The Law of International Responsibility

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Chapter 46

THE OBLIGATION OF NON-RECOGNITION OF AN UNLAWFUL SITUATION*

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1 Introduction

The obligation of non-recognition of an unlawful situation is in large part based on the well-established general principle that legal rights cannot derive from an illegal act (*ex injuria jus non oritur*).[1] In an 'essentially bilateral minded'[2] international legal order, however, with relatively weak enforcement mechanisms, this principle is subject to 'considerable strain and to wide exceptions'.[3] This important qualification delineates the contours of the principle of non-recognition in significant ways. Considerable strain is caused by an apparent antinomy of legality (*ex injuria jus non oritur*) and effectiveness (*ex factis jus oritur*). This is especially relevant where unlawful situations are maintained

* The views expressed herein are solely those of the author and do not necessarily reflect those of the United Nations.

[1] See eg *Factory at Chorzów, Jurisdiction, 1925, PCIJ, Series A, No 9*, p 4, 31; *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*, p 16, 46–47; ibid, Sep Op Judge Dillard, 166–167; *Arbitral Tribunal for Dispute Over the Inter-Entity Boundary in Brcko Area Award, (Republika Srpska v. Bosnia-Herzegovina)*, Award of 14 February 1997, para 77, available at <http://www.ohr.int/ohr-offices/brcko>; *Cyprus v Turkey* (App No 25781/94), *ECHR Reports 2001-IV*, 26. See also H Lauterpacht, 'Règles générales du droit de la paix' (1937-IV) 62 *Recueil des cours* 287; TC Chen, *The International Law of Recognition* (London, Stevens & Sons Limited, 1951), 411; G Arangio-Ruiz, Seventh Report on State Responsibility, *ILC Yearbook 1995*, Vol II(1), 4, 16 (para 64).

[2] W Riphagen, Third Report on State Responsibility, *ILC Yearbook 1982*, Vol II(1), 22, 38 (para 91).

[3] H Lauterpacht, *Recognition in International Law* (Cambridge, CUP, 1947), 420–430; see also H Kelsen, *Principles of International Law* (2nd edn, New York, Holt, 1966), 316–317.

for extended periods of time, for example in case of forcible annexation of territory.[4] An unlawful situation may be 'cured' or validated over time through a gradual process of waiver, acquiescence and prescription.[5]

As a minimum, the rationale of the obligation of non-recognition is to prevent, in so far as possible, the validation of an unlawful situation by seeking to ensure that a *fait accompli* resulting from serious illegalities do not consolidate and crystallize over time into situations recognized by the international legal order—a concern expressed by the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[6] As Brownlie has observed, however, this situation will presumably only occur 'in rare cases as a result of very long possession or general acquiescence by the international community'.[7] In such circumstances, the function of non-recognition is to vindicate the 'legal character of international law against the "law-creating effect of facts"'.[8]

The obligation of non-recognition of an unlawful situation is set out in Article 41(2) ARSIWA in the following terms:

> No State shall recognize as lawful a situation created by a serious breach [by a State of an obligation arising under a peremptory norm of general international law] . . .

The ILC's definition of the principle is based on three interrelated elements. First, *all* peremptory norms may in principle give rise to an obligation of non-recognition. Second, only a *serious* breach of a peremptory norm is subject to the obligation of non-recognition. Third, the principle of non-recognition is only applicable where a serious breach of a peremptory norm specifically results in the assertion of a *legal* claim to status or rights by the wrongdoing State—'a situation' all States are obligated not to recognize 'as lawful'. The ILC explains, without much further elaboration, that this general obligation of non-recognition reflects 'a well established practice' and is thus said to embody existing customary international law.[9] However, this assertion prompts two observations.

First, the examples of peremptory norms noted in the ILC Commentary refer almost exclusively to unlawful situations resulting from territorial acquisitions brought about or maintained by the threat or use of force.[10] International courts and tribunals have confirmed that forcible territorial acquisitions constitute the unlawful situation *par excellence* covered by the obligation of non-recognition under customary international law.[11] However, with

[4] H Lauterpacht, *Recognition in International Law* (Cambridge, CUP, 1947), 420–427; TC Chen, *The International Law of Recognition* (London, Stevens & Sons Limited, 1951), 420–422.

