

THE CONSTITUTIVE VERSUS THE DECLARATORY THEORY OF RECOGNITION: *TERTIUM NON DATUR?*

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I. INTRODUCTION

The question of the legal effect of the recognition of new entities that call themselves 'States' has been characterized for over a century by the 'great debate'¹ between the constitutive and the declaratory schools of thought. Does a State only become a State by virtue of recognition, or is a State a State because it is a State, that is, because it meets all the international legal criteria for statehood? In the first case, recognition is *status-creating*, in the latter, it is merely *status-confirming*. The academic focus on this dispute has been criticized as unhelpful, and in some cases even as obsolete.² However, the issue of the legal effect of recognition does have some significance, as, depending on the answer given, it gives rise to different legal consequences. In considering these consequences, it is necessary to distinguish between the effects of recognition on the legal status of a 'State', and its effects on the State's relationship with other States. This study is mainly concerned with the question of legal status and its resulting rights and obligations. Academic writing to date has exclusively considered the legal effects of positive recognition. This paper will examine whether the constitutive and declaratory theories in their original form³ can also be applied to the non-recognition of new States, or whether non-recognition is of a different legal nature to recognition. In particular, it will consider whether non-recognition signifies more than simply 'not recognized'. These theories will be tested in the context of States collectively not recognized by the international community, where an international organization—the League of Nations or the United Nations—called upon all States not to accord them recognition: Manchukuo, the State of Rhodesia, the South African homeland

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¹ J. Crawford, *The Creation of States in International Law* (1979), p. 16. See also H. Lauterpacht, *Recognition in International Law* (1947), pp. 38–66; T.-C. Chen, *The International Law of Recognition* (1951), pp. 13–29.

² I. Brownlie, 'Recognition in Theory and Practice', this *Year Book*, 52 (1982), pp. 197–211 at p. 197; J.A. Frowein, 'Recognition', in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4 (2000), pp. 33–41 at p. 35.

³ For the various modifications of these theories, see T. Grant, *The Recognition of States. Law and Practice in Debate and Evolution* (1999), pp. 1–82.

States Transkei, Bophuthatswana, Venda, and Ciskei, and the Turkish Republic of Northern Cyprus.⁴

II. CONSTITUTIVE EFFECT

According to the constitutive theory, only recognition makes a State a State, and thus a subject of international law.⁵ In Oppenheim's words: 'A state is, and becomes, an International Person through recognition only and exclusively.'⁶ Recognition is therefore a matter within States' discretion. The constitutive theory is an expression of an outdated, positivist view of international law as a purely consensual system, where legal relations can only arise with the consent of those concerned. From this point of view, fulfilling the conditions for statehood alone does not suffice to render an entity a subject of international law, thus leaving the non-recognized State without rights and obligations *vis-à-vis* the non-recognizing States; in other words, international law does not apply between them. Accordingly, non-recognition of a factually existing State is possible. The non-recognition of a new State does not pose a problem for constitutive theorists; because recognition is seen as *status-creating*, non-recognition (or, more precisely, the non-occurrence of recognition), has *status-preventing* effect.

The most compelling argument against the constitutive theory is that it leads to a relativity of the 'State' as subject of international law. What one State may consider to be a State may, for another, be a non-entity under international law.⁷ States are *natural-born*, i.e. absolute, subjects of international law and are not relative subjects of international law *created* by existing States as, for example, international organizations.⁸ The idea of one State deciding upon another State's personality in international law is at odds with the fundamental principle of the sovereign equality of States.⁹ Furthermore, constitutive theory is

⁴ On the collective non-recognition of these States, see J. Dugard, *Recognition and the United Nations* (1987), pp. 81–111; H. Krieger, *Das Effektivitätsprinzip im Völkerrecht* (2000), pp. 176–256; D. Rai, *Statehood and the Law of Self-Determination* (2002), pp. 105–58; S. Talmon, *Kollektive Nichtanerkennung illegaler Staaten* (2006).

⁵ Proponents of this theory are, e.g., F. von Liszt/M. Fleischmann, *Das Völkerrecht* (12th edn., 1925), p. 91; D. Anzilotti, *Lehrbuch des Völkerrechts*, vol. 1 (3rd edn., 1929), pp. 119–20; H. Kelsen, 'Recognition in International Law', *AJIL*, 35 (1941), pp. 605–17 at pp. 608–9; Lauterpacht (above, n. 1.), p. 75; D.J. Devine, 'The Status of Rhodesia in International Law', *Acta Juridica* 1973, pp. 1–171 at p. 111; L.C. Green, 'Southern Rhodesian Independence', *Archiv des Völkerrechts*, 14 (1969/70), pp. 155–90 at pp. 160–1, 163.

⁶ Oppenheim, *International Law*, vol. 1 (1st edn., 1905), p. 108 at § 71 and (8th edn., 1955), p. 125 at § 71.

⁷ Cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 at p. 73 (sep. op. Amoun): 'An institution is a creature of reason which either exists or does not: it cannot at one and the same time be and not be.'

⁸ Cf. T. Stein/C. von Buttlar, *Völkerrecht* (11th edn., 2005), MN 244; A. Verdross/B. Simma, *Universelles Völkerrecht* (3rd edn., 1984), § 415.

