The Principle of Non-Recognition of States Arising from Serious Breaches of Peremptory Norms of International Law

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Abstract

The concept of recognition of States comprises both political and legal aspects. Over time, its nature has been addressed in different ways that have given rise to a debate encompassing the topic of what statehood is, according to international law. The notions of international personality, which is bestowed upon certain international actors, and of capacity to act, as a manifestation of the former, aid in understanding recognition at the present day. On this basis, an "obligation of non-recognition" when faced with new States arising as a result of the commission of unlawful international actions takes the shape of a restriction upon the capacity to act. Moreover, it may be observed that when the breach is of peremptory norms of international law, the corollary of a principle of non-recognition would come into play, affecting the appearance of elements of statehood.

I. Introduction

1. The concept of recognition has manifested itself as a prerogative of States within the framework of an international system characterized by decentralization and particular sensitivity towards preserving the idea of sovereignty. The case of the unilateral declaration of independence by Kosovo, together with the annexation of the Crimea by the Russian

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Federation, on the one hand, and the recent advisory opinion in the matter of the Chagos Archipelago, on the other, have brought back into the limelight the question of the role in international law of declarations of recognition of new States, and of what is termed the "obligation not to recognize" of unlawful situations.

2. Indeed, very shortly after Kosovo unilaterally declared its independence in 2008, a considerable group of States recognized it as an independent State.[1] In contrast, in relation to the events that took place in the Crimea and its declaration of independence in 2014, only the Russian Federation and ten further States recognized the new status of the Autonomous Republic of Crimea.[2] Manifestations of what has been called "premature recognition", as also of non-recognition, stirred up debate on

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1 The day after the unilateral declaration of independence on 18 February 2008, it was recognized by Afghanistan, Albania, Costa Rica, France, Senegal, Turkey, the United Kingdom (UK), and the United States of America (USA). Among these were three permanent members of the Security Council of the United Nations (UNSC). Over the course of the following days it was to be recognized in addition by Australia (19 February), Latvia and Germany (20 February), so that by the end of February 2008 it had achieved twenty-one recognitions. At present, Kosovo has diplomatic recognition from 117 States, including the majority of Western countries, but is denied it by the Russian Federation, China, Spain and India. Cf. International Recognitions of the Republic of Kosovo (www.mfa-ks.net/en/politika/483/njohjet-ndrkombtare-t-republiks-s-kosovs/483). For its part, the Government of Serbia has not recognized Kosovo as a sovereign State, although it maintains relations with the Government of Kosovo in accordance with the First Agreement of Principles Governing the Normalization of Relations concluded, although not signed by either party, on 19 April 2013 in Brussels under the auspices of the European Union (EU). Cf. Serbia and Kosovo*: historic agreement paves the way for decisive progress in their EU perspectives (ec.europa.eu/commission/presscorner/detail/en/IP_13_347). According to the most recent data, recognition has been conferred by 98 out of the 193 Member States of the United Nations (UN), 22 out of the 27 Member States of the European Union (EU), 26 out of the 30 Member States of the North Atlantic Treaty Organization (NATO), and 31 out of the 57 Member States of the Organization for Islamic Co-operation (OIC). Nevertheless, in March 2020, the Government of Serbia stated that eighteen States had withdrawn recognition: Burundi, the Central African Republic, the Comoros, Dominica, Ghana, Grenada, Lesotho, Nauru, Madagascar, Papua New Guinea, Palau, Sierra Leone, the Solomon Islands, Suriname, and Togo, with a less clear-cut withdrawal by at least Guinea-Bissau, Liberia and São Tomé and Principe.

2 The States that supported the Russian position were: Afghanistan, Armenia, Cuba, Kyrgyzstan, Nicaragua, North Korea, Sudan, Syria, Venezuela and Zimbabwe. Moreover, it is also necessary to take into account the recognition by Abkhazia, Artsakh, South Ossetia and Transnistria of the Republic of Crimea and Sevastopol as "federal subjects" (constituent entities) of the Russian Federation.

the role that these two concepts may play.[3] It appeared that States in one direction were moving away from the traditional practice of avoiding recognition of territories attempting to secede while territorial sovereignty was in dispute with the State within which they had their origin.[4] In the opposite direction, indicating a contrary posture, strong resistance was emerging to awarding recognition while simultaneously demanding an examination of any obligation to non-recognition for new entities emerging from an infraction of international law.[5]

3. The existence of a State is a question of fact. Whilst there is no international legal instrument to indicate how and when it comes into being, international law has had to specify a regime for its appearance. This was termed by the Arbitration Commission of the Peace Conference on Yugoslavia (Badinter Commission) in its Opinion No. 1 in 1991, "the principles of public international law which serve to define the conditions on which an entity constitutes a state".[6]

4. The question addressed here is centred on a determination of the nature and contents of reactions that may occur in the international community when it is faced with situations of entities emerging from a possible violation of international law, which may manage to achieve some effectiveness on the ground. In response to this matter, the cases of Kosovo and the Crimea stand out as key points in the evolution of the changeable law on the idea of statehood and the related norms for recognition.[7]

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3 Cf. C. Tomuschat, Recognition of New States – The Case of Premature Recognition, in P. Hilpold (ed.), Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010 (2012), 31.

4 Cf. J.A. Frowein, Recognition, Max Planck Encyclopedia of Public International Law (2010), para.6 (opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1086?rskey=0y3Wx1andresult=1andprd=EPIL).

5 Cf. S. Oeter, The Role of Recognition and Non-Recognition with Regard to Secession, in Chr. Walter et al., Self-Determination and Secession in International Law (2014), 45.

6 Opinion No. 1, of 29 November 1991, para.1(a). 31 ILM (1992), 1494; 3 EJIL (1992), 182-183 (ejil.org/pdfs/3/1/1175.pdf).
The Arbitration Commission of the Peace Conference on Yugoslavia de la European Economic Community (EEC), known as the Badinter Arbitration Committee, issued Opinion No. 1 in which it confirmed the process of dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). Cf. Opinion No. 1, of 29 November 1991, paras. 2 and 3. See M. Craven, The European Community Arbitration Commission on Yugoslavia, 66 BYIL (1995), 333-413 (doi: 10.1093/bybil/66.1.333).

7 Cf. Bing Bing Jia, The Independence of Kosovo: A Unique Case of Secession?, 8 Chinese JIL (2009), 42 (doi: 10.1093/chinesejil/jmp003).

II. The Principle of Recognition

5. The concept of recognition is used in a great variety of circumstances and for a range of purposes in international society.[8] The scope and weight that this mechanism has gradually acquired have led it to be seen as one of the fundamental principles of international law.[9] By expressing recognition, States manifest their wish to admit *vis-à-vis* themselves the existence and legal effects of a situation or transaction that in the absence of recognition would not be applicable.[10] Although it is also possible for declarations of recognition to be included in some treaties, recognition is in this sense a unilateral act under public international law.[11]

6. Its function revolves around the individual, discretionary pronouncements by States faced with new situations that trigger a certain tension between the prior legal situation and effectiveness, owing to the somewhat imperfect nature of international law.[12] This is because, as noted by Karl Doehring, effectiveness in itself does not bring recognizability to a situation that is unlawful according to peremptory international law.[13]

7. Among its various manifestations, the recognition of a new entity subject to international law stands out as being considered the most relevant.[14] It is with regard to this that the controversial question arises of what the legal nature and the consequences of recognizing States might

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8 Cf. I. Brownlie, Recognition in Theory and Practice, 53 BYIL (1982), 197 (doi: 10.1093/bybil/53.1.197).

9 Cf. G. Schwarzenberger, A Manual of International Law (5th ed.) (1967), 68.

10 Cf. J. Charpentier, La reconnaissance internationale et l'évolution du droit des gens (1956), 217. J.R. Crawford, The Creation of States in International Law (2nd ed.) (2007), 421. Nguyen Quoc Dinh, P. Daillier, A. Pellet, et al., Droit international public (8th ed.) (2009), 619, para.364. G. Schwarzenberger, above n.9, 69.
Article 6 of the Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, signed at Montevideo on 26 December 1933, states that: "The recognition of a State merely signifies that the State which recognizes it accepts the personality of the other with all the rights and duties determined by international law. [...]". 165 LNTS (1936), No. 3802, 19-43.

11 Cf. J.R. Crawford, 6: Recognition of States and Governments, in J.R. Crawford, Brownlie's Principles of Public International Law (8th ed.) (2012), 143. J.A. Frowein, above n.4, para.1.

12 Cf. J.A. Frowein, above n.4, para.28.

13 Cf. K. Doehring, Effectiveness, in R. Bernhardt (ed.), Encyclopedia of Public International Law (1995), Vol. II, 47. A. Miaja de la Muela, El principio de efectividad en Derecho internacional (1958), 97.

14 Cf. I. Brownlie, Principles of Public International Law (4th ed.) (1990), 90.

be.[15] In simple terms, the extensive debate in legal teachings on this topic can be boiled down to the two poles of theory termed declaratory and constitutive.[16]

II.A. The Great Debate over the Nature of Recognition of States

II.A.i. The Declaratory and Constitutive Theories

8. The line of argument adopted by one considerable group of distinguished academic figures had at its head classic "voluntarist" authors such as Lassa Oppenheim, and brought together, among others, Dionisio Anzilotti, Hans Kelsen, Hersch Lauterpacht, Franz von Liszt, Heinrich Triepel and Alfred Verdross. Most of these formed part of the positivist school of international law.[17] They held that for the community recognized, relative to the State recognizing it, recognition had a scope constituting or attributing the rights and duties associated with full statehood.[18] This was the outcome of a system of law based on the

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15 Cf. J. Dugard, The Secession of States and their Recognition in the Wake of Kosovo, 357 Recueil des Cours (2011), 13 (doi: 10.1163/1875-8096_pplrdc_A9789004227316_01).

16 Cf. B.R. Roth, Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine, 11 Melbourne JIL (2010), 396-398. S. Talmon, The Constitutive versus the Declaratory Theory of Recognition: *Tertium non Datur*?, 76 BYIL (2005), 180 (doi: 10.1093/bybil/75.1.101). For an account of the debate between the two schools of thought, see: T. Grant, The Recognition of States: Law and Practice in Debate and Evolution (1999), 1-18 (doi: 10.2307/2642068). J. Vidmar, Explaining the Legal Effects of Recognition, 61 ICLQ (2012), 361 (doi: 10.1017/S0020589312000164).

17 On the main authors working within this tendency, see: J. Crawford, The Creation of States, above n.10, n.75.
Among them, of particular note would be: A. Hold-Ferneck, Anerkennung und Selbstbindung: ein Beitrag zur Lehre vom Wesen des Völkerrechts, 4 Zeitschrift für Rechtsphilosopie in Lehre und Praxis (1929), 165-210. H. Kelsen, Recognition in International Law: Theoretical Observations, 35 AJIL (1941), 608-609 (doi: 10.2307/2192561). H. Lauterpacht, Recognition in International Law (1947), 75. T.J. Lawrence, The Principles of International Law (7th ed.) (1925), 82. L. Oppenheim, International Law. A Treatise / Volume I, Peace (1905-1906), 121. R. Redslob, La reconnaissance de l'État comme sujet de droit international, 13 Revue de droit international (1934), 429. G. Schwarzenberger, International Law as Applied by International Courts and Tribunals / Vol. I: International Law as Applied by International Courts and Tribunals (2nd ed.) (1949), Ch.7. G. Schwarzenberger, above n.9, 28. H. Triepel, Droit international et droit interne (1920), 101. F. von Liszt, Le droit international: exposé systématique (1927), 52-53. H. Wheaton, Elements of International Law (1866), Part I, Ch.II, sect.21.