[5] See eg H Lauterpacht, *Recognition in International Law* (Cambridge, CUP, 1947), 420–430; P Guggenheim, 'La validité et la nullité des actes juridiques internationaux' (1949-I) 74 *Recueil des cours* 231; WE Hall, *A Treatise on International Law* (8th edn, Oxford, Clarendon Press, 1924), 143–144; RY Jennings, *The Acquisition of Territory in International Law* (Cambridge, CUP, 1963), 60–62; *East Timor (Portugal v Australia), ICJ Reports 1995*, p 90, Diss Op Judge *ad hoc* Skubiszewski, 264–265 (paras 131–132). For detailed criticism of this view see A Orakhelashvili, *Peremptory Norms in International Law* (Oxford, OUP, 2006), 360–409.

[6] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p 136, 184 (para 121).

[7] I Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), 422.

[8] H Lauterpacht, *Recognition in International Law* (Cambridge, CUP, 1947), 430.

[9] See Commentary to draft art 53, para 2, *ILC Yearbook 1996*, Vol II(2), 58, 114.

[10] Commentary to art 41, paras 5-8.

[11] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p 136, 171 (para 87); *Arbitral Tribunal for Dispute Over the Inter-Entity Boundary in Brcko Area Award (Republika Srpska v Bosnia-Herzegovina)*, Award of 14 February 1997, para 77, available at <http://www.ohr.int/ohr-offices/brcko>; *East Timor (Portugal v Australia), ICJ Reports 1995*, p 90, Disciplinary Opinion of Judge Skubiszewski, 262 (para 125), 264 (para 129).

the possible exceptions of the right to self-determination, the prohibition of racial discrimination and *apartheid* and basic principles of international humanitarian law, there is virtually no practice in relation to the obligation not to recognize 'as lawful' situations resulting from breaches of *other* peremptory norms. So while there is considerable evidence of an obligation of non-recognition under general international law, the extent to which this obligation covers *all* breaches of peremptory norms is somewhat unclear. The practice in this regard is examined in Section 2 of this Chapter.

Second, the precise content of the obligation is also unclear. What exactly are States supposed to do in order not to recognize as lawful a set of facts? For some types of peremptory breaches of international law, it may be asked with some reason whether—beyond the distinct obligation not to render aid or assistance and the *faculté* to resort to third-party countermeasures[12]—the principle of non-recognition amounts to little more than a 'barren duty'.[13] Unfortunately, the ILC does not answer this question. But even on the assumption that it is not a barren duty which 'adds nothing of substance'[14] in such circumstances, its precise content remains 'largely undefined'.[15] The content of the obligation itself is examined in Section 3 of this Chapter, before conclusions are reached in Section 4.

2 The obligation of non-recognition: beyond forcible territorial acquisition?

It may be asked whether article 41(2), which covers *all* (serious) breaches of peremptory norms, is supported by a 'well-established practice' reflective of customary international law on the matter. The examples which are widely considered representative of the scope and content of the obligation of non-recognition under general international law appear—at least in part—to provide a negative answer to this question.

(a) The leading examples in practice

The first example is the treatment of the regime of Southern Rhodesia led by Ian Smith.[16] Six days before its declaration of independence, the General Assembly adopted a resolution which appealed to all States 'not to recognize any government in Southern Rhodesia which is not representative of the majority of the people'.[17] The day after the declaration of independence, the Security Council adopted a resolution under Chapter VI which called upon all States 'not to recognize this illegal racist minority regime'.[18] A week later,

[12] It should be noted that the distinct obligation of non-assistance applies 'whether or not the breach itself is a continuing one'; see Commentary to art 14, paras 11–12. For a detailed assessment of practice on third-party countermeasures see M Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council' (2006) 77 *BYIL* 333; C Tams, *Enforcing Obligations* Erga Omnes *in International Law* (Cambridge, CUP, 2005), 198–251.

[13] See the comments and observations submitted by the United Kingdom on art 18 of the Draft Declaration on Rights and Duties of States, A/CN.4/2 (15 December 1948), 111.

[14] A/CN.4/515/Add.2, 13 (France).

[15] A/CN.4/515, 54 (Spain); see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p 136, Sep Op Judge Kooijmans, 232 (paras 44–45).

[16] See generally R Zacklin, *The United Nations and Rhodesia* (New York, Praeger, 1974); V Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law* (Dordrecht, Nijhoff, 1990), 423–486.