⁹ Cf. Art. 2 (1) UN Charter. See also K. Hailbronner, 'Der Staat und der Einzelne als Völkerrechtssubjekte', in: Wolfgang Graf Vitzthum (ed.), *Völkerrecht* (3rd edn., 2004), pp. 149–243 at p. 178, MN 87.

incapable of explaining the responsibility of non-recognized States under international law. Not being subjects of international law, they are not only without rights in international law, but are also free from all international legal obligations. How, then, was it possible for the international community to ascribe responsibility to Rhodesia for acts of aggression, or other violations of international law,¹⁰ if it did not exist as a subject of international law? If the non-recognized State can violate international law, it must also (at least partially) be a subject of that law.¹¹

Hersch Lauterpracht attempted to soften the negative consequences of the constitutive theory by assuming that an obligation of recognition arises once the conditions for statehood have been met.¹² However, State practice shows that such an obligation does not exist,¹³ and that recognition is instead treated as a question of political and economic expediency. A further argument against an obligation of recognition is that an obligation usually carries a corresponding right. A right to recognition presupposes at least partial legal personality, which the new State is only supposed to achieve through recognition.

Jochen Abr. Frowein sought to meet the contention that a non-recognized State lacks legal personality by creating the legal entity of the—as he called it—‘*de facto* regime’.¹⁴ This term was used to describe political entities that exercise actual control over territory and call themselves independent, but which other States do not recognize as new States. Frowein accords them a certain limited status in international law solely on the basis of their territoriality, independently of any recognition. The concept of *de facto* regimes was developed when the Cold War was at its peak, to explain the legal status of the German Democratic Republic (GDR), the People’s Republic of Korea (North Korea), and the Democratic Republic of Vietnam (North Vietnam), all of which were not recognized by the West. The main arguments against the *de facto* regime as a new (limited) subject of international law are that there is no State

¹⁰ Cf. S/RES/455 (1979): ‘The Security Council, [. . .] Gravely concerned at the numerous hostile and unprovoked acts of aggression committed by the illegal minority régime in Southern Rhodesia violating the sovereignty, air space and territorial integrity of the Republic of Zambia, [. . .] 4. Calls for the payment of full and adequate compensation to the Republic of Zambia by the responsible authorities for the damage to life and property resulting from the act of aggression.’ See also S/RES/403 (1977) of 14 January 1977; S/RES/406 (1977) of 25 May 1977; S/RES/411 (1977) of 30 June 1977; S/RES/424 (1978) of 17 March 1978. See further J. Combacau, *Le pouvoir de sanction de l’ONU* (1974), pp. 136–8.

¹¹ Crawford (above, n. 1.), p. 267. Cf. Also C. Hillgruber, ‘The Admission of New States to the International Community’, *EJIL*, 9 (1998), pp. 491–509 at p. 494.

¹² Lauterpracht (above, n. 1.), pp. 32–3, 73–5.

¹³ See e.g. K. Ipsen/C. Gloria, *Völkerrecht* (5th edn., 2004), § 22, Rn. 33; Devine (above, n. 5), pp. 143–4, 151; Bindschedler, ‘Die Anerkennung im Völkerrecht’, *Berichte der Deutschen Gesellschaft für Völkerrecht*, 4 (1961), pp. 1–27 at p. 15.

¹⁴ J.A. Frowein, *Das de facto-Regime im Völkerrecht* (1968), pp. 7–8 and passim. He distinguishes between a *de facto* regime and a general *de facto* government, i.e. an unrecognized government that controls the territory of a recognized State (*ibid.*, p. 8). Frowein does not expressly advocate the constitutive theory but it is his intention to overcome its ‘basic weakness’ (*ibid.*, pp. 14–21).

practice to support it,¹⁵ and that, even today, the theory is predominantly found only in German literature.¹⁶ The so-called *de facto* regimes were actually States, in the international law meaning of that term, which were not recognized as such for political reasons.¹⁷ Only a few years later all these States were recognized by the NATO States and their allies, although there had been no change in the factual situation, only in the political climate. These entities were both protected and bound by the prohibition on the use of force, as well as being responsible for illegal acts—not because of their status as *de facto*-regimes (nor because of their constitutive recognition as limited subjects of international law),¹⁸ but solely because of their status as States. How else could they accede to international agreements, which, according to their terms, were only open to ‘States’?¹⁹ The legal position of a *de facto* regime corresponds to that of a State, i.e. it *ipso jure* has those minimum rights and obligations that are concomitant with statehood.²⁰ If there are differences to a recognized State in its legal standing, these are found in the area of optional relations, that is within States’ discretion. The difference between a *de facto* regime (i.e. a non-recognized State) and a recognized State, and thus the meaning of recognition, is limited to that area of discretionary relations. This is shown by the fact that the effect of non-recognition varies from case to case and from State to State. For example, while maintaining discretionary diplomatic, consular, or treaty relations with a *de facto* regime may for one State be irreconcilable with non-recognition, it may be perfectly feasible for another.²¹ A further argument against the theory of *de facto* regimes is its inability to explain why Manchukuo and Rhodesia²² were not accorded Frowein’s basic set of rights and obligations of *de facto* regimes.²³ This is particularly surprising, as that basic set of rights and obligations was meant to exist independently of any recognition.²⁴

¹⁵ The term *de facto* regime is not prominent in the official statements of States. There is also no *opinio juris* to support a defined legal status of effective territorial regimes irrespective of their creation.