18 To quote the wording of Hans Kelsen: "By the legal act of recognition the recognized community is brought into legal existence in relation to the recognizing state, and thereby

concept of States.[19]

9. Constitutive recognition would imply that legal status could not be acquired without recognition. [20] If this line of argument is taken, recognition would not create a State, just as the law does not create a person, but without recognition it would not gain an international legal status.[21] However, the objection may be made that in international practice it may be observed that a State can have some legal status without having been recognized.[22]

10. According to the main contemporary writers on the subject, the most widely held stance in teachings on international law is the declarative theory.[23] To quote Ti-Chiang Chen, its principal premise may be summed

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international law becomes applicable to the relations between these states. Hence the legal act of recognition has a specifically constitutive character". H. Kelsen, Recognition in International Law, above n.17, 609. Principles of International Law (2003), 271. Initially, Hans Kelsen followed the declaratory line in work such as: "La naissance de l'État et la formation de sa nationalité: les principes; leur application au cas de la Tchécoslovaquie", 4 Revue de droit international (1929), 617-618, but gradually evolved towards a constitutive position on the basis of the conclusions reached in: Théorie générale du droit international public. Problèmes choisis, 42 Recueil des Cours (1932), 274 (doi: 10.1163/1875-8096_pplrdc_A9789028607927_0).

Cf. D. Anzilotti, Cours de droit international (1999), originally published: 1929, 159-177. H. Lauterpacht, Recognition in International Law, above n.17. A. Verdross, Règles générales du droit international de la paix, 30 Recueil des Cours (1929), 326 and 328 (doi: 10.1163/1875-8096_pplrdc_A9789028606722_04).

Cf. H.W. Briggs, Recognition of States: Some Reflections on Doctrine and Practice, 43 AJIL (1949), 114 (doi: 10.2307/2193138). A. Pronin, Republic of Crimea: A Two-Day State, 3 Russian LJ (2015), 135 (doi: 10.17589/2309-8678-2015-3-1-133-142).

19 Cf. L. Oppenheim, above n.17, 21.

20 Cf. R.Y. Jennings, The Acquisition of Territory in International Law (1963), 37. J. Verhoeven, La reconnaissance internationale: déclin ou renouveau?, 39 AFDI (1993), 29.

21 Cf. J. Verhoeven, La reconnaissance, above n.20, 39.

22 Cf. Ibid.

23 Cf. Ti-Chiang Chen, The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States (1951), 78. I. Brownlie, Recognition, above n.8, 206. M. Díez de Velasco, Instituciones de Derecho Internacional Público (15th ed.) (2005) 269. J.A. Frowein, above n.4, para.10, Nguyen Quoc Dinh, P. Daillier, and A. Pellet, above n.10, 621, para.365. J.A. Pastor Ridruejo, Curso de Derecho Internacional Público y Organizaciones Internacionales (8th ed.) (2001) 296. S. Talmon, The Constitutive, above n.16, 105. J. Vidmar, The Annexation of Crimea and the Boundaries of the Will of the People, 16 German LJ (2015), 372 (doi: 10.1017/S2071832200020903). G. Wilson, Self-Determination, Recognition and the Problem of Kosovo, 56 Nehtherlands ILR (2009), 459 (doi: 10.1017/S0165070X09004550).

Among the principal forerunners of this line of thought would be: J.L. Brierly, The Law of Nations: An Introduction to the International Law of Peace (1928), 123. By the same author, Règles générales du droit de la paix, 58 Recueil des Cours (1936), 53 (doi:

up as: "whenever a State in fact exists, it is at once subject to international law, independently of the wills or actions of other States".[24] This theory has been supported by treaties, precedent, and the practices of States.

11. Among treaties, emphasis must be laid on the Convention on Rights and Duties of States of 1933 (Montevideo Convention), Article 3 of which stated: "The political existence of State is independent of recognition of the other States".[25] It was enough for the new entity to satisfy the traditional criteria for statehood, which are termed recognition requirements,[26] envisaged in Article 1.[27] Case law likewise at an early stage explicitly adhered to the declarative viewpoint in the decision reached by

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10.1163/1875-8096_pplrdc_A9789028609525_01). G. Diena, Ancora qualche osservazioni in tema di riconoscimento di Stati, 11 RDI (1932), 465-482. R. Erich, La naissance et la reconnaissance des États, 13 Recueil des Cours (1926), 457-461 (doi: 10.1163/1875-8096_pplrdc_A9789028605022_0). H.W. Halleck, International Law, or, Rules Regulating the Intercourse of States in Peace and War (1861), 75. J.L. Kunz, Die Anerkennung von Staaten und Regierungen im Völkerrecht (1928), 218. J.B. Moore, A Digest of International Law... (1906), Vol.I, 18-19. E. Nys, Le droit international: les principes, les théories, les faits (1912), Vol.I, 74. E. Nys, La doctrine de la reconnaissance des États. Les prétendues conditions mises à la reconnaissance..., 35 Revue de droit international et de législation comparée (1903), 292. R.J. Phillimore, Commentaries upon International Law (3rd ed.) (1879), Vol.II, 20. G. Scelle, Précis de droit des gens: principes et systématique (1932), Vol.I, 98. J. Westlake, International Law, Part I: Peace (1904), 49-50. J.F. Williams, Aspects of Modern International Law (1939), 26-27. More recently this view has been put forward by M.B. Akehurst, A Modern Introduction to International Law (6th ed.) (1996), 60-63. J.S. Davidson, Beyond Recognition, 32 Northern Ireland Legal Quarterly (1981), 22-30. J. Verhoeven, La reconnaissance, above n.20. C. Warbrick, Recognition of States: Recent European Practice, in M.D. Evans (ed.), Aspects of Statehood and Institutionalism in Contemporary Europe (1997), 9-44. B. Weston, R.A. Falk, and A.A. D'Amato, International Law and World Order: A Problem-Oriented Coursebook (1980), 267-268.

24 Ti-Chiang Chen, above n.23, 14.

25 Convention on Rights and Duties of States, above n.10.

26 Cf. S. Talmon, The Constitutive, above n.16, 126. C. Ryngaert, and S. Sobrie, Recognition of States: International Law or Realpolitik? The practice of recognition in the wake of Kosovo, South Ossetia and Abkhazia, 24 LJIL (2011), 489 (doi: 10.1017/S0922156511000100).

27 Article 1 of the Montevideo Convention, above n.10, states: "The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other States."

This reflects the "doctrine of the three elements" put forward by Georg Jellinek at the end of the nineteenth century. See G. Jellinek, Allgemeine Staatslehre (1905), 979. See also R. Cohen, The Concept of Statehood in United Nations Practice, 109 University of Pennsylvania LR (1961), 1127-1171 (doi: 10.2307/3310588). T.D. Grant, Defining Statehood: The Montevideo Convention and Its Discontents, 37 Columbia Journal of Transnational Law (1999), 414.

a mixed arbitration tribunal in the matter of *Deutsche Continental-Gas-Gesellschaft* v. *The Polish State* in 1929.[28]

12. Moreover, in both legal doctrine and international practice, the idea took root that recognition should be based on confirmation of the effective existence of a State more than on other aspects.[29] This was the view expressed by the Institut de Droit International (IDI) in 1936,[30] and by the Badinter Commission, whose Opinion affirmed categorically that: "the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory".[31]

13. In brief, as against the premises of constitutive theory based on the will of States, a State becomes a subject of international law, in accordance with an objective legal system, without the assent of the other States.[32] As Jochen Abraham Frowein, put it, it seemed clear that recognition did not create a State.[33] Consequently, it had to be inferred that if a State were not recognized, it would be because it had no existence.

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28 Cf. Nguyen Quoc Dinh, P. Daillier, and A. Pellet, above n.10, 621, para.365.
In the matter of *Deutsche Continental-Gas-Gesellschaft* v. *Etat polonais* in 1929, resolved by the Tribunal Arbitral Mixte Germano-Polonais, it was stated that: "[...], la reconnaissance d'un État est, non pas constitutive, mais simplement déclarative. L'État existe de par lui-même et la reconnaissance n'est que la constatation de cette existence, reconnue par les États de qui elle émane". 2 ZaöRV (1931), 14-40, 14. H. Herz, Le problème de la naissance de l'État et la décision du Tribunal Arbitral Mixte germano-polonais du 1er août 1929, 17 Revue de droit international et de législation comparée (troisième série) (1936), 573.

29 Cf. J. Vidmar, Conceptualizing Declarations of Independence in International Law, 32 Oxford JLS (2012), 153.

30 The text of Article I of Résolution I de l'Institut de Droit International: "La reconnaissance des nouveaux États et des nouveaux gouvernements", adopted during its meeting in Brussels on 23 April 1936 (39 Annuaire de l'Institut de droit international (1936), 300 (www.idi-iil.org/app/uploads/2017/06/1936_brux_01_fr.pdf) H. Wehberg, Tableau général des résolutions: (1873-1956) (1957), 404, read:

> La reconnaissance d'un État nouveau est l'acte libre par lequel un ou plusieurs États constatent l'existence sur un territoire d'une société humaine politiquement organisée, indépendante de tout autre État existant, capable d'observer les prescriptions du droit international et manifestent en conséquence leur volonté de la considérer comme membre de la Communauté international.
>
> La reconnaissance a un effet déclaratif.
>
> L'existence de l'État nouveau avec tous les effets juridiques qui s'attachent à cette existence n'est pas affectée par le refus de reconnaissance d'un ou plusieurs États.

31 Opinion No. 1, above n.6, para.1(a).

32 Cf. Ti-Chiang Chen, above n.23, 19.

33 Cf. J.A. Frowein, above n.4, para.10. Bing Bing Jia, above n.7, 43. Likewise, James Crawford holds that "an entity is not a State because it is recognized; it is recognized because it is a State". J. Crawford, The Creation, above n.10, 22-26.