[17] GA Res 2022(XX), 5 November 1965.

[18] SC Res 216, 12 November 1965.

the Security Council adopted another resolution under Chapter VI which added that States were obligated 'not to entertain any diplomatic or other relations with it'.[19] In the following years, coupled with the imposition of economic sanctions under Chapter VII, the Security Council spelt out the content of non-recognition in some detail. In particular, it entailed an obligation for UN member States not to recognize the issuance of passports by the regime (save on humanitarian grounds) and a need to withdraw consular and trade representation;[20] to deny, at the national level and through its competent State organs, the legal validity of any purported public or official acts of the regime; and to suspend or refuse any claim to membership of an international organization by the regime.[21] In a similar vein, the General Assembly urged all States to 'refrain from any action which might confer a semblance of legitimacy on the illegal regime'.[22] With some notable exceptions,[23] these obligations were widely observed by States.

The second example is the treatment of South West Africa (Namibia), starting in 1966. On 27 October 1966, the General Assembly declared that South Africa had failed to fulfil its obligations in respect of the administration of its mandate in South West Africa (Namibia) and to ensure the moral and material well-being and security of the indigenous inhabitants of the Territory through the application of an illegal policy of *apartheid*, racial discrimination, and a forcible denial of their right to self-determination. The General Assembly terminated South Africa's mandate on that basis.[24] South Africa's continued illegal presence in Namibia—characterized by the United Nations Council for South West Africa as a 'foreign occupation'[25]—was confirmed by the Security Council,[26] and prompted a number of resolutions by the Council under Chapter VI. In rather general terms, the Security Council called on all States 'to refrain from all dealings with the Government of South Africa purporting to act on behalf of the Territory of Namibia . . . which are inconsistent with [its illegal presence in Namibia]'.[27] In a further resolution under Chapter VI, the Council outlined a number of proscribed acts (similar to those applicable in the Rhodesia situation) which were tantamount to '*implying* recognition of the authority of the Government of South Africa over the Territory of Namibia'.[28] These obligations were widely complied with.[29]

A third example can be found in the resolutions adopted by the General Assembly and the Security Council during the 1970s relating to the establishment by South Africa of four Bantustans or 'homeland States'; namely, the Transkei (1976), Bophuthatswana (1977), Venda (1979), and Ciskei (1981). The General Assembly, later endorsed by the Security Council acting under Chapter VI, declared the declaration of independence of the Transkei 'invalid' and called on States 'to deny any form of recognition to the so-called independent

[19] SC Res 217, 20 November 1965. See also to similar effect SC Res 288, 17 November 1970.

[20] SC Res 253, 29 May 1968.

[21] SC Res 277, 18 March 1970.

[22] GA Res 2946(XXVII), 7 December 1972.

[23] South Africa and Portugal (at least until the carnation revolution of 1974). See further SC Res 277, 18 March 1970.

[24] GA Res 2145(XXI), 27 October 1966.

[25] A/6897, 10 November 1967. Following the revocation of the mandate, the Council was established by the General Assembly (GA Res 2248(S-V), 19 May 1967) to administer the mandated territory until independence. See further R Zacklin, 'The Problem of Namibia in International Law' (1981-II) 171 *Recueil des cours* 308–327.

[26] SC Res 264, 20 March 1969.

[27] SC Res 269, 12 August 1969; SC Res 276, 30 January 1970.

[28] SC Res 283, 29 July 1970 (emphasis added).

[29] See generally the extensive practice referred to in S/9863, 7 July 1970.

Transkei'.[30] The same position was adopted in relation to the other Bantustans, with the specific call that States 'reject any travel documents' issued by them.[31]

Fourth, the action of the UN following the 1967 war in the Middle East warrants mention. At an emergency session in 1967, the General Assembly expressed deep concern at the situation prevailing in Jerusalem as a result of the measures taken by Israel in placing the city under a common civil administration. The General Assembly considered these measures 'invalid' and called upon Israel 'to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem'.[32] Subsequently, the General Assembly, and later the Security Council acting under Chapter VI, declared that Israel's occupation of East Jerusalem, the Gaza Strip, the West Bank and the Golan Heights should be characterized as belligerent occupation under international humanitarian law; that is, a status incompatible with Israel's *legal* claims to East Jerusalem[33] and its apparent *de facto* annexation of other occupied territories (notably through the establishment of Israeli civilian settlements). The Security Council condemned Israel's legal claim to East Jerusalem as 'null and void' and called upon States not to recognize it, notably by withdrawing established diplomatic missions from the city.[34] The General Assembly has adopted the same position on several occasions.[35]