¹⁶ Cf. E.g. I. Brownlie, *Principles of Public International Law* (6th edn., 2003), 85–101; R. Jennings/A. Watts (eds.), *Oppenheim’s International Law*, vol. 1 (9th edn., 1992), pp. 126–203. The concept of the *de facto* regime has been criticized in the German legal literature by H.-J. Uibopuu, ‘Gedanken zu einem völkerrechtlichen Staatsbegriff’, in: C. Schreuer (ed.), *Autorität und internationale Ordnung. Aufsätze zum Völkerrecht* (1979), pp. 87–110 at p. 97.

¹⁷ H. Blix, *Contemporary Aspects of Recognition*, *RdC*, 130 (1970-II), pp. 587–704 at pp. 627–8; D.J. Devine, ‘The Requirements of Statehood Re-Examined’, *MLR*, 34 (1971), pp. 410–17 at pp. 414–5.

¹⁸ Hillgruber (above, n. 11), p. 498, who convincingly refutes the concept of *de facto* regime.

¹⁹ See, in more detail, *Talmon* (above, n. 4), ch. 5.I.1.a. ²⁰ See below, s. IV.2.a.

²¹ The United Kingdom maintained diplomatic relations with Israel, although it had accorded only *de facto* recognition to the new State (HC Debs., vol. 466, WA, col. 17–18: 22 June 1949). Germany maintained diplomatic relations with the Federal Republic of Yugoslavia (FRY), although it did not recognize that State (*ZaöRV*, 56 (1996), pp. 1075–6).

²² Frowein regards Manchukuo and Rhodesia as *de facto* regimes, see Frowein (above, n. 14), pp. 7–8 (Manchukuo), pp. 67, 78, 231 (Rhodesia).

²³ On the legal status of the *de facto* regime, see Frowein (above, n. 14), pp. 34–199, 224–5.

²⁴ U. Fink, *Kollektive Friedenssicherung. Kapitel VII UN-Charta in der Praxis des Sicherheitsrats der Vereinten Nationen* (1999), p. 341.

Another attempt to remedy the shortcomings of the constitutive theory is through the centralization of recognition. According to this line of argument, statehood is meant to depend on being admitted to membership of the United Nations, or on a call by that organization not to recognize the new State.²⁵ Apart from its inability to explain the legal responsibility of the non-recognized (i.e. non-member) State, this line of argument does not provide a clear explanation of the legal status of a new State in the time between its declaration of independence and its admission to membership of the United Nations. In the case of the two Koreas, this period lasted more than forty-three years, not least due to the veto of the permanent members of the United Nations Security Council.²⁶ Theories must prove their worth in borderline cases such as these. It is for these reasons that contemporary authors, with few exceptions,²⁷ rightly reject the constitutive theory. Non-recognition, therefore, cannot be accorded a *status-preventing* effect.

III. DECLARATORY EFFECT

1. *Confirmation of the objective legal situation*

The now predominant view in the literature is that recognition merely establishes, confirms or provides evidence of the objective legal situation, that is, the existence of a State.²⁸ Alphonse Rivier stated in 1896 that: 'The existence of the sovereign State is independent of its recognition by the other States.'²⁹ The Institut de Droit International shared that view. In Art. 1 of its Brussels Resolutions Concerning the Recognition of New States and New Governments of 23 April 1936, it recorded: 'Recognition has a declaratory effect; The existence of a new State with all the juridical effects which are attached to that existence, is not affected by the

²⁵ Dugard (above, n. 4), pp. 125–7. See also Grant (above, n. 3), pp. 214–15.

²⁶ The Republic of Korea (South Korea) was established on 15 August 1948 and the Democratic Republic of Korea (North Korea) was founded on 9 September 1948. On 17 September 1991, both States were admitted to the United Nations.

²⁷ C. Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft. Das völkerrechtliche Institut der Anerkennung von Neustaaten in der Praxis des 19. und 20. Jahrhunderts* (1998), p. 388, n. 103; pp. 597–8; S. Terrett, *The Dissolution of Yugoslavia and the Badinter Arbitration Commission* (2000), p. 282. See also C. Simmler, 'Kehrt die Staatengemeinschaft zur Lehre von der konstitutiven Anerkennung zurück?', in: I. Seidl-Hohenveldern/H.-J. Schrötter (eds.), *Vereinte Nationen, Menschenrechte und Sicherheitspolitik—Völkerrechtliche Fragen zu internationalen Konfliktbegrenzungen* (1994), pp. 75–102 at pp. 97–101.

²⁸ See, e.g., Brownlie (above, n. 16), pp. 86–8; Cassese, *International Law* (2nd edn., 2005), pp. 73–4; Conforti, *Diritto internazionale* (5th edn., 1997), p. 17; P. Daillier/A. Pellet, *Droit International Public* (7th edn., 2002), pp. 557–8, MN 365; K. Doehring, *Völkerrecht* (2nd edn., 2004), MN 155; C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law', *RdC*, 281 (1999), pp. 1–438 at p. 118.