14. Nevertheless, a question did arise, to which no answer could be found that would justify depriving them of the inherent rights of a State, in cases in which State-like entities that existed effectively were not recognized.[34] These were effective but unrecognized States, termed *de facto* States, or regimes that emerged in instances running from the issue of the Turkish Republic of Northern Cyprus (TRNC) through to the case of Somaliland.[35]

II.A.ii. The Declaratory and Constitutive Double Effect of the Recognition of States

15. In a search for a coherent explanation, some academics, like Hans Kelsen,[36] following de Visscher, came to argue that recognition combined a double effect, both declaratory and constitutive.[37] According to this line of reasoning, the dichotomy arose because there had been no distinction made between two attributes of one and the same act of recognition.[38] One showed that the community recognized was a State in accordance with international law, to which reference was made as recognition in the legal sense of the term.[39] Thanks to the other, a desire was expressed to maintain political or other relations with the State recognized, so that it could be called political recognition.[40] According to Kelsen's views, political recognition had no legal consequences in itself, since the State manifesting its wishes in relation to the new State did so without the intention of taking on board any legal obligation.[41]

16. Another group of writers went farther, since for them the disparity was to be defined as between the recognition of the possession of an international legal personality and that of the exercise of international

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34 Cf. V. Gowland-Debbas, Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia (1990), 215-216.

35 Cf. J. Grzybowski, To Be or Not to Be: The Ontological Predicament of State Creation in International Law, 28 EJIL (2017), 416 (doi: 10.1093/ejil/chx031). See also: T.S. Beyene, Declaration of Statehood by Somaliland and the Effects of Non-Recognition under International Law, 10 Beijing LR (2019), 196-211 (doi: 10.4236/blr.2019.101012).

36 See above, n.18.

37 Cf. C. De Visscher, Théories et réalités en droit international public (4th, rev.ed.) (1970), 258. J. Charpentier, above n.10. H. Lauterpacht, Recognition of States in International Law, 53 Yale LJ (1944), 385. J. Salmon, La reconnaissance d'État: quatre cas: Mandchoukouo, Katanga, Biafra, Rhodésie du Sud (1971), 19.

38 Cf. H. Kelsen, Principles, above n.18, 268-269.

39 Cf. Ibid.

40 Cf. Ibid.

41 Cf. Ibid.

rights by a State.[42] In the words of Charles Cheney Hyde, the distinction arose from the moment when "the 'rights and attributes of sovereignty' are said to 'belong to it independently of all recognition', although 'it is only after it has been recognized that it is assured of exercising them'".[43]

17. According to this line of argument, as interpreted by other scholars, personality would lack any significant meaning, so that those formulating this approach might be considered "constitutivists".[44] Nevertheless, it could not be in doubt that an unrecognized State may be the subject of international law and consequently have a capacity to be entitled to rights and duties independently of whether they are exercised. If this reasoning is followed, recognition confers full exercise of the international rights forming part of a legal or juridical personality, and those proposing it should be considered "declarativists".[45]

18. More recent practice, for instance in relation to the case of Kosovo, has made this conception plain through various statements.[46] Hence, for example, in the Letter from the President George W. Bush to the President of Kosovo of 18 February 2008, the USA recognized the fact of the existence of Kosovo as a sovereign State while simultaneously expressing a desire to establish diplomatic relations with it.[47] The terms used implied, on the one hand, recognition of statehood, and on the other, recognition of an international juridical personality through the establishment of bilateral relations.[48] Confirmation of the existence of a State, as a mere question of fact, had a declarative nature, whilst the setting up of a legal relationship, which was a manifestation of an international juridical personality, was constitutive in character.[49]

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42 Cf. P. Fauchille, Traité de droit international public (1921), Vol.I, Part I, 306. P. Fiore, Droit international codifié et sa sanction juridique: suivi d'un résumé historique des principaux traités internationaux (1890), 93-96. C.C. Hyde, International Law, Chiefly as Interpreted and Applied by the United States (1922), Vol.I, 58. A. Rivier, Principes du droit des gens (1896), Vol.I, 57.

43 Cf. C.C. Hyde, above n.42, 58.

44 Cf. R. Erich, above n.23, 460. A. Verdross, Règles générales, above n.18, 329.

45 Cf. Ti-Chiang Chen, above n.23, 17.

46 Cf. Bing Bing Jia, above n.7, 43. J. Vidmar, The Annexation, above n.23, 372.

47 Cf. Letter from the President George W. Bush to the President of Kosovo of 18 February 2008, paras.1 and 3 (georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080218-3.html). United States Recognizes Kosovo as an Independent State, 102 AJIL (2008), 640 (doi: 10.2307/20456653).

48 Cf. I. Brownlie, Principles, above n.14, 93. Bing Bing Jia, above n.7, 44.

49 Cf. I. Brownlie, Principles, above n.14, 93.

II.B. Recognition, International Legal Personality and Capacity to Act

19. The principal problem that must be addressed thus consists of the determination of the nature of an entity lacking recognition as a State. Constitutive writers accepted that a State may have an existence without being endowed with an international juridical personality.[50] They even acknowledged that recognition did not have the effect of "creating" the State.[51] On these lines, Article 9 of the Charter of the Organization of American States (OAS Charter) of 1948 envisaged that: "The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence".[52] Nevertheless, it was not easy to decide from the viewpoint of international law, what was the extent of the existence of a State not granted recognition.[53] This was because there could be no doubt that its very existence constituted a situation that in itself triggered certain legal effects.[54]

20. Some writers took as their starting point the controversial split between what are termed the *de facto*, and the legal, existence of a State. According to this distinction, those entities that accumulated the elements normally required by a State would constitute *de facto* States that could reach full legal existence by means of the granting of appropriate recognitions. In conformity with this line of thinking, they came to differentiate between the idea of a State and the concept of an international legal person, or subject of international law. Hence, an international juridical personality, or in other words the ability to have rights and obligations,[55] would be something attributed to a pre-existing

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50 Cf. Ti-Chiang Chen, above n.23, 30.

51 Cf. R. Erich, above n.23, 448-449.

52 The Charter of the Organization of American States, signed in Bogotá, on 30 April 1948, 119 UNTS (1952), No. 1609, 3-97. The changes made by Article V of the Protocol of Amendment to the Charter of the Organization of American States (Protocol of Buenos Aires), signed on 27 February 1967, meant that the original Article 9 became the new Article 13, 721 UNTS (1970), No. 1609, 324-389.

53 Cf. F. von Liszt, above n.17, 53.

54 Cf. L. Kopelmanas, La reconnaissance en droit international, 9 Communicazioni e Studi (1957), 4.

55 Cf. C. Dominicé, La personnalité juridique dans le système du droit des gens, in Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski (1996), para.6 (doi: 10.4000/books.iheid.1338). The definition in the original is: "l'aptitude à être titulaire de droits et d'obligations".

State through recognition.[56]

21. Nonetheless, this claim involves various contradictions, since the idea of a State is linked to that of sovereignty, which in turn is defined by full powers and independence. Consequently, if a State exists, it must be accepted that it enjoys full competences and exercises them independently, in other words without being subordinated or subject to other States. If a State exists, it must be acknowledged that it constitutes a subject of international law. This was the meaning of the words of Jean Charpentier: "statehood is opposable to non-recognizing States"[57] identifying the autonomous and independent nature of the existence of a State as a subject of international law, regardless of recognition.[58] It would be a contradiction to hold that a State exists but that its international status depends upon recognition by other States.[59]

22. International law can define the conditions for triggering the consequences derived from a given situation, or for the definitive attribution of a legal status. Just as the internal legal arrangements in States grant individuals a legal personality, in an analogous fashion international law confers upon a State an international juridical personality.[60] As Hans Kelsen remarked, there is only one possible route, which is that an international personality is assigned by an objective order on the basis that a legal consequence has been linked to a specific event.[61]

23. Even if a State has been granted an international personality as a subject of international law, this does not imply that it can exercise all the rights and obligations to which it may be entitled. An international legal personality has indeed been conferred, but the set of rights and obligations that a subject of international law may be able to bring to bear, as also their

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56 Cf. G. Schwarzenberger, above n.9, 71. In the dissenting opinion expressed by the German arbitrator, Viktor Bruns, with regard to the matter of *Deutsche Continental-Gas-Gesellschaft* v. *Etat polonais*, above n.28, he declared that: "La reconnaissance d'un nouvel État signifie que les États qui le reconnaissent lui confèrent la qualité de personne juridique; ils l'admettent comme membre dans la communauté international". 2 ZaöRV (1931), 33. H. Herz, above n.28, 575.

57 Cf. J. Charpentier, above n.10, 160-167.

58 Cf. Ti-Chiang Chen, above n.23, 14.

59 Cf. ibid., 31.

60 Cf. J. Crawford, The Creation, above n.10, 20.

61 Cf. H. Kelsen, Théorie générale du droit international public. Problèmes choisis, 42 Recueil des Cours (1932), 271-272 (doi: 10.1163/1875-8096_pplrdc_A9789028607927_02).

extent, will vary a good deal from one subject to another.[62] Nonetheless, there is an essential core idea of international legal personality shared by all of them, which would be "the capacity to enter into relations with other subjects",[63] or to put it in another way, a "capacity to enter into legal obligations", as will be seen.[64]

24. It must thus be stated that the capacity to act brings with it the possibility of exercising the attributes peculiar to an international juridical personality, or legal status, understood as capacities.[65] Such capacities may be restricted in their use for various reasons, without this calling into question their existence.[66] It may be said that an international personality, as a State, will enjoy full rights when it can bring completely into play its capacity to act in international society. This full capacity to act is reached via recognition in its various forms by each of the international subjects.

25. In international law it is less clear which capacities are linked to an international legal personality than it is in a nation's internal legal arrangements.[67] Legal doctrine, confirmed by practice, has traditionally

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62 The ICJ had occasion to declare in its frequently quoted Advisory Opinion in the matter of *Reparation for Injuries Suffered in the Service of the United Nations* of 1949 that there is a difference in the scope of legal capacity in connection with the functions performed in international society: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community." ICJ Reports 1949, 178.

63 Cf. J.A. Barberis, Nouvelles questions concernant la personnalité juridique internationale, 179 Recueil des Cours (1983), 169 (doi: 10.1163/1875-8096_pplrdc_A9789024729487_02). H. Mosler, Subjects of International Law, in R. Bernhardt (ed.), Encyclopedia of Public International Law (2000), Vol.IV, 714. S. Talmon, The Constitutive, above n.16, 116.

64 H. Mosler, above n.63, 714. J.E. Nijman, The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law (2004), 512. *Reparation for Injuries* of 1949: "[...] capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims", above n.62, 179.

65 Cf. C. Dominicé, above n.55, para.67. H. Mosler, above n.63, 714.

66 Cf. C. Dominicé, above n.55, para.72.

67 Cf. Id., para.73.
The three capacities characteristic of a legal personality are: to make contracts, to procure and transfer property and goods, and to bring suits before a court of law. Cf. N. Mugerwa, Subjects of International Law, in M. Sørensen, Manual of Public International Law (1968), 249. Article I of the Convention on the Privileges and Immunities of the United Nations, adopted by the UNGA at New York, on 13 February 1946, establishes the rights that must be recognized by signatory States: "The United Nations shall possess juridical personality. It shall have the capacity: a) to contract; b) to acquire and dispose of immovable and movable property; c) to institute legal proceedings", 1 UNTS (1946-47), No. 4, 15-33; and 90 UNTS (1951), No. 4, 327. Similarly, the Convention on the

identified three capacities inherent in an international juridical personality, these being: to conclude treaties, to establish diplomatic relations, and to participate in procedures relating to international liabilities.[68] These three capacities have been characterized in conformity with the procedures generating rights and obligations that are acknowledged at the present day, such as participating in the drawing up of international legal standards, being covered by them, and having legitimacy to lodge complaints, or to have complaints lodged against them, for failure to comply with them.[69]

26. In fact, as has been noted in more recent international practice, acceptation by the international community is especially important in the deployment of all the legal effects inherent in a State.[70] It might be stated that recognition has a stabilizing function, a consolidating effect, as it has been deemed by several writers,[71] rather than one of proving existence, in the emergence of a new State in international society. In conclusion, according to these premises, recognition would have a double nature: declarative of international personality and constitutive of the capacity to act.[72]

Privilegies and Immunities of the Specialized Agencies, approved by the UNGA on 21 November 1947, expresses this in identical wording in its Article II, 33 UNTS (1949), No. 521, 261-342.

