union not to concern itself with developments in Moldova. On the contrary, the situation in Moldova is a regular topic in the EU's political dialogue with Russia and Ukraine, with a view to improving common understanding on the root causes of the country's

[148] See EC Bulletin 4-1992 point 1.5.8.
[149] On this case see Marko Milanović and Tatjana Papić, 'The Applicability of the ECHR in Contested Territories' (2018) 67 International and Comparative Law Quarterly 779, 787–789.
[150] See for instance EC Bulletin 6-1993 point 1.4.16. and EC Bulletin 11-1993 point 1.4.9.
[151] See EC Bulletin 3-1994 point 1.3.19 that congratulated with Moldova for the first parliamentary elections held in February 1994 and EC Bulletin 11-1994 point 1.3.10 that concerned the signature of the Draft partnership and cooperation agreement between the European Community and Moldova, which entered into force in 1998, and in addition … as follows: 'welcomes the agreement signed between the Governments of the Russian Federation and the Republic of Moldova on 21 October 1994 on the withdrawal of the Russian 14th army from the territory of the Moldova. The European Union urges the parties to adhere to the timetable for withdrawal set down in that agreement. The European Union welcomes the continuation of negotiations on the status of Transdniestra and the constructive role the CSCE and the Russian special envoy have played in that process. The European Union calls upon the parties to show restraint and flexibility in seeking a solution to the issue'. See also S/1994/1359, 29 November 1994, Letter dated 29 November 1994 from the Permanent Representative of Germany to the United Nations addressed to the Secretary-General (annex). The relevant passage of the letter reads: 'The European Union reiterates its support for the independence and territorial integrity of the Republic of Moldova. The European Union welcomes the agreement signed between the Governments of the Russian Federation and the Republic of Moldova on 21 October 1994 on the withdrawal of the Russian 14th Army from the territory of the Republic of Moldova. The European Union urges the parties to adhere to the timetable for withdrawal set down in that agreement'.

> problems, and in order to find solutions in the Transdniestria in particular where the Organisation for Security and Cooperation in Europe (OSCE) also has a key role to play.[152]

The approach just described however changed in the early 00s and the Union has gradually stepped up its efforts towards the settlement of the conflict while abandoning the balanced approach that characterized the European action towards the question at hand.[153] The reasons for this relatively sudden development are many, but arguably there is not a persuasive legal reason and actually this change did not go completely unnoticed. One may take as an example the decision of the Council of the European Union to adopt targeted sanction as a tool to exercise pressure on Transnistrian authorities, which are considered as the primary 'responsible for the lack of cooperation to promote a political settlement of the conflict'.[154] In this regard, a member of the Parliament held:

> On 27 February 2003, more than 11 years after the *de facto* secession of the Dniester Republic … the Council adopted Common Position 2003/139/CFSP(1) banning members of the leadership of the Transnistrian region from travelling to or through EU Member States. What European interest is served by this? How has the situation changed in the last 11 years? Moreover, why has this step been taken jointly with the US?[155]

The Council after having specified that it took note of 'Moldova's pro-European choice' and that, accordingly, it is acting so to strengthen EU–Moldova relations, made a few comments on the conflict and on its settlement. Firstly, it is interesting that the Council qualified the conflict as a civil war and that it refrained from referring to Russia as a participant. Second, the Council connected the necessity of a change of pace with the occurring of a variety of illegal trafficking in the territory of the breakaway republic and with the idea that the unsolved conflict is the 'single largest impediment to Moldova's political and economic development and one of the root causes of poverty'. Thirdly, the reason for sanctions resides in the opinion that Transnistria authorities have impeded progress in

[152] See the written question E-0684/02 and E-0685/02 by Erik Meijer (GUE/NGL) to the Commission, 11 March 2002, Official Journal of the European Union C 78 E, 344–346 and the joint answer given by Mr. Patten on behalf of the Commission, 24 April 2002.
[153] Popescu (n 115) 29.
[154] Written question E-1325/03 by Erik Meijer (GUE/NGL) to the Council, 8 April 2003, Official Journal of the European Union C 51 E, 26/02/2004, 74–75.
[155] Reply to the written question E-1325/03, 29 September 2003, ibid.

negotiations and thus are considered as the primary responsible for the current state of things. Finally, the Council clarified that it is working with all parties for reaching a peaceful and solution in full respect of Moldova's territorial integrity.[156]

As said, in 2004, the European Community did not support the Kozak memorandum. In addition, starting from this year, it resorted to other tools aimed to exercise pressure on Transnistria. More specifically, with an agreement between the Community and Moldova a double-checking system relating to steel import from the latter to the former was established. With this agreement the Community prevented the import from Transnistria of steel, which indeed could no longer obtain the appropriate Moldovan certificate.[157] Further, the Parliament, in occasion of the EU–Russia Summit held in the Hague on 25 November 2004, welcomed 'the Council's proposal for closer cooperation in crisis management and expects of Russia a more sincere and constructive role as regards the conflicts in Transdnistria and South Caucasus'.[158] In 2005, the EU–Moldova action plan, broadly aimed to bring Moldova closer to the European Union, was adopted.[159] Different passages of the plan address the settlement of the conflict in Transnistria. For instance, Section 2.2 is dedicated to the co-operation between the Union and Moldova in the settlement of the Transnistrian conflict. Afterwards, the Union appointed a Special Representative for Moldova[160] and launched the European Union's Border Assistance Mission to Moldova and Ukraine.[161] Moreover, it is starting from this year that the European Parliament regularly adopted resolutions on the question of Transnistria.[162] In 2006 finally, before a five-years pause of official negotiations, the Union as well as the United States became observer members of the negotiation format that would have been known as 5+2 format.

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[156] See also supra n 152.
[157] Popescu (n 115) 31–32.
[158] European Parliament resolution on the EU-Russia Summit held in The Hague on 25 November 2004, Official Journal 226 E, 15 September 2005, 224–226, para 13.
[159] On the change of foreign policy by Moldova, see also Andreas Johansson, 'The Transnistrian Conflict after the 2005 Moldovan Parliamentary Elections' (2006) 22 Journal of Communist Studies and Transition Politics 507, 510–512.
[160] Council Joint Action 2005/265/CFSP, 23 March 2005, OJ L 081, 50.
[161] See the EU Statement on the Republic of Moldova and Ukraine, 1 December 2005 <www.osce.org/files/f/documents/a/d/17561.pdf>.
[162] See for instance European Parliament resolution on the parliamentary elections in Moldova, 1 December 2005, OJ C 304E, 398–400 and European Parliament resolution on Moldova (Transnistria), 20 December 2006, OJ C 313E, 427–429.

It seems clear that a strong response to the alleged unlawful Russian conduct that was instrumental to the emergence of Transnistria occurred only in a second phase when the wider geopolitical context had radically changed. As Kolstø puts it: 'The fact that the Dniester area had already proclaimed its independence in 1990, at a time when Moldovan independence was not recognised by the international community … was partly overlooked, partly not considered relevant'.[163]

In the last few years Moldova's Government has consistently supported negotiations in the 5+2 format—ie, Moldova, Transnistria, the OSCE, Ukraine, Russia, the United States, and the European Union. For instance, the Permanent Representative of Moldova to the UN held in 2011 that:

> We have always made the same appeal. Moldova calls for the unconditional resumption of the negotiations on the political settlement of the conflict in the "5+2" format. I am happy to announce that … that decision was finally taken. We express our gratitude to the Russian Federation, the Organization for Security and Cooperation in Europe, Ukraine, the European Union and the United States … for their efforts in reaching that result … On this occasion, I would like to reiterate some basic elements of the Moldovan approach towards the problem. A viable and comprehensive political solution can be based only on respect for the sovereignty and territorial integrity of the Republic of Moldova, within its internationally recognized borders. The central question on the agenda of the five plus two negotiations should be the special status of the Transnistrian region within Moldova.[164]

It is significant that none of the various settlement proposals that have been envisaged over the years—namely the CSCE report (1993), the Kozak Memorandum (2003), the Mediator Proposals (2004), the Ukrainian plan (2005), the Moldovan Framework Law (2005), and the Moldovan Package Proposals (2007)—have deviated from the basic elements of the Moldovan approach described above.[165] On the contrary, all of them were proposing to preserve Moldovan territorial integrity and, conversely, to grant to Transnistria a certain degree of autonomy. An option for the secession of Transnistria from Moldova was included only in the case the latter would have joined Romania. More recently, Igor Dodon, at that time President of Moldova, reiterated this position:

[163] Kolstø, Edemsky, and Kalashnikova (n 96) 974.
[164] A/66/PV.29, 27 September 2011, 29.
[165] Wolff (n 112) 866.

> I reaffirm our confidence in that negotiating format, as it is the arrangement most likely to yield an acceptable solution to a problem that is of major importance to Moldova. Under the format, the special status of the Transnistrian region, within the internationally recognized borders of a sovereign and territorially integrated Moldova that guarantees full human rights and fundamental freedoms to its people, is to be debated and agreed.[166]

Even outside the negotiation process in the 5+2 format, each and every statement adopted by third States in relation to Transnistria that supports direct negotiations between the parties at the same time sets a red line that cannot be crossed, which is Moldovan territorial integrity. For instance, the Permanent Representative of the United Kingdom to the United Nations, affirmed that:

> It is in everyone's interests that tensions in this region subside, including in Transnistria. It is important that the de facto authorities in Tiraspol continue to negotiate, and do so in a constructive way. The United Kingdom and our partners will always support Moldova's territorial integrity and sovereignty.[167]

The same elements are mentioned in the statements issued by other third States, such as Ukraine, Romania, and France.[168] Even the Government of Russia has never recognized Transnistria as a State neither it has supported the secession of Transnistria from Moldova. On the contrary, at least verbally, Russia has consistently supported the territorial integrity and sovereignty of Moldova by claiming that Transnistria could be an autonomous part of the latter. In this regard, Russia reaffirmed that the Transnistrian problem has to be solved:

> [o]n the basis of respect for sovereignty, territorial integrity and neutral status of the Republic of Moldova, on defining special status of Transnistria… [the Memorandum on the Bases for Normalization of Relations between the Republic of Moldova and Transnistria] set and introduced a number of notions and obligations defining interaction between the sides of the conflict, mediators in the negotiations process and

[166] A/74/PV.7, 26 September 2019, 22.
[167] Statement adopted by ambassador Matthew Rycroft on 21 February 2017 <www.gov.uk/government/speeches/this-council-has-a-responsibility-to-sustain-the-peace-won-in-europe-seven-decades-ago>.
[168] See the statement issued by Ambassador Ihor Prokopchuk, Permanent Representative of Ukraine to the International Organizations in Vienna, 31 January 2019 <https://vienna.mfa.gov.ua/en/news/70275-zajava-delegaciji-ukrajini-shhodo-ostannih-podij-u-procesi-pridnistrovsykogo-vregulyuvannya-ta-vazhlivosti-jih-rozglyadu-v-ramkah-obse>, the statement issued by Ministry of Foreign Affairs of Romania Corlăţean on 16 April 2017 <www.mae.ro/en/node/26117>, the statement issued by the United States State Department Spokeperson Heather Nauert, 24 April 2018 <www.state.gov/welcome-step-forward-in-transnistria-peace-process-in-moldova>, the statement issued by Amélie de Montchalin Secrétaire d'État Chargée des Affaires Européennes, 13 September 2019 <www.diplomatie.gouv.fr/en/country-files/moldova/events-4506/article/moldova-visit-by-amelie-de-montchalin-13-09-19>.

> international norms of relations development in the region But the most important thing was that the document specified objectives for the settlement.[169]

This stance has not evolved even after the 2016 independence referendum held in Transnistria which, in turn, was somewhat triggered by the events occurred in Eastern Ukraine and in Crimea.[170] Similarly, the OSCE expressed its support for:

> [a] comprehensive, peaceful and sustainable settlement of the Transnistrian conflict based on the sovereignty and territorial integrity of the Republic of Moldova within its internationally recognized borders with a special status for Transdniestria that fully guarantees the human, political, economic and social rights of its population.[171]

> The European Union aligned itself to the OSCE position.[172]

What emerges from this array of official statements on the question of Transnistria is first that in the beginning the conflict was treated as a civil war at least by the European Community, while Moldova at times denounced Russian responsibilities and at other times adopted a less straightforward stance on the question. The rest of the international community was apparently unconcerned with the events occurring in Moldova. The response of the European Union and of Moldova, as well as of other members of the international community such as the United States and the GUAM States, changed not after a different assessment of the factual and legal situation but in temporal correlation with the evolution of the wider political environment. Still the statements issued with reference to the conflict in question, with the exception of those issued within the context of the GUAM, have generally refrained to address the original unlawfulness so much so that these statements are essentially identical to those issued with reference to Kosovo. The point seems to be that the territorial

[169] Comment of the Information and Press Department of the MFA of Russia in connection with the 15th anniversary since signing Memorandum on the Bases for Normalization of Relations between the Republic of Moldova and Transnistria, 15 May 2012 <www.mid.ru/en/web/guest/foreign_policy/international_safety/conflicts/-/asset_publisher/xIEMTQ3OvzcA/content/id/156794>.

[170] Foreign Policy Concept of the Russian Federation (approved by President of the Russian Federation Vladimir Putin on November 30, 2016 <www.mid.ru/en/web/guest/foreign_policy/official_documents/-/asset_publisher/CptICkB6BZ29/content/id/2542248>.

[171] Statement issued by the Head of the OSCE Mission to Moldova Claus Neukirch, 13 May 2019 <www.osce.org/mission-to-moldova/419408>.

[172] See the 2005 EU-Moldova Action Plan para 16 <https://eeas.europa.eu/sites/eeas/files/moldova_enp_ap_final_en.pdf> and the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, 30 August 2014, art 8.

integrity of Moldova *per se* rather than the consolidation of a factual situation created by a breach of international law. There is another aspect that is noteworthy that is a comparison with the case of Nagorno-Karabakh, which is addressed in the next sub-section. In the case of Transnistria, it seems that the territorial integrity of Moldova is non-negotiable. What is negotiable, on the contrary, is the kind of constitutional arrangement that will regulate the relations between the central government and the local government. This stance of the international community, in contrast with the other aspects mentioned above, is coherent with the argument that Transnistria is an unlawful situation in the sense of Article 41(2) ARSIWA and, accordingly, that third States have a duty of non-recognition that implies the impossibility of subsequent validation of the unlawful situation. On the contrary, in the case of Nagorno-Karabakh, which as for non-recognition can be compared to the case of Transnistria, the territorial integrity of Azerbaijan was called into question. Arguably, States by supporting negotiations without preconditions, express their belief that the factual situation arising from any settlement could be validated and recognized.

2.2. Nagorno-Karabakh

The Nagorno-Karabakh Republic, known also as Artsakh Republic, is a non-recognized political entity located in the Caucasus that borders Armenia, Azerbaijan, and Iran. This territory, as the territory of Transnistria, has been for long time subject to power politics by many entities, such as the Russian, the Persian, and the Ottoman Empire and, starting from the beginning of the 20th century, France and the United Kingdom too.[173] It follows that for long time, as put it by Krüger: 'Nagorno-Karabakh has been a transit and settlement zone for many ethnic groups and, as such, has seen innumerable campaigns of conquest and ethnic dislocations'.[174]

[173] The following historical account is based on Heiko Krüger, *The Nagorno-Karabakh Conflict* (Springer Berlin Heidelberg 2010) and Heiko Krüger, 'Nagorno-Karabakh', in Walter, von Ungern-Sternberg, and Abushov (n 92).
[174] Krüger, *The Nagorno-Karabakh Conflict* (n 173) 4.

For the purposes of this work, it is enough to recall that, while until the 19th century Nagorno-Karabakh was ethnically mixed, starting from the beginning of the same century Nagorno-Karabakh became a part of the Russian Empire, which undertook a policy of Christianization that among other things led to the settlement of many Armenians. Moreover, the influx of Armenians further increased as a consequence of the Russo-Ottoman wars of 1853–1856 (ie, the Crimean war) and 1876–1878 (ie, the Serbo–Turkish and the Russo–Turkish war) and of the Ottoman repression targeting Christian minorities including Armenians. Krüger noted that '[t]he antipathies and tensions between the Armenians and Azerbaijanis grew in the course of the population movements' that continued in the Soviet period too.[175] In 1921 Soviet authorities, which had pursued a policy of expansionism towards the Caucasus, decided to keep Nagorno-Karabakh as an autonomous oblast within the territory of the newly formed Azerbaijan Soviet Socialist Republic notwithstanding the fact that Armenians constituted an absolute demographic majority in this territory (94.4%). Starting from that moment the government of the Armenian Soviet Socialist Republic, together with the local authorities of Nagorno-Karabakh, have asked to transfer Nagorno-Karabakh to Armenia but without any success.

As in the case of Transnistria, during the perestroika the influence of nationalist movements grew decisively. The Regional Soviet of Nagorno-Karabakh asked once more to transfer the region to Armenia, but the Supreme Soviet of Azerbaijan refused to act. The break-up of the Soviet Union triggered a period of chaos in the region so much so that the Russian Government had to move armed forces there so to prevent the secession of Nagorno-Karabakh. Indeed, subsequently it had to place the region under special administration so to prevent further secessionist ambitions. This however did not prevent an escalation of the situation for the civilian population, which led also to acts of ethnic cleansing. The situation escalated also from a political point of view so much so that the Armenians of Karabakh established a 'Congress of plenipotentiary representatives of the population of the autonomous region of Nagorno-Karabakh', which in turn elected a 'National Council'. Subsequently,

[175] ibid 10.

the newly formed authorities of Nagorno-Karabakh on 2 September 1991 proclaimed the sovereignty of the territory in question and on 6 January 1992, after a referendum, they declared independence. In the meanwhile, Azerbaijan too had declared independence and as a response to these acts by the authorities of Nagorno-Karabakh revoked the autonomous status of this political entity.[176] Between 1992 and 1994 there was an armed conflict between Azerbaijan and Nagorno-Karabakh with the support of Armenia. The war, also thanks to such support, was won by Armenians.

Since the ceasefire reached in May 1994, the Nagorno-Karabakh Republic has maintained the factual control of Nagorno-Karabakh with the continuous support of Armenia. Since then, Azerbaijan has consistently tried to reintegrate the territory of Nagorno-Karabakh mainly through diplomatic means even if all along the years there would have been a number of border skirmishes.

No State, not even Armenia, has recognized the Republic of Nagorno-Karabakh, but is Nagorno-Karabakh an unlawful territorial situation in the sense of Article 41(2) ARSIWA? Some legal scholars made such an argument.[177] As noted above, while Nagorno-Karabakh is usually considered as an unlawful territorial situation, the way in which third States approached this question is particularly telling. First of all, the unlawfulness itself of the situation is too easily assumed. Admittedly, the role of the third State (Armenia) in the case at hand seems more straightforward compared that to the role of Russia in the case of Transnistria. However, it seems that the conflict can be framed as a proper civil war rather than as an aggression, and as such it was treated from the beginning by the European Community and later by the European Union. Accordingly, no argument was raised that a serious breach of international law was committed and, more specifically, that Armenia intervened unlawfully.

[176] For a detailed description of this chaotic period, see ibid 18–22.

[177] See for instance ibid 90–92, Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States since 1776* (Oxford University Press 2010) 179, Stefan Oeter, 'The Role of Recognition and Non-Recognition with Regard to Secession' in Walter, von Ungern-Sternberg, and Abushov (n 92) 65. Théodore Christakis and Aristoteles Constantinides, 'Territorial Disputes in the Context of Secessionist Conflicts' in Marcelo Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing 2017) 23, Dagmar Richter (n 121) 43–46, and Brad R Roth (n 121) 197–198.

For instance, in the beginning of 1992 a joint statement was adopted by the European Community and by Russia that reads as follows: 'The Russian Federation and the Community and its Member States are profoundly concerned about the continuing conflict over Nagorno-Karabakh, which threatens to grow into a protracted and bloody war'.[178] The same declaration urged the parties to enter into substantive negotiations. Similarly, after a few months the European Community adopted a statement that condemned the use of force by both sides and 'any actions against territorial integrity or designed to achieve political goals by force, including the driving-out of civilian populations'.[179] In addition, it urged them 'to work towards the early convening of the CSCE Peace Conference on Nagorno-Karabakh and to find a solution regarding the modalities of a representation of the communities of Nagorno-Karabakh, without which no lasting peace can be established'.[180] At times, the European Community addressed only Armenia but only to ask to use its *influence* on the authorities of Nagorno-Karabakh.[181] Only in the end of 1993, when the armed conflict was turning around in favour if the Armenians, the European Union, besides condemning the violations of the ceasefire, calling upon the parties to restore it, and, more in general, expressing support for the OSCE Minsk Group in order to find a lasting political solution, mentioned the territorial integrity of Azerbaijan as a relevant element.[182] After the definite ceasefire, the following statement was adopted:

> The European Union welcomes with great satisfaction the recent statements by the leaderships of Armenia, Azerbaijan and Nagorny-Karabakh … In these statements, the parties to the conflict confirmed their commitment to upholding the cease-fire until an agreement on the settlement of the conflict has been concluded. The European Union further welcomes the official declaration issued on this matter by the governments of Armenia and Azerbaijan as well as the authorities in Stepanakert. The European Union considers this an important step in consolidating the cease-fire and approaching a political solution. It thanks the CSCE Minsk Group for its efforts in bringing about these statements and renews its support for the Group's work, which is indispensable for the way towards peace in Nagorny-Karabakh … Finally, the European Union hopes that the parties to the conflict also show restraint in public declarations. The European Union furthermore encourages continued direct contacts

[178] EC Bulletin 3-1992 point 1.4.4. See also EC Bulletin 6-1992 point 1.5.7., EC Bullettin 3-1993 1.4.5., EC Bullettin 6-1993 point 1.4.9.
[179] EC Bulletin 5-1992 point 1.3.10. See also EC Bullettin 9-1993 point 1.3.14, EC Bullettin 9-1993 point 1.4.5
[180] EC Bulletin 5-1992 point 1.3.10.
[181] EC Bullettin 4-1993 1.4.6. In the same sense see also EC Bullettin 6-1993 point 1.4.10.
[182] EC Bullettin 11-1993 point 1.4.4. See also EC Bullettin 1/2-1994 1.3.7.

> between parties in order to create a more friendly and psychologically favourable atmosphere for the continuing of negotiations.[183]

In the following years, the European Union has continued to maintain a similar stance. For instance, answering a parliamentary question, Christopher Patten, at that time European Commissioner for External Relations, referred to the European Union's continued commitment to the Southern Caucasus and to the need to play a more active role in the peace processes in the region. In addition, he noted that the Commission had worked according to such a commitment by, for instance, allocating significant amount of funds to Azerbaijan and Armenia (as well as to Georgia) aimed to humanitarian and reconstruction actions.[184] Subsequently, on occasion of the adoption of a communication directed to a series of States in the European Neighbourhood Policy, the very same recommendations were made towards Armenia and Azerbaijan also with reference to Nagorno-Karabakh, which was simply described as a conflict between them over a territory.[185] The same goes for the action plans adopted: the action plans described the conflict in the same manner.[186] These documents confirm that the European Union did not treat Armenia as an aggressor, did not address the legal status of Nagorno-Karabakh, neither the territorial integrity of Azerbaijan is mentioned with reference to Nagorno-Karabakh.