²⁹ A. Rivier, *Principes du droit des gens*, vol. 1 (1896), p. 57 (translation by the author). See also J.C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten* (1868), p. 71, § 35; J. Lorimer, *The Institutes of the Law of Nations*, vol. 1 (1883), pp. 104–5.

refusal of recognition by one or more States.³⁰ Thus, the international legal personality of a State and its concomitant rights and obligations solely depend on it being able to satisfy the criteria for statehood. Although that may be a contentious issue, it does not mean that all States' views are equally correct and that consequently, in applying the constitutive theory, the question of statehood is answered by looking to the views of individual States. It merely means that there is still no central authority that can decide on the question of statehood, its determination being binding for all. However, that is not a problem particular to statehood, but a general problem of international law.³¹ States, like natural persons in municipal law, attain legal personality at birth; that is, they are 'born' subjects of international law. The declaratory theory has its roots in the natural law view of international law, which considers international law as an objective legal order based on a nature-like community of States. Customary law is created by the common will of the States, and automatically applies to new States, independently of their recognition. This is exemplified by the fact that, time and again, non-recognized States have been the addressees of international claims, allegations of aggression, and condemnations for other illegal acts under international law.³²

The declaratory theory is supported by treaties,³³ declarations of States,³⁴ and especially by jurisprudence.³⁵ Of particular value are the opinions of the Arbitration Commission of the Hague Conference on Yugoslavia ('Badinter Commission'), established under the auspices of European Political Co-operation (EPC). Its purpose was to consider questions relating to the recognition of new States and State succession, which arose as a result of the dismemberment of the Socialist Federal

³⁰ Reproduced in English in *AJIL Suppl.*, 30 (1936), pp. 185–7 at p. 185. For the original French version see *Annuaire de l'Institut de Droit International*, 39-II (1936), pp. 300–5 and H. Wehberg, *Institut de Droit International* (1957), pp. 11–14.

³¹ The same is true for the legality of an intervention or the question of self defence.

³² Brownlie (above, n. 16), pp. 87–8. See also the declaration of the US representative 65th Session of the Special Committee on the Question of Defining Aggression with regard to the condemnation of Rhodesia: UN Doc. A/AC.134/SR.52–66 [65], 19 October 1970, p. 151 and the declarations of the representatives of the USSR (*ibid.*, p. 155) and Italy (*ibid.*, p. 159).

³³ See Art. 3 of the (Inter-American) Convention on the Rights and Duties of States (Montevideo Convention) of 26 December 1933: 'The political existence of the State is independent of recognition by the other States.' (165 LNTS 19). See also Art. 12 of the Charter of the Organization of American States of 30 April 1948, as amended (1994) 33 ILM 987).

³⁴ A letter of the German Foreign Office, dated 10 February 1994, reads: 'We and our partners in the EU have not recognized the FRY. [. . .] This is of no relevance for the question of the international legal personality of the Federal Republic of Yugoslavia, as recognition does not have constitutive effect.' (*ZaöRV*, 56 (1996), pp. 1007–8 (translation supplied). See also the declaration of Australia in the oral proceedings in the *East Timor* case: CR 95/10, 9 February 1995, p. 52.

³⁵ *Deutsche Continental Gas Gesellschaft c. Etat polonais* (1929), 4 AD 11 at p. 15: 'the State exists by itself and the recognition of a State is nothing else than a declaration of this existence [. . .]' See also the decision of the German Constitutional Court of 31 July 1973, BVerfGE 36, p. 1 at p. 22; *S. v Oosthuizen* [1977 (1)] SA 823 at pp. 824–5; *S. v Banda*, [1989 (4)] SA 519 at pp. 531–9 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections)* [1996] ICJ Rep 595 at pp. 661, 686 (diss. op. Kreća); *Reference re Secession of Quebec* (1998) 37 ILM 1340 at p. 1374, para. 142.

Republic of Yugoslavia (SFRY).³⁶ In its first Opinion on 29 November 1991, the Commission stated that:

the principles of public international law [. . .] serve to define the conditions on which an entity constitutes a State; that in this respect, the existence [. . .] of the State is a question of fact; that the effects of recognition by other States are purely declaratory.³⁷

Consequently, in its Opinion No. 10, the Commission concluded that the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY) was a 'new State'. This was the case although it had neither received nor requested recognition, claiming to be the sole successor to the SFRY.³⁸ Opinion No. 11 also shows that the question of when a State emerges does not depend on recognition. In this Opinion, the Commission decided on the date of emergence and thus the moment of succession for each successor State to the SFRY: that date was 8 October 1991 for Croatia and Slovenia; 17 November 1991 for Macedonia; 6 March 1992 for Bosnia and Herzegovina and 27 April 1992 for the Federal Republic of Yugoslavia.³⁹ In all these cases, the date of emergence preceded recognition by other States by several months or even, in some cases, several years. The date of emergence was not always identical to the date when independence was declared. The Member States of the European Union, for example, recognized Croatia and Slovenia on 15 January 1992, Bosnia-Herzegovina on 7 April 1992, and Macedonia on 8 April 1993. They did not recognize the Federal Republic of Yugoslavia until April 1996.⁴⁰