68 Cf. I. Brownlie, Principles, above n.14, 60. C. Dominicé, above n.55, para.75. H. Mosler, above n.63, 714. O.I. Tuinov, The International Legal Personality of States: Problems and Solutions, 37 Saint Louis University LJ (1993), 325.

69 Cf. J.A. Carrillo Salcedo, Curso de Derecho Internacional Público: Introducción a su estructura, dinámica y funciones (1st ed. 4th reprint.) (1991), 25. M. Díez de Velasco, above n.23, 258.

70 Cf. Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217. 115 International Law Reports (1999), 274, para.106 (scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do), 37 ILM (1998), 1342-1377.

71 Cf. J. Dugard and D. Raič, The Role of Recognition in the Law and Practice of Secession, in M. Kohen (ed.), Secession: International Law Perspectives (2006), 135. P. Hilpold, The Kosovo Case and International Law: Looking for Applicable Theories, 8 Chinese JIL (2009), 59 (doi: 10.1093/chinesejil/jmn042) A. Saltzman, Developing the Principle of Non-recognition, 43 Ohio Northern University LR (2017), 2.

72 This double nature of recognition had already been highlighted in comments by Alfred Verdross, who noted that even for the declarative tendency there was a need to recognize at least that the exercise of external competences depended upon recognition. Cf. A. Verdross, Règles générales, above n.18, 329. Verdross laid down that the process comprised two steps: first, the confirmation that a new order has arisen that has some semblance of durability, this being of a declarative nature, and second, the beginning of relations with the new State, which is constitutive in character. A. Verdross, Völkerrecht (2nd ed.) (1950), 159. Anerkennung von Staaten, 2 Wörterbuch des Völkerrechts (1961), 50.

III. Non-Recognition and Reaction to International Illicit Actions

27. In contemporary international law there appears to have arisen the idea that there is an obligation of non-recognition in respect of effective entities that have emerged in an illegal way.[73] The existence of such an obligation is backed by a generalized practice of not recognizing illegally constituted situations.[74] Among the arguments put forward by those claiming that this duty of non-recognition has become established, are references to the Stimson doctrine, to the expressions of collective non-recognition in the early American conventions, to resolutions of the General Assembly (UNGA) and UNSC, the International Law Commission's (ILC) Draft Articles on State Responsibility, and to several decisions by the International Court of Justice (ICJ). As Ian Brownlie noted, the idea of non-recognition was a natural consequence of the principle *ex injuria jus non oritur.*[75]

28. The reactions arising in the international community in relation to the declarations of independence by Kosovo and the Crimea rekindled debate on whether this obligation exists in international law and what its scope might be. In respect of the first stage, if the effective presence of criteria for statehood could not be confirmed, declarations of recognition would be considered premature and such declarations should be seen as null and void.[76] With reference to the Crimea, the majority of the

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73 Cf. J. Verhoeven, La reconnaissance, above n.20, 34.
R. Bierzaneck, La non-reconnaissance et le droit international contemporain, 8 AFDI (1962), 117-137. I. Brownlie, The Principle of Non-Recognition, in I. Brownlie, International Law and the Use of Force by States (1963), 532. Comments: Non-recognition: A Reconsideration, 22 University of Chicago LR (1954), 261-278. A. Corobană, Non-Recognition of States as a Specific Sanction of Public International Law, 9 Juridical Tribune (2019), 589-598. C. Hill, Recent Policies of Non-Recognition (1933), 127. H. Herz, above n.28. H. Lauterpacht, The Principle of Non-recognition in International Law (1939), 22. G. Scelle, Théorie et pratique de la fonction exécutive en droit international, 55 Recueil des Cours (1936), 126-131 (doi: 10.1163/1875-8096_pplrdc_A9789028609228_02). R.H. Sharp, Non-Recognition as a Legal Obligation 1775-1934 (1934), 232. S. Talmon, La non reconnaissance collective des États illégaux (2007), 115. J.F. Williams, The New Doctrine of "Recognition", 18 Transactions of the Grotius Society (1932), 109-129. By the same author, Some Thoughts on the Doctrine of Recognition in International Law, 47:5 Harvard LR (1934), 776-794 (doi: 10.2307/1331534).

74 Cf. Nguyen Quoc Dinh, P. Daillier, and A. Pellet, above n.10, 627, para.368. M.F. Witkin, Transkei: An Analysis of the Practice of Recognition - Political or Legal, 18 Harvard International LJ (1977), 615.

75 Cf. I. Brownlie, The Principle, above n.73, 410.

76 Cf. J. Crawford, The Creation, above n.10, 21.

international community declared in favour of non-recognition of the supposed new entity.

29. For its part, the ICJ issued its *Kosovo Advisory Opinion* in 2010, confirming that there are certain declarations of independence that are illegal "from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character".[77] Such illegal situations, triggered by a serious violation of a standard with a peremptory character, give rise to consequences in the area of international liability, including a duty not to recognize them.[78]

30. This set of references would appear to constitute proof of an international practice and of an *opinio juris* that gives rise to a true international custom, in the view of a good number of academics.[79] Nonetheless, for other authors, all these precedents have only dubious legal value.[80] Moreover, accepting this claim would also equate to admitting the constitutive nature of the effects of recognition.[81] There are even those who consider the so-called "doctrine of non-recognition" not to be a legal doctrine so much as a sanction used as a tool for political intervention.[82]

III.A. The Notion of Non-Recognition

31. The "voluntarist" viewpoint was that if recognition had a constitutive or attributive nature, giving the rights and duties associated with full

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77 *Accordance with the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010*, 437, para.81.

78 Cf. R. Bismuth, Odyssée dans le conundrum des réactions décentralisées à l'illicite, 141 JDI (2014), 724. A. Lagerwall, L'agression et l'annexion de la Crimée para la Fédération de Russie: Quels enseignements au sujet du droit international, Questions of International Law, Zoom Out I, 2014, 66 (www.qil-qdi.org/wp-content/uploads/2014/12/CRIMEA_Lagerwall_FINAL.pdf). T. Christakis, The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?, 24 LJIL (2011), 82 (doi: 10.1017/S0922156510000609). G. Wilson, Crimea: Some Observations on Secession and Intervention in Partial Response to Müllerson and Tolstykh, 14 Chinese JIL (2015), 220 (doi: 10.1093/chinesejil/jmu047).

79 Cf. A. Saltzman, above n.71, 7.

80 Cf. A. Pert, The "Duty" of Non-recognition in Contemporary International Law: Issues and Uncertainties, 30 Chinese Yearbook of International Law and Affairs (2012), 49 (doi: 10.1163/9789004425040_005).

81 Cf. J. Vidmar, Explaining, above n.16, 362.

82 Cf. E. Borchard, Recognition and Non-Recognition, 36 AJIL (1936), 111 (doi: 10.2307/2192200).

statehood, then by the same token non-recognition removed those privileges and obligations when statehood had been achieved illicitly. One of its principal forerunners, Lassa Oppenheim, claimed that a State may expressly declare that in the future it will not validate by any act of recognition the outcome of an illegal procedure.[83] The question that arises lies in the possibility of non-recognition that considers the existence of a State as a mere matter of fact, with recognition having no more than a declarative value.

III.A.i. The Emergence of an Obligation Not to Recognize

32. The statement of an obligation of non-recognition of certain given situations reached through an illicit act or deed had as one of its earliest manifestations what is known as the Stimson doctrine, which was formulated in relation to actions contrary to the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) of 1928.[84] Faced with Japan's policy of occupying Manchuria in 1931, the United States Secretary of State Henry Lewys Stimson, declared there would be no recognition of any international territorial changes that might be achieved by means of force: "[the United States] 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 [...]".[85] The same line was taken in the Resolution adopted on 11

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83 Cf. L. Oppenheim, above n.17, para.75c.

84 Cf. ibid.
On the Stimson Doctrine, see: R.N. Current, The Stimson Doctrine and the Hoover Doctrine, 59 American Historical Review (1954), 513-542 (doi: 10.2307/1844715). R. Langer, Seizure of Territory: The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice (1947), 313. A.D. McNair, The Stimson Doctrine of Non-Recognition – A Note on its Legal Aspects, 14 BYIL (1933), 65-74. D. Turns, The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law, 2 Chinese JIL (2003), 105-143 (doi: 10.1093/oxfordjournals.cjilaw.a000464). J. Trone, The Stimson Doctrine of Non Recognition of Territorial Conquest, 19 University of Queensland LJ (1996), 160-164. W.G. Grewe, Admission to the International Legal Community: The Stimson Doctrine of Non-Recognition, in W.G. Grewe, The Epochs of International Law (2000), 599-602. The General Treaty for Renunciation of War as an Instrument of National Policy, signed in Paris on 27 August 1928, was to come into effect on 24 July 1929. 94 LNTS (1929), No. 2137, 57-64 (treaties.un.org/doc/Publication/UNTS/LON/Volume%2094/v94.pdf).

85 The Secretary of State to the Consul General at Nanking (Peck), Washington, January 7, 1932, Foreign Relations of the United States Diplomatic Papers, 1932, The Far East,

March 1932 by the General Assembly of the League of Nations, which requested countries "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".[86]

33. In short order, this doctrine took shape in various American instruments of direct, binding, legal force, such as the Anti-War Treaty of Non-Aggression and Conciliation of 1933 (Saavedra Lamas Treaty),[87] and the Montevideo Convention of 1933.[88] The texts of these treaties were followed by a considerable body of international practice hand-in-hand with an *opinio juris* that gradually gave shape to a customary obligation of non-recognition in general international law.[89]

34. Over the course of the 1930s, the episode of the annexation of Ethiopia by Italy in 1935 and other events preceding the Second World War did not hamper the practice of non-recognition on the part of some

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Vol.III, 7-8 (history.state.gov/historicaldocuments/frus1932v03/pg_7).
On the non-recognition of Manchukuo, see: C.Y. Ling, La position et les droits du Japon en Mandchourie (1933). F.A. Middlebush, The Effect of the Non-Recognition of Manchukuo, 28 American Political Science Review (1934), 677-683 (doi: 10.2307/1947199). G. Mong, La position juridique du Japon en Mandchourie (1933). W.W. Willoughby, The Sino-Japanese Controversy and the League of Nations (1935), 516-535.