Several resolutions adopted by the European Union Parliament confirm this reading. Admittedly at times Nagorno-Karabakh and the surrounding districts are defined as occupied territories, but at other times Nagorno-Karabakh properly understood is considered merely as a

[183] EC Bullettin 9-1994 point 1.3.5. See also EC Bullettin 7/8-1994 point 1.3.5.
[184] See the written question E-0907/03 by Olle Schmidt (ELDR) to the Commission, 24 March 2003 and the Answer given by Mr Patten on behalf of the Commission, 22 April 2003, OJ C 84E, 462–463.
[185] Communication from the Commission to the Council - European Neighbourhood Policy - Recommendations for Armenia, Azerbaijan, Georgia and for Egypt and Lebanon, COM/2005/0072 final, 2 March 2005.
[186] Proposal for a Council Decision on the position to be adopted by the Communities and its Member States within the Cooperation Council established by the Partnership and Cooperation Agreement establishing a partnership between the European Communities and its Member States, of the one part, and the Republic of Azerbaijan, of the other part, with regard to the adoption of a Recommendation on the implementation of the EU-Azerbaijan Action Plan, COM/2006/0637 final, 26 October 2006. See also Proposal for a Council Decision on the position to be adopted by the Communities and its Member States within the Cooperation Council established by the Partnership and Cooperation Agreement establishing a partnership between the European Communities and its Member States, of the one part, and Armenia, of the other part, with regard to the adoption of a Recommendation on the implementation of the EU-Armenia Action Plan, COM/2006/0627 final, 25 October 2006.

disputed territory.[187] Another resolution, dealing in general with the need for a European Union strategy for the South Caucasus, addressed also the topic of the Nagorno-Karabakh conflict. On the one hand, the resolution demands 'the withdrawal of Armenian forces from all occupied territories of Azerbaijan, accompanied by deployment of international forces to be organised with respect of the UN Charter in order to provide the necessary security guarantees in a period of transition'. On the other hand, it uses a rather balanced language (eg, the calls to show a more constructive attitude, courage and political will to reach a settlement, to act responsibly, and to compromise over maximalist positions) and more importantly adds that the Parliament:

> [b]elieves the position according to which Nagorno-Karabakh includes all occupied Azerbaijani lands surrounding Nagorno-Karabakh should rapidly be abandoned; notes that an interim status for Nagorno-Karabakh could offer a solution until the final status is determined and that it could create a transitional framework for peaceful coexistence and cooperation of Armenian and Azerbaijani populations in the region.[188]

It seems also meaningful that with the same resolution, as for the conflicts in Georgia, the Parliament '[r]eiterates its unconditional support for the sovereignty, territorial integrity and inviolability of the internationally recognised borders of Georgia, and calls on Russia to respect them'.[189] The difference between the wording of the former passage and of the latter passage is remarkable.

In a subsequent resolution the Parliament addressed a series of recommendations to the Council, the Commission, and the European External Action Service, which should ensure *inter alia* that:

> the negotiations on the EU-Azerbaijan and EU-Armenia Association Agreements … are linked to credible commitments to making substantial progress towards the resolution of the Nagorno-Karabakh conflict, including … the withdrawal of Armenian forces from occupied territories surrounding Nagorno-Karabakh, and their return to Azerbaijani control … and international security guarantees that would include a genuine multinational peacekeeping operation in order to create suitable

[187] European Parliament Resolution on the economic and commercial aspects of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, OJ C 115, 14 April 1997, 193. See also the European Parliament Resolution on support for the peace process in the Caucasus, OJ C 175, 21 June 1999, 251.
[188] European Parliament resolution on the need for an EU strategy for the South Caucasus European Parliament resolution of 20 May 2010 on the need for an EU strategy for the South Caucasus (2009/2216(INI)), OJ C 161E , 31 May 2011, 136–147.
[189] ibid.

> agreed conditions for the future legally-binding free expression of will concerning the final status of Nagorno-Karabakh.[190]

The same goes for the subsequent negotiations, which illustrate the balanced approach to the question at hand. It seems relevant that at least in an initial phase of the negotiations taking place in the context of the OSCE Minsk Group—ie, the group created by the OSCE and co-chaired by France, Russia, and the United States with the aim to find a peaceful solution to the Nagorno-Karabakh conflict created already in 1992—the Government of Azerbaijan itself has appeared ready to talk about proposals of a territory swap with Armenia.[191]

Admittedly, the precise content of the negotiations in particular in these early stages is unknown and in this regard some have talked of a 'veil of confidentiality' and of a 'gentlemen's agreement' that the negotiating process should remain confidential.[192]

It is worth noting, however, that the so-called Basic Principles formulated in 2006 explicitly envisaged the possibility of a referendum aimed to determine the final legal status of Nagorno-Karabakh,[193] which clearly suggests that a door was left open for any kind of settlement. These principles were overall updated in the Madrid Principles—ie, the peace plan proposed in 2007 under the auspices of the OSCE—which were drafted as a 'reasonable compromise based on the Helsinki Final Act Principles of Non-Use of Force, Territorial Integrity, and the Equal Rights and

[190] Negotiations of the EU-Azerbaijan Association Agreement European Parliament resolution of 18 April 2012 containing the European Parliament's recommendations to the Council, the Commission and the European External Action Service on the negotiations of the EU-Azerbaijan Association Agreement (2011/2316(INI)), OJ C 258E, 7 September 2013, 36–43. See also the European Parliament resolution of 18 April 2012 containing the European Parliament's recommendations to the Council, the Commission and the European External Action Service on the negotiations of the EU-Armenia Association Agreement (2011/2315(INI)), OJ C 258E, 7 September 2013, 44–50.

[191] On the various proposals including possible territorial exchanges, see Carey Cavanaugh, 'OSCE and the Nagorno-Karabakh Peace Process' (2016) 27 Security and Human Rights 422, 436–438. See also Marco Pertile, 'Mettere in discussione la stabilità delle situazioni territoriali illecite: Il dovere del non riconoscimento dalla prospettiva dello jus post bellum', *Atti del Convegno, XVIII Giornata Gentiliana* (Edizioni Università di Macerata, 2020) 117ff.

[192] Ruzanna Stepanian, 'Caucasus Report: June 30, 2006' (RFE/RL 2006) <www.rferl.org/a/1341685.html>. See also Liz Fuller, 'Armenian, Azerbaijani Presidents Agree on Preamble to "Madrid Principles"' (RFE/RL 2010) <www.rferl.org/a/1940349.html>. See in this regard Christopher R Rossi, 'Nagorno-Karabakh and the Minsk Group: The Imperfect Appeal of Soft Law in an Overlapping Neighborhood' (2017) 52 Texas International Law Journal 26, 68–69 and Nina Caspersen, 'Moving Beyond Deadlock in the Peace Talks' in Svante E Cornell (ed), *The International Politics of the Armenian-Azerbaijani Conflict: The Original "Frozen Conflict" & European Security* (Palgrave Macmillan 2017) 184–186.

[193] See the Statement by the OSCE Minsk Group Co-Chairs available at <www.osce.org/mg/47496>.

Self-Determination of Peoples'.[194] In this regard, however, it should be noted that the call for the right of self-determination has historically been used in order to support the lawfulness of the secession of the post-Soviet breakaway republics including of Nagorno-Karabakh.[195] Even more significantly, this document openly called for a series of specific principles including:

- Evacuation and demilitarization of the territories surrounding Nagorno-Karabakh;
- A corridor linking Armenia to Nagorno-Karabakh;
- An interim status for Nagorno-Karabakh providing guarantees for security and self-governance;
- Future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will.[196]

Even if the latter point does not explicitly mention the holding of a dedicated referendum as the Basic Principles did, it treats the question of the future legal status of Nagorno-Karabakh as an *open* question, thus not precluding any legal status for the territory in question.[197] In other words, it seems that the Madrid principles suggest that while territories surrounding Nagorno-Karabakh should be returned to Azerbaijan, Nagorno-Karabakh itself should not be returned to Azerbaijan. It has already been noted that what was precisely negotiated in the OSCE context is unknown, however a few statements subsequently adopted suggest that this kind of compromise was the gist of the Madrid Principles.

In 2014 James Warlick, the United States co-chairman of the Minsk Group, elaborated further the aforementioned principles, which he defined as embodying a well-established compromise. He listed the following six principles:

> First, in light of Nagorno-Karabakh's complex history, the sides should commit to determining its final legal status through a mutually agreed and legally binding expression of will in the future. This is not optional. Interim status will be temporary.

[194] See the statement adopted on 10 July 2009 available at<www.osce.org/mg/51152>.
[195] Supra n 191.
[196] See the OSCE Minsk Group Co-Chairs statement available at <www.osce.org/mg/49237> and the excerpts of the basic principles available at <www.legal-tools.org/doc/0b80bb/pdf>. The OSCE Minsk Group Co-Chairs reiterated their endorsement of the Madrid principles in 2009 and 2010. See the statement adopted on 10 July 2009 available at <www.osce.org/mg/51152> and the statement adopted 26 June 2010 <www.osce.org/mg/69515>.
[197] A minor further difference is that the basic principle proposed a separate status not only for the Lachin corridor (that is the 'corridor' linking Armenia to Nagorno-Karabakh) but also for the district of Kelbacar.

> Second, the area within the boundaries of the former Nagorno-Karabakh Autonomous Region that is not controlled by Baku should be granted an interim status that, at a minimum, provides guarantees for security and self-governance.
> Third, the occupied territories surrounding Nagorno-Karabakh should be returned to Azerbaijani control. There can be no settlement without respect for Azerbaijan's sovereignty, and the recognition that its sovereignty over these territories must be restored.
> Fourth, there should be a corridor linking Armenia to Nagorno-Karabakh. It must be wide enough to provide secure passage, but it cannot encompass the whole of Lachin district.
> Fifth, an enduring settlement will have to recognize the right of all IDPs and refugees to return to their former places of residence.
> Sixth and finally, a settlement must include international security guarantees that would include a peacekeeping operation. There is no scenario in which peace can be assured without a well-designed peacekeeping operation that enjoys the confidence of all sides.[198]

Similarly, in 2017 Richard Hoagland, the United States new co-chairman of the Minsk Group, reiterated the same set of principles.[199] Maria Zakharova, spokesperson for the Ministry of Foreign Affairs of Russia, asked whether Hoagland's statement was reflective of the consensus of the co-chairs, answered that '[t]he statements … cited are nothing new. The Russian, US and French presidents have repeatedly referred to them in their joint statements on the Nagorno-Karabakh settlement process from 2009 through 2013'.[200] Indeed, for instance, in 2016 the Heads of Delegation of the OSCE Minsk Group Co-Chair countries adopted a joint statement that, after having reminded the core principles of the Helsinki Final Act, listed the following additional elements proposed by the Presidents of the Co-Chair countries including:

> return of the territories surrounding Nagorno-Karabakh to Azerbaijani control; an interim status for Nagorno-Karabakh providing guarantees for security and self-governance; a corridor linking Armenia to Nagorno-Karabakh; future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will; the right of all internally displaced persons and refugees to return to their former places of residence; and international security guarantees that would include a peacekeeping operation.[201]

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[198] Statement adopted by Ambassador James Warlick on 7 May 2014 during an event held at the Carnegie Endowment for International Peace <https://am.usembassy.gov/ambassador-james-warlick-nagorno-karabakh-the-keys-to-a-settlement>.
[199] Statement reported by an Armenian media outlet on 24 August 2017 <https://news.am/eng/news/406152.html>.
[200] Briefing by Foreign Ministry Spokesperson Maria Zakharova, 31 August 2017 <www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2850802#19>.
[201] See the statement of the Heads of Delegation of the OSCE Minsk Group Co-Chair Countries available at <www.osce.org/mg/287531>.

Some have talked of a plan proposed by Russia and labelled as 'Lavrov-plan', after the name of Russian Minister of Foreign Affairs.[202] Reportedly, the gist of this plan was a compromise solution according to which the *status quo* in Nagorno-Karabakh may persist, while the surrounding districts shall be returned to Azerbaijan.[203] Official statements do not shine a light on this plan even if it can be inferred that the Security Council resolutions adopted in 1993 are not considered as relevant, that the conflict has to be settled by way of negotiations, and that Nagorno-Karabakh and the surrounding districts are treated differently.[204]

Eventually, no territory swap had occurred and, on the contrary, statements adopted by Azerbaijan, in particular staring from the adoption of the Kosovo declaration of independence, show that Azerbaijan was even willing to make use of armed force in order to get back Nagorno-Karabakh as well as the surrounding districts, which eventually happened in the autumn of 2020.[205] However, it is important to note that the negotiability of territorial integrity of Azerbaijan was not a momentary position, but on the contrary it had been supported for a certain amount of years.

As for the UN, the Security Council adopted four resolutions on Nagorno-Karabakh. Given that these resolutions were adopted in 1993, that is after the first phases of the armed confrontation between Armenians and Azerbaijani, they focus more on the ongoing confrontations than on their hypothetical consequences. Nonetheless, these resolutions do reaffirm in their preambular part the principle of inviolability of the frontiers and the territorial integrity of Azerbaijan as well as of all other States in the region. Accordingly, they demanded the immediate cessation of all hostilities and

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[202] Azer Babayev , 'Nagorno-Karabakh: The Genesis and Dynamics of the Conflict' in Azer Babayev, Bruno Schoch, and Hans-Joachim Spanger (eds), *The Nagorno-Karabakh Deadlock: Insights from Successful Conflict Settlements* (Springer Fachmedien Wiesbaden 2020) 34–35. See also International Crisis Group, Digging out of Deadlock in Nagorno-Karabakh (Crisis Group Europe Report N°255, 20 December 2019) 19–20 <www.crisisgroup.org/europe-central-asia/caucasus/nagorno-karabakh-conflict/255-digging-out-deadlock-nagorno-karabakh> and Thomas de Waal, A Precarious Peace for Karabakh (Carnegie Moscow Center, 11 November 2020) <https://carnegie.ru/commentary/83202>.

[203] ibid.

[204] See for instance Foreign Minister Sergey Lavrov's remarks and answers to questions at a roundtable discussion with the participants of the Gorchakov Public Diplomacy Fund in the videoconference format, 21 April 2020 <www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4103828>.

[205] 'Azerbaijan may use force in Karabakh after Kosovo', Reuters, 4 March 2008 <www.reuters.com/article/us-azerbaijan-armenia-idUSL0466207520080304>.

the withdrawal of all occupying forces from recently occupied areas of Azerbaijan.[206] It seems in any case significant that a clear condemnation of Armenia is lacking. The Security Council meeting records clarify that it was contentious to what extent it was a local conflict between Nagorno-Karabakh and Azerbaijan, or whether it was a proper inter-State armed conflict between Armenia and Azerbaijan.[207]

As for the General Assembly, at that time it adopted on this matter one resolution that dealt exclusively with the humanitarian assistance to refugees and to displaced persons.[208] Later, in 2006, it adopted a resolution that dealt with a serious environmental issue occurring in the territory in question *per se* unrelated to the conflict, but that required a certain degree of cooperation.[209] Eventually, only in 2008, thanks to an intensive diplomatic effort, Azerbaijan succeeded to take the question of the legal status of Nagorno-Karabakh before the General Assembly. This resolution firstly recalled the previous resolutions adopted by UN organs and, accordingly, it reaffirmed the territorial integrity and sovereignty of Azerbaijan in its internationally recognised borders.[210] Secondly, it demanded 'the immediate, complete and unconditional withdrawal of all Armenian forces from all the occupied territories of the Republic of Azerbaijan' and it reaffirmed the 'inalienable right of the population expelled from the occupied territories of the Republic of Azerbaijan to return to their homes'.[211] Finally, it reaffirmed 'that no State shall recognize as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining this situation'.[212]

[206] S/RES/822, 30 April 1993, S/RES/853, 29 July 1993, S/RES/874, 14 October 1993, and S/RES/884, 12 November 1993.
[207] See for instance S/PV.3205, 30 April 1993.
[208] A/RES/48/114, 20 December 1993.
[209] The Resolution was dealing with a series of natural fires. A/RES/60/285, 7 September 2006. On this question see Johann G Goldammer and Global Fire Monitoring Center (eds), *Vegetation Fires and Global Change: Challenges for Concerted International Action: A White Paper Directed to the United Nations and International Organizations* (Kessel 2013) 292–293.
[210] A/RES/62/243, 14 March 2008, para 1.
[211] ibid, paras 2–3.
[212] ibid, para 5.

There are a few aspects that are worth underlining. Even if this resolution uses the verb 'reaffirm' in connection with non-recognition, this is the first time that a UN organ makes this call with reference to Nagorno-Karabakh. As regards this call, it should be noted that the wording employed clearly echoes Article 41(2) ARSIWA. Moreover, it is the first time that a UN organ unequivocally affirms that Nagorno-Karabakh and the surrounding districts are occupied by Armenia and unambiguously demands the withdrawal of Armenian forces. Similarly, the resolution does not merely reaffirm the territorial integrity and sovereignty of Azerbaijan and Armenia but, in accordance with the call to withhold recognition, it specifies 'in its [that is, Azerbaijan] internationally recognized borders'. It is worthwhile to note that the United States, France, Russia—ie, the Minsk Group co-chairs—voted against this resolution. The United States reaffirmed the negotiators' support for the territorial integrity of Azerbaijan, which explains why these three States do not recognize Nagorno-Karabakh, but also held that:

> the draft resolution before us today selectively propagates only certain of those principles, to the exclusion of others, without considering the Co-Chairs' proposal in its balanced entirety. Because of this selective approach, the three OSCE Minsk Group Co-Chair countries must oppose this unilateral draft resolution. They reiterate that a peaceful, equitable and lasting settlement of the Nagorny Karabakh conflict will require unavoidable compromises among the parties that reflect the principles of territorial integrity, non-use of force and equal rights of peoples, as well as other principles of international law.[213]

Similarly, Slovenia, in behalf of the European Union, stated that 'Minsk Group should retain the lead in settling the Nagorny Karabakh conflict' and accordingly European States abstained.[214] Again, it is possible to perceive a significant tension between legal considerations and political considerations related with the purpose of achieving a peaceful settlement.

[213] A/62/PV.86, 14 March 2008, 5. The resolution passed by a vote of 7 against (Angola, Armenia, France, India, Russia, United States, Vanuatu) to 39 in favour (with the exceptions of Serbia and Tuvalu all member State of the OIC, of the NAM, and/or of the GUAM) with 100 abstentions.
[214] ibid, 5, 10.

Not surprisingly, this resolution was heartily supported by Moldova, Georgia, and Ukraine.[215] The resolution was supported also by many Muslim States. The representative of Pakistan, speaking on behalf of the OIC, said that the organization:

> has a long-standing, principled and firm position vis-à-vis the aggression of the Republic of Armenia against the Republic of Azerbaijan. That position, based on the principles and objectives of the Charter of the United Nations and on our full support for the just stance of the Republic of Azerbaijan, is articulated in the relevant declarations, communiqués and resolutions of the OIC at the summit and ministerial levels.[216]

Similarly, after that the Minister of Foreign Affairs of Armenia Nalbandian had claimed that Turkey was responsible for the failure of the normalization of relations between the two countries and had addressed the Armenian effort to have the Armenian genocide recognized by the international community, Turkey affirmed that 'it is necessary that in the settlement of the … conflict progress is achieved, based on Azerbaijan's territorial integrity and in light of the relevant resolutions of the Security Council … Armenia must put an end to its invasion of Azerbaijan's territories'.[217] Indeed, Turkey on occasion of each election and referendum indicted in Nagorno-Karabakh has reaffirmed that those acts are clear breaches of the principles of international law, the Security Council

[215] ibid 10.

[216] ibid 6. See for instance the final communiqué of the 14th Islamic Summit conference, 31 May 2019, para 34 <www.oic-oci.org/docdown/?docID=4496&refID=1251>. The text of the communiqué reads as follows: 'The Conference reiterated its principled position on condemnation of the aggression of the Republic of Armenia against the Republic of Azerbaijan, reaffirmed that acquisition of territory by use of force is inadmissible under the Charter of the United Nations and international law, and urged for strict implementation of UN Security Council resolutions … and for immediate, complete and unconditional withdrawal of the armed forces of the Republic of Armenia from Nagorno-Karabakh region and other occupied territories of the Republic of Azerbaijan. The Conference called for the resolution of the conflict on the basis of the sovereignty, territorial integrity and inviolability of the internationally recognized borders of the Republic of Azerbaijan. The Conference also expressed its grave concern by the continuing arms supply to the aggressor, unlawful actions aimed at a changing the demographic, cultural and physical character of the occupied territories, including by destruction and misappropriation of cultural heritage and sacred sites, illegal economic and other activities and interference with the public and private property rights in the Nagorno-Karabakh region and other occupied territories of Azerbaijan. In that regard, the Conference urged Member States to take effective measures, including through national legislation, that would prevent any arms supply to the aggressor from or via their territories, any activities by any natural and legal persons operating on their territories against the sovereignty and territorial integrity of Azerbaijan, including the participation in or facilitation any unlawful activity in the Nagorno-Karabakh region and other occupied territories of Azerbaijan, as well as any action which would help maintain the occupation'.

[217] See the press release of 14 December 2017 <www.mfa.gov.tr/no_-385_-ermenistan-disisleri-bakani-edward-nalbantyanin-iddialari-hk_en.en.mfa>. The statement by Nalbandian is available at <www.mfa.am/en/speeches/2017/12/13/fm-greece-speech/7794>.

resolutions, and the principles of the OSCE and that they impair the efforts to reach a peaceful and lasting solution to the Nagorno-Karabakh conflict.[218]

As for the NAM the picture is more complex. At the outset, it should be noted that Armenia is an observer State,[219] while Azerbaijan joined the organization only in 2011 having in precedence seldomly participated as an observer State. Starting from that moment Azerbaijan has consistently brought the question of Nagorno-Karabakh before the organization.[220] Already in May 2012 it succeeded in including a specific paragraph on this question in the final document of the Ministerial Meeting of the Coordinating Bureau. The Ministers merely reaffirmed the principle of non-use of force and expressed their support for a negotiated settlement based on the norms and principles of international law, in particular those relating to respect for the sovereignty, territorial integrity and inviolability of the internationally recognized borders of the States; remarkably the principle of self-determination is not mentioned at all.[221] After a few months, however, the wording used changed. In fact, the Summit of Heads of State or Government held in August 2012 specified that the negotiated settlement should have preserved the territorial integrity, the sovereignty, and the internationally recognized borders of Azerbaijan.[222] In 2016, at the following summit, the paragraph dedicated to the question of Nagorno-Karabakh included a reference to the four Security Council resolutions adopted in 1993.[223] At the next summit, in 2019, the wording was much stronger. It is worthwhile to note that

[218] See for instance the press release of 11 September 2015 and of 20 February 2017 <www.mfa.gov.tr/no_-250_-11-september-2015_-press-release-regarding-the-so_called-local-elections-planned-to-be-held-in-nagorno_karabakh-region-of-the-republic-of-azerbaijan.en.mfa> and <www.mfa.gov.tr/no_55_-17-february-2017_-press-release-regarding-the-so_called-_referendum-on-constitutional-changes_-planned-to-be-held-in-nagorno_karabakh-on-20-february-2017.en.mfa>.

[219] Armenia first participated as an observer state to the 10th Summit Conference of Heads of State or Government of the NAM held in Jakarta, Indonesia, 1–6 September 1992.

[220] Jason Strakes, 'Azerbaijan and the Non-Aligned Movement: Institutionalizing the "Balanced Foreign Policy" Doctrine' (IAI Working Papers 15/11, May 2015) 14–16.

[221] Final Document (NAM 2012/CoB/Doc.1), Ministerial Meeting of the Coordinating Bureau, Sharm El Sheikh, 7–10 May 2012, 106, para 382 <https://web.archive.org/web/20131113115020/https://mfa.gov.eg/nam/documents/final%20document%20adopted%20by%20the%20ministerial%20meetings%209-10%20May.pdf>.

[222] 16th Summit of Heads of State or Government of the Non-Aligned Movement Tehran, Islamic Republic of Iran, 26–31 August 2012, 104, para 391 <http://cns.miis.edu/nam/documents/Official_Document/16thSummitFinalDocument(NAM2012-Doc.1-Rev.2).pdf>.