If recognition has *status-confirming* effect, it only corroborates the objective legal situation, i.e. the existence of a State. Thus, *argumentum e contrario*, in the case of non-recognition, an actual State must not exist. This explains why, in the case of collectively non-recognized States, declaratory theorists are at pains to prove the non-existence of a State. If such a State were actually to exist, they would face the dilemma of not being able to justify its non-recognition, and in particular the withholding of the rights which are inherent in statehood.⁴¹

³⁶ On the work of the Badinter Commission, see Terrett (above, n. 27), pp. 119–253; S. Oeter, 'Yugoslavia, Dissolution', in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4 (2000), pp. 1563–608 at pp. 1568–70; S. Hille, *Völkerrechtliche Probleme der Staatenanerkennung bei den ehemaligen jugoslawischen Teilrepubliken* (1996), pp. 67–71; Grant (above, n. 3), pp. 152–68; M. Craven, 'The European Community Arbitration Commission on Yugoslavia', this *Year Book*, 66 (1995), pp. 333–413. The Commission's Opinions were not binding but can be seen as authoritative statements of international law, *ibid.*, pp. 334, 353.

³⁷ *Opinion No. 1 [Disintegration of the SFRY]* (1991) 92 ILR 162 at pp. 164–5. Affirmed in *Opinion No. 8 [Extinction of the SFRY]* (1992) 92 ILR 199 at p. 201.

³⁸ *Opinion No. 10 [Recognition of the FRY (Serbia and Montenegro)]* (1992) 92 ILR 206 at p. 208. See also Terrett (above, n. 27), p. 159.

³⁹ *Opinion No. 11 [Dates of Succession]* (1993) 32 ILM 1587–9.

⁴⁰ See Oeter (above, n. 36), pp. 1571–3; J. Williams, *Legitimacy in International Relations and the Rise and Fall of Yugoslavia* (1998); Hille (above, n. 36), pp. 55–66; S. Baer, *Der Zerfall Jugoslawiens im Lichte des Völkerrechts* (1995), pp. 305–419.

⁴¹ Cf. Crawford (above, n. 1), p. 104; the same, 'The Criteria for Statehood in International Law', this *Year Book*, 48 (1976–77), pp. 93–182 at p. 162: 'Against this background, only three positions seem possible: that Rhodesia is in fact a State, and that action against it, so far as it is based on the

2. *Non-existence of a State*

Three scenarios are conceivable for the non-existence of a State in the sense of international law: (a) the so-called 'State' does not meet the criteria for statehood in international law, (b) the creation of the State is null and void as a result of an internationally wrongful act, or (c) a competent authority declares the emergence of the state to be invalid with effect *erga omnes*. In the first case, a State does not emerge at all, i.e. it already does not exist in fact. In the second case, the emergence of the State does not produce any legal effects *ab initio*. Finally, in the third case, the emergence of the State loses its legal effect (possibly *ex tunc*) by virtue of the declaration.⁴² These three scenarios will be considered in turn.

a. *The criteria for statehood are not met*

(1) Distinction between criteria for statehood and conditions for recognition

Publicists and States do not always distinguish clearly between the requirements for recognition of an entity *as a State* (the criteria for statehood) and the requirements for recognition *of a State*, that is, the preconditions for entering into optional or discretionary relations with it (the conditions for recognition). While the former are prescribed by international law, the latter may vary from State to State.⁴³ A good example is the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union',⁴⁴ adopted by the EU Member States' Ministers for Foreign Affairs on 16 December 1991. These make recognition dependent on the fulfilment of certain minimum standards of the rule of law, democracy, and human rights; guarantee of minority rights, respect for the inviolability of existing boundaries, acceptance of all relevant commitments with regard to disarmament, and recourse to arbitration. The United States had made a similar declaration⁴⁵ some three months earlier but with less

contrary proposition, is illegal; that recognition is constitutive [. . .]; or that the principle of self-determination in this situation prevents an otherwise effective entity from being regarded as a State.' Cf. also V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law. United Nations Action in the Question of Southern Rhodesia* (1990), pp. 215–16; Devine (above, n. 17), pp. 415–6.

⁴² Cf. P. Guggenheim, 'La validité et la nullité des actes juridiques internationaux', *RdC*, 74 (1949–I), pp. 191–268 at p. 204; R. Jennings, 'Nullity and Effectiveness in International Law', in: *Cambridge Essays in International Law, Essays in honour of Lord McNair* (1965), pp. 64–87 at pp. 66–7; J.A. Frowein, 'Nullity in International Law', in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 3 (1997), pp. 743–7 at p. 744. See also *Eastern Greenland Case* (1933), PCIJ Rep Series A/B, No 53, 95 (diss. op. Anzilotti).

⁴³ On the necessity to distinguish between criteria for recognition and criteria for statehood, see Blix (above, n. 17), pp. 636–7.

⁴⁴ Reproduced in *EC Bulletin* 12–1991, p. 121, MN 1.4.5; *EJIL*, 4 (1993), p. 72; (1991) 31 ILM 1468. On the guidelines, in general (1991) 31 ILM 1174–6; J. Charpentier, 'Les Déclarations des Douzes sur la reconnaissance des nouveaux Etats', *RGDIP*, 96 (1992), pp. 343–55; R. Kherad, 'La reconnaissance des Etats issus de la dissolution de la République socialiste fédérative de Yougoslavie par les membres de l'Union européenne', *RGDIP*, 101 (1997), pp. 663–93.