86 League of Nations Official Journal, Special Supplement No. 101, Volume I, 87.

87 Anti-war Treaty of Non-aggression and Conciliation, signed in Rio de Janeiro on 10 October 1933, Article 2. 163 LNTS (1935), No. 3781, 394-413.

88 Convention on Rights and Duties of States, above n.10.
Together with these texts, others were adopted whose binding nature would only be such if they represented the emergence of an international custom. Cf. A. Pert, above n.80, 49.

89 Cf. A.D. McNair, above n.84. D. Turns, above n.84, 123.
This same obligation was restated on the occasion of the *Gran Chaco* Conflict of 1928 to 1935 between Bolivia and Paraguay in the form of a Declaration of Nineteen American Republics of 3 August 1932, and of the *Leticia* Conflict between Colombia and Peru, though a Resolution of the Council of the League of Nations of 18 March 1933. Cf. 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, J.M. Thouvenin (eds.), The Fundamental Rules of the International Legal Order: *Jus Cogens* and Obligations *Erga Omnes* (2005), 138.
Cf. T. Christakis, L'obligation, above n.89, 135. T. D. Grant, Doctrines (Monroe, Hallstein, Brezhnev, Stimson), Max Planck Encyclopedia of Public International Law (2014), para.14 (opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e697?prd=EPIL). S.E. Himmer, The Achievement of Independence in the Baltic States and Its Justification, 6 Emory International LR (1992), 272. A. Lagerwall, above n.78, 64. E. Milano, The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question, Questions of International Law, Zoom Out I, 2014, 36 (www.qil-qdi.org/wp-content/uploads/2014/05/CRIMEA_Enrico-Milano_FINAL.pdf).

States or calls for the restoration of the Ethiopian State once the World War ended.[90] One especially relevant matter was the annexation of the Baltic States by the Union of Soviet Socialist Republics (USSR) in June 1940.[91] A good number of States did not recognize their incorporation into the USSR. When that Union dissolved in 1990, the Baltic States put forward the view that their independence had merely been restored, so that they had no need to make any declaration of independence. This reasoning was accepted by other States, which denied any necessity for a formal recognition.[92]

35. In the period that began with the UN Charter, the list of texts which cite an obligation of non-recognition is extensive.[93] In the very first session of the UNGA a draft Declaration on the Rights and Duties of States was submitted in which it was envisaged that there should be a duty for every State "to refrain from recognizing territorial acquisitions obtained through force or the threat of force", this being referred to the ILC for consideration.[94] Among all the texts adopted by the UNGA, of particular note are Resolution 2625 (XXV) "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", particularly its First Principle;[95] Resolution 3314 (XXIX) "Definition of Aggression", specifically Article 5(3);[96] Resolution 36/103, a "Declaration

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90 Cf. T. Christakis, L'obligation, above n.89, 138. J.W. Garner, Non-Recognition of Illegal Territorial Annexations and Claims to Sovereignty, 30 AJIL (1936), 682 (doi: 10.2307/2191130). Nguyen Quoc Dinh, P. Daillier, and A. Pellet, above n.10, 627, para.365.
On the conflict between Italy and Abyssinia, see: A.N. Mandelstam, Le conflit italo-éthiopien devant la Société des Nations (1937), 577. C.E. Rousseau, Le conflit italo-éthiopien devant le droit international (1938), 280, 251.

91 Cf. T. Christakis, Le droit à l'autodétermination en dehors des situations de décolonisation (1999), 200-201.

92 Cf. S.E. Himmer, above n.89, 284-288. R. Rich, Recognition of States: The Collapse of Yugoslavia and the Soviet Union, 4 EJIL (1993), 37 (doi: 10.1093/oxfordjournals.ejil.a035834). J. Vidmar, Remedial Secession in International Law: Theory and (Lack of) Practice, 6 St. Antony's International Review (2010), 44.

93 Cf. A. Pert, above n.80, 54.

94 See Rights and Duties of States: Draft Declaration Submitted by the Delegation of Panama, UN Doc. A/285, of 15 January 1947, 26.

95 UN Doc. A/RES/2625 (XXV), of 24 October 1970, at Annex, "The Principle that States 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", para.10.

96 UN Doc. A/RES/3314 (XXIX), of 14 December 1974, Annex.

on the Inadmissibility of Intervention and Interference in the Internal Affairs of States";[97] and Resolution 42/22, a "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations".[98]

36. At a regional level, the principle was incorporated in Article 17 of the OAS Charter of 1948,[99] confirmed by Article 20 of the Protocol of Buenos Aires of 1967.[100] In the European context, there was also the Declaration of Principles Guiding Relations between Participating States forming part of the Helsinki Final Act of 1975, of the Conference on Security and Co-operation in Europa (CSCE).[101] At a later date, the Declaration of the European Council on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union of 1991[102] should be highlighted, as should the opinions adopted by the Badinter Commission in that same year.[103]

37. The doctrine has been accepted in other texts drawn up by the ILC, especially Article 41(2) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of 2001;[104] and Article 42(2) of the Draft Articles on the Responsibility of International Organizations of

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97 UN Doc. A/RES/36/103, of 9 December 1981, Annex, para.2(III) (e).

98 UN Doc. A/RES/42/22, of 18 November 1987, at Annex, para.10.

99 Charter of the Organization of American States, above n.52.

100 Protocol of amendment to the Charter of the Organization of American States, above n.52.

101 Conference on Security and Co-operation in Europe Final Act, Helsinki, 1 August 1975, the section entitled "Declaration of Principles Guiding Relations between Participating States (IV) 'Territorial Integrity of States'" (www.osce.org/helsinki-final-act?download=true). 14 ILM (1975), 1293.

102 Declaration of the European Council on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union, of 16 December 1991, 31 ILM (1992), 1485-1487, UN Doc. A/46/804, of 18 December 1991, Annex.

103 According to the Badinter Commission "the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory", Opinion No. 1, above n.6, para.1(a).

Cf. Opinion No. 1, above n.6, paras.2 and 3. See M. Craven, above n.6.

For a more detailed study of its contents, see: D. Türk, Recognition of States: A Comment, 4 EJIL (1993), 66-71 (doi: 10.1093/oxfordjournals.ejil.a035855).

104 Article 41(2) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the ILC in its fifty-third session (Report of the International Law Commission, Fifty-Third Session (23 April–1 June and 2 July–10 August 2001), UN Doc. A/56/10, 536, 43-59), lays down that:

> No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

2011,[105] which envisage a prohibition on recognizing as legitimate a situation created by the violation of a peremptory norm.[106] In its Commentary to Draft Article 41, the ILC stressed that this obligation was grounded in international practice and in decisions of the ICJ.[107] Similarly, the ILC also accepted on its first reading the text and titles of the draft conclusions and draft annex on peremptory norms of general international law (*jus cogens*), whose Draft Conclusion 19(2) reproduces, with necessary modifications, Article 41(2) of the 2001 Articles on State responsibility.[108]

38. History has shown numerous instances of collective non-recognition gathered into the doctrine over the period in question.[109] Among these, there was the reaction to the attempt at secession by Southern Rhodesia in 1965, which brought both the UNGA and the UNSC to request non-recognition because it infringed the right to self-

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105 The text of Article 42(2) of the Draft Articles on the Responsibility of International Organizations adopted by the ILC in its sixty-third session (Report of the International Law Commission, Sixty-Third Session (26 April–3 June and 4 July–12 August 2011), UN Doc. A/66/10, 384, 54-69), reads as follows:

> No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.

106 Cf. J. Vidmar, Conceptualizing, above n.29, 166. M. Dawidowicz, Chapter 46. The Obligation of Non-Recognition of an Unlawful Situation, in J. Crawford, A. Pellet, S. Olleson, and K. Parlett (eds.), The Law of International Responsibility (2010), 678.

107 Cf. ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, above n.104, 287.

108 The line taken by Draft Conclusion 19(2) in the terms of the Text of the Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*), adopted by the Commission on first reading (A/CN.4/L.936) during its 3472nd meeting held on 31 May 2019 (A/CN.4/SR.3472) (Report of the International Law Commission, Seventy-First Session (29 April–7 June and 8 July–9 August 2019), UN Doc. A/74/10, 406, 142-147), is as follows:

> 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 (*jus cogens*), nor render aid or assistance in maintaining that situation.

See S.D. Murphy, Peremptory Norms of General International Law (*Jus Cogens*) and Other Topics: The Seventy-First Session of the International law Commission, 114 AJIL (2020), 68-86 (doi: 10.1017/ajil.2019.74). D. Tladi, Codification, Progressive Development, New Law, Doctrine, and the Work of the International Law Commission on Peremptory Norms of General International Law (*Jus Cogens*): Personal Reflections of the Special Rapporteur, 13 Florida International University LR (2019), 1137-1150 (doi: 10.25148/lawrev.13.6.13).

109 In general, for practice in this period, see: J. Dugard, Recognition and the United Nations (1987). V. Gowland-Debbas, above n.34. S. Talmon, Recognition in International Law. A Bibliography (2000).

determination.[110] Other similar matters would include the reaction to the *de facto* authorities established at the end of the South Africa mandate in Namibia, in 1966;[111] to the creation of the Bantustans of Transkei, Ciskei, Bophuthatswana, and Venda by South Africa from 1976 onwards as a sort of "forced secession";[112] and the secession of the Turkish Republic of Northern Cyprus (TRNC) in 1983, considered "legally invalid" by the UNSC.[113]

39. There were also expressions of non-recognition in the face of illegal territorial acquisitions like the annexation of certain occupied territories by Israel in 1967, 1973 and 1981, affecting the West Bank, East Jerusalem,

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110 Cf. UN Doc. A/RES/2022 (XX), of 5 November 1965, para.9. UN Doc. S/RES/216 (1965), of 12 November, para.1. H. Blix, Contemporary Aspects of Recognition, 130 Recueil des Cours (1970), 672-677 (doi: 10.1163/1875-8096_pplrdc_A9789021891118_06). V. Gowland-Debbas, above n.34, 282.

111 Cf. UN Doc. S/RES/269 (1969), of 12 August, para.7.
Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts - Article 41 Commentary, in Report of the International Law Commission, Fifty-Third Session (23 April–1 June and 2 July–10 August 2001), UN Doc. A/56/10, 289, para.8.
Cf. also: H. Blix, above n.11010, 665-672.