[223] 17th Summit of Heads of State and Government of the Non-Aligned Movement, Island of Margarita, Bolivarian Republic of Venezuela, 17–18 September 2016, 129–130, para 500 <http://cns.miis.edu/nam/documents/Official_Document/XVII-NAM-Summit-Final-Outcome-Document-ENG.pdf>.

this meeting was held in Baku and that during this summit the presidency of the NAM was handed to Aliyev, President of Azerbaijan. The final document includes an additional paragraph that reads as follows:

> the Heads of State and Government also underlined the inadmissibility of the acquisition of territory by force, reaffirmed that no State shall recognize as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining that situation, including through economic activities in these territories.[224]

After the armed clashes occurred in July 2020, the member States of the NAM condemned Armenia and explicitly affirmed their support to Azerbaijan in its efforts aimed at restoration of its territorial integrity.[225]

It is noteworthy that three member States of the NAM voted against the aforementioned General Assembly resolution[226] and as many as 47 abstained.[227] The somewhat mixed support by NAM member States to Azerbaijan, together with the increasingly strong statements adopted at the summits or in occasion of specific events, raises a difficult problem concerning the position of those States that individually take a position different from the position adopted collectively by the regional organization to which they belong.[228]

In contrast with the position adopted by the OIC, the GUAM and the NAM, the statements adopted by other third States in relation to Nagorno-Karabakh support negotiations between the parties, without at the same time any reference to the territorial integrity of Azerbaijan. On the contrary, they do refer to the principle of self-determination, which, as mentioned above, is the legal

[224] 18th Summit of Heads of State and Government of the Non-Aligned Movement Baku, the Republic of Azerbaijan, 25–26 October 2019, 160, para 663 <www.namazerbaijan.org/pdf/BFOD.pdf>.
[225] Communique of the Coordinating Bureau of the NAM, 18 July 2020 <www.namazerbaijan.org/pdf/acdoc12.pdf>.
[226] Angola, India, and Vanuatu.
[227] Algeria, Antigua and Barbuda, Bahamas, Barbados, Bolivia, Bosnia and Herzegovina, Botswana, Cameroon, Chile, Congo, Costa Rica, North Korea, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Ghana, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Kenya, Liberia, Madagascar, Mauritius, Mongolia, Mozambique, Namibia, Nepal, Nicaragua, Panama, Papua New Guinea, Peru, Philippines, Saint Lucia, Singapore, South Africa, Sri Lanka, Suriname, Timor-Leste, Togo, Trinidad and Tobago, Venezuela, and Zambia.
[228] On this and other problems concerning the reconstruction of the position of the international community, see Marco Pertile and Sondra Faccio, 'What We Talk When We Talk about Jerusalem: The Duty of Non-Recognition and the Prospects for Peace after the US Embassy Relocation to the Holy City' (2020) 33 Leiden Journal of International Law 621, 628.

basis relied upon by Armenia in order to support the claim for the lawful secession of Nagorno-Karabakh.[229]

The Co-Chairs of the OSCE Minsk Group summed up the principles according to which the negotiations are based and, more specifically, they affirmed that:

> The Co-Chairs reiterate that a fair and lasting settlement must be based on the core principles of the Helsinki Final Act, including in particular the non-use or threat of force, territorial integrity, and the equal rights and self-determination of peoples. It also should embrace additional elements as proposed by the Presidents of the Co-Chair countries in 2009-2012, including: return of the territories surrounding Nagorno-Karabakh to Azerbaijani control; an interim status for Nagorno-Karabakh providing guarantees for security and self-governance; a corridor linking Armenia to Nagorno-Karabakh; future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will; the right of all internally displaced persons and refugees to return to their former places of residence; and international security guarantees that would include a peacekeeping operation. The Co-Chairs stress their view that these principles and elements must be the foundation of any fair and lasting settlement to the conflict and should be conceived as an integrated whole. Any attempt to put some principles or elements over others would make it impossible to achieve a balanced solution.[230]

The European Union supported negotiations in the context of the Minsk Group and reaffirmed for example that '[t]he current situation cannot endure, and we support the continuation of high-level negotiations to achieve a peaceful settlement of the conflict in accordance with international law'.[231] The same stance was expressed on occasion of the multiple elections held in Nagorno-Karabakh adding that the European Union does not recognise the elections and the legal and constitutional framework in which they were hold.[232]

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[229] Supra n 191.

[230] See the Press Statement by the Co-Chairs of the OSCE Minsk Group on the Upcoming Meeting of President Aliyev and Prime Minister Pashinyan, 9 March 2019 <www.osce.org/minsk-group/413813>.

[231] Statement by the European Union at the 1070th meeting of the OSCE Permanent Council Regarding Nagorno-Karabakh, 9 October 2015 <www.osce.org/pc/197881?download=true>.

[232] See the statements by the European Union at the 1155th meeting of the OSCE Permanent Council on the "presidential election" in Nagorno-Karabakh, 20 July 2017 <www.osce.org/permanent-council/333016?download=true> and at the 1135th meeting of the OSCE Permanent Council on the so-called constitutional referendum in Nagorno-Karabakh, 2 March 2017 <www.osce.org/permanent-council/304336?download=true>. However, in few cases the European Union expressed its support for the territorial integrity of Azerbaijan, see for instance the Declaration by the Presidency on behalf of the European Union on forthcoming "Presidential elections" in Nagorno Karabakh, 2 August 2002 <https://europa.eu/rapid/press-release_PESC-02-105_en.htm?locale=FR>.

More specifically, Armenia and Azerbaijan were treated on an equal stand for a series of international policy reasons. The attempt to be perceived as a neutral player can be noted not only in the rather neutral statement cited above, but also by comparing the wording of the so-called Action Plans for Azerbaijan and for Armenia and by comparing the wording of the Actions Plan for these States with those for Moldova and Georgia. In these regards, Cornell emphasized a series of differences.[233] On the one hand, the Action Plans for Georgia and for Moldova clearly state that the European Union is committed to the settlement of the respective conflicts based on respect of the sovereignty and territorial integrity of metropolitan States within their internationally recognised borders. In contrast, the Action Plans for Armenia and Azerbaijan do not contain such a commitment and the European Union merely recalled its support for the OSCE Minsk Group conflict settlement efforts. In addition to that, the only Action Plan that contains reference to the principle of self-determination is the Action Plan for Armenia and, moreover, the same plan does not contain any reference to the principle of territorial integrity. Conversely, the action plan for Azerbaijan does refer to the latter principle but, unlike those for Moldova and Georgia, only in its preamble, while the specific section on the situation in Nagorno-Karabakh refers only to Security Council resolutions and to the legal documents adopted in the context of the OSCE.

Some have noted that the elections in Nagorno-Karabakh have not been consistently defined as illegal or as illegitimate and, actually, on some occasions the co-chairs in their statement in which they take note of the elections and they add that they 'the need for the de facto authorities in NK to try to organize democratically the public life of their population with such a procedure'.[234] One can

[233] Svante E Cornell, 'The European Union and the Armenian–Azerbaijani Conflict: Lessons Not Learned' in Svante E Cornell (ed), *The International Politics of the Armenian-Azerbaijani Conflict* (Palgrave Macmillan 2017) 158–161. With regard to such differences, she concludes: 'This approach to conflict resolution is not serious. The fact that the EU uses the same exact paragraphs, with interchangeable principles on which it bases its efforts, implies that the EU in reality does not operate on the basis of any principles whatsoever. Moreover, the inclusion of the principle of self- Determination without reference to the principle of territorial integrity is highly unusual diplomatic practice—whereas the opposite is commonplace'. See ibid 159. The Action Plan for Armenia is available at <https://eeas.europa.eu/archives/docs/enp/pdf/pdf/action_plans/armenia_enp_ap_final_en.pdf> while that for Azerbaijan is available at <https://eeas.europa.eu/archives/docs/enp/pdf/pdf/action_plans/azerbaijan_enp_ap_final_en.pdf>.

[234] See the statement adopted by Mr Didier Gonzalez, Deputy Permanent Representative of France, at the meeting of the OSCE Permanent Council, 27 May 2010 <www.osce.org/files/f/documents/9/4/68324.pdf>. See also more recently the press statement by the Co-Chairs of the OSCE Minsk Group, 31 March 2020 <www.osce.org/minsk-group/449410>. See

compare such a statement with those adopted in the context of the NAM,[235] the GUAM,[236] and the OIC,[237] which unambiguously condemned the elections and defined them as illegal.

As regards third States, the Spokesman for the Ministry of Foreign Affairs of Russia did recall that 'Russia supports the principle of territorial integrity of Azerbaijan, as well as other fundamental norms and principles of international law', but then added also that:

> We are convinced that its future status should be determined without the use of force as a result of political negotiations between all the parties within the framework of the Minsk process. At the same time, Moscow does not believe that the course of the peaceful settlement of the conflict could depend on the elections in Nagorno-Karabakh. As for Russia, it will, in close coordination with its co-chair partners, continue to vigorously help Azerbaijanis and Armenians to reach a compromise solution to the Karabakh knot as soon as possible.[238]

The United States aligned with the statements released by the OSCE Minsk Group Co-Chairs and, more specifically, affirmed that 'our longstanding policy, shared by the Minsk Group co-chairs, is that a just settlement must be based on international law, which includes the Helsinki Final Act, in particular the principles of non-use of force, territorial integrity, and self-determination'.[239] China, answering a question by the press on its stance on the parliamentary elections held in Nagorno-Karabakh on 3 May 2015, held that 'China's position … is clear and consistent. It is hoped that parties concerned will find a mutually acceptable solution through consultation and dialogue based on well-

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on this point Elmar Brok, 'The EU's New Foreign Policy' in Michael Kambeck and Sargis Ghazaryan (eds), *Europe's next Avoidable War: Nagorno-Karabakh* (Palgrave Macmillan 2012) 114–115.

[235] Communiqué of the Coordinating Bureau of the Non-Aligned Movement on the so-called "presidential and parliamentary elections" held in the occupied territories of Nagorno-Karabakh, 4 April 2020 <www.namazerbaijan.org/pdf/acdoc6.pdf>.

[236] Statement by the Council of Ministers of Foreign Affairs of the Organization for Democracy and Economic Development – GUAM on so-called presidential elections in the Nagorno-Karabakh region, 9 July 2007 <https://guam-organization.org/en/statement-by-the-council-of-ministers-of-foreign-affairs-of-the-organization-for-democracy-and-economic-development-guam-on-so-called-presidential-elections-in-the-nagorno-karabakh-region> and Statement by the MFA of the Rebublic of Azerbaijan regarding the so-called "elections" to the "parliament" of Nagorno-Karabakh region, 27 February <https://guam-organization.org/en/statement-by-the-mfa-of-the-rebublic-of-azerbaijan-regarding-the-so-called-elections-to-the-parliament-of-nagorno-karabakh-region>.

[237] Statement adopted by the Secretary General of the Organization of Islamic Cooperation on the so-called "Parliamentary Elections" in Occupied Nagorno-Karabakh, 22 April 2015 <www.oic-oci.org/topic/?t_id=10006&ref=3965&lan=en> and Statement adopted by the General Secretariat of the Organization of Islamic Cooperation on the elections in the occupied Nagorno-Karabakh, 31 March 2020 <www.oic-oci.org/topic/?t_id=23303&ref=13971&lan=en>.

[238] See the statement by the Spokesman for Ministry of Foreign Affairs of Russia Andrei Nesterenko, 23 May 2010 <www.mid.ru/en/web/guest/kommentarii_predstavitelya/-/asset_publisher/MCZ7HQuMdqBY/content/id/248882>.

[239] Press Statement issued by Department spokesperson Heather Nauert, 21 June 2017 <www.state.gov/recent-violence-and-casualties-in-nagorno-karabakh>.

recognized norms of the international law and relevant resolutions of the UN Security Council'.[240] France, in occasion of a visit of the leader of Nagorno-Karabakh to France, clarified that it 'does not recognize the self-proclaimed Nagorno-Karabakh Republic. It does not maintain any relations with those who claim to be its representatives' but added that 'France is working to ensure that a peaceful and lasting solution can be found and is conducting its mediation efforts in strict compliance with its duty of impartiality'.[241] Similarly, David Lidington, Minister for Europe of the United Kingdom, reaffirmed that his Government supports the work of the Mink Group and recalled that 'the elements making up a deal, including the return of occupied territories and the acceptance of a free expression of will on the status of Nagorno-Karabakh, were once again set out clearly on 7 May by the United States Co-Chair'.[242]

To sum up, from a legal perspective the case of Nagorno-Karabakh is, when it comes to territorial issues, identical to the case of Transnistria. However, it is worth mentioning that all the statements by means of which third States and international organizations took a position over Transnistria mention the necessity to preserve the territorial integrity and sovereignty of Moldova. In contrast, when it comes to Nagorno-Karabakh, third States and international organizations generally refer to the need to respect international law and, at the same time, refer to the necessity to engage into negotiations. From the statements that have been issued it can be inferred that the restitution the surrounding districts can be negotiated and, more specifically, it seems that their restitution can be traded with the possibility to keep Nagorno-Karabakh. It follows that these statements manifest the will to recognize the situation emerging from negotiations and thus to validate a situation originally unlawful.

[240] Statement by Foreign Ministry Spokesperson Hua Chunying adopted, 8 May 2015 <www.fmprc.gov.cn/ce/cgbelfast/eng/wjbfyrth_3/t1261981.htm>.
[241] Daily press briefing, 16 November 2018 <www.diplomatie.gouv.fr/en/country-files/armenia/events/article/armenia-azerbaijan-q-a-excerpts-from-the-daily-press-briefing-16-11-18>.
[242] Statement by David Lidington, Minister for Europe of the United Kingdom, 12 May 2014 <www.gov.uk/government/news/fco-minister-comments-on-20th-anniversary-of-nagorno-karabakh-ceasefire>.

The representative of Azerbaijan, while criticising the negative vote of some States to the resolution sponsored by Azerbaijan itself, raised this point arguing that when legality is involved there can be no negotiations. More specifically, he mentioned the four Security Council resolutions and he claimed that: 'Neutrality was not a position; it was the lack of one. There could be no neutrality when the norms of international law were violated. Neutrality under such conditions meant total disregard for those norms'.[243] Similar arguments were raised in the context of discussions before the General Assembly. The Azerbaijani and Turkish representatives argued that any solution to the territorial dispute over Nagorno-Karabakh must be based on international law. The representative of the former, after having argued that secession was prohibited under both Soviet Law and international law, and conversely that Nagorno-Karabakh has not a positive right to secession, argued that:

> Armenia cannot demand privileges, at the very core of which are gross and systematic violations of international law, including international humanitarian law and international human rights law, and the discriminatory denial of the rights and freedoms of others, in particular of the significantly larger Azerbaijani population, totalling more than 1 million people, who have been expelled and prevented from returning to their homes and properties in both Armenia and the occupied territories of Azerbaijan … [N]o peace settlement to the conflict can be reached that … is inconsistent with international law. The primary objective of the ongoing peace process, the mandate of which is based on the relevant Security Council resolutions, is to ensure the immediate, complete and unconditional withdrawal of the Armenian armed forces from the Nagorno Karabakh region and all other occupied territories of Azerbaijan; the restoration of the territorial integrity of Azerbaijan within its internationally recognized borders; and the return of forcibly displaced persons to their homes and properties. The unlawful use of force and the resulting military occupation and ethnic cleansing of the territories of Azerbaijan do not represent a solution and will never bring about peace, reconciliation and stability.[244]

Turkey made the same argument. Talking of the Israeli–Arab conflict it affirmed that:

> We as Turkey have a clear stance on that issue — the immediate establishment of an independent Palestinian State, with homogeneous territories on the basis of the 1967 borders and with East Jerusalem as its capital, is the only solution Any other peace plan, apart from that, will never stand a chance at being fair, just and implemented.

Then it continued the statement by making the same argument on the situation on Nagorno-Karabakh:

[243] Press release on the resolution reaffirming territorial integrity of Azerbaijan, demanding withdrawal of all Armenian force, 14 March 2008 <www.un.org/press/en/2008/ga10693.doc.htm>.
[244] A/74/PV.8, 26 September 2019, 58–59.

> It is unacceptable that Nagorno Karabakh and its surrounding areas, which are Azerbaijani territories, are still occupied despite all the resolutions that have been adopted in that regard.[245]

In contrast, Armenia argued that any solution must be based on compromise:

> I want to make it clear that the conflict of Nagorno Karabakh is a very complicated and painful issue … and that it is impossible to settle it … without a compromise, mutual respect and balance. I therefore wish to invite my Azerbaijani counterpart, President Ilham Aliyev, to accept the formula that will create the conditions for a breakthrough in the peace process. Any solution to the Nagorno Karabakh conflict must be acceptable to the people of Armenia, the people of Nagorno Karabakh and the people of Azerbaijan.[246]

It is worthwhile to note that the statements cited above do not support that the 'primary objective of the ongoing peace process' is 'to ensure the immediate, complete and unconditional withdrawal of the Armenian armed forces from the Nagorno Karabakh region and all other occupied territories of Azerbaijan'. On the contrary they support the contention of Armenia that the conflict in question shall be solved by way of compromise.

The international response to the 2020 war between Armenia and Azerbaijan confirms such a contention. Armed clashes occurred in July and in the mid of September 2020, but the situation really escalated in the end of the same month. On 27 September 2020, Azerbaijan with the assistance of Turkey, launched a military intervention against Nagorno-Karabakh with the manifest aim to reconquer the territory lost in the early nineties. This conduct firstly raises the question whether a State can lawfully reconquer a territory that it has previously lost or, on the contrary, whether a State loses such a right if a ceasefire agreement has been concluded or if or a considerable lapse of time has passed between the original conquest and the reaction. In the case at hand the question is, more precisely, whether a long-standing unlawful occupation can be understood as a continuing attack thus allowing the resort to self-defence. Indeed, Azerbaijan framed the question as an action undertaken out of self-defence with reference to violations of the ceasefire and also added that '[i]n order to

[245] A/74/PV.3, 24 September 2019, 22.
[246] A/74/PV.6, 25 September 2019, 45. See also A/74/PV.8, 26 September 2019, 61, which mentions the pogroms and the mass deportations occurring in the nineties.

prevent another military aggression by Armenia and provide the security of densely populated civilian residential areas the Armed Forces of the Republic of Azerbaijan undertake counter-offensive measures within the right of self-defence'.[247] It has been noted that even if there are not many precedents and if State practice does not provide any conclusive answer, there are compelling arguments—ie, the lack of the requirements of immediacy, necessity, and proportionality—that suggest that it is not possible to act out of self-defence in cases such as Nagorno-Karabakh.[248] However, third States have mostly refrained from expressing their opinions on this specific matter. On the other hand, no State condemned the action of Azerbaijan, but merely called upon the parties to agree on an immediate cessation of the hostilities and for the observance of a ceasefire.[249]

During the armed conflict Armenia lost control over four of the districts surrounding Nagorno-Karabakh (namely, Qubadli, Zangilan, Jabrayil, and Fuzuli) and eventually was compelled to agree to a ceasefire. More specifically, on 9 November 2020 Azerbaijan, Armenia, and Russia signed an agreement by means of which the parties agreed on a complete ceasefire and the termination of hostilities.[250] First, this agreement envisaged the deployment of a Russian peacekeeping contingent along the line of contact in Nagorno-Karabakh and along the Lachin corridor, which remain under

[247] S/2020/948, 28 September 2020, annex (Statement of the Ministry of Foreign Affairs of the Republic of Azerbaijan).
[248] Specifically on the conflict in question, see Bernhard Knoll-Tudor and Daniel Mueller, 'At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh' (*EJIL:Talk!*, 17 November 2020) <www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh> and Tom Ruys and Felipe Rodríguez Silvestre 'The Nagorno-Karabakh Conflict and the Exercise of "Self-Defense" to Recover Occupied Land' (*Just Security*, 10 November 2020) <www.justsecurity.org/73310/the-nagorno-karabakh-conflict-and-the-exercise-of-self-defense-to-recover-occupied-land>. See also Terry D Gill, 'When Self-defence End?' in Marc Weller (ed), The Oxford Handbook of International Law (Oxford University Press 2015) and Judith G Gardam, *Necessity, Proportionality and the Use of Force* (Cambridge University Press 2004) 167–168.
[249] Press Statement by the Indian Ministry of External Affairs on Armenia Azerbaijan Conflict, 1 October 2020 <www.mea.gov.in/press-releases.htm?dtl/33084/press+statement+on+armenia+azerbaijan+conflict>, Statement by Japanese Press Secretary Yoshida Tomoyuki, 28 September 2020 <https://www.mofa.go.jp/press/release/press4e_002916.html>, Press release by the Office of the Minister of Foreign Affairs of Brazil on the military confrontation between Armenia and Azerbaijan <www.gov.br/mre/en/contact-us/press-area/press-releases/military-confrontation-between-armenia-and-azerbaijan>, Statement by the Office of the Minister of Foreign Affairs of Byelorussia, 28 September 2020 <www.mfa.gov.by/print/press/news_mfa/f72d69a5c8cfc896.html>, Statement of the Australian Foreign Minister, 1 October 2020 <www.foreignminister.gov.au/minister/marise-payne/media-release/azerbaijan-armenia-conflict>, the joint statement of the Foreign Ministers of Canada and United Kingdom, 28 September 2020 <www.canada.ca/en/global-affairs/news/2020/09/joint-statement-by-canada-and-the-united-kingdom-on-the-armenia-azerbaijan-conflict.html>, Statement by the Ministry for Europe and Foreign Affairs Spokesperson, 27 September 2020 <www.diplomatie.gouv.fr/en/country-files/azerbaijan/news/article/situation-in-nagorno-karabakh-statement-by-the-ministry-for-europe-and-foreign>.
[250] Text of this agreement can be found at <www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4419267>.

the control of the peacekeeping contingent for five years with an automatic renewal of five years. Second, the districts conquered by Azeri are to be kept by the Azeri forces, while the remaining districts (namely, Kalbajar, Agdam, and Lachin except the five-kilometres wide strip of land connecting Armenia and Nagorno-Karabakh, which is located in the latter district) are to be returned within fixed deadlines. For the purposes of this work, it should be noted that the agreement is silent over the final status of Nagorno-Karabakh properly intended, which thus is left unsolved. As regard to the ceasefire agreement the OSCE as well as the EU have expressed their satisfaction renewing the invitation to negotiate without any additional observation on the scope of such negotiations except for the reference that the final settlement shall be sustainable.[251]

Indeed, the parliamentary questions raised before the European Parliament after the 2020 war seem significant. For instance, the European Union reiterates its full support to the international format of the OSCE Minsk Group with the aim to reach a comprehensive and sustainable settlement of the conflict. It seems relevant that the EU refers to a 'negotiated peaceful conflict settlements under the internationally agreed negotiating formats and processes' without again any mention to any particular outcome.[252]

In another instance a member of the parliament asked what steps the Union has undertaken with respect of the post-soviet frozen conflicts. The High Representative Vice-President Borrell answering on behalf of the Commission started by saying that 'The EU is fully committed to the peaceful resolution of conflicts and to building trust and good neighbourly relations across the Eastern Partnership (EaP) region'.[253] However, it should be noted that as regards Nagorno-Karabakh he

[251] Statement by the High Representative/Vice-President Josep Borrell on the cessation of hostilities, 10 November 2020 <https://eeas.europa.eu/headquarters/headquarters-homepage/88476/nagorno-karabakh-statement-high-representativevice-president-josep-borrell-cessation_en> and Joint Statement by the Heads of Delegation of the OSCE Minsk Group Co-Chair Countries, 3 December 2020 <www.diplomatie.gouv.fr/en/country-files/azerbaijan/news/article/joint-statement-by-the-heads-of-delegation-of-the-osce-minsk-group-co-chair>.

[252] Question for written answer E-006323/2020 to the Commission, Rule 138, Idoia Villanueva Ruiz (GUE/NGL), 19 November 2020, and the answer given by High Representative/Vice-President Borrell on behalf of the European Commission, 8 February 2021.

[253] Priority question for written answer P-005437/2020 to the Commission, Rule 138 Janina Ochojska (PPE) and others, 5 October 2020 and the answer given by High Representative/Vice-President Borrell on behalf of the European Commission, 16 December 2020.

merely reaffirmed that the Union supports the OSCE effort and negotiations for a permanent settlement of the conflict. In contrast, as regards Transnistria, he elaborated as follows:

> the EU continues to support the 5+2 process aiming at a peaceful and comprehensive settlement of the conflict based on respect for the territorial integrity and sovereignty of the Republic of Moldova within its internationally recognised borders, with a special status for Transnistria.[254]

On another occasion, a member of the parliament asked whether the Union intended to improve economic cooperation with Armenia and Nagorno-Karabakh and to support the latter's efforts to achieve sovereignty. To this very direct question Olivér Várhelyi, Commissioner for Neighbourhood and Enlargement, answering on behalf of the Commission, made no comments on Nagorno-Karabakh except for reaffirming the support for the OSCE negotiating effort and simply listed some initiatives aimed to enhance the substantial economic cooperation with Armenia.[255]

2.3. Abkhazia and South Ossetia

As the territorial disputes in Transnistria and in Nagorno-Karabakh, the dispute between, on the one hand, Georgia and, on the other hand, South Ossetia and Abkhazia dates back to the dissolution of the Soviet Union. This event caused a wave of nationalism in both Georgia and in the territories in question, which actually had already expressed separatist feelings over-time. This, in turn, created renewed ethnic tensions between Georgians on the one hand and Ossetians and Abkhazians on the other and, more in general, between central and local authorities. However, the deep causes of these disputes date back long before the nineties. As put it by Waters, these 'conflicts which led to secession are at least partly rooted in competing cultural historiographies and myths of ethnogenesis (which

[254] ibid.