⁴⁵ Declaration of Secretary of State Baker of 4 September 1991 on the US position on developments in the Soviet Union: *Department of State Dispatch*, 2 (1991), p. 667. See also *ibid.*, pp. 679–80, 740–8, 890–1 and *Foreign Policy Bulletin*, 2 (Nov.–Dec. 1991), p. 42.

media attention. Japan also prepared such guidelines for recognition.⁴⁶ Constitutive theorists in particular have regarded these guidelines as a cataloguing of further criteria for statehood.⁴⁷ However, as the title of the EU guidelines shows, the listed requirements are not criteria for statehood but political conditions for recognition.⁴⁸ The title refers to the 'Recognition of *New States*'. It thus assumes the statehood of the States which are to be recognized. The European Council had asked the Ministers of Foreign Affairs to 'to evaluate the evolution of the situation in Eastern Europe and in the Soviet Union with a view to elaborating an approach concerning *the relations with the new States*.'⁴⁹ This view also finds support in the Opinions of the Badinter Commission, which distinguish between statehood of the SFRY's successor States and their compliance with the conditions set out in the Guidelines.⁵⁰ In its Opinion No. 10, the Commission stated that 'the FRY (Serbia and Montenegro) is a new State [. . .] its recognition by the Member States of the European Community would be subject to its compliance with the conditions laid down by [. . .] the Guidelines of 16 December 1991.'⁵¹ In deciding on the existence of a State, only the international law criteria for statehood are of any relevance. The value- or interest-led conditions for recognition, that each State or group of States may formulate, are not.

(2) The classic criteria for statehood

(a) *Jellinek's doctrine of the three elements of statehood*

In his *Allgemeine Staatslehre* (General Theory of the State) of 1900, Georg Jellinek⁵² developed the doctrine of the three elements of statehood, according to which a State exists if a *population*, on a certain

⁴⁶ In a Press Statement of 28 December 1991, the Japanese Foreign Minister specified the following conditions for the establishment of diplomatic relations with the Republics of the former USSR: '(1) Abiding by the obligations based on treaties and other international agreements concluded between the U.S.S.R. and other countries, (2) Keeping nuclear weapons under unified and strict control, (3) Carrying out existing obligations concerning arms control and disarmament, (4) Respecting basic human rights, (5) Pursuing economic reforms for transition to the market economy, (6) Taking over the debts of the former U.S.S.R.' (Statement on record with the author).

⁴⁷ Hillgruber (above, n. 11), p. 492; J. Dugard, *International Law. A South African Perspective* (2nd edn., 2000), p. 79.

⁴⁸ See M. Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', *AJIL*, 86 (1992), pp. 569–607 at pp. 588, 604; W. Hummer, 'Probleme der Staatennachfolge am Beispiel Jugoslawien', *Schweizerische Zeitschrift für internationales und europäisches Recht*, 4 (1993), pp. 425–59 at p. 440; Charpentier (above, n. 44), p. 351; S. Talmon, 'Recognition of Governments: An Analysis of the New British Policy and Practice', this *Year Book*, 63 (1992), pp. 231–97 at pp. 250–1; Terrett (above, n. 27), p. 282.

⁴⁹ *Bulletin de l'Agence Europe*, no. 5628 (12 December 1991), p. 5 (translation by the author, emphasis added).

⁵⁰ Cf. *Opinion No. 4 [Recognition of Bosnia-Herzegovina]* (1992), 92 ILR 173; *Opinion No. 5 [Recognition of Croatia]* (1992), 92 ILR 179; *Opinion No. 6 [Recognition of Macedonia]* (1992), 92 ILR 182; *Opinion No. 7 [Recognition of Slovenia]* (1992), 92 ILR 188.

⁵¹ *Opinion No. 10 [Recognition of the FRY (Serbia and Montenegro)]* (1992), 92 ILR 206 at p. 208.

⁵² On Georg Jellinek and his *Allgemeine Staatslehre*, see M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law* (2002), pp. 198–206.

territory, is organized under an effective *public authority*.⁵³ Although some authors have criticized this definition as treating the State as a purely factual phenomenon,⁵⁴ it is still the definition most commonly found in State practice. Thus, the German Foreign Office wrote on 10 February 1994:

The Federal Republic of Yugoslavia's statehood and personality in international law are not affected [by its non-recognition] [. . .]. The FRY meets the objective criteria for statehood (territory, population, public authority).⁵⁵

The Badinter Commission, in its Opinion No. 1 of 29 November 1991, also stated that 'the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority [. . .]'.⁵⁶ There are usually two requirements regarding the element of 'public authority': internally, it must exercise the highest authority, that is, it must possess the power to determine the constitution of the State (internal sovereignty); externally, it must be independent of other States (external sovereignty).⁵⁷ Independence of other States refers to *legal* independence; that is, the State must only be subject to international law, not to the laws of any other State.⁵⁸ On this point, Judge Anzilotti stated in his separate opinion in the *Austro-German Customs Union* case (1931):

The conception of independence, regarded as the normal characteristic of States as subjects of international law, cannot be better defined than by comparing it with the exceptional, and, to some extent, abnormal class of States known as 'dependent States'. These are States subject to the authority of one or more other States. The idea of dependence therefore necessarily implies a relation between a superior State [. . .] and an inferior or subject State [. . .]; the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. [. . .] It follows that the legal conception of

⁵³ G. Jellinek, *Allgemeine Staatslehre* (1900), pp. 355–93; (2nd edn., 1905), pp. 381–420; (3rd edn., 1914), pp. 394–434.