112 Cf. UN Doc. A/RES/31/6A, of 26 October 1976; A/RES/3411D (XXX), of 28 November 1975; A/RES/32/105N, of 14 December 1977; and A/RES/37/69A, of 9 December 1982. UN Doc. S/RES/402 (1976), of 22 December, and S/RES/407 (1977), of 25 May.
At a regional level, the Organization of African Unity approved a Resolution on Non-Recognition of South African Bantustans during the Twenty-Seventh Ordinary Session of the Council of Ministers, held at Port Louis, Mauritius, June 24 - July 3, 1976, OAU Doc. CM/Res. 493 (XXVII), para.2. 15 ILM (1976), 1221.
See J. Dugard, Collective Non-Recognition: The Failure of South Africa's Bantustan States, in Boutros Boutros-Ghali Amicorum Discipulorumque Liber: Paix, Développement, Démocratie (1998), 383-403. G. Fischer, La non-reconnaissance du Transkei, 22 AFDI (1976), 63-76 (doi: 10.3406/afdi.1976.1977). D.A. Heydt, Non-recognition of the Independence of Transkei, 10 Case Western Reserve University (1978), 167-196. Transkei Independence Declared Invalid. Assembly Calls for Non-Recognition: United Nations Position on Transkei Clear, Says Secretary-General, 13 UN Chronicle (1976), 14. E. Klein, Die Nichtanerkennungspolitik der Vereinten Nationen gegenüber den in die Unabhängigkeit entlassenen südafrikanischen *homelands*, 39 ZaöRV (1979), 469-495. M.F. Witkin, above n.74.

113 Cf. UN Doc. S/RES/541 (1983), of 18 November, paras.2 and 7.
See S. Talmon, The Legal Consequences of (Non) Recognition: Cyprus and the Council of Europe, in M. Evans (ed.), Aspects of Statehood and Institutionalism in Contemporary Europe (1997), 57-81. J. Ker-Lindsay, Great Powers, Counter-Secession, and Non-Recognition: Britain and the 1983 Unilateral Declaration of Independence of the "Turkish Republic of Northern Cyprus", 28 Diplomacy and Statecraft (2017), 431-453 (doi: 10.1080/09592296.2017.1347445).

the Gaza Strip, and the Golan Heights.[114] The same was true of the annexation of Kuwait by Iraq in 1990,[115] or the declaration of independence by the Crimea and its later annexation by the Russian Federation in 2014.[116]

40. Although secession is not prohibited in international law, it would be illegal if it were to be the outcome of a clear violation of norms of general international law[117] or of a *lex specialis* of international law.[118] The unilateral declarations of independence by Southern Rhodesia, the TRNC, and the attempt made by the Republika Srpska,[119] were condemned as illegal by the UNSC, as the ICJ noted in its *Kosovo Advisory Opinion.*[120] In all these cases, illegality lay in the fact that they were attempting to emerge as new entities in international society though the use of force, in violation of the right to self-determination, or by virtue of apartheid.[121]

41. The result has been, as was affirmed by Judge *ad hoc* Krysztof Skubiszewski in his dissenting opinion in the *East Timor* case, that in such contexts non-recognition might take on the status of a peremptory norm of international law:

> The *policy* of non-recognition, which goes back to before the First World War, started to be transformed into an *obligation* of non-recognition in the thirties. [...] The rule or, as Hersch Lauterpacht says, the principle of non-recognition now constitutes part of general

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114 A listing of the resolutions may be consulted in: J. Dugard, Recognition, above n.1099, 112.

115 Cf. UN Doc. S/RES/662 (1990), of 9 August.

116 Cf. UN Doc. A/RES/68/262, of 27 March 2014, on Territorial Integrity of Ukraine, by a recorded vote of 100 in favour to 11 against, with 58 abstentions, the UNGA: "*Calls upon* all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum [...]".

117 Cf. S.F. van den Driest, Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law, 62 Netherlands ILR (2015), 335, n.28 (doi: 10.1007/s40802-015-0043-9).

118 Cf. J. Vidmar, Conceptualizing, above n.29, 169.

119 Cf. UN Doc. S/RES/787 (1992), of 16 November, paras.2 and 3.

120 Cf. *Kosovo Advisory Opinion*, above n.77, 437, para.81.
Cf. T. Christakis, The ICJ, above n.78, 82. S.F. van den Driest, above n.1177, 356. S. Yee, Notes on the International Court of Justice (Part 4): The Kosovo Advisory Opinion, 9 Chinese JIL (2010), 781 (doi: 10.1093/chinesejil/jmq033).

121 Cf. J. Crawford, The Creation, above n.10, 107-157. J. Vidmar, The *Kosovo* Advisory Opinion Scrutinized, 24 LJIL (2011), 371 (doi: 10.1017/S0922156511000057). By the same author, The Annexation, above n.23, 375.

> international law. The rule may be said to be at present in the course of possibly reaching a stage when it would share in the nature of the principle of which it is corollary, i.e., the principle of the non-use of force. In that hypothesis non-recognition would acquire the rank of a peremptory norm of that law (*jus cogens*).[122]

III.A.ii. The Content of the "Obligation of Non-Recognition"

42. The ICJ has come to accept the existence of an obligation of non-recognition in the face of illegal situations, but has not proposed a specific content for it. It may be noted, with regard to its scope, that it is circumscribed to situations caused directly or indirectly by the violation of peremptory norms of international law in relation to a territory.[123] In general international law, there already existed an obligation to withhold recognition from all illicit situations arising from an infringement of peremptory norms (*jus cogens*).[124] These peremptory norms would be: the prohibition of resort to threats or an actual use of force, the proclaimed principle of non-intervention in the internal affairs of States linked to a use of force, or the recognized right of peoples to self-determination in a context of decolonization.[125]

43. This obligation takes the shape of a minimum reaction against illicit actions: "a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to

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122 *East Timor (Portugal v. Australia), Judgment*, (diss. op. Skubiszewski), *ICJ Reports 1995*, 262, para.125. On the question of East Timor, see: T.D. Grant, East Timor, the U.N. System, and Enforcing Non-recognition in International Law, 33 Vanderbilt Journal of Transnational Law (2000), 273-310.

123 Cf. R. Bismuth, above n.78, 725.

124 Cf. ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, above n.104, article 41(2). ILC Text of the Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*), adopted by the Commission on first reading, above n.108, 146, conclusion 19(2).

In Draft Conclusion 23, the ILC referred to a non-exhaustive list of norms as having peremptory nature to be found in the annex to the conclusions. Among these are the linked items: (a) the prohibition of aggression, and (h) the right to self-determination. ILC Text of the Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*), adopted by the Commission on first reading, above n.108, 146-147, conclusion 23, and Annex.

125 Cf. M. Díez de Velasco, above n.23, 269. Nguyen Quoc Dinh, P. Daillier, and A. Pellet, above n.10, 627, para.368. J. Salmon, above n.37, 36.

the serious breaches referred to in article 40".[126] The duty of non-recognition implies States ought "to refrain from acting".127 Moreover, this is an obligation affecting all States with an *erga omnes* nature derived from this sort of illegality and invalidity.[128]

44. In its *Namibia* advisory opinion, it suggested that the contents of the obligation comprised various kinds of abstention intended to isolate the illicit regime or authority. These might include refusing to establish conventional relations,[129] not setting up diplomatic relations in the shape of accreditation or reception of missions, vetoing admission to international organizations, or avoiding links of a financial or commercial character.[130] Its contents do not imply any imposition of sanctions, but rather are limited exclusively to abstaining from acts that might imply recognition of the legality of the situation.[131] This is a duty that Stefan Talmon has described as a "duty of active abstention" leading to denial of

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126 ILC Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts - Article 41 Commentary, above n.1111, 289, para.8.

127 Commentary on Conclusion 19(2), ILC Text of the Draft Conclusions on Peremptory Norms of General International Law *(jus cogens)*, adopted by the Commission on first reading, above n.108, 196, para.6.

Cf. D. Tladi, The ILC's Draft Conclusions on Peremptory Norms of General International Law: Personal Reflections of the Special Rapporteur, 24 Austrian Review of International and European Law (2019), 121-140 (doi: 10.1163/15736512-02401010).

128 Cf. E. Cimiotta, Le reazioni alla 'sottrazione' della Crimea all'Ucraina. Quali garanzie del diritto internazionale di fronte a gravi illeciti imputati a grandi potenze?, 8 Diritti umani e diritto internazionale (2014), 493 (doi: 10.12829/77379). E. Milano, above n.89, 39. On the nature of obligations *erga omnes*, the IDI adopted a Resolution Obligations *Erga Omnes* in International Law during its Session in Cracow in 2005, Article 1(a) of which defines them as: "an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action; [...]". 71 Annuaire de l'Institut de Droit International (2005), 287 (www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf).

129 Cf. *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, 55, para.122.

130 Cf. id., para.124.

On the set of measures, see T. Christakis, L'obligation, above n.89, 144. By the same author, Les conflits de sécession en Crimée et dans l'Est de l'Ukraine et le droit international, 141 JDI (2014), 759. E. Milano, above n.89, 51.

131 Cf. T. Christakis, Les conflits, above n.13030, 758. 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 Ch. Tomuschat, J.M. Thouvenin (eds.), The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes (2005), 112.

the rights, capacities and privileges derived from Statehood.[132]

45. Nevertheless, as was noted by the ILC in its Commentary on Draft Article 41, the consequences of this obligation to non-recognition are not unqualified and the invalidity of the acts of the authorities of the non-recognized State "cannot be extended to those acts, [...] the effects of which can be ignored only to the detriment of the inhabitants of the Territory".[133] This conditionality of the obligation of non-recognition has been applied in numerous matters by the European Court of Human Rights.[134]

46. According to this view, the obligation of non-recognition certainly constitutes a duty, but it is hard to demand compliance with it from States. It thus has limited effectiveness in confronting illegal actions.[135] In brief, it is more a choice taken by a State or a group of States than a mandate derived from a rule of international law establishing reactive measures against the violation of primary obligations.[136] For this reason it has been seen as more of a "social sanction" within the international community than strictly an international penalty, although the effects associated with the isolation arising from it may be accounted comparable to those triggered by international sanctions.[137]

47. Despite its limitations, this obligation has had a crucial function in re-affirming the international rule of law in the face of illicit effective control. [138] The international practice described above cannot be considered as an obligation that is completely inefficacious over the long and medium term. On the contrary, almost all of the instances in which non-recognition of an illegal situation was demanded ended in a failure of the attempt to consolidate the situation, and the impact of isolation has to

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132 Cf. S. Talmon, The Duty, above n.13131, 112 and 118.

133 *Namibia Advisory Opinion*, above n.1299, 56, para.125, quoted in the: ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, above n.104, 290; and in the: Commentary on Conclusion 19(2), ILC Text of the Draft Conclusions on Peremptory Norms of General International Law *(jus cogens)*, adopted by the Commission on first reading, above n.108, 197, para.8.

134 Among others, it is possible to quote *Cyprus* v. *Turkey* (Application No. 25781/94), Judgement of 10 May 2001, paras. 89-98, *Case of Güzelurtlu and others* v. *Cyprus and Turkey* (Application No. 36925/07), Judgment of 29 January 2019, paras.179-197.

135 Cf. S. Talmon, The Duty, above n.13131, 125. J. Verhoeven, La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales (1975), 288.