In addition, the political organs of the United Nations have declared that certain changes carried out by Israel in the Gaza Strip and the West Bank contravene the 1949 Geneva Conventions and as such are 'null and void'; accordingly, they have called upon Israel 'to rescind forthwith all such measures and to desist from all policies and practices affecting the physical character or demographic composition of the occupied Arab territories'.[36] The General Assembly has further called upon all States 'not to recognize any such changes and measures carried out by Israel in the occupied Arab territories and invite[d] them to avoid actions, including in the field of aid, that could constitute recognition of that occupation'.[37] In a similar vein, the Security Council has decided that Israel's formal decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is 'null and void' and 'without international legal effect', and accordingly demanded that Israel rescind its decision.[38] For its part, the General

[30] GA Res 31/6A, 26 October 1976; SC Res 402, 22 December 1976; SC Res 407, 25 May 1977.

[31] GA Res 32/105N, 14 December 1977; GA Res 34/93G, 12 December 1979; GA Res 36/172A, 17 December 1981; S/13549, 21 September 1979 (statement by the President of the Security Council); S/PV.2315 (statement by the President of the Security Council). But see the humanitarian concerns raised by France and the United Kingdom in relation to the categorical non-recognition of travel documents (summarized in UNYB (1979), 182). For a discussion see J Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1986), 98–108; J Dugard, 'Collective Non-Recognition: The Failure of South Africa's Bantustan States', in *Boutros-Boutros-Ghali Amicorum Discipulorumque liber. Paix, développement et démocratie*, Vol I (Brussels, Bruylant, 1998), 383–403.

[32] GA Res 2253(ES-V), 4 July 1967; GA Res 2254(ES-V), 14 July 1967. For Israel's view that this action did not alter the status of Jerusalem (and therefore did not amount to annexation), see A/6753-S/8052, 10 July 1967.

[33] See Basic Law: Jerusalem, Capital of Israel, 5740–1980 (31 July 1980), available at <http://www.knesset.gov.il/laws/special/eng/basic10_eng.htm>. Article 1 of the Basic Law provides that 'Jerusalem, complete and united, is the capital of Israel'.

[34] SC Res 476, 30 June 1980; SC Res 478, 20 August 1980.

[35] GA Res 36/120E, 10 December 1981; GA Res 37/123C, 16 December 1982; GA Res 39/146C, 14 December 1984.

[36] GA Res 2949(XXVII), 8 December 1972; see also SC Res 465, 1 March 1980.

[37] GA Res 2949(XXVII), 8 December 1972.

[38] SC Res 497, 17 December 1981. The text of the Golan Heights Law (14 December 1981) is available at <http://www.mfa.gov.il>.

Assembly has characterized this annexation as an 'act of aggression' that should 'not be recognized'.[39] Finally, the General Assembly has declared that Israel's presence in the Palestinian occupied territories contradicts the right to self-determination of its inhabitants.[40] While no State has formally recognized Israel's *de facto* (and sometimes *de jure*) claims to the occupied territories, problems have arisen in practice regarding acts by third States that might imply such recognition—an example in point being the application of the preferential treatment clause in the 1995 EC-Israel Association Agreement to the export of goods produced in the West Bank and the Gaza Strip.[41]

The fifth example is the treatment of the Turkish Republic of Northern Cyprus (TRNC).[42] After the TRNC declared its independence on 15 November 1983, the Security Council adopted a resolution under Chapter VI by which it considered the declaration of independence to be legally invalid and called upon all States not to recognize any other State than the Republic of Cyprus.[43] Subsequently, the Security Council also condemned all secessionist actions and reiterated the call upon all States not to recognize the secessionist entity.[44] The European Community, the Committee of Ministers of the European Council, and the Commonwealth have adopted similar positions.[45]

Finally, in respect of Iraq's invasion of Kuwait in August 1990, the Security Council adopted a resolution under Chapter VII calling upon States 'not to recognize any regime set up by the occupying Power'.[46] The Security Council further decided that the annexation had 'no legal validity' and called upon all States, international organizations and specialized agencies in general terms 'not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of that annexation'.[47] The Organization of the Islamic Conference, the Arab League, the Gulf Cooperation Council, the Non-Aligned Movement, the OAS, the European Community, and the Nordic countries made statements to similar effect.[48] In the event, no State recognized Iraq's annexation of Kuwait or its authority in that country and Iraqi legal claims arising from the annexation were denied in foreign national courts.[49] The purported annexation was eventually reversed by enforcement action under Chapter VII.