⁵⁴ J. Crawford, 'Israel (1948–1949) and Palestine (1998–1999): Two Studies in the Creation of States', in: G. Goodwin-Gill/S. Talmon (eds.), *The Reality of International Law* (1999), pp. 95–124 at p. 113; the same (above, n. 1), pp. 36–48; Grant (above, n. 3), pp. 9–12, with regard to the definition in Art. 1 of the Montevideo Convention of 26 December 1933.

⁵⁵ *ZaöRV*, 56 (1996), pp. 1007–8 (translation by the author). On 14 November 1998, the German Foreign Minister wrote in a letter to his predecessor that Germany continued to adhere to the 'necessary criteria for statehood (territory, people, and public authority)' (ibid., 60 (2000), p. 901). See also similar statements by the Dutch Government (P.J. Kuyper, 'Recognition: Netherlands' Theory and State Practice', in: H.F. van Panhuys/W.P. Heere/J.W.J.J. Ko Swan Sik/A.M. Stuyt (eds.), *International Law in the Netherlands*, vol. 1 (1978), pp. 371–403 at p. 374; *NYIL*, 6 (1975), p. 252) and by Switzerland (H. Klarer, *Schweizerische Praxis der völkerrechtlichen Anerkennung* (1981), p. 259; *Schweizerisches Jahrbuch für internationales Recht*, 34 (1978), p. 81 and ibid., 36 (1980), p. 172).

⁵⁶ *Opinion No. 1 [Disintegration of the SFRY]* (1991), 92 ILR 162 at p. 165. This decision was confirmed and applied in *Opinion No. 10 [Recognition of the FRY (Serbia and Montenegro)]* (1992), 92 ILR 206 at p. 208.

⁵⁷ See the declaration of the Swiss Federal Council on the question of recognition of 10 March 1977: *Schweizerisches Jahrbuch für internationales Recht*, 34 (1978), p. 81. See also K. Ipsen/V. Epping, *Völkerrecht* (5th edn., 2004), § 5, MN 7.

⁵⁸ Verdross/Simma (above, n. 8), § 382; G. Dahm/J. Delbrück/R. Wolfrum, *Völkerrecht*, vol. 1 (1989), p. 131.

independence has nothing to do with [. . .] numerous and constantly increasing states of *de facto* dependence which characterize the relation of one country to other countries.⁵⁹

Legal independence of a State can be assumed, as long as the independence of its legal order is assured; that is, as long as it is not subject to the legal order of another State, especially in day-to-day decision-making and the implementation of those decisions.⁶⁰ Recognition of a new State by the parent State or the State that was involved in its creation ('sponsor State') usually establishes a presumption in favour of the State's legal independence.⁶¹

(b) *Factual independence of public authority*

Some authors have denied statehood to Manchukuo, the South African homeland States, and the Turkish Republic of Northern Cyprus, on the basis of their supposed factual dependence on their respective parent or sponsor States. The use of deputized officials, economic aid, transfer payments to subsidize the State budget, and stationing of the sponsor State's troops were all regarded as indicators of a lack of factual independence.⁶² There are, however, several arguments against factual independence as an additional criterion for statehood. The requirement of factual 'independence in external relations' is predominantly found in declarations by the British Government.⁶³ These declarations do not deal with criteria for statehood, but with the British 'criteria for recognition'.⁶⁴ The case of Manchukuo in particular shows that its undoubted factual dependence on Japan was not necessarily regarded as a bar to statehood.⁶⁵ The Lytton Commission was established by the Council of

⁵⁹ *Case concerning the Customs Régime between Germany and Austria*, PCIJ, Rep Series A/B, No 41, 57–8 (sep. op. Anzilotti) and *ibid.*, p. 41.

⁶⁰ Uibopuu (above, n. 16), p. 103. See also Brownlie (above, n. 16), p. 72; Crawford (above, n. 1.), p. 133.

⁶¹ Cf. the judgment of the German Federal Supreme Court of 4 July 1989, BGHZ, 108, p. 200 at p. 204. The Court rejected the argument that Turkey had annexed the Turkish Republic of Northern Cyprus (TRNC) pointing to its recognition by Turkey. See also the decision of the Stuttgart High Court of 19 November 1987 noting that Turkey was concerned about the TRNC's 'independence under international law and [. . .] immediately recognized the Turkish Republic of Northern Cyprus.' (Transcript on file with author). See also L. Oppenheim, *International Law*, vol. 1 (8th edn., ed. by H. Lauterpacht, 1955), § 72.