136 Cf. E. Milano, above n.89, 49.

137 Cf. Ibid.

138 Cf. T. Christakis, L'obligation, above n.89, 133.

be accepted for the most part. The independence of Southern Rhodesia collapsed after fifteen years, the South African presence in Namibia was not stabilized even after a twenty-year stay, with independence achieved in 1990, the Homelands did not become independent States, the TRNC is not accepted as a State despite the thirty-eight years that have gone by since its unilateral declaration of independence, and Kuwait did not ultimately lose its freedom after the occupation and annexation by Iraq in 1990.[139] To sum up, the cases that have occurred since the decades immediately after the UN Charter though until the beginning of the new millennium did not attain their aims and ended with the re-establishment of the preceding *status quo.*[140]

III.B. The Principle of Non-Recognition in the Latest Contemporary International Practice

48. The obligation to non-recognition has gained new relevance as an outcome of the advisory opinion in the matter of the *Construcion of a Wall* in 2004 where the ICJ held that "given the character and the importance of the rights and obligations involved, [...] all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall".[141] Thanks to this same opinion, support was given for the existence of an obligation of non-recognition for all States with no need for the pronouncement of a prior authoritative decision.[142] Its reasoning was grounded in the notion of *erga onmes* obligations, as Judge Rosalyn Higgins remarked in her separate opinion.[143]

49. In the instance of Kosovo, the secession had been deemed illegal and there was no possibility of affirming that elements of Statehood were in place at the moment it occurred.[144] Nonetheless, the international

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139 Cf. Ibid.
In relation to the cases of claimed unilateral declarations of independence on the basis of violations of norms of international law, see above, 7.

140 Cf. S. Talmon, The Duty, above n.13131, 122.

141 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, 200, para.159.
Cf. T. Christakis, L'obligation, above n.89, 142. J. Vidmar, The *Kosovo*, above n.1211, n.93. A. Saltzman, above n.71, 27. S. Talmon, The Duty, above n.13131, 100.

142 Cf. A. Saltzman, above n.71, 27.

143 Cf. *Construction of a Wall,* (sep. op. Higgins), *ICJ Reports 2004*, 216, para.37.

144 Cf. C. Ryngaert and C. Griffioen, The Relevance of the Right to Self-determination in the Kosovo Matter: In Partial Response to the Agora Papers, 8 Chinese JIL (2009), 586 (doi:

community supported the side considered more vulnerable in the dispute. This was intended to give decisive backing to the consolidation of Statehood for Kosovo and in this way to impose a penalty upon the parent state.[145] In any case, there was a need for continuing effectiveness over time.[146]

50. The claimed secession and annexation of Crimea was a more complicated matter. This was deemed contrary to international law, to the extent of being seen as an infringement of peremptory legal norms, and has received no recognition from the international community. These events have contributed to buttressing a significant practice in the application of an obligation to non-recognition that has been unanimous in respect of the group of Western countries.[147] In opposition to them, just eight States have formally recognized a new status for the peninsula.[148] For its part, the UNSC saw an initiative to arrange for collective non-recognition, but in the end, the draft resolution presented by forty-one States was vetoed by the Russian Federation.[149] Nonetheless, the UNGA approved Resolution 68/262 in its meeting on 24 March 2014,[150]

10.1093/chinesejil/jmp021). A. Tancredi, Some Remarks on the Relationship Between Secession and General International Law in the Light of the ICJ's Kosovo Advisory Opinion, in P. Hilpold (ed.) Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010 (2012), 106.

145 Cf. A.H. Berlin, Recognition as Sanction: Using International Recognition of New States to Deter, Punish, and Contain Bad Actors, 31 University of Pennsylvania JIL (2009), 590. C. Ryngaert and C. Griffioen, above n.1444, 586.

146 Cf. S. Pegg, International Society and the De Facto State (1998), 122.

147 Cf. T. Christakis, Les conflits, above n.13030, 756. A. Lagerwall, above n.78, 64. E. Cimiotta, above n.1288, 503. E. Milano, above n.89, 37.

148 See above n.1.

149 At the request of Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, New Zealand, Norway, Poland, Portugal, the Republic of Moldova, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, the Netherlands, the UK and the USA, among these being all the twenty-eight Member States of the EU, the Security Council had submitted to it a proposal for resolution relating to the referendum on the status of Crimea (UN Doc. S/2014/189, of 15 March 2014). Basically, this proposal stated that the referendum lacked any validity and could not constitute the basis for an alteration in the status of the Crimea[149]. Approval for this was sought in the session of 15 March, the result being 13 votes in favour, a vote against by Russia, and the abstention of China (Cf. UN Doc. S/PV.7138, of 15 March 2014, 3).

150 In its 27 March session, the UNGA approved Resolution 68/262 co-sponsored by Canada, Costa Rica, Germany, Lithuania, Poland, the Ukraine and the USA on the Territorial Integrity of Ukraine. Cf. UN Doc. A/68/L.39 and Add.1, of 24 March 2014.

requesting non-recognition of any changed status in identical terms to the draft rejected within the UNSC:

> Calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.[151]

51. During the debates, numerous States asked that there should be no recognition, either of the results of the referendum, or of the subsequent annexation by Russia. Among others, the interventions by France, the UK, Lithuania, Australia and Luxemburg in the meetings of the UNSC were noteworthy,[152] as were those of the delegation of the EU, Norway, Georgia, Turkey and Lichtenstein in the UNGA.[153]

52. The same demand was made in the joint statement by the President of the European Council, Herman Van Rompuy, and the President of the European Commission, José Manuel Durão Barroso.[154] It was later incorporated in a joint declaration by the leaders of the G-7 when they

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The text received 100 votes in favour, 11 votes against, and 58 abstentions (Cf. UN Doc. A/68/PV.80, of 27 March 2014, 17. The States voting against were: Armenia, Belarus, Bolivia, Cuba, the Democratic People's Republic of Korea, Nicaragua, the Russian Federation, Sudan, the Syrian Arab Republic, Venezuela, and Zimbabwe. It was possible to adopt it because a there was a more than two-thirds majority of those States voting. However, only 59% of the Member States were represented at the meeting, and so just 51% of all Member States thus actually supported the resolution, so its impact remained very limited (Cf. A.F. Douhan, International Organizations and Settlement of the Conflict in Ukraine, 75 ZaöRV/HJIL (2015), 201).

151 Resolution on Territorial Integrity of Ukraine, UN Doc. A/RES/68/262, of 27 March 2014, para.6.

152 Cf. UN Doc. S/PV.7138, of 15 March 2014, 12, Intervention of Mr. Araud (France), 5; Intervention of Sir Mark Lyall Grant (UK), 5; Intervention of Ms. Murmokaitė (Lithuania), 6; Intervention of Mr. Quinlan (Australia), 9; Intervention of Ms. Lucas (Luxembourg), 11.

153 Cf. UN Doc. A/68/PV.80, of 27 March 2014, 27, Intervention of Mr. Mayr-Harting (EU), 4; Intervention of Ms. Power (USA), 6; Intervention of Mr. Wenaweser (Lichtenstein), 7; Intervention of Mr. Imnadze (Georgia), 11; Intervention of Mr. Çevik (Turkey), 11; Intervention of Mr. Pedersen (Norway), 14.

154 Cf. Joint Statement on Crimea by the President of the European Council, Herman Van Rompuy, and the President of the European Commission, José Manuel Barroso, Brussels, 18 March 2014 (europa.eu/rapid/press-release_STATEMENT-14-74_en.htm).

met in The Hague on 24 March 2014.[155]

53. The declaration by NATO through its General Secretary, Anders Rasmussen, insisted on the same point. It read: "Russia continues to violate Ukraine's sovereignty and territorial integrity, and remains in blatant breach of its international commitments. [...] Crimea's annexation is illegal and illegitimate and NATO Allies will not recognise it".[156]

54. As there was no success in solving the controversy by diplomatic means, non-recognition was followed by a proposal from the USA, the EU and other Western States to adopt sanctions. These were to be of varying nature and intensity, affecting the individuals and bodies involved in the changes of government that occurred in the Autonomous Republic of Crimea.[157]

55. This reaction was aimed at dissuading the Russian Federation from its aims in the region, but from the point of view of a return to the *status quo ante* the measures proved ineffective. Faced with an obstinate sticking to its purpose by the Russian Federation and the impossibility of restoring

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155 Cf. Declaration of The Hague, of 24 March 2014 (www.international.gc.ca/g7/2014_hague_declaration.aspx?lang=eng).

156 NATO Secretary General condemns moves to incorporate Crimea into Russian Federation, NATO Document Press Release (2014) 050, Issued on 18 March 2014 (www.nato.int/cps/en/natohq/news_108100.htm?selectedLocale=en).

157 The EU adopted Council Decision 2014/145/CFSP, of 17 March, concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJEU L 78, 17.3.2014, 16-21; and Council Regulation (EU) No. 269/2014, of 17 March, concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJEU L 78, 17.3.2014, 6-15. At a later date, several further items were adopted: Council Implementing Regulation (EU) No. 284/2014, of 21 March, OJEU L 86, 21.3.2014, 27-29; Council Implementing Regulation (EU) No. 433/2014, of 28 April, OJEU L 126, 29.4.2014, 48-50; Council Implementing Regulation (EU) No. 477/2014, of 12 May, OJEU L 137, 12.5.2014, 3-4; Council Implementing Regulation (EU) No. 577/2014, of 28 May, OJEU L 160, 29.5.2014, 7-10, followed by a series of updates down to the present day.

For its part, the United State saw approval by the President of Executive Order 13660, of 6 March 2014, Blocking Property of Certain Persons Contributing to the Situation in Ukraine, Federal Register 79, No. 46, Monday, March 10, 2014, 13493-13495; of Executive Order 13661, of 16 March 2014, Blocking Property of Additional Persons Contributing to the Situation in Ukraine, Federal Register 79, No. 53, Wednesday, March 19, 2014, 15535-15538; of Executive Order 13662, of 20 March 2014, Blocking Property of Additional Persons Contributing to the Situation in Ukraine, Federal Register 79, No. 56, Monday, March 24, 2014, 16169-16171; and of Executive Order 13668, of 19 December 2014, Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to the Crimea Region of Ukraine, Federal Register 79, No. 247, Wednesday, December 24, 2014, 77357-77359.

the Crimea to the Ukraine, non-recognition constituted the international legal mechanism for confronting an illicit act. The effectiveness of non-recognition would depend upon how generalized and lasting over time it proved to be. Nonetheless, in the matter of *Coastal State Rights* (Ukraine v. Russian Federation), the Russian Federation alleged that support by the international community for non-recognition had undergone "a notable dwindling" since Resolution 68/262 and those following.158

56. The Arbitral Tribunal in its ruling on the preliminary objections relating to the *Coastal State Rights* (Ukraine v. Russian Federation) case assumed that the obligation of non-recognition extended to acts that imply a recognition of lawfulness.159 However, recognition of the existence of a dispute over the territorial status of Crimea in no way amounts to recognizing any alteration of the status of Crimea from being the territory of one Party to that of another.160 It held that recognition of the existence of this dispute was not prohibited by UNGA resolutions and in no way 'might be interpreted as recognizing any such altered status' or that the actions of the Russian Federation were lawful.161

57. Hence, this non-recognition has not changed the situation, but it has contributed to delaying a legal settlement.[162] If this were to be attained, it would be the first case in international practice of this nature that would have achieved such an outcome. However, non-recognition of a given

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158 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation), Award Concerning the Preliminary Objections of the Russian Federation*, 21 February 2020, PCA Case No.2017-06, para.89. 191 ILR (2021), 1-171 (doi: 10.1017/ilr.2020.3). La UN Doc. A/RES/68/262, of 27 March 2014, Territorial Integrity of Ukraine, was adopted by 100 votes in favour to 11 votes against, with 58 States abstaining. Cfr. UN Doc. A/68/PV.80, 17. For is part, the most recent UN Doc. A/RES/75/192, of 16 December 2020, Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, was adopted by 64 to 23, with 86 abstentions. Cfr. UN Doc. A/75/PV.46, 26.