[39] See eg GA Res 37/123A, 16 December 1982.

[40] GA Res 36/226A, 17 December 1981; GA Res 39/146A, 14 December 1984.

[41] See C Hauswaldt, 'Problems under the EC-Israel Association Agreement: The Export of Goods Produced in the West Bank and the Gaza Strip under the EC-Israel Association Agreement' (2003) 14 *EJIL* 591. See also S Talmon, *Kollektive Nichtanerkennung illegaler Staaten. Grundlagen und Folgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern* (Tübingen, Mohr Siebeck, 2006), 119–120 (with further references).

[42] See A/38586-S/16148, 16 November 1983. See generally S Talmon, *Kollektive Nichtanerkennung illegaler Staaten. Grundlagen und Folgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern* (Tübingen, Mohr Siebeck, 2006).

[43] SC Res 541, 18 November 1983.

[44] SC Res 550, 11 May 1984.

[45] The statements are quoted in J Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1986), 109 (fns 135–137).

[46] SC Res 661, 6 August 1990.

[47] SC Res 662, 9 August 1990.

[48] See A/45/383-S/21444, 6 August 1990; A/45/409-S/21502, 13 August 1990; S/21448, 10 August 1990; S/21500, 13 August 1990; S/21430, 3 August 1990; S/21468, 7 August 1990; S/21719, 6 September 1990; A/45/585-S/21849, 5 October 1990; S/21665, 23 August 1990; S/21751, 12 September 1990.

[49] See *Iraq Airways Company and the Republic of Iraq v Kuwait Airways Corporation (No 1)* (2002), 103 *ILR* 340, 116 *ILR* 534, 125 *ILR* 602.

(b) Assessment of practice

These examples call for two general observations.

First, since the practice assessed above is based almost exclusively on Security Council action under Chapter VI of the United Nations Charter and General Assembly resolutions, it is necessary to determine whether the source of the obligation of non-recognition may be considered a conventional obligation based on the Charter (i.e. limited to action mandated by UN organs) or customary in character and thus generally available to States on an individual basis. In the case of the General Assembly, the answer seems clear: 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. In the case of the Security Council, the answer to the same question will depend on the concrete application of the test expounded in the *Namibia* Advisory Opinion to determine whether a given Chapter VI resolution is binding on States under article 25 of the Charter.[50] Whether or not one agrees with the *Namibia* test or its application in that case,[51] it is doubtful whether many of the resolutions assessed above would meet that test. In any event, it is generally accepted that the Security Council does not have an *a priori* competence in the field of State responsibility—a point repeatedly stressed by the ILC.[52] Therefore, individual States are obligated under general international law not to recognize certain unlawful situations; they do not require the approval of UN organs to justify their actions since this obligation is self-executory.

Second, the brief survey of practice assessed above suggests that the obligation of non-recognition has been applied to unlawful situations resulting from forcible territorial acquisition, *apartheid* and racial discrimination, the denial of the right to self-determination and basic principles of international humanitarian law. This practice therefore does not support an obligation of non-recognition in respect of *all* peremptory norms, as suggested in article 41 ARISWA. But this may not necessarily be the end of the matter.

Both in conceptual and practical terms, it seems that what is decisive is not the individual character of the peremptory norm but that the unlawful situation flowing from 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. Practice demonstrates that this has not been the case for all peremptory norms, and with good reason. For example, situations created by acts of genocide, torture, or crimes against humanity do not, in principle,[53] result in any legal consequences which are capable of being denied by States—the source, it may be recalled, of Judge Kooijmans' 'great difficulty' in understanding what a duty not to recognize an illegal fact involves. While the absence of any practice admittedly makes it difficult to draw any definitive conclusions, it seems clear as a matter of principle that this fact alone does not necessarily negate the possibility that the obligation of non-recognition may also cover other peremptory norms under general international law. Indeed, the valid

[50] *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*, p 16, 53 (para 114).