[255] Question for written answer E-003995/2019 to the Commission, Rule 138, Lars Patrick Berg (ID), 31 March 2020, and the answer given by Mr Várhelyi on behalf of the European Commission, 31 March 2020. See also Question for written answer E-005718/2020 to the Commission, Rule 138, Athanasios Konstantinou (NI), 31 March 2020 and the answer given by High Representative/Vice-President Borrell on behalf of the European Commission, 11 January 2021 and Question for written answer E-006323/2020 to the Commission, Rule 138, Idoia Villanueva Ruiz (GUE/NGL), 19 November 2020 and the answer given by High Representative/Vice-President Borrell on behalf of the European Commission, 8 February 2021.

people were there first) and civilization (which people had the more advanced culture) forged over time'.[256]

From the outset, it should be noted that these two territorial disputes present a series of specificities.[257] However, when it comes to the third States' reaction to the secessions, the two cases can be dealt with together since they pose from a legal perspective the very same problem. In fact, both of them were autonomous entities within Georgia, being Abkhazia an autonomous republic and South Ossetia an autonomous oblast and they both fought for secession.[258] In the end of the 80s a series of demonstrations were held asking for more autonomy and eventually for independence, even if in some instances political leaders of South Ossetia asked the unification with Northern Ossetia, which is part of Russia.[259] Rapidly however these mass protests escalated into violence.

Between 1991 and 1992 there was an armed conflict between Georgia and South Ossetia, the result of which was the retreat of Georgian troops from the territory of the separatist republic and the *de facto* control by the authorities of the latter over a large part of the territory that constituted before the autonomous oblast of South Ossetia. The conflict in Abkhazia developed differently in the sense that it was much more costlier in terms of human lives also because of the different relevance of ethnic tensions and because of the participation of mercenaries and militants from the so-called Confederation of Mountain Peoples of the Caucasus.[260] The definitive ceasefire was signed only in 1994. During the armed conflicts and after the ceasefires it was mostly the OSCE and the UN that tackled these two territorial situations with the informal understanding that the former would have been dealing with the situation in South Ossetia and the latter with the situation in Abkhazia.[261]

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[256] Christopher Waters, 'South Ossetia' in Walter, von Ungern-Sternberg, and Abushov (n 92) 176.
[257] In the first place, the degree of ethnic tensions is different. While the relations between Georgians and Ossetians under the Russian Empire before and under Soviet Union after was more or less positive, the relations between Georgians and Abkhazians have always been more bitter. On a similar vein, it is worth underlining that while Ossetians are the largest ethnic group of South Ossetia, Abkhazians are a minority in Abkhazia which moreover is much smaller and less populated than South Ossetia. See ibid.
[258] For an historical account see respectively Tim Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia: A Legal Appraisal* (Kluwer Law International 2001) 8–12, 12–14.
[259] ibid.
[260] ibid 12.
[261] A/48/549, 2 November 1993, para 9.

As for Abkhazia the final document of the meeting in Moscow between the Russian President Yeltsin and the President of the State Council of Georgia Shevardnadze lists the basic principles for a comprehensive political settlement. More specifically this agreement, which was endorsed by the Security Council,[262] specified that the territorial integrity of Georgia shall be ensured and envisioned a series of specific measures aimed to elicit the compliance of the parties—ie, Russia, Georgia, Abkhazia, and North Caucasians republics—with the cease-fire established by the same document.[263]

Georgia, during the first phase of the armed conflict, described the situation in the following terms:

> Armed conflict in one of the regions of Georgia—Abkhazia—instigated by an assorted variety of local separatist groups, nationalist forces of the Confederation of Caucasia Peoples and reactionary elements of some governmental structures of Russia, including representatives of military establishment, have unleashed a well-planned conspiracy aimed at the violation of the sovereignty and territorial integrity of the Georgian Republic. The leadership of Abkhazia, taking advantage of the complex political setting in Georgia, has undertaken an attempt to turn the autonomous Republic into a dean of terrorists and mercenaries … Since the Abkhazian leaders refused to effectively stop the activities carried out by subversive groups based on Abkhazia, Georgia had to relocate its armed forces within its region. … Unfortunately, this troop movement was met by fire from the so-called Abkhazian national guard. The armed conflict was thus unleashed … The Georgian forces found themselves involved in a full-scale undeclared war with the mercenaries, launched from the territory of a neighbouring country … Unfortunately, the government of the Russian federation cannot effectively stop the infiltration of Georgian territories by mercenaries.[264]

These events and more importantly their interpretations find a confirmation in the Summary of the report of the mission of good office to Georgia headed by the Director of the UN Department of Political Affairs.[265] Afterwards, as acknowledged by a subsequent report of the mission to Georgia, relations between Georgia and Russia deteriorated since not only mercenaries and militants were largely coming from Russia but also a consistent part of Russian elites supported Abkhaz forces and

[262] S/24542, 10 September 1992.
[263] S/24523, 8 September 1992, Annex (Letter from the Chargé d'Affaires of the Permanent Mission of Russia to the UN addressed to the President of the UN Security Council).
[264] S/24632, 7 October 1992, Annex (Letter from the First Deputy Foreign Minister of Georgia addressed to the Secretary-General).
[265] S/24633, 8 October 1992, Annex (Letter from the Secretary-General addressed to the President of the UN Security Council).

some Russian soldiers present in Abkhazia were allegedly siding with the latter.[266] Again, the scenario described by Georgian authorities is a scenario of chaos in which a paramilitary group (the already mentioned Confederation of Mountain Peoples of the Caucasus) established itself in the northern Caucasus, another previously autonomous republic of the Soviet Union, Chechnya, declared independence and announced the intention of its leaders is to side with Abkhazian forces, and finally Russia was on the verge of a new political crisis.[267]

The same stance is expressed in other declarations and statements dating back to 1993. In none of these documents the situation is clearly described as an aggression by Russia to Georgia, neither it is argued that Russia is supporting Abkhaz forces.[268] It follows that, at least in the opinion of the Georgian authorities, the one in Abkhazia was a war between Georgia itself and a secessionist entity. The Security Council adopted few resolutions that however are not particularly relevant since they do not tackle any of these questions.[269]

Approximately the same goes as it regards South Ossetia. None of the statements adopted in the context of the General Assembly and of the OSCE refer to a serious breach of international law by Russia, neither for what it matters by the secessionist entity. For instance, the report prepared by the UN Special Rapporteur on the question of the use of mercenaries recalled the secessionist nature of the conflict in South Ossetia and reported a mercenary presence in connection with the conflict in question.[270]

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[266] See the report of the Independent International Fact-Finding Mission on the Conflict in Georgia its decision established on 2 December 2008 by the Council of the European Union, vol 1, 20–21. The report is available at <www.mpil.de/en/pub/publications/archive/independent_international_fact.cfm>.

[267] S/24794, 11 November 1992, Annex (Letter from the Secretary-General addressed to the President of the Security Council). See also S/24626, 7 October 1992, Annex I (Letter from the First Deputy Foreign Minister of Georgia addressed to the President of the UN Security Council) para 9.

[268] See for instance S/25026, 30 December 1992, Annex (Letter of Head of State of Georgia Shevardnadze, Note verbale from the Ministry of Foreign Affairs of Georgia addressed to the Secretary-General (annex) and S/25166, 26 January 1993, Annex (Statement of envoy of the Head of State of Georgia Kavsadze, Note Verbale from the ministry of foreign Affairs of Georgia to the Secretary General).

[269] S/RES/849, 9 July 1993, S/RES/854, 6 August 1993, and S/RES/858 24 August 1993.

[270] A/48/385, The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Note by the Secretary-General (annex), 23 September 1993, paras 42, 89. See also the Speech by the OSCE Secretary General Wilhelm Höynck, 18 May 1994 <www.osce.org/sg/36949?download=true>.

The various statements adopted by the European Community and, later, by the European Community on these conflicts confirm such a reading. In 1992, for instance, the Community referred in general to the 'grave events' taking place in Georgia, called upon 'all political forces in Georgia to renounce violence and to engage in a democratic process of dialogue and national reconciliation', and reaffirmed that 'respect for fundamental rights and liberties is a condition for recognition of Georgia as an independent State'.[271] Subsequently, the Community recognized Georgia as a State and welcomed the commitment expressed by Georgian authorities in the sense of the above including, interestingly enough, 'Georgia's commitment to recognize and respect the inviolability of all borders, which can only be changed by peaceful means and by common agreement; (iv) the commitment to settle by agreement … all issues concerning State succession and regional disputes'.[272] In a few statements the Community expressed its concern continued fighting in Georgia.[273] In 1993, a Parliament resolution on the situation in Georgia condemned 'the attacks on Georgia's territorial integrity and democratic structures' and called 'on all sides in the civil war to accept an immediate ceasefire and seek a peaceful solution to the conflict'. This resolution also 'urged Georgia's neighbours to refrain from any infringement of its sovereignty and independence'.[274] Afterwards, the European Union took a position with reference specifically to Abkhazia, welcomed the starting of negotiations and, in this regard, added that '[a] political solution to the conflict must be found within the framework of existing international frontiers and by means of dialogue'.[275]

After the ceasefires concluded in 1994 in Abkhazia, the European Union, after having noted that the Caucasus is geopolitically important to the Union itself, emphasized that 'bilateral and regional political dialogue between the partners and with Russia … could help the rebuilding effort'.[276] The fact that ceasefires were concluded did not detract from the fact that the situations were

[271] EC Bullettin 1/2-1992 point 1.5.6.
[272] EC Bullettin 3-1992 point 1.4.9.
[273] See for instance EC Bullettin 6-1992 point 1.2.8. and EC Bullettin 10-1992 point 1.5.6.
[274] EC Bullettin 10-1993 point 1.3.22.
[275] EC Bullettin 11-1993 point 1.4.10.
[276] EC Bullettin 5-1995 point 1.4.79.

not definitively settled. However, even later the Community and the Union did not change such a stance and, more specifically, they refrained from determining an illegality. On the contrary, the situation was depicted simply as resulting from secessionist wars, without apparently any meaningful role by a third State.

In 1996 the European Parliament adopted a resolution that, after having noted that 'Georgia has been largely devastated by several years of civil war and ethnic conflicts', stressed that 'a final peaceful solution to the conflict in Abkhazia should be based on a comprehensive political settlement respecting the sovereignty and territorial integrity of Georgia within its internationally recognized borders'.[277] The same resolution stressed that: 'elections can only be held in Abkhazia after the determination through negotiations of the political status of Abkhazia within the framework of a comprehensive political settlement and with the guaranteed possibility of full participation for all refugees'.[278]

On the same year, a Partnership and Cooperation Agreement was concluded between the European Communities and their member States and Georgia. The agreement in question does not address the question of the unsettled conflict and merely recognizes that 'support of the independence, sovereignty and territorial integrity of Georgia will contribute to the safeguarding of peace and stability in Europe'.[279] It is starting from 2001 that the Union has addressed the conflict in a more direct manner firstly by means of a Council Joint Action regarding a contribution from the European Union to the conflict settlement process in South Ossetia lead by the OSCE. The general aim was to provide a contribution to the conflict settlement process in South Ossetia especially by financial aid; it is noteworthy that the Council called upon both the Georgian and the South Ossetian sides to make

[277] European Parliament resolution on the situation in Abkhazia, OJ C 362, 2 December 1996, 264.
[278] ibid.
[279] Partnership and Cooperation Agreement was concluded between the European Communities and their member States and Georgia, 22 April 1996, preamble.

progress towards a lasting and peaceful settlement.[280] Afterwards, the Council has routinely adopted a joint action in this sense.[281]

The support for conflict resolution in the regions of Abkhazia and South Ossetia and, more importantly, the commitment towards the sovereignty and territorial integrity of Georgia have consistently emerged in the resolutions of the European Parliament. [282] Two aspects are noteworthy, the first of which is the emphasis on the role that Russia should play in the solution of the conflicts. In this regard, the Parliament:

> Calls on the Council and Commission to fully involve the Russian Federation in this process of securing stability through political negotiations and calls on the Government of the Russian Federation to refrain from any action which might endanger this process; calls on the Council and Commission to include the issue of Georgia's territorial integrity in the agenda for the dialogue with Russia within the framework of the Partnership and Cooperation Agreement;
> Urges the Russian Federation to respect its commitments given at the 1999 OSCE Istanbul Summit on the reduction and withdrawal of Russian military forces from Georgia and supports Georgia's commitment as expressed by President Saakashvili at the UN that foreign troops would not move in once the Russian military withdrew.[283]

In another occasion the European Parliament held that it '[r]eaffirms its full support for the sovereignty and territorial integrity of Georgia and calls on the Russian authorities to fully respect the sovereignty of that country within its internationally recognised borders'.[284] One may note that previously the Parliament called upon Russia simply to reaffirm its commitment for the territorial integrity of Georgia, arguably a weaker formula. The same resolution also added that the Parliament:

> Strongly condemns the attempts by movements in the Georgian regions of Abkhazia and South Ossetia to establish independence unilaterally;

[280] 2001/759/CFSP: Council Joint Action of 29 October 2001 regarding a contribution from the European Union to the conflict settlement process in South Ossetia, OJ L 286, 30 October 2001, 4–5.
[281] See for instance Council Joint Action 2003/473/CFSP of 25 June 2003 regarding a contribution of the European Union to the conflict settlement process in Georgia/South Ossetia, OJ L 157, 26 June 2003, 72–73 and Council Joint Action 2005/561/CFSP of 18 July 2005 regarding a further contribution of the European Union to the conflict settlement process in Georgia/South Ossetia, OJ L 189, 21 July 2005, 69–70.
[282] See for instance European Parliament resolution on EU-Russia relations (2004/2170(INI)), OJ 117 E , 18 May 2006, 235–241, para 1.
[283] European Parliament resolution on Georgia, OJ C 166E , 7 July 2005, 63–65, paras 7–8.
[284] European Parliament resolution on the situation in South Ossetia, OJ 313 E , 20 December 2006, 429–432, para 2.

> Calls on the Government of the Russian Federation to withhold support from all of these movements and to give its fullest support to the multilateral efforts to find a solution to the conflicts in its neighbourhood;
> Condemns the fact that South Ossetia will hold a referendum on independence on 12 November 2006, and reminds the parties that a similar referendum on independence in 1992 was not internationally recognised.[285]

It is equally noteworthy that these resolutions dealt with the elections taking place in the breakaway territories. For instance, it was established that 'the "presidential elections" which took place in Abkhazia on 3 October 2004 must be considered illegitimate and unacceptable in the absence of an agreement on the final status of Abkhazia'.[286] The Parliament mentioned as ground for this decision that these elections 'were based on an electorate of 115.000 persons and whereas more than 300.000 Georgians had previously been disenfranchised through expulsion from their homes in the region'.[287]

Initially, the Commission refrained from elaborating on such issues. In a communication to the Council concerning the European Neighbourhood Policy it included a series of recommendations to Georgia and the Commission considered the problem with the breakaway republics of Abkhazia and South Ossetia as merely *one* of the problems afflicting Georgia.[288] When proposing the Action Plan for Georgia the Commission explicitly mentioned the need to respect 'the sovereignty and territorial integrity of Georgia'.[289] It should be noted that still in 2008 the Council still considers the situation as a civil war. In this regard, the relevant passage of the Council joint action on the contribution of the Union to the conflict settlement process in South Ossetia reads as follows: 'Both the Georgian and South Ossetian sides should make demonstrable efforts to achieve real political progress towards a lasting and peaceful settlement of their differences'.[290]

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[285] ibid paras 3–5.
[286] European Parliament resolution on Georgia, OJ C 166E , 7 July 2005, 63–65, preamble.
[287] ibid. See also ibid para 4 and European Parliament resolution on the situation in South Ossetia, OJ 313 E , 20 December 2006, 429–432, preamble.
[288] Communication from the Commission to the Council - European Neighbourhood Policy - Recommendations for Armenia, Azerbaijan, Georgia and for Egypt and Lebanon, COM(2005) 72 final, 2 March 2005.
[289] Proposal for a Council Decision on the position to be adopted by the Communities and its Member States within the Cooperation Council established by the Partnership and Cooperation Agreement establishing a partnership between the European Communities and its Member States, of the one part, and Georgia, of the other part, with regard to the adoption of a Recommendation on the implementation of the EU-Georgia Action Plan, COM/2006/0623 final.
[290] Council Joint Action 2008/450/CFSP of 16 June 2008 regarding a further contribution of the European Union to the conflict settlement process in Georgia/South Ossetia, OJ L 157, 17 June 2008, 110–111, Article 3.

Since the signing of the ceasefires until 2008 it is not possible to find any clear condemnation towards Russia and any argument that a violation of international law has occurred, let alone a serious breach of a peremptory norm. In the same period there have been only occasionally some skirmishes, the most serious of which occurred in 1998 in Abkhazia when there was a military confrontation between Georgian paramilitary forces on the one hand and Abkhazians military and Russian peacekeeping troops (the so-called Six-Day War of Abkhazia).[291]

The territorial disputes escalated again in 2008 when Georgia tried to regain its sovereignty over these territories with the use of armed force and Russia intervened on the side of the breakaway republics. The facts are essentially uncontroversial and have been illustrated in detail in a report by the Independent International Fact-Finding Mission on the Conflict in Georgia by the Council of the European Union, which also provides a legal analysis of these events.[292] Here it is enough to remind that the night between the 7th and the 8th of August 2008, Georgia launched an armed attack against Tskhinvali—ie, the capital of South Ossetia South Ossetia. Russia intervened by launching a wide military operation that rapidly stopped and repelled the Georgian advance and even penetrated into Georgian territory. At the same time, Abkhazia, which had not been attacked, pre-emptively intervened by starting a series of air attacks and by occupying a part of contested territory between Abkhazia itself and Georgia. Already on 12 August 2008 a ceasefire agreement was signed by Russian President Medvedev, Georgian President Saakashvili and French President Sarkozy, which marked a further consolidation of the breakaway republics. Under the term of the agreements the parties withdraw to the positions held before the war, even if it should be added that Russia maintained

[291] Sabine Fischer, 'The Conflicts over Abkhazia and South Ossetia in Light of the Crisis over Ukraine' in Sabine Fischer (ed) *Not Frozen! The Unresolved Conflicts over Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh in Light of the Crisis over Ukraine* (Stiftung Wissenschaft und Politik, 2016) 45–49.

[292] See the report of the Independent International Fact-Finding Mission on the Conflict in Georgia its decision established on 2 December 2008 by the Council of the European Union, vol I, 10ff. The report is available at <www.mpil.de/en/pub/publications/archive/independent_international_fact.cfm>. See also Council of Europe Parliamentary Assembly Resolution 1633, 2 October 2008, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17681&lang=en>.

troops in the territory of Abkhazia and South Ossetia. Subsequently, on 26 August 2008, Russia recognized the two secessionist entities.[293]

This was a real turning point and indeed many international actors strongly condemned such recognition. Moreover, it is approximately from this time that many (scholars as well as international actors) have argued that South Ossetia and Abkhazia are occupied territories. Starting from 2008 Georgia has consistently referred to the breakaway republics as to occupied territories making clear that they are occupied by Russia.[294] The 2008 the Law on Occupied Territories declared that the breakaways republics shall be deemed illegal and sketch a special legal regime for activities undertaken there such as for instance migration, real estate property rights, economic activities, and protection of human rights and of cultural monuments.[295]

Similarly, a group of States (Canada, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, Sweden, Ukraine, the United Kingdom, the United States) adopted a joint statement by means of which they:

> [R]eaffirm our full support for Georgia's sovereignty and territorial integrity within its internationally recognized borders.
> Ten years since the Russian military invasion of Georgia, we remain deeply concerned over the continued occupation of Georgian territories and underline the need for the peaceful resolution of the conflict, based on full respect for the UN Charter, the Helsinki Final Act, and the fundamental norms and principles of international law.
> We urge the Russian Federation to reverse its recognition of the so-called independence of Georgia's Abkhazia and South Ossetia regions.[296]

The NATO[297] and the European Union[298] have fully supported Georgia's territorial integrity within its internationally recognised borders and have asked to Russia to withdraw its forces as well as to

[293] Statement by President of Russia Medvedev, 26 August 2008 <http://en.kremlin.ru/events/president/transcripts/1222>.
[294] Law on Occupied Territories of Georgia, 23 October 2008 <www.ilo.org/dyn/natlex/docs/SERIAL/81268/88220/F1630879580/GEO81268.pdf>.
[295] ibid.
[296] Joint statement of the group of friends of Georgia 10 years since the Russian military invasion of Georgia, 7 August 2018 <www.mfa.gov.ge/News/evroparlamentis-rezolucia-aris-kidev-erti-dasturi.aspx>. See also the Statement on Georgia by Germany, Belgium, France, Poland, the United Kingdom and the United States, and Estonia, 8 August 2019 <https://new-york-un.diplo.de/un-en/news-corner/190808-unsc-georgia/2238218>.
[297] Joint press conference with NATO Secretary General Jens Stoltenberg and the Prime Minister of Georgia, Mamuka Bakhtadze, 25 March 2019 <www.nato.int/cps/en/natohq/opinions_164822.htm?selectedLocale=en>.
[298] Declaration by the Presidency on behalf of the European Union on Russian Prime Minister Putin's visit to the Georgian region of Abkhazia, 13 August 2009 <https://data.consilium.europa.eu/doc/document/ST-12645-2009-INIT/en/pdf>.

repel its acts of recognition. Similar statements have been rendered public both right after the war between Georgia and Russia, but also on occasion of each election held in one of the breakaway republics[299] or of the acts of recognition by another third State (Syria for example).[300]

The statements adopted in the context of the European Union deserve further scrutiny since it is possible to see a shift towards a more confrontational stance. It is only with the gradual deterioration of the situation starting from the second half of the 2008 that there is, at least by the European Parliament, a clear condemnation towards one side and towards Russia.[301] After the armed conflict, there are the first references to non-recognition. In the first place, the European parliament reaffirmed 'that there cannot be a military solution to the conflicts in the Caucasus and expresses its firm condemnation of all those who resorted to force and violence in order to change the situation in the Georgian breakaway territories of South Ossetia and Abkhazia', then it called 'on Russia to respect the sovereignty and territorial integrity of the Republic of Georgia and the inviolability of its internationally recognised borders' and accordingly it condemned 'the recognition by the Russian Federation of the independence of the breakaway Georgian regions of South Ossetia and Abkhazia as contrary to international law'.[302]

Further, gradually but consistently, the positions of the various European Union organs hardened. For instance, in the immediate aftermath the situation is described as a 'open conflict which has broken out in Georgia by the resulting violence' and condemned 'the disproportionate reaction of Russia'.[303] Similarly, the European Council condemned such acts of recognition and clarified that 'that decision is unacceptable and the European Council calls on other States not to recognise this

[299] Declaration by the Presidency on behalf of the European Union on "presidential elections" in Abkhazia, Georgia, 12 December 2009 ,15 December 2009 <https://data.consilium.europa.eu/doc/document/ST-17510-2009-REV-1/en/pdf>.
[300] The website of the Georgian Ministry of Foreign Affairs reports the statements of the OSCE, EU, United States, Canada, Iceland, Norway, Switzerland, Ukraine, Azerbaijan, and Turkey <www.mfa.gov.ge/News/euto-s-mudmivi-sabchos-skhdomaze-siriis-rejimis-mi.aspx>.
[301] Deterioration of the situation in Georgia European Parliament resolution of 5 June 2008 on the situation in Georgia OJ C 285E , 26 November 2009, 7–11. See also European Parliament resolution of 19 June 2008 on the EU-Russia Summit of 26–27 June 2008 in Khanty-Mansiysk, OJ C 286E , 27 November 2009, 35–41.
[302] Georgia European Parliament resolution of 3 September 2008 on the situation in Georgia, OJ C 295E , 4 December 2009, 26, paras 1–2.
[303] Council of the European Union, Extraordinary European Council, 1 September 2008, para 1.

proclaimed independence and asks the Commission to examine the practical consequences to be drawn'.[304] Equally unacceptable is the decision 'to sign military-assistance and cooperation agreements with the de facto authorities of those two Georgian provinces and to establish military bases there, since these steps undermine the territorial integrity of Georgia'.[305] The Commission, while addressing the implementation of the ENP Action Plan by Georgia, noted that:

> In the course of 2008, Russia took a number of unilateral steps aimed at strengthening its relations with Georgia's separatist regions Abkhazia and South Ossetia, notably building up its military presence … The ensuing recognition by Russia of the self-declared independence of the two separatist entities violated Georgia's sovereignty and complicated peaceful and sustainable settlement of the conflicts.[306]

A subsequent resolution adopted by the Parliament, labelled the 'Georgian regions' of Abkhazia and South Ossetia as occupied territories. The same resolution also called upon 'Georgia and Russia to engage in direct talks, without preconditions'.[307] However, this call is radically different from similar calls to negotiations without preconditions. First, a few passages of the same resolution reaffirmed in unambiguous terms the support of the Union to the sovereignty and territorial integrity of Georgia.[308] Second, such talks 'should complement, not replace, the existing Geneva process'.[309] Similarly, the Association Agreement between the Union and Georgia puts in relation the 'territorial integrity and the effective control over Abkhazia and South Ossetia with the 'peaceful and lasting resolution of the

[304] ibid para 2. See also Council of the European Union, Conclusions of the Presidency of the Brussels European Council, 16 October 2008, paras 21–22. The European Parliament held that a military solution is not acceptable referring both to the attempt of Georgia to retake the breakaway territories and to the Russian response. See European Parliament resolution of 22 October 2008 on the European Council of 15 and 16 October 200, OJ C 15E , 21 January 2010, 40, paras 37 –38. See also Recommendation to the Council on the new EU-Russia agreement European Parliament recommendation to the Council of 2 April 2009 on the new EU-Russia agreement (2008/2104(INI)), OJ C 137E , 27 May 2010, 29, E. The Parliament referred to 'Russia's disproportionate counter-attack, triggered by the Georgian troops entering South Ossetia and extended to the other Georgian territories with the use of armour and air power, as well as the unprovoked military action in Abkhazia'.