See A. Lott, The Passage Regimes of the Kerch Strait–To Each Their Own?, 52 Ocean Development & International Law (2021), 64-92 (doi: 10.1080/00908320.2020.1869445). R.G Volterra, G.F. Mandelli, and A. Nistal, The Characterisation of the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, 33 International Journal of Marine and Coastal Law (2018), 614-622 (doi: 10.1163/15718085-12331098).

159 *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, above n.158, para. 97.

160 Id, para.178.

161 Id., paras.177-178.

162 Cf. P. Hilpold, Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History, 14 Chinese JIL (2015), 269 (doi: 10.1093/chinesejil/jmv011).

situation emerging from illicit deeds, in which there is no possibility of reversing the result, cannot retain legal significance indefinitely.[163] The contrast between reality and law prolonged over a considerable time must in the end tilt in favour of effective control, despite the principle *ex injuria jus non oritur.*[164]

58. Solving long-drawn-out non-recognition poses a problem requiring violations of international law to be overcome by negotiation.[165] A negotiated solution, in which non-recognition would play a major role, would appear to be the only option for successful resolution of a conflict between illicit effectiveness and law. In these circumstances, recognition would be appropriate, as was noted by Robert Yewdall Jennings, in facing situations that were illicit but of general interest to States.[166] The international community might concede acknowledgment on a case by case basis for such conditions of 'consolidation' through employing a quasi-legislative procedure.[167] As to this possibility, there is a noteworthy recent holding by the Arbitral Tribunal in the *Coastal State Rights* (Ukraine v. Russian Federation) case concerning the scope that might be permitted for UNGA resolutions, not binding *per se*, but relevant in considering the emergence of an *opinio iuris*.[168]

59. Moreover, the ICJ repeated, in its separation of the *Chagos Archipelago* advisory opinion of 2019, that the right to self-determination constitutes an obligation *erga omnes* and that territorial integrity is a corollary of this. Hence, it held that "the process of decolonization of Mauritius was not lawfully completed", and in this circumstance, according to some participant, States "have an obligation not to recognize the unlawful situation".[169]

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163 Cf. R.Y. Jennings, above n.20, 59.

164 Cf. T. Christakis, The ICJ, above n.78, 82. C. De Visscher, Les effectivités du droit international public (1967), 37-38. R.Y. Jennings, above n.20, 62.

165 Cf. T. Christakis, Les conflits, above n.13030, 764.

166 Cf. R.Y. Jennings, above n.20, 62.

167 Cf. Id., 63-64.

168 Cf. *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, above n.158, para.173.

169 Cf. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritio in 1965, Advisory Opinion*, ICJ Reports 2019, 139, 134, and 137, paras. 180, 160, and 174. Restated by the UNGA in its Resolution on Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, UN Doc. A/RES/73/295, of 22 May 2019, para.Sixth(1)(e) and (7) dispositivo. Cf. F. Salerno, L'obbligo di non riconoscimento di situazioni territoriali illegittime dopo il parere della Corte Internationazionale di Giustizia sulle isole Chagos, 102 RDI (2019),

60. Consequently, matters appear to be different when it is a case of a recognized infringement of a peremptory norm of international law. In such as case, the matter of the *Chagos Archipelago* advisory opinion, the ICJ and the UNGA were forceful in demanding that the UK should "bring to an end its administration of the Chagos Archipelago as rapidly as possible".[170] For this reason, the UNGA requested the UN "to refrain from impeding that process by recognizing, or giving effect to any measure taken by or on behalf of, the 'British Indian Ocean Territory'".[171] This view was also taken by the ITLOS in the matter of *Maritime Boundary* (Mauritius v. Maldives) which took as its starting point the premise that continuing administration by the UK "constitutes an unlawful act of a continuing character"[172], and so did not recognize any capacity on the part of the UK to participate in procedures relating to international liabilities referring to the Chagos Archipelago.[173]

IV. Conclusion

61. The discussion above has addressed situations in which entities emerge to become a new State through an infringement of international law. A proposal is put forward for a theoretical construct that would establish the legal status of such entities in the face of the emergence in international

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Judge Antônio Augusto Cançado Trindade stressed that: "The fundamental right of peoples to self-determination indeed belongs to the realm of *jus cogens*, and entails obligations *erga omnes*, with all legal consequences ensuing therefrom" in the *Chagos Archipelago Advisory Opinion* (sep. op. Cançado Trindade), ICJ Reports 2019, 193, para.119. On these same lines would also be: *Chagos Archipelago Advisory Opinion*, (sep. op. Sebutinde), (sep. op. Robinson) ICJ Reports 2019, 290, para.43; 308-326, para.48-89.

170 Cf. *Chagos Archipelago Advisory Opinion*, above n.16969, 43, para.182. UN Doc. A/RES/73/295, above n.169, para.2(d).

171 UN Doc. A/RES/73/295, above n.168, para.6.

172 *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment*, 28 January 2021, Case No.28, paras.173, 247.

See T. Burri, and J. Trinidad, Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean, Preliminary Objections (ITLOS), ILM (2021), 1-69 (doi: 10.1017/ilm.2021.20). C.D. Gaver, Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives). Case No. 28. Judgment, 115 AJIL (2021), 519-526 (doi: 10.1017/ajil.2021.24).

173 *Maritime Boundary Between Mauritius and Maldives*, above n.172, para.247.

With regard to the capacities inherent in an international juridical personality, see above n.68 and related text.

law of a principle of non-recognition.

62. As a starting point, there are the arguments of writers who see a State as a *de facto* entity, a historical event, of which effectiveness is a manifestation whose existence the law cannot deny.[174] At most, law might affect the consequences of its emergence. Confirmation of the presence of the criteria for statehood would be conclusive in the creation of a State.[175] They hold inadmissible any arguments intended to require lawfulness as a corollary of statehood, which in brief would be simply the "capacity to enter into relations with the other States".[176] A State born of unlawfulness is not non-existent either factually or legally, and non-recognition of an unlawful State would merely cause a situation of social isolation, with a resultant factual limitation of its legal sphere.[177]

63. In the opinion of other academics, the appearance of a State is a juridical question, so that it must also observe certain requirements for legality established by international law.[178] At the very least, those calling for this prerequisite believe that the process of turning the *de facto* entity into a new State should not be based on a violation of peremptory norms of international law, such as disregarding the ban on the use of force against territorial integrity of a State or breaching the principle of self-determination.[179]

64. Finally, there is an intermediate position holding that the creation of a State is indeed a question of fact, but at the same time, the international community demands the observance of certain standards in

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174 Cf. A. Tancredi, Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia, 18 Italian YIL (2008), 53 (doi: 10.1163/22116133-90000075).

175 In the creation of a new State, the definitive point is whether elements of statehood co-occur with its effective exercise. Cf. Opinion No. 1, above n.6, para.1).a). J. Quel López, La práctica reciente en materia de reconocimiento de Estados', in Cursos de Derecho International de Vitoria-Gasteiz 1992 (1993), 54.
Cf. A. Tancredi, Neither Authorized, above n.17474, 53.

176 Montevideo Convention, above n.10, Article 1.

177 Cf. A. Tancredi, A Normative 'Due Process' in the Creation of States through Secession, in M. Kohen (ed.) Secession. International Law Perspectives (2006), 206.

178 Cf. M. Kohen, Introduction, in M. Kohen (ed.) Secession. International Law Perspectives (2006), 13. T. Christakis, The State as "Primary Fact". Some Thoughts on the Principle of Effectiveness, in M. Kohen (ed.) Secession. International Law Perspectives (2006), 165.

179 Cf. T. Christakis, Les conflits, above n.13030, 749. A. Tancredi, A Normative, above n.17777, 181.

the process of its creation.[180] Infringement of these would trigger a situation of social isolation entailing restrictions on its legal sphere.[181] As the ICJ declared in its *Construction of a Wall* advisory opinion, this limitation would affect the formal agreements States could enter into with the violating State, and lead them to refrain from diplomatic relations with it.[182] Likewise, it would imply abstaining from providing aid or assistance in keeping up the illegal situation.[183] Such restrictions would entail a certain precariousness in the effectiveness and independence of the new entity, which might be protracted owing to collective non-recognition.[184] Non-recognition would constitute an extreme form of the declarative theory in which a new State would be deemed not in being because it had no entitlement to exist. To sum up, recognition would be impossible, since there would be no rights to recognize.[185]

65. It would appear that the process of generating a new State involves a confluence of multiple factual and legal features making up the idea of statehood. Both aspects of fact, termed substantial by some academics, and those of law, are of particular interest for the international community. For this reason, they are regulated by international law through the concession of a legal personality and the capacity to act.

66. Some processes giving rise to new States may be affected by infringements of various standards in international law. Among these norms, it is appropriate to distinguish between those forming general or particular international law and those others constituting peremptory norms of international law. Transgression of any peremptory norm would have a crucial impact on the assembling of the elements necessary for Statehood and the consequence would be that no new State would have ever emerged in reality in such as case. It would entail an absence of the factual requisites for the emergence of a new State more than a judgement on the licit or illicit nature of the supposed creation of this novel State.[186]

67. This type of infringement cannot give rise to the consolidation of

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180 Cf. A. Tancredi, A Normative, above n.17777, 205.

181 Cf. Id., 206.

182 Cf. *Namibia Advisory Opinion*, above n.1299, 55, paras. 123-124. *Construction of a Wall Advisory Opinion*, above n.14141, 200, para.159.

183 Cf. *Namibia Advisory Opinion*, above n.1299, 55-56, para.124. *Construction of a Wall Advisory Opinion*, above n.14141, 200, para.159.

184 Cf. A. Tancredi, Neither Authorized, above n.17474, 54.

185 Cf. A. Pert, above n.80, 65. J. Verhoeven, La reconnaissance, above n.20, 35.

186 Cf. J. Verhoeven, La reconnaissance, above n.20, 37.

a State on the basis of effectiveness, since the essential elements of Statehood have never been present. These are instances in which there has been a threat, or a use, of force against political independence or territorial integrity, or a breach of the principle of self-determination. Such situations are governed by the principle of non-recognition, which avoids the validation of an illegal act.[187] This principle constitutes a necessary corollary of the peremptory norms of international law and carries with it an obligation to non-recognition for all States without a prior declaration of authority. The international law in which a State was recognized merely because it had effective control on the ground has been abandoned in favour of the recognition of legitimate States founded on an observance of standards, and essentially of the peremptory norms of international law.

187 Cf. A. Saltzman, above n.71, 37.