[51] This was a controversial issue which divided the Court: for approval see ibid, Separate Opinion of Judge Ammoun, 97–98; Separate Opinion of Padilla Nervo, 118–119; for dissent see Dissenting Opinion of Judge Fitzmaurice, 293; Separate Opinion of Judge Petrén, 136–137; Dissenting Opinion of Judge Gros, 340–341; Separate Opinion of Judge Onyeama, 147–149; Separate Opinion of Judge Dillard, 150, 165–166.

[52] See Commentary to art 40, para 9; Commentary to draft art 53, para 3, *ILC Yearbook 1996*, Vol II(2), 58, 169–170.

[53] For a discussion of some possible scenarios, see S Talmon, *Kollektive Nichtanerkennung illegaler Staaten. Grundlagen und Folgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern* (Tübingen, Mohr Siebeck, 2006), 116–118.

reasons described above for the absence of practice in relation to these norms reinforces the notion that there is no logical difficulty in accepting this conclusion.

It therefore appears that, consistently with article 41(2) ARSIWA, the obligation of non-recognition is based on customary international law and applies to any unlawful situation resulting from a serious breach of a peremptory norm where that situation results in the assertion of a legal claim by the wrongdoing State.

3 The content of the obligation of non-recognition

Article 41(2) ARSIWA does not elaborate the content of the obligation of non-recognition, although the Commentary notes that the obligation 'not only refers to the formal recognition of [situations created by the relevant breaches], but also prohibits acts which would imply such recognition'.[54] Where the Security Council and the General Assembly have elaborated upon the content of the obligation of non-recognition, they have generally defined it broadly to include any dealings with the responsible State which could imply formal recognition of an unlawful situation, save where humanitarian considerations apply.[55] In addition to this generalized obligation, the Security Council and the General Assembly have referred to obligations not to recognize passports or travel documents issued by a regime;[56] to withdraw consular representation;[57] to withdraw diplomatic missions;[58] to deny the legal validity of any public or official acts of the regime;[59] and to refuse any claim to membership of an international organization.[60]

Although the obligation of non-recognition has been referred to by the ICJ on a number of occasions, the Court has provided little in the way of elaboration of the content of the obligation of non-recognition. Two judgments warrant examination: the Court's Advisory Opinion in relation to Namibia[61] and its later Opinion in the *Wall* case.[62]

In the *Namibia* opinion, the Court held that South Africa's mandate over Namibia had been lawfully revoked and that South Africa's continued presence in Namibia was accordingly unlawful. In consequence, all States had an obligation of non-recognition. The Court first stated the content of that obligation in general terms, holding that any dealings with South Africa which may 'imply a recognition that South Africa's presence in Namibia is legal' would be inconsistent with the Security Council's declaration of illegality and as such proscribed.[63]

[54] Commentary to art 41, para 5.

[55] See eg GA Res 2946(XXVII), 7 December 1972 (Rhodesia); SC Res 283 (29 July 1970) (Namibia); SC Res 497, 17 December 1981 (Israel); SC Res 550, 11 May 1984 (TRNC).

[56] SC Res 253, 29 May 1968 (Rhodesia); GA Res 32/105N, 14 December 1977) (South Africa); GA Res 34/93G, 12 December 1979 (South Africa); GA Res 36/172A, 17 December 1981 (South Africa).

[57] SC Res 253, 29 May 1968 (Rhodesia);

[58] SC Res 476, 30 June 1980 (Israel); SC Res 478, 20 August 1980 (Israel); GA Res 36/120E, 10 December 1981 (Israel); GA Res 37/137C, 16 December 1982 (Israel); GA Res 39/146C, 14 December 1984 (Israel).

[59] SC Res 253, 29 May 1968 (Rhodesia). [60] Ibid.

[61] *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*, p 16.

[62] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p 136. Although the Court also dealt with the obligation of non-recognition in the *East Timor* case, its judgment does not elaborate the content of the obligation: see *East Timor (Portugal v Australia), ICJ Reports 1995*, p 90. But see ibid, Diss Op Judge *ad hoc* Skubiszewski, 262–265.