[305] ibid para 1(aa).

[306] Communication from the Commission to the European Parliament and the Council - Implementation of the European Neighbourhood Policy in 2008, COM/2009/0188 final, 23 April 2009. See also European Parliament resolution of 20 May 2010 on the need for an EU strategy for the South Caucasus (2009/2216(INI)), OJ C 161E , 31 May 2011, 136, para 15 in which the Parliament address the problematic of the 'passportisation' and the policy of borderisation.

[307] European Parliament resolution of 17 November 2011 containing the European Parliament's recommendations to the Council, the Commission and the EEAS on the negotiations of the EU-Georgia Association Agreement, (2011/2133(INI)), OJ C 153E , 31 May 2013, 137, para 1(l).

[308] ibid, preamble, para 1(d), and 1(i).

[309] ibid para 1(l). See also European Parliament resolution of 17 November 2011 containing the European Parliament's recommendations to the Council, the Commission and the EEAS on the negotiations of the EU-Georgia Association Agreement (2011/2133(INI)), OJ C 153E , 31 May 2013, 137.

conflict'.[310] Subsequently, the various statements simply followed the factual evolution on the ground. Thus, for example, the Euronest Parliamentary Assembly adopted a resolution that *inter alia*

> expresses concern … regarding developments in the Georgian regions of Abkhazia and the Tskhinvali region/South Ossetia, including Russia's implementation of the so-called "treaties" deepening its integration with Abkhazia and the Tskhinvali region/South Ossetia, the ongoing military build-up therein, the illegal installation of barbed wire fences and signposts along the occupation line, and the grave human rights situation on the ground … Calls on Russia … to reverse its recognition of the so called "independence" of Abkhazia and the Tskhinvali region/South Ossetia and … to engage constructively in the Geneva International Discussions on the key issues set out on the agenda, namely the non-use of force, international security arrangements, and the safe and dignified return of internally displaced persons and refugees.[311]

With a resolution adopted after 10 years the 'Russian invasion', the Parliament 'condemns the decision by Venezuela, Nicaragua, Syria and Nauru to recognise Abkhazia and South Ossetia, and calls for this recognition to be withdrawn'.[312]

3. Concluding remarks

3.1. Tentative conclusions on the first research question

In the case of Kosovo a policy of non-recognition in the sense of Article 41(2) ARSIWA was not invoked nor by States neither by scholars. The *Kosovo* advisory opinion does not concern directly non-recognition. The Court expressly observes that '[t]he question posed by the General Assembly … asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration'.[313] Accordingly, the Court limits itself to deal with the illegality of declaration of independence. In this regard, the Court excludes the relevance of some resolutions invoked in the written and oral

[310] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261, 30 July 2014, 4, preamble.
[311] Resolution by the Euronest Parliamentary Assembly on Common positions and concerns of the EU Member States and Eastern European partner countries over foreign policies and external threats to their security, OJ C 193, 31 May 2016, 1, paras 17–18.
[312] European Parliament resolution of 14 June 2018 on Georgian occupied territories 10 years after the Russian invasion (2018/2741(RSP)), OJ C 28, 27 January 2020, 97. See also 'U.S. condemns Syria's ties with Georgian breakaway regions', 30 May 2018 <www.reuters.com/article/us-georgia-syria-usa-idUSKCN1IV1GS>.
[313] *Kosovo* advisory opinion (n 44) para 51.

statements submitted by the participants including resolutions on Rhodesia, the TRNC, and the Republika Srpska. According to the Court, in these cases the Security Council made a determination of illegality and this illegality stemmed from the unlawful character of the respective declaration of independence, which in turn was connected with 'the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character'.[314]

Few aspects are worthwhile. First, the opinion deals with the question of the legality of secession, but the wording of the mentioned passage clearly echoes Article 41(2) ARSIWA. Second, there is still a certain confusion as to what make a secession unlawful and thus as to what kind of breaches trigger the duty of non-recognition. In fact, in contrast with other cases, the Court relies on the concept of *ius cogens*, but it lets a window open with respect to other breaches. In fact, the expression 'in particular those' clearly implies that breaches of ordinary norms if serious enough could make a unilateral declaration of independence unlawful. Overall, it is not clear whether a declaration of independence connected with a breach of an ordinary norm or a non-serious breach of a *ius cogens* norm would render the secession unlawful and, indirectly, would imply a duty of non-recognition for third States. Finally, the Court concludes its argument by noting that in the in contrast with the cases mentioned above, in the case of Kosovo the Security Council did not make a determination of illegality, thus assigning to the Security Council, in an exclusive fashion, the task of determining the legality of a given situation. These observations taken together call into question the relevance of this opinion as for the customary character of the duty in question.

However, given the wording of this article as well as its rationale it seems unpersuasive to argue that the duty of non-recognition, at least in theory, is relevant to this situation. More in particular, it should be noted that the arguments advanced in support of the non-application of the doctrine of non-recognition do not sound completely persuasive. The followings elements have been mentioned:[315] the will of people of Kosovo, who overall supported independence; the respect of *ius*

[314] ibid 437, para 81.
[315] See above at 338ff.

ad bellum rules by NATO States, which in turn impedes referring to an unlawful situation; the principle of self-determination, which suggests that Kosovars had a right to independence; the previous violation of human rights of Kosovars by Serbia, which makes independence the only realistic outcome; the fact that the Security Council did not invoke non-recognition and, on the other hand, accepted the outcome of the NATO intervention. None of these elements seems relevant in the sense that they pertain to aspects that have nothing to do with the doctrine of non-recognition.

In this regard there are two partial exceptions. The argument concerning respect for *ius ad bellum* rules illustrates well the problem connected to what triggers the duty of non-recognition. In fact, it is debatable that such rules were respected, and, in any case, each State is free to carry out a different assessment of the lawfulness of the NATO intervention. Second, the argument that the Security Council refrained from acting in this sense and that, on the contrary, it accepted the factual outcome of the intervention actually demonstrates the centrality of the organized international community, which also in this case opted for accommodating reality. The role given to Security Council Resolution 1244 suggest that States consider that non-recognition is not mandatory if there is not a precise causal link or whether the causal link is interrupted by a Security Council resolution.

Moreover, a comparison with post-Soviet breakaway republics reveals a series of inconsistencies. If one takes into account the above-mentioned elements, then these situations can hardly be defined as unlawful situations in the sense of Article 41(2) ARSIWA. However, nobody has seriously argued that the fact that Transnistrian prefer independence or union with Russia is relevant. The same goes, albeit with the *caveat* mentioned in the relevant sections, for Nagorno-Karabakh and for Abkhazia and South Ossetia. More importantly, it is noteworthy that statements by means of which States expressed their stance not to recognize Kosovo are generally identical to statements by means of which States expressed their non-recognition towards post-Soviet breakaway republics, especially those issued in an initial phase. In both cases States have referred in general to a violation of sovereignty and territorial integrity of the respective parent State. This observation confirms that it is not clear to what extent those are really unlawful situations or not.

Conversely, as for as the post-Soviet breakaway republics, it seems that more or less spontaneously the grounds for a policy of non-recognition have shifted from political to legal grounds. And, again more or less spontaneously, a mandatory policy of non-recognition implemented on the assumption that recognition is prevented by the prohibition of interference (eg, in the case of a secession whose outcome is not settled) can transform itself in a mandatory policy of non-recognition implemented on the assumption that there is a duty of non-recognition as understood in Article 41(2) ARSIWA. For instance, only after intense diplomatic pressure by Moldova and Azerbaijan the relevant situations were framed by some States as unlawful situations and thus the support of secessionists by Russia and Armenia was qualified as an unlawful conduct.

The case of Nagorno-Karabakh is paradigmatic. The initial response of the Security Council was from the beginning rather mild. The Council adopted only four resolutions and all of them were adopted in 1993, that is when the first territories of, and surrounding, Nagorno-Karabakh, were occupied by Armenian forces. These resolutions do reaffirm the territorial integrity of Azerbaijan and they do demand the withdrawal of *all* occupying forces. The prohibition of forcible acquisition of territory was also reaffirmed, but eventually the Council refrained from invoking non-recognition. Neither these resolutions considered Armenia as having aggressed Azerbaijan.[316] Also afterwards, that is when the factual situation consolidated, the Council refrained from adopting any new resolution.

Peace talks have occurred almost exclusively in the context of the OSCE. Two aspects are noteworthy. First, these negotiations did not treat the territorial integrity of Azerbaijan as non-negotiable, which is crucial. In fact, such a conduct seems at odds with the common assumption that Nagorno-Karabakh, because of the intervention of Armenia and its continuous assistance to the unrecognized entity that arguably amount to a breach of a *ius cogens* norm, is another unlawful

[316] The role of Armenia mostly went unnoticed and only Resolution 884 named Armenia and called upon it 'to use its influence to achieve compliance by the Armenians of the Nagorny Karabakh region of the Azerbaijani Republic with resolutions 822 (1993), 853 (1993) and 874 (1993), and to ensure that the forces involved are not provided with the means to extend their military campaign further'. S/RES/884, 12 November 1993, para 2.

situation in the sense of Article 41(2) ARSIWA. This aspect is dealt with further in the next section, but it already suggests that this situation, at least for a period of time, was not treated as an unlawful situation in the sense of the above. It should be noted that Azerbaijan itself refrained in an initial phase to frame the question as such. The same goes for third States both individually and collectively. In this regard, the approach to the question at hand by the European Community and later by the European Union is particularly telling. In the statements adopted in the European context during the war over Nagorno-Karabakh in the early 90s, in its immediate aftermath, as well as afterwards reference is only made to a separatist war and a vague political condemnation of Armenia, conversely there is not a determination of unlawfulness, neither is there reference to a mandatory policy of non-recognition.

Second, talks on a mandatory policy of non-recognition have begun only following a series of diplomatic initiatives by Azerbaijan in various international fora. In fact, even if negotiations have been going on mainly in the context of the OSCE, Azerbaijan sought to bring the attention of the whole international community on the question of Nagorno-Karabakh. General Assembly Resolution 62/243 reaffirmed the territorial integrity of Azerbaijan and demanded the immediate, complete and unconditional withdrawal of all Armenian forces from all the occupied territories of Azerbaijan; in addition, it called upon States not to recognize as lawful the situation resulting from such occupation and not to render aid or assistance in maintaining this situation. Notwithstanding the appeal by Azerbaijan according to which '[b]y supporting the draft resolution, Member States will confirm indeed their stated position with regard to adhering to the norms and principles of international law as the basis of the world order and inter-State relations',[317] the resolution in question received only 39 votes in favour. Positive votes to the resolution introduced by Azerbaijan came from NAM, OIC, and GUAM States. This voting pattern witnesses the relevance of the Azeri diplomatic effort. Thus, while most States have framed the question as a longstanding entrenched dispute that shall be solved

[317] A/62/PV.86, 14 March 2008, 4.

during negotiations, the former groups of States have framed it as a dispute that originated from a serious breach to the prohibition of the use of force and that as such can be settled only by the restoration of the *status quo ante*, which in this case amounts to the restitution of *all* the territories claimed by Azerbaijan.

In the case of Georgia, a turning point was the Georgian attempt to reconquer the lost territories. Thus, in this case the question of non-recognition was dealt with only after the 2008 Russian intervention even though on a closer inspection the territorial situations already existed. Overall, it is difficult to apply Article 41(2) ARSIWA to situations as these ones since they do not fall easily within the paradigm of a serious breach of a peremptory norm that in turn mandates non-recognition of the relevant situation.

3.2. Tentative conclusions on the second research question

The case of Kosovo suggests something similar both if taken singularly and if taken in comparison with post-Soviet cases. Unlike some previous cases, in the case of Kosovo, the tension between the rights-based and the pragmatic approach did not emerge explicitly except for the narrative according to which this was a *sui generis* case and that in any case there were no realistic alternatives. More specifically, the idea was that it was not possible to ask to Kosovars to remain under the sovereignty of Serbia after the tragedies preceding the NATO intervention. In this regard, the position of Peters is paradigmatic. She lists a series of arguments according to which the secession was actually lawful, which in turn makes the duty of non-recognition irrelevant. Besides the fact that it was noted that the arguments are not compelling, a comparison with post-Soviet breakaway republics reveals a certain inconsistency. In fact, it seems that if the same arguments are applied to these cases, the logical conclusion is that these situations, as Kosovo, are not unlawful in the sense of Article 41(2) ARSIWA. Conversely, it seems that within the international community, the argument of a mandatory policy of non-recognition emerged only in a second phase thanks to a diplomatic initiative of the respective parent State and/or to the evolution of the geopolitical situation, which confirms that States consider

themselves free to choose an approach rather than another one depending on a series of extra-legal criteria.

Again the case of Nagorno-Karabakh is paradigmatic to the extent that it clearly reflects this tension even if there has not been a gradual evolution from one approach to the other one as for instance in the case of Western Sahara. Actually, from the beginning the international community has tended towards an approach that could be easily defined as pragmatic. In fact, no international organ called for non-recognition or made a determination of illegality. Instead, the Security Council, as well as the European Community and later the European Union, opted for a rather equidistant approach. On the other hand, non-recognition has been gradually invoked by Azerbaijan as a part of a wider diplomatic move that involved the NAM, the GUAM, and the OIC. It is noteworthy that Azerbaijan, as well as Turkey, when introducing and discussing a General Assembly resolution that made such a call, and also in other occasions, clearly framed the question as a question that can be solved *only* through a rights-based approach. It is equally interesting that a majority of States did not back up this resolution whose wording, from a legal perspective, was not controversial. The reasons put forward by States that did not support the resolution suggest that the Nagorno-Karabakh question has to be settled by way of compromise. Eventually, the Azeri argument that '[t]here cannot be neutrality when the norms of international law are violated'[318] has not be bought by the majority of States. Thus, it seems that even in the case of violation of the most important norms of international law, States tend to favour negotiations.

It could be said that the claims by the Armenians of Karabakh have been taken seriously *notwithstanding* the fact that these claims from a legal perspective are largely unsubstantiated. From a legal point of view the situation of Nagorno-Karabakh and the surroundings districts is the same one. Armenians (be them Armenians of Nagorno-Karabakh or Armenians) have no title to these territories. However, the international community has tended to make a difference between these two

[318] ibid.

situations so to increase the chances of a settlement. In this regard, it is significant that the integral withdrawal from Nagorno-Karabakh has not really been taken into consideration in the various attempts made by the international community to achieve a peaceful settlement. This is confirmed by looking at the negotiations occurring in the context of the OSCE, as well as at the way in which the above-mentioned resolution has been introduced by Azerbaijan and at how the same resolution has been welcomed by States. In fact, most of the calls for negotiations between Azerbaijan and Armenians are not coupled with a reminder on the territorial integrity of Azerbaijan. Even more importantly, it seems that the implicit proposal was a compromise by means of which Nagorno-Karabakh would have remained under Armenian sovereignty while the surrounding districts would have been returned to Azerbaijan.

The argument that Nagorno-Karabakh and the surrounding districts have been treated in a different manner could look irrelevant given that ultimately Nagorno-Karabakh is not recognized and, moreover, there is a general support to the contention that international law does not allow a forcible change of borders. However, the comparison that has been done with the case of Transnistria is particularly telling. The two situations share a series of characteristics and most importantly both are unlawful situations in the sense of Article 41(2) ARSIWA. However, these situations legally speaking identical have been treated very differently. The territorial integrity of Azerbaijan is called into question; apparently the international community has supported the duty of non-recognition, but if this was really the case then there should not be any call for negotiations that do not establish as starting point the territorial integrity of Azerbaijan. In the case of Transnistria, the contrary has happened. The present writer could not find a single statement from which it could be inferred that the territorial integrity of Moldova can be negotiated, what is negotiated is *exclusively* the autonomy settlement. This suggests that when the consequences of non-recognition come into question and, more in general, when the way in which an unlawful situation is approached is carefully examined, there is no automatism in the behaviour of third States.

Chapter 6 – Conclusion

1. The duty of non-recognition is not a well-established customary norm

1.1. The duty of non-recognition: a logical and uncontroversial rule?

The first research question was whether the duty of non-recognition of factual situations brought about by serious breaches of *ius cogens* norms is a *well-established* customary norm. On the basis of the practice of States analysed in Chapters 3, 4, and 5, this dissertation argues that the answer to this question is in the negative. On the one hand, it is true that within the international community there is a consensus on the general principle that certain violations of international law cannot be recognized, which is confirmed by an established trend in this sense. However, on the other hand, there is a gap between State practice and the prevailing scholarly understanding of this duty, which roughly corresponds to that of the ILC enshrined in Article 41(2) ARSIWA. It is contended that the problematic aspects of this duty have been somehow downplayed because of the above-mentioned consensus. In fact, by reading scholarly works dealing with the doctrine of non-recognition,[1] one may get the impression that the process of definition and consolidation of this purported well-established customary norm could be the outcome of a logical process and that it could be uncontroversial.

As for the *logical* process, it seems that the prohibition against acquisition of territory through the use of force logically implies the prohibition of recognising such acquisitions.[2] Similarly, once the principle of self-determination has acquired legal character, it is hardly arguable that States can freely recognize a political entity emerged in flagrant violation of this norm.[3] Moreover, both these norms are now widely considered as amounting to *ius cogens* norms, which makes the logical step between a peremptory prohibition and the duty to refrain from recognizing a situation emerged in violation of such a prohibition even more compelling. Arguably, the same goes for those factual situations established in violation of other norms having peremptory character.

[1] See above ch 1, s 2 and ch 2, s 4.
[2] See above at 81–82.
[3] See above at 89–92.

As for the *uncontroversial* development, it seems that States fully acknowledged this logicality, and thus, arguably, legal scholars have simply recorded the consensus existing within the international community. According to this approach, they have concluded that there is no doubt that non-recognition of unlawful situations in the sense of the above is an obligation of general international law.[4] Such a conclusion is based first of all on a number of cases in which non-recognition was invoked, but it is also bolstered by references to the case-law of the ICJ, which has addressed the doctrine of non-recognition in a few cases, and to the ARSIWA, whose text includes a specific provision that prescribes a mandatory policy of non-recognition.[5]

As for State practice, there are indeed a good number of cases in which non-recognition was invoked as a response to certain violations of international law and, moreover, starting from the Manchurian crisis, there has been a growing trend for the resort to such a response. Furthermore, it could appear that the ICJ, with the *Namibia* advisory opinion, gave its stamp of approval to such a practice. Subsequent cases in which the Court dealt with non-recognition are understood as a confirmation of the findings that the Court made in this opinion. Finally, the fact that the ILC eventually included in the final text of its codification project a provision to the effect that States have a duty to refrain from recognizing situations brought about by serious breaches of *ius cogens* norms is often regarded as the culmination of the process of definition and consolidation of the duty in question. However, it is here submitted that the way in which State practice and these legal materials are interpreted is somewhat one-sided. Accordingly, this dissertation argues that the cases considered in the previous three chapters, which are routinely mentioned by legal scholars as evidence of the customary character of this duty, the drafting history of Article 41(2) ARSIWA, and the relevant case-law of the ICJ paint a different, more complex, story.

First, the fact that in a number of cases non-recognition was invoked and, at least to a certain extent, implemented does not end the debate over the customary character of non-recognition. In this

[4] See above at 7–8.
[5] ibid. See also above at 50–51.

regard, the early State practice, which is considered in Chapter 3, is less straightforward than is generally assumed, and should thus be reassessed. More specifically, it is not persuasive to argue that the cases of Manchuria and the cases of Rhodesia, Namibia, and the homelands are evidence of a practice accompanied by *opinio iuris*. Rather, at best, these cases could be regarded as mere forerunners or antecedents of a mandatory policy of non-recognition, and thus they do not have a significant 'precedential' value.[6]

International practice addressed in Chapter 4 too does not clearly suggest that the duty of non-recognition is a well-established customary norm. It is true that there is a policy of collective non-recognition of Western Sahara, Palestine, and East Timor as integral parts of respectively Morocco, Israel, and Indonesia as well as of the TRNC as an independent State. Moreover, in some of these cases—namely, Western Sahara and East Timor—non-recognition has been implemented even if the Security Council, or the General Assembly for what it matters, did not adopt a specific resolution in this sense and in the absence of a judgement rendered by the ICJ.[7] Thus, it could be argued that these cases confirm that the duty of non-recognition is an *autonomous* duty.

However, it was observed above that the international community in *all* these cases has tended to leave a door open for a negotiated settlement.[8] This observation *per se* does not call into question the customary character of the duty of non-recognition but, on the contrary, pertains more to the second question tackled by the present work. But the two questions cannot be easily separated. On the one hand, a call for negotiations with an unrecognized political entity that is not accompanied by any precondition is at odds with the prevailing understanding of the duty of non-recognition to the extent that negotiations may eventually lead to the validation of the purported original breach of a *ius cogens* norm. This is the problem of the open-ended nature of the duty of non-recognition and is addressed in the following section. On the other hand, the overall inconsistent approach of the

[6] See above ch 3, s 3.1.
[7] See above respectively ch 4, ss 1, 4.
[8] See above ch 4, s 5.2 and ch 5, s 3.2.

international community and especially the fact itself that it may or may not decide to call upon States to withhold recognition and that it may still *subsequently* decide to modify its previous stance seems at odds with the customary character of this duty.[9]

The same goes for the State practice considered in Chapter 5. First of all, it is not completely clear to what extent the concept of unlawful situations in the sense of Article 41(2) ARSIWA is relevant to Kosovo and to the post-Soviet breakaway republics. More specifically, if the very same arguments that have been raised to explain why the duty in question is not applicable to the case of Kosovo are applied to the post-Soviet breakaway republics some contradictions emerge.[10] As for the latter situations there are two additional features of interest. First, it is possible to observe an inconsistent approach by the international community at large. In fact, the case of Nagorno-Karabakh is treated differently from the other cases (namely, Transnistria, South Ossetia, and Abkhazia) even if all the four situations are, at least as for matters of non-recognition, virtually identical.[11] Second, while initially the international community remained silent after the alleged breaches of peremptory norms of international law, its stance has evolved over-time mostly after a change of the wider political climate.[12]

Similarly, also the drafting history of the ARSIWA brings into question the well-established customary character of this duty. First of all, it should be noted that the function of the ILC is not only to crystallize customary international law but also to develop it. More importantly, the final formulation of Article 41(2) was not much the result of a study of relevant State practice, but rather it was a sudden development that occurred after the decision by Special Rapporteur Arangio-Ruiz to retire.[13] This decision was due also to the negative reactions to the proposal to envisage an institutional mechanism aimed to trigger the additional consequences arising from the regime of

[9] See above ch 4, s 5.1.
[10] One may take as an example the role assigned to the Security Council. See above at 341–342.
[11] See above ch 5, s 2.2, especially at 377–379.
[12] Except for the cases of South Ossetia and Abkhazia. See above ch 5, ss 2.1–2.3.
[13] See above at 36. Indeed, it is noteworthy that a procedure for the ascertainment of breaches in the sense of the above was present starting from the beginning of the work of the ILC on additional legal consequences in case of international crimes.

aggravated responsibility including thus non-recognition. In fact, such reactions were motivated by the contention that it was difficult to envisage an *effective* mechanism for the ascertainment of serious breaches of peremptory norms.[14]

As said, in the final text no agreement could be found on the matter and the same goes for other substantive aspects of the doctrine in question. There was an agreement in principle on this doctrine, but no agreement as to the when and the how. These questions are simply not addressed in the text of the ARSIWA neither they are in the commentary.[15] In the latter regard, it is also significant to look at the cases chosen by the ILC with the aim of illustrating this norm: in all cases a UN organ called upon States not to recognize. One is left to wonder why the ILC did not mention a case such as Western Sahara, East Timor, or one of the post-Soviet cases. Rather, among the cases mentioned by the ILC, there is that of Namibia, which prompts us to look at the 'case-law' of the ICJ.

The Court has addressed, more or less explicitly, the doctrine of non-recognition in three advisory opinions and in one contentious case, but ultimately, as seen, in none of these situations the Court really clarified what this doctrine entails.[16] In addition, there is one case in which, significantly, the Court decided *not* to resort to non-recognition.

The advisory opinion in question is that rendered on the Chagos Archipelago.[17] One of the questions posed to the Court was on the legal consequences arising from the continued administration by the United Kingdom, which the Court found to be incompatible with the right to self-

[14] ibid.

[15] In the text of the draft conclusions on peremptory norms of general international law adopted by the ILC on first reading the Commission essentially reiterated the observations done in the Commentary to Article 41 ARSIWA adding merely that the duty of non-recognition is 'settled'. See the Conclusion 19 and the respective Commentary in 'Report of the International Law Commission Seventy-first session (29 April–7 June and 8 July–9 August 2019)', General Assembly Official Records, Seventy-fourth Session, Supplement No. 10 (A/74/10), 193–198. Interestingly enough, previously, on occasion of the 70th session the draft conclusion on non-recognition omitted the qualifier 'serious'. The argument raised by the Special Rapporteur was that the duty of non-recognition is based on the peremptoriness of the norm, which is supported by the fact that the ICJ in the advisory opinions on *Namibia* and the *Wall* refrained from ascertaining the threshold of seriousness of the respective breaches. See 'Report of the International Law Commission Seventieth session (30 April–1 June and 2 July–10 August 2018)', General Assembly Official Records, Seventy-third Session, Supplement No. 10 (A/73/10), 228, 234.

[16] See above at 107 ff (the *Namibia* advisory opinion), ch 4, s 2.3 (the *Wall* advisory opinion), ch 4, s 4.4 (the case of *East Timor*), and at 328ff (the *Kosovo* advisory opinion).

[17] For a comment on the opinion in question, see Diane Marie Amann, 'Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965' (2019) 113 American Journal of International Law 784.

determination.[18] The Court held that the United Kingdom must bring to an end its administration of the Chagos Archipelago and that third States, given the *erga omnes* character of the right in question, must co-operate to complete the decolonization of this territory,[19] but it refrained from invoking non-recognition. Some have argued that this 'shortcoming' undermines the customary character of the duty of non-recognition.[20] The argument goes that, because of the line of reasoning of the opinion itself, the Court should have assessed whether the conduct of the United Kingdom was amounting to a serious breach of *ius cogens* and, accordingly, whether third States have to withhold recognition. In contrast, the Court preferred to somehow 'channel' the consequences of the unlawful conduct by the United Kingdom.[21]

A comparison with the *Namibia* and the *Wall* advisory opinions is revealing: the question is overall similar, but the outcome is rather different without persuasive legal reasons. This observation suggests a weakening of the norm of non-recognition since ultimately the Court simply decided not to resort to this duty even if arguably the finding that third States have a duty of non-recognition would have been the most logical finding.[22] Thus, the 'case-law' of the ICJ too does not lend itself to clearly support the argument that the duty of non-recognition as it is understood in the ARSIWA is a well-established customary norm.

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[18] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95, para 177.

[19] ibid para 182.

[20] Francesco Salerno, 'L'obbligo di non-riconoscimento di situazioni territoriali illegittime dopo il parere della Corte Internazionale di Giustizia sulle Isole Chagos' (2019) Rivista di diritto internazionale 729. Also Eggett and Thin talk in this regard of a 'potential for unfortunate confusion'. See Craig Eggett and Sarah Thin, 'Clarification and Conflation: Obligations Erga Omnes in the Chagos Opinion' (EJIL:Talk!, 21 May 2019) <www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion>.

[21] Salerno (n 20) 735ff. Salerno identifies other relevant elements that should have lead the Court to address non-recognition. First, the determination of illegality is accompanied by the finding that third States have a duty to cooperate, thus reflecting, except for the lack of an invocation not to recognize, Article 41 ARSIWA. Admittedly, the Court connected the duty to cooperate not so much to the regime of aggravated responsibility, but to a more general duty to cooperate with UN organs, especially as for decolonization issues. ibid 738. Second, the question of a mandatory duty of non-recognition emerged in the submissions to the Court as well as in the separate and dissenting opinions. See ibid 739. Third, even if the Court did not explicitly refer to a serious breach of the right to self-determination, the opinion dwells on the scale and character of such a breach. See ibid.

[22] Cf Marina Mancini, *Statualità e non riconoscimento nel diritto internazionale* (Giappichelli 2020) 119–120. Mancini argues that the Court opted for an '*ottica promozionale*' in the sense that the Court adopted a managerial approach to the right to self-determination rather than to an emancipatory approach. This pairs of terms (eg, managerial and emancipatory) have been used by Imseis with reference to the approach of the UN towards the occupation of Palestine. Ardi Imseis, 'Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020' (2020) 31 European Journal of International Law 1055, 1064.

1.2. The 'assertion' of a customary duty of non-recognition

Conversely, it seems that the rule in question has been somehow 'asserted', and this goes not only for the scholarship,[23] but also for the ICJ and the ILC. More specifically, as for the ICJ, the cases in which the Court addressed the doctrine of non-recognition seem to confirm the argument that Talmon made on the Court's preferred method of ascertainment of custom. Talmon argues that the ICJ has not a single preferred method to ascertain the existence of customary norms, but that it usually 'asserts' rules of customary international law.[24] The argument goes that the Court does not deduce or induce customary norms, but it may use both methods, a mixture of them, or none of them, and then it eventually asserts the customary norm. The Court does not explicitly hold that the duty of non-recognition is a customary norm, but it could be argued that in the *Wall* advisory opinion, by holding that third States have such a duty and by not referring to any specific international convention, the Court is implicitly referring to a customary duty.[25] In any case not only the Court did not address the relevant State practice and *opinio iuris*, but also it refrained from basing its argument on the codification of the ILC on State responsibility.

Talmon's argument may well be relevant in the case of this norm. He adds that the Court usually tends to resort to the deductive method instead than to the inductive one, which is generally considered as the standard way to ascertain customary norms, in four situations: when State practice is not sufficiently extensive because a given question is too recent, when State practice is inconclusive, when *opinio iuris* cannot be properly established, and when there is a discrepancy

[23] See above ch 2, s 4.

[24] Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law 417. Cfr Omri Sender & Michael Wood, 'The International Court of Justice and Customary International Law: A Reply to Stefan Talmon' (EJIL:Talk!, 1 December 2015) <www.ejiltalk.org/methodology-and-misdirection-a-response-to-stefan-talmon-on-custom-and-the-icj>. Ryngaert and Hora Siccama made a similar argument to that made by Talmon but with reference to domestic courts rather than to the ICJ. See Cedric M J Ryngaert and Duco W Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 Netherlands International Law Review 1. For recent contributions to the discussion of such methodological issues, see Jean d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' in Giuliana Ziccardi Capaldo (ed) The Global Community Yearbook of International Law and Jurisprudence 2015 (Oxford University Press 2016) and Noora Arajärvi, 'The Requisite Rigour in the Identification of Customary International Law: A Look at the Reports of the Special Rapporteur of the International Law Commission' (KFG Working Paper Series, No. 6, January 2017).

[25] See above ch 4, s 2.3.

between State practice and *opinio iuris*.[26] Except for the first situation, the other three are applicable to the case of the doctrine of non-recognition. It was contended above first that State practice is not particularly consistent, second that it is difficult to establish what the *opinio iuris* of States is, and third that, while States do not explicitly call into question this duty by their actions, they have often signalled their willingness to set aside a strict policy of non-recognition.[27]

Talmon further specifies that typically the Court resorts to different kinds of deductive reasoning, which have different functions. Here it is worthwhile to stress that the Court does not limit itself to *find* customary international law, but it can also *strengthen* it, which ultimately witnesses the extent to which the Court is a protagonist of the process of consolidation of customary norms. More specifically, Talmon contends that: 'Where a rule of customary international law is logical, because it can be deduced from an existing underlying principle, the burden of proving the rule by way of inductive reasoning is proportionally diminished'.[28] Meaningfully, some have argued that such a contention is even more compelling when the norms that protect certain core values are involved.[29]

It could thus be argued that the Court with the *Wall* advisory opinion *strengthened* the customary character of non-recognition. However, as noted above, the opinion itself supports a certain understanding of this duty that differs from the ILC understanding of the same norm.[30] It was also noted that, in a subsequent case, the Court refrained to make the same call even in presence of a factual situation that would have probably required it. Incidentally, it is noteworthy that in the *Wall*

[26] Talmon (n 24) 422. On the deductive and inductive method and on the ascertainment of custom, see also William T Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (2014) 45 Georgetown Journal of International Law 445.
[27] See above ch 2, ss 1–2.
[28] ibid 427. On this matter see also Frederic L Kirgis Jr, 'Custom on a Sliding Scale' (1987) 81 American Journal of International Law 146, 149.
[29] Kirgis adds that: 'The more destabilizing or morally distasteful of activity—for example, the offensive use of force or the deprivation of fundamental human rights—the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable'. See ibid. See also Talmon (n 24) 429. In this regard, often the distinction between traditional custom or, more precisely, traditional methods for ascertaining custom and modern custom or, more precisely, modern methods for ascertaining custom, is introduced. See, concerning the ascertainment of custom with reference to the prohibition on the use of force, Olivier Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' (2005) 16 European Journal of International Law 803. See also Anthea E Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 757.
[30] See above ch 4, ss 2.3. and 5.1.

opinion the Court found that the duty of non-recognition was relevant, but used a wording different to that used in the ARSIWA, while in the *Chagos Archipelago* opinion the Court used the very same wording used by the ILC, but eventually did not find that the duty in question was relevant.

This is noteworthy because the ILC too in some way 'asserted' this rule. More specifically, it was noted that the final text of the relevant provision does not reflect much State practice, but rather a series of other considerations.[31] Moreover, the interpretation given to the *Namibia* opinion by the ILC—ie, that this case supports the communitarian account of non-recognition—does not seem correct in the sense that it arguably support an *alternative* theoretical account.[32] As noted, it is also curious that the commentary mentions *only* cases in which a UN organ eventually intervened by adopting a resolution mandating a policy of non-recognition. This is particularly relevant given that the question of who shall determine the unlawfulness and the extent to which the UN political organs shall have a role was extensively discussed during the works of the ILC. Indeed, the drafting history of Article 41(2) ARSIWA shows that the inclusion of such a provision in the final text of the codification project marked a certain disagreement within the ILC.[33]

1.3. The relevance of recent State practice

In the beginning of this work, it was mentioned that some scholars have maintained that there is *no doubt* that the duty of non-recognition is a customary norm.[34] Christakis in this regard adds an interesting observation: according to the author, since the resolutions adopted by the UN political organs played an important role in the emergence of this duty there is no need to identify the moment in which this norm crystallized.[35]

[31] See above ch 2, s 3.
[32] See above 123, 125–126.
[33] See above ch 2, s 3.
[34] See above at 7–8.
[35] Théodore Christakis, 'L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales' in Jean-Marc Thouvenin and Christian Tomuschat (eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 143.

Even if, in general, it is difficult to look for the precise moment in which a customary norm was created given that the process of formation of customary norms, which is supposedly characterized by a certain flexibility,[36] it seems still relevant to understand whether such a duty emerged in the aftermath of the first world war with the Stimson doctrine, in the 60s with the first cases in which non-recognition was invoked in the context of the process of decolonization, whether it emerged later with the cases of Western Sahara, Palestine, the TRNC, and East Timor, in the 90s with the establishment of the unrecognized political entities in the post-Soviet area, or perhaps even more recently.

On the one hand, in all these cases the international community resorted to non-recognition as a tool to exercise pressure on the political entity that allegedly violated international law. On the other hand, many aspects of this duty remain obscure, which ultimately is confirmed by the cleavage between the ILC understanding of this doctrine and that of the ICJ. The fact that both the ILC and the ICJ did not address many of the substantive aspects of this duty and that, in any case, it seems that they interpret the doctrine of non-recognition differently has contributed to the persistence of such doubts. This has gone mostly unnoticed in the legal scholarship with only few exceptions.

Arcari, for instance, observes that '[f]aced with this controversial picture one may legitimately wonder what kind of contribution can be expected from the *scant* and *selective* practice of the UN SC'.[37] The 'controversial picture' to which Arcari refers derives from the drafting history of Article 41(2) ARSIWA and from the contradictions resulting from the case-law of the ICJ.[38] However, Arcari adds that, despite such shortcomings, *recent* State practice suggests the existence of an independent

[36] Supra nn 24, 26. See also Daniel H Joyner, 'Why I Stopped Believing in Customary International Law' (2019) 9 Asian Journal of International Law 41. More in general, on the difficulty connected with the ascertainment of an *evolving* customary law, see Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 82–84.

[37] Maurizio Arcari, 'The UN SC, Unrecognised Subjects and the Obligation of Non-recognition in International Law' in Wladislaw Czaplinski and Agata Kleczkowska (eds), *Unrecognised Subjects in International Law* (Scholar Publishing House 2019) 233 (emphasis added).

[38] More specifically, Arcari held that the final wording of Article 41(2) marks a departure with respect to the previous work of the ILC and that, while the *Namibia* case regards the duty in question as deriving from a binding resolution of the Security Council, in the *East Timor* case Australia raised the argument that in the absence of such a resolution there is no duty to withhold recognition and the Court apparently agreed with Australia. See ibid.

duty of non-recognition.[39] The cases to which Arcari refers are the following: the 2008 Russian military intervention in Georgia, the 2014 Russian annexation of Crimea, and the 2017 relocation of the United States embassy to Jerusalem. It is however doubtful whether these cases, all following the adoption of the ARSIWA by the ILC, truly support the argument that a general and autonomous duty of non-recognition exists.[40]

First, as for South Ossetia and Abkhazia, it was noted that non-recognition of these breakaway republics only apparently is unproblematic.[41] On the one hand, the breakaway republics were established after a separatist war and, from the very beginning, they were not recognized. In fact, for a number of years, no State contended that a serious breach of a *ius cogens* norm was committed and, accordingly, no State invoked non-recognition as a mandatory response to such a breach. In this initial phase the policy of non-recognition towards these entities was due to the respect of the territorial integrity and sovereignty of Georgia *per se*. In other words, the hypothetical recognition of the two breakaway republics would have been a premature recognition rather than a violation of the duty of non-recognition, which indeed for years had not been invoked.[42] More or less similarly to what happened in the cases of Transnistria and Nagorno-Karabakh, non-recognition in the sense of Article 41(2) ARSIWA was invoked only at a later stage. The difference between the latter cases and South Ossetia and Abkhazia is that such a development did not occur after a change of the wider political environment on the initiative by the respective parent States, but it occurred after an armed conflict in which a third State sided with the secessionists. In fact, the turning point was the Georgian offensive aimed to take back the territories lost and the subsequent Russian intervention on the side of the two breakaway republics. The problem is that the factual existence of the two breakaway republics *predated* this intervention while Article 41(2) ARSIWA establishes that: 'No State shall recognize as lawful a situation *created by* a serious breach within the meaning of article 40, nor render

[39] ibid (emphasis added).
[40] ibid 236.
[41] See above ch 5, s 2.3 and s 3.
[42] See above at 389ff.

aid or assistance in maintaining that situation'. Abkhazia and South Ossetia formally declared independence in the early 90s and, in any case, since then they had exercised *de facto* authority in the territory in question.[43] Thus, either the situations were actually already unlawful situations at that time or this intervention somehow turned the factual situations into *unlawful* factual situations. The first hypothesis should be abandoned. On the one hand, a forcible secession does not amount to a serious breach of a peremptory norm. This hypothesis could be plausible on the assumption that the secessionists received aid or assistance by a third State. But, on the other, the international community at large refrained from raising this argument. The second hypothesis is theoretically defensible, but it is not totally persuasive. Indeed, the stance assumed by the international community, and more specifically by the European Union, which compared to other political actors has more interests in the area, changed gradually even *after* the Russian intervention and still the first statements adopted on the question did not invoke a policy of non-recognition motivated with the commission of a serious breach.

In contrast, as for Crimea, it seems that the response of the international community is fully consistent with the duty of non-recognition as it is envisaged in Article 41(2) ARSIWA, and this in a rather explicit way. Indeed, the alteration of the status of the Crimean Peninsula is still not recognized, at least by the overwhelming majority of States, and a series of restrictive measures were adopted as a response. However, first, it is not easy to understand which measures amount to sanctions properly understood and which ones are a consequence of a policy of non-recognition. One may take as an example the ban on imports of goods from Crimea and Sevastopol decided by the European Union. In fact, given that this prohibition is considered as 'part of the EU's non-recognition policy regarding the illegal annexation of Crimea',[44] it is difficult to understand the differences in trade relations with

[43] See above at 386ff.

[44] See Council of the European Union, 'EU prohibits imports of goods from Crimea and Sevastopol', press release, 23 June 2014 <www.consilium.europa.eu/media/28027/143342.pdf>. See Council of the European Union, 'Adoption of agreed EU restrictive measures over Crimea and Eastern Ukraine', press release, 30 July 2014, <www.consilium.europa.eu/media/22021/144174.pdf>. The relevant passage reads as follows: 'As requested by the European Council of 16 July, the Council also adopted further trade and investment restrictions for Crimea and Sevastopol, as part of the EU's policy of not recognising the illegal annexation. These include a ban on new investment

other unlawful situations, such as *in primis* Western Sahara[45] and Palestine.[46] Such an inconsistent response is hardly compatible with a general and abstract duty.[47]

The same question arose also in the context of the Swiss response to the Crimean crisis, which includes an import ban. More specifically, a ban on the import and export of certain goods used in the extraction of oil and gas was decided and this ban was connected directly with the decision not to recognize the annexation in question.[48] A parliamentary motion to the *Conseil fédéral* was put forward with the aim of implementing an import ban as that towards Crimea towards the territories occupied by Israel in Palestine.[49] The assumption is that if a policy of non-recognition implies such a ban, then given that Switzerland does not recognize Israeli sovereignty over these territories an equivalent measure shall be adopted.[50] However, the *Conseil fédéral* decided to reject the motion on the basis of a twofold argument. First, the sanctions towards Russia taken as a response to the annexation of Crimea are based on the *loi sur les embargos*, which allows Switzerland to adopt the

in the following sectors in Crimea and Sevastopol: infrastructure projects in the transport, telecommunications and energy sectors and the exploitation of oil, gas and minerals. Key equipment for the same six sectors may not be exported to Crimea and Sevastopol; finance and insurance services related to such transactions must not be provided'. For a description of the measures adopted by the European Union see <www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis>.

[45] See the question for written answer E-000824-18 to the Commission, Rule 130, Bodil Valero (Verts/ALE) and others, 8 February 2018 and the answer given by Vice-President Mogherini on behalf of the Commission, 15 May 2018. The answer clarifies that 'there is no prohibition, embargo or ban on imports of products from Western Sahara into the European Union'.

[46] See the question for written answer E-000007/2020 to the Commission, Rule 138, Nikolaj Villumsen (GUE/NGL), 3 January 2020 and the answer given by High Representative/Vice-President Borrell on behalf of the European Commission, 12 May 2020. More precisely, the member of the European Parliament asked clarifications on the Commission's position on the sale of products produced in unlawful Israeli settlements in the occupied Palestinian territories and on the possibility of introducing a ban on imports of those products. The answer notes that: 'Products originating from the settlements in these occupied territories can enter the EU; however, no preferences or other trade facilitation measures under EU legislation or agreements apply to such goods'.

[47] It might be argued that the duty of non-recognition entails that the territorial scope of trade agreements with a certain political entity does not extend to the territory unlawfully annexed and that an import ban is simply a sanction. However, as noted above, official statements adopted by the European Union suggests that the import ban is part of the policy of non-recognition.

[48] See the statement issued on 27 August 2014 by the State Secretariat for Economic Affairs <www.seco.admin.ch/seco/en/home/seco/nsb-news.msg-id-54221.html>. Later the scope of the import ban was extended to other goods. See the statement issued on 6 March 2015 by the State Secretariat for Economic Affairs <www.seco.admin.ch/seco/en/home/seco/nsb-news.msg-id-56478.html>.

[49] See the Parliamentary motion to the Federal Council n 14.3784, 'Appliquer les règles adoptées pour la Crimée annexée aux territoires occupés de Palestine', 24 September 2014 and the Statement of the Federal Council, 19 November 2014 <www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20143784>.

[50] As put it by the member of the Parliament proposing the motion, '[l]a cohérence dans l'application du droit international impose que l'importation des biens originaires des colonies de peuplement israéliennes ne soit autorisée que s'ils sont assortis d'un certificat d'origine établi par les autorités palestiniennes'. See ibid.

same sanctions already decided by the UN, by the OSCE, or by other international actors such as the European Union. In contrast, no sanctions were decided towards Israel and thus no sanctions could be taken on the basis of the above-mentioned law. Second, it is noted that the annexation of Crimea by Russia and the occupation of Palestine by Israel are not comparable. The European Free Trade Association, as the European Union, concluded free trade agreements with both Israel and with the PLO. Accordingly, the goods coming from the occupied territories that do not have a certificate of origin issued by Palestinian authorities do not enjoy any preferential treatment and this is enough to dispel the risk of implicit recognition of Israeli sovereignty over the territories in question rendering a ban as that decided towards Crimea not useful.[51]

This statement is not persuasive for at least two reasons. It is not clear whether a ban on the import of goods is part of a policy of non-recognition or whether it is a sanction. Actually, the reply conflates non-recognition and sanctions. The fact that the law mentioned above does not allow Switzerland to adopt autonomously sanctions cannot imply that Switzerland can escape from its duties deriving from general international law. Second, the differences between these situations (Russia annexed a territory of an already existing State, while Israel occupied, supposedly after an act of self-defence, a territory which had not yet became a State) do not make them incomparable

[51] Kanevskaia, on the basis of EU-Israel Association Agreement, of the EU-PLO Interim Association Agreement, of the *Brita* ruling, and of the Advocate General Hogan's opinion on the *Psagot* case, concludes that: 'The EU legal approach to trade with Israeli settlements is clear: importation of settlements' products is not prohibited as such, yet subjected to many hurdles, ranging from obtaining customs documentation from Palestinian authorities to affixing labels indicating that products were "made in Israeli settlements"'. She adds that: 'Despite condemning the presence of foreign administrative and military power on the territories discussed in this section [ie, Israeli settlements, TRNC, Western Sahara, and Crimea], the EU demonstrates inconsistency in its trade practices with these areas'. See Olia Kanevskaia, 'EU Labelling Practices for Products Imported from Disputed Territories' in Antoine Duval and Eva Kassoti (eds), *The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives* (Routledge 2020) 120ff, table 5.1. See also Olia Kanevskaia, 'Misinterpreting Mislabelling: The Psagot Ruling' (2019) 4 European Papers 763. The same inconsistent approach is visible with reference to other conflicts. For instance, Cornell notes that the approach of the European Union towards Nagorno-Karabakh has been affected by other disputes such as *in primis* the disputes over Crimea. More specifically, she holds that: 'EU officials are … aware of these glaring similarities. It is therefore no surprise that slowly, these realities have gradually turned the tables in the conflict, and the EU has been at a loss to counter Azerbaijani accusations of double standards in the differentiated treatment of Crimea and Nagorno-Karabakh. High-level EU diplomats privately acknowledge as much, agreeing that their efforts to dodge the issue and cite their support for the Minsk Group as justification is decidedly unsatisfying. And in fact, this helps explain why EU officials including the President of the European Council have lately returned to a policy of expressing support for Azerbaijan's territorial integrity … Whether this will lead to a more consistent application of the principles of international law, however, remains to be seen'. Svante E Cornell, 'The European Union and the Armenian–Azerbaijani Conflict: Lessons Not Learned' in Svante E Cornell (ed), *The International Politics of the Armenian-Azerbaijani Conflict* (Palgrave Macmillan US 2017) 166.

given that arguably in both cases there was a serious breach of *ius cogens*. Indeed, for example, the letter to policy makers in the European Union and its member States calling for compliance with international legal obligations related to withholding trade from and toward Israeli settlements, signed by many prominent legal scholars, made such a comparison.[52]

Second, it is noteworthy that such measures were taken only by some States (that is, beside the European Union, the United States,[53] Canada,[54] New Zealand,[55] Australia,[56] and Japan[57]). Other members of the international community either have refrained from condemning the Russian conduct or have condemned it without however adopting specific measures. For instance, Brazil, India, China, and South Africa have not adopted any of such measures and it does not appear that these States have changed their stance towards Russia.[58]

Further, it seems significant that the General Assembly resolution that affirmed the commitment of the Assembly to the sovereignty and territorial integrity of Ukraine, and that accordingly called upon States not to recognize any alteration of the status of Crimea on the basis of the referendum held on 16 March 2014, which is considered invalid, and to refrain from any action that might be interpreted as recognizing any such altered status,[59] was adopted by 100 votes to 11 and

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[52] This letter is available at <www.eccpalestine.org/wp-content/uploads/2015/12/Letter-on-settlement-trade-FINAL-.pdf>. See also in the same sense the letter by 87 legal experts and 32 legal networks and organizations to the Secretary General of the United Nations Ban Ki-moon and to the High Contracting Parties to the Geneva Conventions, '10 Years after the Advisory Opinion on the Wall in Occupied Palestine: Time for Concrete Action', 9 July 2014, which is available at <https://reliefweb.int/sites/reliefweb.int/files/resources/ICJletter.pdf>. See also Tom Moerenhout, 'The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories' (2012) 3 International Humanitarian Legal Studies 344.