[63] *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*, p 16, 55, 58 (paras 121, 133).

More particularly, the Court noted that States were accordingly enjoined from (1) entering into treaty relations with South Africa in all cases in which the Government of South Africa purported to act on behalf of or concerning Namibia; (2) invoking or applying existing bilateral treaties concluded by South Africa on behalf of or concerning Namibia which involved active intergovernmental co-operation; (3) sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia; (4) sending consular agents to Namibia (and when required to withdraw any such agents already there); and (5) entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which might entrench its authority over the Territory.[64] The Court recognized an important qualification on the broad ground of humanitarian considerations: it noted that 'with respect to multilateral treaties, however, the same rule [of invalidity] cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia'. In a similar vein, invalidity did not extend to 'those acts, such as, for instance, the registration of births, deaths and marriages, the effect of which can be ignored only to the detriment of the inhabitants'.[65]

In the *Wall* Advisory Opinion, the Court held that all States were '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'.[66] However, the Court did not elaborate on the content of the obligation of non-recognition, leaving the matter to be determined by the political organs of the UN acting within their respective spheres of competence. The Court stated:

> . . . the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.[67]

The Court's decision not to elaborate on the content of the obligation in the *Wall* case left States with a particular uncertainty as to what this duty entails—if anything—in circumstances which do not necessarily result in legal claims.

4 Concluding observations

While article 41(2) ARSIWA states the obligation of non-recognition in general terms, its simplicity glosses over some significant ambiguities in relation to the circumstances in which the obligation of non-recognition arises and its precise content.

First, the ILC's contention that the obligation of non-recognition applies to *all* peremptory norms is not borne out by practice—at least not in the conclusive manner suggested by the ILC. The obligation of non-recognition has traditionally been intimately linked to forcible territorial acquisition. Since the 1960s, it has been extended to cover the prohibitions of *apartheid*, racial discrimination, basic principles of international humanitarian

[64] Ibid, 55–56 (paras 122–124).

[65] Ibid, 55–56 (paras 122, 125). In a dissenting opinion, Judge Petrén suggested that the obligation of non-recognition only excluded 'diplomatic relations and those formal declarations and acts of courtesy through which recognition is normally expressed' and did not extend to lower administrative levels, 'since necessities of a practical or humanitarian nature may justify certain contacts or certain forms of cooperation': ibid, 134–135.

[66] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, 200 (para 159).

[67] Ibid, 200 (para 160).

law and the denial of the right to self-determination. In contrast, there is no practice in relation to *other* peremptory norms. But what appears to be decisive is not the character of the particular peremptory norm but rather the extent to which an unlawful situation flowing from the violation of a peremptory norm results in a legal claim to status or rights by the responsible State. While this is relatively common where there is an unlawful annexation of territory, it is rather less obvious when such a situation would arise in respect of some other peremptory norms, such as the prohibitions of torture and genocide.

Second, while it is clear that where an obligation of non-recognition arises, it entails a broad obligation to refrain from any formal act of recognition and acts which would imply such recognition in a formal sense, there remains uncertainty as to the precise content of the obligation. The ILC did not elaborate on this question and international courts and tribunals as well as the political organs of the United Nations have been reluctant to develop relevant criteria beyond concrete cases. In these circumstances, it is very difficult for States to precisely identify the acts or omissions in respect of which they are obliged; an uncertainty which is not resolved in the ILC Articles.

Further reading

H Blix, 'Contemporary aspects of recognition' (1970-III) *Recueil des cours* 586

J Charpentier, *La reconnaissance internationale et l'évolution du droit des gens* (Paris, Pedone, 1956)

T-C Chen, *The International Law of Recognition: with special reference to practice in Great Britain and the United States* (London, Stevens & Sons Ltd, 1951)

T 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 C Tomuschat and J-M Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus cogens and obligations erga omnes* (The Hague, Martinus Nijhoff, 2006), 127

J Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987)

H Lauterpacht, *Recognition in International Law* (Cambridge, CUP, 1947)

S Talmon, 'The Duty "Not to Recognize as Lawful" a Situation created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation Without Real Substance?', in C Tomuschat and J-M Thouvenin (eds), *The Fundamental Rules of the International Legal Order:* Jus Cogens and Obligations Erga Omnes (The Hague, Martinus Nijhoff, 2006), 101