[53] For the response of the United States, see Kristina Daugirdas and Julian Davis Mortenson (eds), 'Contemporary Practice of the United States Relating to International Law' (2014) 108 American Journal of International Law 783, 797ff.

[54] The response of Canada is described at <www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/russia-russie.aspx?lang=eng>.

[55] The response of New Zealand is described at <www.beehive.govt.nz/release/new-zealand-introduces-crimea-travel-sanctions>.

[56] The response of Australia is described at <www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/crimea-and-sevastopol-sanctions-regime>.

[57] See Daisuke Kitade, 'Considering the Effects of Japanese Sanctions Against Russia' (Mitsui Global Strategic Studies Institute Monthly Report July 2016) and Maria Shagina, 'How to Make Sense of Japan's Delicate Balance Between Russia and Ukraine' (Atlantic Council, UkraineAlert, 17 May 2018) <www.atlanticcouncil.org/blogs/ukrainealert/how-to-make-sense-of-japan-s-delicate-balance-between-russia-and-ukraine>.

[58] Felix Hett and Moshe Wien (eds), *Between Principles and Pragmatism: Perspectives on the Ukraine Crisis from Brazil, India, China and South Africa* (Friedrich-Ebert-Stiftung 2015). See also Shagina (n 58) who notes that Japan is the only Asian country that has imposed sanctions on Russia and Juergen Bering, 'The Prohibition on Annexation: Lessons from Crimea' (2017) 49 International Law and Politics 747, 790–795, 800–801.

[59] A/RES/68/262, 27 March 2014, paras 1, 5–6.

58 States decided to abstain.[60] Subsequently, Ukraine introduced resolutions on the 'Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)' and on the 'Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov'.[61] These resolutions, besides dealing with their specific objects, reaffirm the abovementioned General Assembly resolution. It is worthwhile to note that the degree of support has steadily decreased so much that Resolution 75/192 was adopted by 64 votes to 23, with as many as 86 abstentions, while Resolution 75/29 was adopted by 63 votes to 17, with 62 abstentions.[62] It remains to be seen to what extent this shift will continue in the future as well as what its implications will be.[63] By now it should be noted that within the international community there is not a clear consensus on the question at hand.

As for relocation of the United States embassy to Jerusalem, it is difficult to derive a conclusive answer on the basis of the international response to this act setting aside the wider Middle East conflict as well as other conflicts and their developments occurring approximately at the same time. It is true that most of the international community criticised the United States decision. However, more in general, it was noted above that the statements adopted subsequently on occasion of other diplomatic initiatives concerning the Middle East have never put into question that the conflict shall be solved by means of direct negotiations between the parties. [64]

These three cases provide a further confirmation that there is an established trend towards non-recognition of unlawful situations, in particular when established in violation of the prohibition of territorial conquest. Indeed, it is in connection with this prohibition that the doctrine of non-

[60] A/68/PV.80, 27 March 2014, 17. On the voting patterns within the General Assembly with reference to the resolution in question, see G Matteo Vaccaro-Incisa, 'Crimea's Secession from Ukraine and Accession to the Russian Federation as an Instance of North(-West) v. South(-East) Divide in the Understanding of International Law' (2017) 15 Santa Clara Journal of International Law 125.

[61] Falling within the former, the Assembly adopted A/RES/71/205, 19 December 2016, A/RES/72/190, 19 December 2017, A/RES/73/263, 21 December 2018, A/RES/74/168, 18 December 2019, and A/RES/75/192, 16 December 2020. Falling within the latter, the Assembly adopted A/RES/73/194, 17 December 2018, A/RES/74/17, 18 December 2019, and A/RES/75/29, 7 December 2020.

[62] A/75/PV.46, 16 December 2020 and A/75/PV.36, 7 December 2020.

[63] The erosion of the consensus on the question bears some similarities with that occurred in the case of the UN resolutions adopted in the case of East Timor. See above at 269.

[64] See above ch 4, s 5.2.

recognition has emerged more clearly being also expounded by means of a series of international conventions and declarations.[65] The norm on the prohibition of conquest is rather unambiguous and that States cannot simply recognize territorial conquests is equally unambiguous. But while there is a consensus on non-recognition as a response to such breaches, there is no consensus on some crucial characteristics of such a principle. In fact, State practice does not provide support for the duty of non-recognition as it is understood by the ILC in the ARSIWA. More specifically, it seems that as for non-recognition there are no automatisms, and this concerns the *beginning* of the policy of non-recognition as well as its *content*. In other words, State practice analysed in Chapters 3–5 does not confirm that there is an autonomous duty of non-recognition triggered by breaches in the sense of Article 41(2) ARSIWA and that the precise consequences of such a policy are predictable. States maintain a certain degree of discretion on all these questions and the same goes for the *end* of unlawful situations.

2. The duty of non-recognition is not an open-ended obligation

2.1. To trade a strict policy of non-recognition for the sake of peace?

The second research question posed was whether a mandatory policy of non-recognition lasts until the unlawful situation exists or whether, hypothetically, even unlawful situations in the sense of Article 41(2) ARSIWA can be recognized, at least under certain circumstances. In Chapter 2 it was noted that while for a period of time scholars have acknowledged that recognition remains always possible, gradually it was argued that the commission of a serious breach of a *ius cogens* norm is an *unsurmountable* obstacle to the recognition of a factual situation brought about by such a breach, which renders the duty in question an open-ended duty.[66] In this regard, Orakhelashvili observes that '[i]t is impossible to find a single case where the international community has recognized a serious

[65] See above at 48ff.
[66] See above ch 2, s 5.

breach of *jus cogens*',[67] thus suggesting that such a recognition is barred by international law and that the changes of the situation on the ground are completely irrelevant. This argument has an important consequence on the attempts to settle a conflict whose alleged origin is a breach in the sense of the above. In fact, if such an argument were taken seriously it would tend to narrow the material scope of negotiations between the parties to the conflict. In other words, if one of the opposing parties were allegedly entitled to a right protected by *ius cogens* and the other party violated this right, it could be held that there is nothing to negotiate since the only thing to do would be the implementation of what is required by international law. My argument, however, is that the open-ended nature of the duty in question is not clearly supported by State practice.

In the following pages some further observations on States' tendency to call upon the parties to intractable conflicts to negotiate, without any reference to the original unlawfulness, and on the common characteristics of such conflicts are made. Then, the next subsection discusses to what extent negotiations and duty of non-recognition are at odds. Afterwards, two possible criticisms towards such a tendency are considered. Finally, given that such criticisms are not persuasive, it is contended that there is nothing preventing States to act in this sense.

From the outset, it should be noted that a continuous rigid stance by international actors towards unlawful situations is the exception rather than the rule. In most cases, in fact, it is possible to record a growing support within the international community for bilateral direct negotiations involving the outcome itself and not only the process to reach the outcome somehow 'predetermined' by international law. Indeed, generally this call for negotiations is not coupled with a demand that the outcome is in full compliance with international law so much so that an expression that is commonly used is 'negotiations without preconditions'.[68]

[67] Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2008) 381.
[68] For instance with reference to Western Sahara see above at 139ff.

In the cases taken into consideration above, especially in Chapter 4, it is possible to identify two opposite approaches, namely a rights-based and a pragmatic approach.[69] The former is roughly characterized by the primacy of international law over politics in the sense that it tends to put at the centre of the settlement legal considerations to the detriment of every other consideration. The latter is roughly characterized by the primacy of politics over international law in the sense it tends to set aside legal considerations as an acceptable price to the extent that this may contribute to the settlement of the conflict. Overall, it is hardly surprising that legal scholars have tended to prefer the rights-based approach, while States, albeit with some exceptions, have tended to prefer the alternative approach. It is doubtful however that international law mandates the exclusive reliance on the rights-based approach. On the contrary, I argue that international law leaves a margin for negotiations.

It is noteworthy that the distinction between the two above-mentioned approaches is somewhat artificial. On the one hand, a few legal scholars have conceded that it may be necessary to leave out an excessively legalistic approach.[70] Conversely, some States have not been willing to completely renounce to the restraining power of international law.[71] After all, the law limits the range of normatively acceptable behaviours. This holds true for the States who have been wronged, which understandably do not accept to simply disregard the legal consequences resulting from the wrong, and for weaker States in general, which consider that international law provides a 'shield' to be used against more powerful States. But, more in general, some of the values that characterize the contemporary international legal order are reaffirmed by States also in what we have called pragmatic approach.[72] In other words, it may be conceded that these two approaches are at two extreme poles and thus they do not precisely depict reality, neither they do justice to the various theoretical approaches that can be found in the legal scholarship and to the international community's efforts in the settlement of intractable conflicts.

[69] These approaches are described in ch 4 s 2.1.
[70] See above at 188–189.
[71] See above at 197–198.
[72] See ibid.

However, analysing these radically opposite approaches does provide insight concerning the interplay between the strict implementation of non-recognition and negotiations without preconditions. More in general, the relation between these approaches echoes certain aspects of the interplay between the principle of legality and the principle of effectiveness in international law. As noted above, traditionally international law did not regulate the use of force, thus the conquest of territories was considered as a lawful method for acquiring sovereignty over newly acquired territory.[73] Before the emergence of a specific rule prohibiting the use of force, effectiveness was a characteristic of the international legal order especially as regards territorial situations.[74] The emergence of such a rule implied the unlawfulness of forcible acquisition of territory, and thus it is generally argued that such acquisitions cannot not be recognized as legal by third States. In other words, the principle of legality has barred effectiveness, which however still plays a limited role in the contemporary international legal order, and it is in these cases that effectiveness can be understood as a proper legal principle.[75] However, to what extent and in which cases effectiveness still plays a role remains nowadays contentious. More importantly, as Milano puts it, the relation between these principles is not static, but it is dynamic and neither legality nor effectiveness can be completely compressed to the detriment of the other.[76]

This arguably is also true for non-recognition and negotiations. It was noted that, as for territorial situations brought about by a serious breach of a peremptory norm, it is generally argued that third States have a specific obligation to withhold recognition and that subsequent factual changes, including even the possible outcome of negotiations, have no effect on this obligation.[77] However, my argument is that State practice actually supports a more nuanced position, and the

[73] See above ch 3, s 1.
[74] In this regard, Milano observes that 'the adaptation of law to reality was a paramount element in international law, and therefore the material element played an important role in territorial situations'. Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Nijhoff 2006) 21.
[75] It is enough to think about the attribution of international responsibility to a State for the conduct of a private person, which as is well-known relies on two alternative tests, namely the 'effective control test' and the 'overall control test'.
[76] Milano (n 74) 21–22. A practical illustration of the complexity of this relation is provided by the case on the TRNC before the ECtHR.
[77] See above at 423.

validation of unlawful situations by recognition of the international community cannot be completely excluded. This position has been expressed by States to a varying extent in relation to all the cases analysed in Chapters 4 and 5. Before assessing the precise legal relevance of this practice, it seems important to look at some common characteristics of these conflicts.

First, they are all *long-standing* conflicts. The reasons for this are many including, for instance, ethnic hatreds, deep religious divides, marked economic differences, and the existence of a kin State or of a patron State that, in turn, gives to a certain dispute a pronounced international dimension. Moreover, the time factor *per se* seems relevant in the sense that the more a given conflict is long-standing the more it becomes entrenched, and thus its settlement becomes increasingly difficult.

Second, in all these cases the organized international community has not acted in an effective way. In the case of Western Sahara, it simply refrained from taking effective measures.[78] In other cases, certain measures have been adopted, but they have not been effective. First of all, it is necessary that third States comply with such measures. However, what typically happens is that the unrecognized political entity receives support from a patron State thus avoiding excessive harm resulting from the regime of isolation as in the cases of Turkey and the TRNC[79] and of Armenia and Nagorno-Karabakh.[80] In yet other cases the political entity targeted by additional measures including non-recognition can 'shoulder' these measures without any problem, the case of Russia with respect to sanctions adopted because of the annexation of Crimea is paradigmatic.[81]

The objective difficulties in settling the conflicts and the attitude of the international community explain the stalemate that characterizes these situations and also illustrate the reasons why States have tended to implement a shift from one approach to another one, that is from an approach

[78] See above at 133.
[79] See above at 236ff.
[80] See above at 365.
[81] Konstantin A Kholodilin and Aleksei Netšunajev, 'Crimea and Punishment: The Impact of Sanctions on Russian Economy and Economies of the Euro Area' (2018) 19 Baltics Journal of Economics 39.

consisting of an inflexible policy of non-recognition to an approach less uncompromising. Allowing a margin for negotiations *notwithstanding* the original unlawfulness of the respective situations can be seen as the beginning of a process of accommodation of the law to reality, a process hypothetically leading to the subsequent validation of the unlawful situation. However, that unlawful situations and negotiations are at odds is not self-evident. The next subsection comments upon the interplay between them.

2.2. The interplay between non-recognition and negotiations

As the maintenance of peace is one of the core values of the UN Charter, it is hardly surprising that UN political organs call upon opposing parties to negotiate instead than to resolve their disputes by force of arms. Besides the relevance of Article 2(4) of the UN Charter, Article 2(3) clearly establishes that States 'shall settle their international disputes by peaceful means'. Similarly, Article 33(1) establishes that: 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall … seek a solution by negotiation'. Further, the following paragraph of the Charter assigns to the Security Council the responsibility, when it deems it necessary, to call upon the opposing parties to a dispute to resort to such peaceful means.[82] Therefore, it can be contended that international law and the UN Charter express a marked preference towards negotiations. The interplay between international law and negotiations, however, is not at all that straightforward.

More specifically, there are cases in which it is possible to contend that they are incompatible. Babbitt, while addressing self-determination in the context of negotiations, holds that: 'Human rights and negotiation may seem, at first blush, mutually exclusive. If a "right" is an entitlement that is owed to you… then claimants would say it should never have to be compromised in a negotiation process'.[83]

[82] See in general Robert Barnridge, 'The International Law as a Means of Negotiation Settlement' (2013) 36 Fordham International Law Journal 545.
[83] Eileen Babbitt, 'Mediating Rights-Based Conflicts: Making Self-Determination Negotiable' (2006) 11 International Negotiation 185.

Similarly, Donnelly observes that the term 'right' involves two central moral and political concepts, namely the concepts of 'rectitude' and of 'entitlement'.[84] These concepts are intuitively at odds with that of compromise, and *ius cogens* norms offer an even higher moral ground.

Likewise, it seems unfair to ask to the State whose territorial integrity was violated to make concessions to precisely that State that violated its territorial integrity. Brilmayer and Tesfalidet observe that '[i]n situations like these, the victim's calls for help cannot be met as they might be in the domestic context, by saying "call the police" or "take it to court." These options are rarely available internationally. Understandably, the victim typically feels that the legal merit of its claim entitles it to the world community's support'.[85]

However, third States in the cases analysed above, rather than to continue enforcing the various secondary norms of State responsibility, albeit after years of stalemate, have frequently called the parties to negotiate, and such a call amounts to a first step towards recognition. First, being an equal party to negotiations is in itself an important political recognition granted to the unrecognized political entity. Second, while for instance Imseis deduces from the principle *ex iniuria ius non oritur* the proposition that 'states may not negotiate the consequences of their illegal actions',[86] this is what concretely happens, and arguably the international community not only supports such negotiations but is willing to recognize their outcomes.

The tendency to leave a margin for negotiations can be explained with a variety of rationales, the first of which is the will to finally settle a conflict that has been ongoing for many years. In some cases, this rationale is coupled with other ones, which are in any case connected with the attempt to improve somehow the situation. For instance, States have referred to the economic benefits that may derive from a settlement of the conflict for the States and political entities involved.[87] Another rationale that is often mentioned is the possibility to ensure better conditions of life in the new factual

[84] Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) 7.
[85] Lea Brilmayer and Isaias Yemane Tesfalidet, 'Third State Obligations and the Enforcement of International Law' (2011) 44 Journal of International Law and Politcs 1, 4.
[86] Ardi Imseis (n 22) 1066. See also above ch 2, s 5.
[87] See above with reference to Western Sahara at 144.

situation for the local population.[88] In other cases, States have referred to the fact that it is somewhat reasonable to acquiesce to a certain factual situation or that in any case there are no credible alternatives.[89]

Overall, there can be a number of rationales, but they all pertain to the contention that any peaceful settlement is preferable to the indefinite persistence of the *status quo*. It follows that States tend to leave a margin for negotiations even if these negotiations may lead to the validation of the original unlawful situation. Not only it is possible to detect a certain deference accorded by the international community to negotiations aimed to the settlement of intractable conflicts, but this deference does not disappear when serious breaches of *ius cogens* norms are involved.

These observations do not *per se* end the question, especially from a legal perspective. After all, States do violate international law and this deference too could simply be a conduct at odds with international law. Further, even if the settlement of an intractable conflict is a positive development, it is intuitively doubtful that a fully pragmatic approach can be admitted without reserve.

However, it is contended that this tendency is much more than a series of unrelated violations of international law and that it should be seen as a wider and consistent trend that has acquired a precise legal relevance. First, this deference affects the wider environment in which international law is applied, thus it shows to what extent States resort to a series of political *and* legal considerations. Second, even if States are not the only subjects of international law, a trend within an international community as the one in question cannot be simply set aside as being irrelevant. In other words, a consistent practice is apt to influence the interpretation and application of norms of international law on State responsibility.

That this tendency is not simply a violation of international law does not mean that it is not legally problematic. More specifically, the problem posed by a pragmatic approach to the settlement of conflicts is at least twofold since it is, at the same time, theoretical and practical. The next two

[88] See above with reference to East Timor at 270ff.
[89] Se ibid.

subsections illustrate two possible counter arguments to the pragmatic approach and contend that they are not fully persuasive.

2.3. The theoretical problem of the pragmatic approach

This problem revolves around the effect of *ius cogens* norms in the context of negotiations. As is well-known the gist of peremptory norms is that they do not allow any derogation.[90] So it might be argued that if a *ius cogens* norm has been violated, then the factual situation emerging from such violation cannot be validated by means of recognition also in the case the act of recognition eventually occurs after a negotiation between the opposing parties.[91]

However, while nowadays only few scholars doubt of the existence of *ius cogens* norms, so much so that some, echoing Frank with reference to international law itself, have referred to the 'post-ontological era' of *ius cogens*,[92] many have raised criticisms towards the ever-increasing scope of *ius cogens* norms.[93] Such doubts are relevant since in the case of the doctrine of non-recognition the problem does not consist of a conflict of norms, but rather it consists of how to deal with a violation of *ius cogens* that has already taken place. Here it is not the place where to deal in detail with such arguments, it is however noteworthy that references to myth, magic, and uncontrollable natural events, are recurring in the scholarly writings critical towards the legal effects of *ius cogens*. For instance, Weil stresses that 'the assignment of a norm to the upper category, like the actions of the *sorcerer's apprentice*, seems to provoke a chain reaction that may get out of control'.[94] Bianchi, with regard to the transposition of the paradigm of 'inderogability' from the law of the treaties to

[90] See above at 72.
[91] Such an argument is presented at 71–74.
[92] Thomas Kleinlein, 'Jus Cogens Re-Examined: Value Formalism in International Law' (2017) 28 European Journal of International Law 295, 299.
[93] See below notes 94–96.
[94] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 American Journal of International Law 413, ibid 429–430 (emphasis added). More specifically at 430 Weil notes: 'a growing tendency … to consider that peremptory norms create obligations for all states, and that each state has legal standing to call for those obligations to be fulfilled and to assert the responsibility of any other state that fails to observe them'.

international law at large, observes that 'the river bank of the law of treaties having been carried away by the force of the flood, *jus cogens* has inundated the plain of international law'.[95]

Overall, these scholars have considered *ius cogens*, *rectius* its effects, as *uncontrolled*. It might be argued that, on the one hand, it is the development of the notion in question that was not controlled by States and instead was somehow created by legal scholars. On the other hand, it is an uncontrolled development in the sense that it is too 'strong' to be controlled by any subject, even legal scholars. Leaving aside such metaphors, this mostly ungoverned development can be seen as a problem of methodology. Zemanek observes that *ius cogens* has become the expression of some fundamental values of the international community and, given that there is no a competent organ that may determine such values, that '*jus cogens* has to be identified through an intellectual operation by those who apply it or discuss it academically. This makes the way free for all sorts of philosophical speculations'.[96]

[95] Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 European Journal of International Law 491, 496. Such an argument is based on a series of cases before a number of international and domestic courts. Bianchi refers to the *Jurisdictional Immunities* case and the *Armed Activities* cases before the ICJ, to the *Nelson* case before the United States Supreme Court, to the case concerning the Distomo Massacre before the German Supreme Court, and to the *Al-Adsani* case before the European Court of Human Rights. According to Bianchi these cases suggest that *ius cogens* norms do not automatically trump any other norm. See ibid 501. The solution according to the author resides in the balancing of interests that is made possible by a systematic interpretation aimed to implement the values underlying relevant *ius cogens* norms. See ibid 503–505. On the balancing of interests in connection with *ius cogens* and procedural norms such as State immunity norms, see also Lorenzo Gradoni and Attila Tanzi, 'Immunità dello Stato e crimini internazionali tra consuetudine e bilanciamento: Note critiche a margine della sentenza della Corte internazionale di giustizia del 3 febbraio 2012' (2012) LXVII La Comunità internazionale 203, 209–210, 222–226. Similarly, Linderfalk, refers to the widening of the legal effects of these norms as of the 'opening of Pandora's box' and argues that 'if we take the existence of peremptory international law to its logical consequence, then this will simply carry too far: most actors on the international arena will consider the effects unacceptable'. See Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 European Journal of International Law 853, 856. The solution proposed by Linderfalk is to recognize that *ius cogens* norms are used merely as a rhetorical tool that evoke certain emotions. See ibid 871. This is the same conclusion reached by Shelton who argues that the function of *ius cogens* is an 'important, though symbolic expression or declaration of societal values'. See Dinah Shelton, 'Sherlock Holmes and the Mystery of Jus Cogens' (2015) 46 Netherlands Yearbook of International Law 23, 35. Interestingly enough she talks of the 'mystery of *ius cogens*' in the sense that such a concept was based not based in reality, but in writers' imagination. See ibid 23, 48.

[96] Karl Zemanek, 'The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2020) 384. Similarly, Focarelli notes that: 'Most scholars tend … to infer a variety of "special" or "derogatory" effects which are deemed to be virtually unlimited… from the very notion of *jus cogens*'. See Carlo Focarelli, 'Promotional Jus Cogens: A Critical Appraisal of Jus Cogens' Legal Effects' (2008) 77 Nordic Journal of International Law 429, 445

The argument that has been made all along this dissertation is precisely this one: that the thesis according to which States have a duty of non-recognition lasting until the unlawful situation exists and that there are no other ways to end this situation but to restore the *status quo ante* is generally deduced by the rationale of this duty.[97] However, legally speaking there are no reasons why it is so, unless to argue either that non-recognition itself is a *ius cogens* norm or that recognition of an unlawful situation in the sense of Article 41(2) ARSIWA amounts itself to a violation of the *ius cogens* norm originally violated.

As for the first hypothesis, some have argued that this is the case.[98] Many, however, have denied that secondary norms envisaging certain consequences in case of violation of *jus cogens* are themselves peremptory. These scholars have elaborated further the concerns mentioned above—ie, that the consequences resulting from *ius cogens* norms are excessive and that these consequences are inferred by pure deduction.[99] From a policy perspective, Tomuschat, after having observed that secondary norms on the legal consequences of breaches of *ius cogens* norms do not have peremptory character, holds that:

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[97] See above ch 2, s 5.

[98] Orakhelashvili, for instance, concludes his treatise on peremptory norms of international law holding that '[i]f peremptory norms are to operate as norms, not merely as aspirations, they must generate consequences that are themselves peremptory'. Orakhelashvili (n 67) 580. Such an argument is actually one of the main arguments raised by Orakhelashvili throughout his work and, apparently, it is justified by way of deduction from the rationale of such norms. See ibid 144, 307, 385, 449. See also for a similar argument Anthony Cassimatis, *Human Rights Related Trade Measures under International Law* (Brill Nijhoff 2007) 100 and Lauri Hannikainen, 'The Case of East Timor from the Perspective of Jus Cogens' in International Catholic Institute for International Relations with International Platform of Jurists for East Timor (ed*), International Law and the Question of East Timor* (CIIR/IPJET 1995) 105. See also above ch 2, s 5.

[99] Cannizzaro holds that 'there is no logical necessity to assume that the secondary rules, designed to govern the legal consequence of a breach, borrow the same normative value of the primary rules breached'. He adds that: 'Jus cogens has been sometimes evoked with regard to treaties aimed to regulate the exploitation of resources of unlawfully occupied territories. The underlying idea is that a State which, instead of abiding by the legal consequences envisaged by Article 41(1) and Article 41(2) concludes a treaty with the wrongdoer, whereby it regulates the consequences of the previous violation, commits a breach of jus cogens and that the instrument employed, namely the treaty, is null and void. To conclude that not only the conclusion of such treaties constitutes an unlawful act, but also that the treaties are invalid, however, would entail the demonstration that the obligations laid down by Article 41(1) and Article 41(2) have already acquired the status of peremptory law. *Such a demonstration, however, has not been convincingly offered*'. See respectively Enzo Cannizzaro, 'On the Special Consequences of a Serious Breach of Obligations Arising out of Peremptory Rules of International Law' in Enzo Cannizzaro (ed), *The Present and Future of Jus Cogens* (Sapienza Università Editrice 2015) 140, 141–142 (emphasis added). Tams similarly observes that: 'there is little indication that the self-standing duty of non-recognition should itself be valid erga omnes'. See Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 184. See also Robert Kolb, *Peremptory International Law – Jus Cogens : A General Inventory* (Hart Publishing 2015) 109ff and Thomas Kleinlein, 'Jus Cogens as the 'Highest Law'? Peremptory Norms and Legal Hierarchies' (2015) 46 Netherlands Yearbook of International Law 173, 202ff.

> [w]ise statesmanship is required to repair grave breaches. Rigid norms satisfy the requirements of justice only regarding their endeavour to prevent a foreseeable evil from occurring. Once the evil outcome has materialized, dependency on inflexible rules is unsuitable as a recipe for the restoration of satisfactory conditions of peace and justice.[100]

This observation on the untenability of such an uncompromising stance and especially the reference to the need of statesmanship takes us to the second possibility mentioned above.

The hypothesis is that, while the duty of non-recognition itself is not a peremptory norm, the recognition of an unlawful situation can amount itself to the violation of a *ius cogens* norm. More precisely, when the act of recognition is so tightly linked to the original violation it arguably amounts *per se* to a violation of the peremptory norm.[101] In the hypothesis taken into consideration above it was considered that *all* secondary rules mandating certain legal consequences in case of breach of *ius cogens* have peremptory character, while here the hypothesis is that the international community remains free to ascertain the legal situation on a case-by-case basis depending on a series of factual and legal circumstances.

The argument is that if State A invades and annexes State B and State C *immediately* recognizes such annexation then it could be contended that both State A and State C violated the prohibition on the forcible annexation of territories in a direct manner as regards State A or in an indirect manner as regards State B. The problem however is not the passing of time itself. The term 'immediately' should not be intended with reference to time (ie, without any delay between the annexation and the act of recognition), but with reference to the lack of any intervention by another object, cause, or agency.

Indeed, it is not that unlawful situation can be recognized as if no breach of *ius cogens* occurred; it seems that the key word is that they are not *readily* recognizable, which was the position

[100] Christian Tomuschat, 'The Security Council and Jus Cogens' in Cannizzaro (n 72) 85. See also Robert Kolb, *Peremptory International Law – Jus Cogens : A General Inventory* (Hart Publishing 2015) 111–112.
[101] See for instance Marco Pertile and Sondra Faccio, 'What We Talk When We Talk about Jerusalem: The Duty of Non-Recognition and the Prospects for Peace after the US Embassy Relocation to the Holy City' (2020) 33 Leiden Journal of International Law 621, 642.

originally adopted by Lauterpacht and Chen and subsequently by Crawford.[102] In particular there is a difference between the automatic incorporation of an unlawful factual situation into the international legal order and an incorporation that is somehow mediated by the international community including by the State 'victim'.

With the emergence and with the widening of the effects of *ius cogens* norms the contention that a certain degree of flexibility is necessary has been set aside by the scholarship.[103] After all such a contention does not lend itself to the mobilization of international law in favour of a given cause. This is a crucial aspect given that the conflicts taken into consideration above, because of the centrality of justice, the relevance of norms of international law, and the number of violations allegedly occurred, lend themselves to such use of international law.[104]

It is this second hypothesis that finds support in the State practice described above. One may take as an example the international response to the United States recognition of Israeli sovereignty over the Golan Heights and of Moroccan sovereignty over Western Sahara. Even if such acts from a legal point of view are to a large extent comparable, at least for matters of non-recognition, they elicited an opposite response in the sense that *only* the recognition of Israeli sovereignty over the Golan Heights was unambiguously rejected.[105]

The acquisition of the latter territory was from the beginning treated by the international community as an annexation and thus as an unlawful acquisition. Accordingly, the international community has consistently reiterated the importance of the prohibition of forcible acquisition of territory, which indeed remains the backbone of the international legal order. In contrast, the reaction

[102] See above at 74–76.
[103] See above at 77–78.
[104] Indeed, Cannizzaro observes: 'Politically, it is difficult to determine what is the best approach to re-establish a situation of full compliance with jus cogens after a breach: whether it is an approach based on intransigence, or one based on flexibility. Legally, the issue is even more complicated, as the absence of consistent practice makes it necessary to rely on mere logical deduction from premises which are far from clear'. See Enzo Cannizzaro, 'A Higher Law for Treaties?' in Enzo Cannizzaro (n 96) 433. This contention echoes Lauterpacht's metaphor of recognition as a bitter pill of unavoidable political necessity or as a wise weapon of international policy as well as the 'wise statesmanship' invoked by Tomuschat. See respectively Hersch Lauterpacht, 'The Principle of Non-Recognition in International Law', in Quincy Wright (ed) *Legal Problems in the Far Eastern Conflict* (Institute of Pacific Relations 1941) 147 and supra n 94.
[105] On the international response to the United States recognition of Western Sahara, see above ch 4, s 1.7. On the international response to the United States recognition of the Golan heights, see ch 4 s 2.6.

to the United States recognition of Western Sahara as part of Morocco, as well as similar acts undertaken by other third States, did not attract any international condemnation. Given that the Security Council has not treated the question as an unlawful annexation there is no need to reaffirm such a prohibition by reiterating adhesion to a mandatory policy of non-recognition.

The recent response to different acts and proposals regarding the fate of Palestine suggests something similar. On the one hand, the reaction to the announcement of the President Trump's peace plan and to the conclusion of the Abraham accords, which are part of the wider United States diplomatic effort, ranged from a mild support to sharp condemnation. However, on the basis of such statements, it seems that there is always a margin for an adjustment to the situation on the ground.[106] On the other hand, the reaction to the proposed Israeli annexation of parts of the West Bank envisaged on occasion of a coalition agreement between the Prime Minister of Israel, Benjamin Netanyahu, and the leader of the White and Blue political alliance, Benjamin Gantz, was unambiguous.[107] It seems that the international community is willing to accept territorial swaps agreed by the parties in the context of a comprehensive peace plan, but is not willing to accept an outright annexation. Indeed, the need to reaffirm a given norm depends on the circumstances of each case.

2.4. The practical problem of the pragmatic approach

This observation takes us to the 'practical problem', which ultimately consists in the risk of putting the specific *ius cogens* norm breached on a 'slippery slope'. In other words, it could be speculated that condoning a single violation of a *ius cogens* norm once, would lead to condoning other violations and, in turn, to the loss of the deterring function exercised by international law. Such a possibility is particularly worrying in the case of the prohibition of forcible acquisition of territory. To admit that in certain circumstances even such acquisitions can be recognized may lead States and especially

[106] See above 206–211.
[107] See above at 211.

great powers to consider that their unlawful conduct will be 'rewarded', thus defeating one of the fundamental principles of the international legal order.

Admittedly, that violations of a given norm of international law may in the long-term undermine the rule itself is rather undisputed, both in the case the violator characterizes the violation as an exception that supposedly will not assume a 'precedential' value and in the case the violator attempts to craft a new exception to the rule which will likely assume such a value.[108] However, as for the subsequent validation of a breach of *ius cogens* by means of recognition, it does not seem that the question is so straightforward. Some States have expressed this concern. For instance, South Africa criticising expressions such as 'realism' and 'spirit of compromise' with reference to the settlement of Western Sahara asked: 'Are we going to say to the people of Palestine that they should be realistic in that they cannot get their freedom because of the powerful State of Israel?'.[109]

One may take as an example the Israeli–Palestinian conflict—ie, the case in which the tension between a rights-based and a pragmatic approach emerged more clearly. If eventually Israel would annex parts of the West Bank, it would mean that Israel would have managed to definitively acquire territories entered unlawfully into its possession. In turn, by rewarding an unlawful behaviour, other States might conclude that forcible annexations, even if prohibited by international law, can still be fruitful provided that the State that annexed unlawfully a territory manages to keep possession of its territory long enough to create new facts that can hardly be reversed. It could be said that the rights-based approach is fundamentally at odds with the possibility that the spoils of aggression could be conceded to the wrongdoer given that such a concession is considered as incompatible with the rule-based world order.

[108] See Remarks by Simon Chesterman (2014) 108 Proceedings of the Annual Meeting (American Society of International Law) 37, 38–39 and Anthea Roberts, 'Syrian Strikes: A Singular Exception or a Pattern and a Precedent?' (Ejil:Talk!, 10 April 2017) <www.ejiltalk.org/syrian-strikes-a-singular-exception-or-a-pattern-and-a-precedent>. More in general, see Alexander Orakhelashvili, 'Changing Jus Cogens Through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) and Jean d'Aspremont, 'Mapping the Concepts behind the Contemporary Liberalization of the Use of Force in International Law' (2009–2010) 31 University of Pennsylvania Journal of International Law 1089.
[109] See above at 143.

However, I contend that given what said above this risk is likely a non-issue. Concededly, if the act of recognition occurs contextually with the violation than there is the need to reaffirm the rule and it could be held that such an act would amount to rewarding the wrongdoing with indeed the risk of undermining the norm violated. However, if the violation and the act of recognition are not directly linked, and on the contrary are mediated by the international community, then this risk is greatly reduced.

One may take the question of the status of Jerusalem as an example. On the one hand, many radically different solutions have been proposed.[110] On the other hand, while admittedly the precise legal status of West Jerusalem is not completely clear from a legal perspective,[111] it could be persuasively argued that sovereignty over East Jerusalem including thus over the Old City accrues to Palestinian people.[112] In a nutshell, the argument goes that the territory in question was captured in 1967 on occasion of a war and that such a capture, not depending on the lawfulness of the war, cannot grant any title of sovereignty. Accordingly, States have not recognized East Jerusalem as part of Israel and in this regard have adopted a series of additional measures. Indeed, Eisner listing some proposals that have been raised over-time and indicating pro and cons of each of them, observes that the proposal that Palestine would have sovereignty over East Jerusalem and the Old City and Israel would have sovereignty over West Jerusalem is the most legally sound.[113] However, on the assumption that such a solution is not feasible, he recommends another solution—ie, that Israel would have

[110] On the various solutions proposed, see Ruth Lapidoth, 'Jerusalem' in Wolfrum Rüdiger (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press online version) and Eugene Cotran, 'The Jerusalem Question in International Law: The Way to a Solution' (2001) 40 Islamic Studies 487, 497ff. See also for a detailed description of the various proposals, Moshe Hirsch, Deborah Housen-Couriel, and Ruth Lepidoth, *Whither Jerusalem?: Proposals and Positions Concerning the Future of Jerusalem* (Martinus Nijhoff Publishers 1995).

[111] Thomas and Sally Mallison observe that 'in examining the Security Council resolutions along with those of the General Assembly, it appears that there is, at the least, an implicit intent to preserve the principle of the corpus separatism even though these resolutions, following the intense hostilities of June 1967, put special emphasis upon the post-1967 Israeli actions'. See W Thomas Mallison and Sally V Mallison, 'An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question' (United Nations publication ST/SG/SER.F/4, 1979) 54. On West Jerusalem, see also Antonio Cassese, 'Legal Considerations on the International Status of Jerusalem' (1986) 3 Palestinian Yearbook of International Law 13, 22–28.

[112] ibid 28–32.

[113] Michael Eisner, 'Jerusalem: An Analysis of Legal Claims and Political Realities' (1994) 12 Wisconsin Journal of International Law 221, 272ff.

sovereignty over West Jerusalem, Palestine would have sovereignty over East Jerusalem, and both of them would share a form of joint sovereignty over the Old City. It could be argued that such a solution does not take sufficiently into consideration international law given that the Palestinians have a *right* also over the Old City and that Israel, after having effectively annexed this territory, is still able to reap some benefits from its unlawful conduct.[114] Such a solution, besides being more or less in line with the spirit of the UN partition plan, hardly encourages other States to annex the territory of another State. More in general, it is hard to imagine that the hypothetical settlement of the conflict in the Middle East, to the extent that such a settlement is agreed by the parties, it involves the international community, and it is realizing the interests of *both* parties, could have such an effect.

The same goes for other unlawful situations. Some for example have proposed a new referendum in Crimea, 'under international supervision and in full compliance with international standards' in exchange of the removal of sanctions, a "Finnish" solution for Ukraine, no NATO membership for Ukraine, and the disengagement of Russia from the Donbass.[115] Arguably such a comprehensive solution consistent with principles of international law would reinvigorate a rules-based international order rather than undermining it.[116]

There is another way in which the 'slippery slope' argument could be understood, that is that an act of recognition of an unlawful situation can lead to the modification of the *ius cogens* rule originally breached. For instance, Ben-Naftali when addressing the *Demopoulos* case before the ECtHR, after having noted that the Court preferred the principle *ex factis ius oritur* to the principle *ex iniuria ius non oritur*, argues that '[t]he court … seems to have not merely dismissed without much ado the whole rationale of the law of belligerent occupation, but to have further embraced the notion

[114] See ibid 274. For such an argument see also above at 196.
[115] Antonio Bultrini, 'EU "Sanctions" and Russian Manoeuvring: Why Brussels Needs to Stay its Course while Shifting Gears' (IAI Commentaries 20 | 46, June 2020) 4 <www.iai.it/sites/default/files/iaicom2046.pdf>. Bultrini is well aware that the mere acceptance of the annexation 'would … send a wrong message elsewhere, at a time, for example, when Israel is contemplating the (illegal) annexation of large parts of the West Bank, Western Sahara is still in a limbo and the situation in Hong-Kong is deteriorating'. See ibid. See also Andreas Beyer and Benno Zogg, 'Time to Ease Sanctions on Russia' (Center for Security Studies, ETH Zurich, Policy Perspective Vol. 6/4, July 2018).
[116] Bultrini (113) 5.

that customary international law changes by means of the violation of its norms'.[117] However, the tendency expressed by States to abandon an uncompromising stance when facing the settlement of intractable conflicts is not purported to change any customary norm. Indeed, this tendency is devoid of any specific *opinio iuris*[118] in the sense that it is not aimed to change a customary norm, let alone a peremptory norm, but it is a reaction to a violation of such a norm. This observation prompts some clarifications concerning the clarity of international law. In fact, until this moment we have assumed that in all the cases considered above a violation of *ius cogens* did occur.

2.5. Concluding remarks

The rights-based approach is arguably centred on the assumption that it is always possible to identify in each dispute a party that violated international law and a party whose rights were violated. However sometimes the situation is not so clear as to clearly distinguish a 'wrongdoer' and a 'victim'.[119] This argument may sound preposterous also because States in the past have raised the problem of the complexity of the factual and/or of the legal situation in order to circumvent a given norm. In this regard, the case of Kosovo, and especially the narrative that it was a *sui generis* case, is paradigmatic.[120] On closer inspection, historical arguments too are often an attempt to circumvent contemporary international law. One may take as an example the South China Sea dispute. China, in

[117] Orna Ben Naftali, 'Temporary/Indefinite' in Orna Ben Naftali, Michael Sfard, and Hedi Viterbo (eds), *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018) 405–406.

[118] In such cases States tend to refrain from addressing legal questions at all. See below at 439.

[119] It was noted above when addressing the case of East Timor that a number of States raised such an argument. See above at 270ff. This is also one of the arguments that was raised by Judge Higgins in her separate opinion to the *Wall* advisory opinion. She observes that the legal and factual background of the Israeli–Palestinian conflict, as well as its political ramifications, is particularly complex. See the Separate Opinion of Judge Higgins in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para 14. More specifically, she contends that this complexity should have prevented the Court to make a determination on one single element of a much wider dispute and more specifically that the Court 'should not purport to "answer" these larger legal issues'. See ibid paras 14, 17. The same argument was raised by some dissenting judges with reference to decisions of the ECtHR concerning the TRNC. These judges criticised the stance adopted by the Court for having rendered a judgement on a human rights case of a single person setting aside a very complex situation. In addition, they have also criticised the Court for tending to blame exclusively one of the opposing parties (Turkey) for such a complex situation. See above at 128–129.

[120] See for instance Christopher J Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia' (2009) 10 Chicago Journal of International Law 1, 10ff.

the lack of a legal argument that could support its territorial claims resorted to a variety of arguments drawn from history.[121] Another example is the Crimean crisis. Hilpold for instance critically observes that some have contended that traditional categories of international law are largely irrelevant in the context of the settlement of the Crimean crisis on the basis of the 'unique ethnographic history of Crimea' and of 'inner-Soviet politics'.[122] On the contrary, he contends that 'traditional international law is *very well* suited to deal with the Ukraine case'.[123]

However, it is very well possible that it is difficult to apply a given rule to a specific fact and the problem it is not only that the rules are not clear but also that not always international law can grasp the complexity of reality. In the introduction to this work the expression 'simplifying rigor of the law' was used.[124] The meaning of this expression is that reality may be complex but in the end the law functions within the dichotomy lawful–unlawful. This however does not mean that international law too is not complex and it does not entail that international law provides an answer to each legal problem. Indeed, it is possible to make an argument on the *indeterminacy* of international law as notably done by critical legal scholars. This thesis does not imply that all legal arguments are persuasive in the same measure, but it points at the intrinsic complexity of international law.[125] However, what was defined as rights-based approach is centred on the assumption that international law does prescribe a specific solution to the conflicts considered.

[121] On the soundness of the arguments raised by China from a legal perspective, see Florian Dupuy and Pierre-Marie Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea' (2013) 107 American Journal of International Law 124, 126ff, Melda Malek, 'A Legal Assessment of China's Historic Claims in the South China Sea' (2013) 5 Australian Journal of Maritime & Ocean Affairs 28, 33ff, and Steve Lorteau, 'China's South China Sea Claims as "Unprecedented": Sceptical Remarks' (2018) 55 Canadian Yearbook of International Law 72, 79ff.

[122] Peter Hilpold, 'Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History' (2015) 14 Chinese Journal of International Law 237. See also Lauri Mälksoo, 'The Annexation of Crimea and Balance of Power in International Law' (2019) 30 European Journal of International Law 303.

[123] Hilpold (n 122) 237, 267–270. Incidentally, it is noteworthy that, after having noted that there is no hope to restore the territorial integrity of Ukraine any time soon, he observes that the doctrine of non-recognition is the only concrete measure that can impede the consolidation of the factual situation and that it 'constitutes a continuous reminder of the need for a political solution, and in this context it opens the floor for a discussion that might also allow for the consideration of some historical elements in the problem solution process'. See ibid 268–269.

[124] See above at 3.

[125] For an illustration of this theory, see Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 136–138, 164–167.

Zappalà, who supports the argument that under certain conditions an unlawful situation can be recognized, argues that one of the requirements so that this can lawfully happen is an acknowledgement that there was such a breach.[126] However, State practice does not clearly support this argument. In this regard, it seems that the various calls for a political solution *prescind* from the identification of a wrongdoer. In other words, it seems that the international actors making such calls do not consider such an identification politically acceptable. It appears that the attempt is to avoid referring to legal considerations, especially those concerning the alleged original unlawfulness.

One may take as an example the Security Council resolutions on Western Sahara that reaffirm in the abstract the principle of self-determination but that at the same time support a political solution arguably at odds with this principle.[127] Another example is the use of political terms by the United States with reference to the Israeli settlements in the West Bank, which are considered merely as obstacles to peace. The same, however, goes for other situations by third States as well as by UN political organs. Indeed, Imseis observes that the General Assembly resolutions on Palestine in temporal correlation with the beginning of the Oslo process stopped qualifying the occupation of Palestine as unlawful.[128]

More in general, on the basis of the State practice analysed in Chapters 4 and 5, it seems that when direct negotiations between the parties of an intractable conflict begin States individually and collectively put international law 'on hold' and on the basis of what said above it appears that such a behaviour is not at odds with international law itself.[129] Echoing Koskenniemi's remark on the indeterminacy of international law,[130] it could be contended that the fact that international law has to

[126] Salvatore Zappalà, *Effettività e valori fondamentali nella comunità internazionale* (Editrice CUSL 2005) 110.
[127] See above ch 4, ss 1.4–1.5.
[128] Imseis (n 22) 1082.
[129] See above ch 6, ss 2.3–2.4.
[130] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge University Press 2002) 571. The author contends that the indeterminacy of international law 'should [not] be thought of as a scandal or (even less) a structural ''deficiency'' but that indeterminacy is an absolutely central aspect of international law's acceptability. It does not emerge out of the carelessness or bad faith of legal actors (States, diplomats, lawyers) but from their deliberate and justified wish to ensure that legal rules will fulfil the purposes for which they were adopted. Because those purposes, however, are both conflicting as between different legal actors and unstable in time even in regard to single actors, there is always the risk that rules – above all ''absolute rules'' – will turn out to be over-inclusive and under-inclusive'.

accommodate certain policy considerations should not be taught as a scandal, but rather as an essential part of international law's acceptability. More specifically, the contention is that it is the stage of development itself of international law to make acceptable, or even necessary, the resort to substantive negotiations to settle intractable conflicts, and this holds true also for those conflicts whose alleged origin is a breach of *ius cogens*. A central judicial institution endowed with compulsory jurisdiction still does not exist and the action of the UN political organs is subjected to a variety of constraints. Given such a state of affairs, an excessively rigid and uncompromising understanding of duty of non-recognition would lead to the rejection of an array of possible solutions aimed to settle such conflicts as well as to a further entrenchment of the positions of the parties.

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