⁶² On the economic dependence of the TRNC on Turkey, see J.-F. Drevet, *Chypre en Europe* (2000), pp. 235–6; J. Choisi, *Wurzeln und Strukturen des Zypernkonflikts 1878 bis 1990* (1993), pp. 383–5; on the economic dependence of the homeland States on South Africa, see Crawford (above, n. 1), pp. 225–6, n. 56; M.F. Witkin, 'Transkei: An Analysis of the Practice of Recognition—Political or Legal?', *Harvard ILJ*, 18 (1977), pp. 605–27 at p. 615; E. Klein, 'South African Bantustan Policy', in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4 (2000), pp. 477–80 at p. 478.

⁶³ HC Debs., vol. 160, WA, col. 494: 16 November 1989; *ibid.*, vol. 152, cols. 852–3: 10 May 1989.

⁶⁴ See HC Debs., vol. 75, WA, col. 532: 20 March 1985; HL Debs., vol. 513, cols. 844–5: 5 December 1989.

⁶⁵ US Secretary of State Stimson spoke of 'the existing State of "Manchukuo"' (H.L. Stimson, *The Far Eastern Crisis: Recollections and Observations* (1936), p. 228). See also the memorandum by Sir John Pratt, a high official in the Far Eastern Department of the Foreign Office, dated 13 December 1933: 'So long as "Manchukuo" is in fact a State with a stable Government it will become in practice more and more difficult to ignore its existence.' (FO 371/17081/F7759,

the League of Nations in December 1931 to investigate whether the new State was the result of a 'genuine and spontaneous independence movement'⁶⁶ and not whether it was in fact independent.⁶⁷ The reason for this investigation was the obligation of the members of the League of Nations, according to Art. 10 of the League Covenant, to preserve the territorial integrity of member States against *external* aggression, but not against *internal* secessionist movements independent from other States. The Lytton Commission did not regard the recognition of Manchukuo as precluded on principle, but merely considered it an 'unsatisfactory solution'.⁶⁸ The question of Manchukuo's factual independence concerned other States only inasmuch as it related to independence from China, not independence from Japan. Another indication that Manchukuo's statehood was not an issue is that the League of Nations' Advisory Committee on questions consequent on the non-recognition of Manchukuo, in its Circular of 7 June 1933, called on the Members of the League 'to take all steps in their power to *prevent* Manchukuo's accession to certain general international Conventions'.⁶⁹ It is worth noting that there would have been no need to 'prevent' a non-State's attempt to accede to Conventions open to States only, as such an attempt would already have failed for lack of statehood.⁷⁰

A further argument against factual independence as an additional criterion for statehood is its vagueness. On 7 February 1978, the British Government responded to the question of which States it regarded as independent for the purposes of international law: 'You will appreciate that the term "independent" is not always easy to define [. . .]'.⁷¹ On another occasion, it declared that 'the receipt of external economic, military or other assistance, does not necessarily detract from the attributes of [. . .] independence in its internal autonomy and external relations.'⁷² The criterion's unsuitability is further demonstrated by the considerable *de facto* dependence of many existing States.⁷³ Lesotho, Botswana, Malawi, or Swaziland were not much more independent from South Africa than the homeland States⁷⁴—therefore, where should the line be drawn?

The Government of the Republic of Cyprus, adhering to Krystyna Marek's view,⁷⁵ has argued with regard to the Turkish Republic of

reproduced in A. Carty/R. Smith, *Sir Gerald Fitzmaurice and the World Crisis. A Legal Adviser in the Foreign Office, 1932-1945* (2000), p. 152).

⁶⁶ LNOJ 1931, pp. 2374-5. ⁶⁷ But see Crawford (above, n. 41), p. 129.

⁶⁸ League of Nations, *Appeal by the Chinese Government. Report of the Commission of Enquiry* (1932), p. 132. ⁶⁹ LNOJ, Spec. Suppl. No. 113, p. 11.

⁷⁰ On this question, see in detail Talmon (above, n. 4), ch. 4.I.I.a. and ch. 6.I.I.

⁷¹ UKMIL 1978: this *Year Book*, 49 (1978), p. 338.

⁷² HC Debs., vol. 75, WA, col. 532: 20 March 1985.

⁷³ Cf. Frowein (above, n. 14), p. 8; W. Rudolf, 'Neue Staaten und das Völkerrecht', *Archiv des Völkerrechts*, 17 (1977/78), pp. 1-45 at p. 25; Crawford (above, n. 1), p. 50, 226; Klein (above, n. 62), p. 478.

⁷⁴ Cf. E. Stabreit, *Der völkerrechtliche Status der Transkei, Ciskei, Bophuthatswanas und Vendas während der Zeit ihrer formellen Unabhängigkeit von der Republik Südafrika* (1997), pp. 80-2.

⁷⁵ K. Marek, *Identity and Continuity of States in Public International Law* (1954), pp. 113-15.

Northern Cyprus that no independent State could emerge on territories under foreign occupation. It regards States formed by nationals of the occupied State during military occupation as mere 'puppet governments' or 'puppet States', which are nothing but organs of the occupying power.⁷⁶ Some courts⁷⁷ and authors⁷⁸ have adopted this line of argument. In this regard, the first point to note is that 'puppet government' and 'puppet State' are not terms of art in international law describing a clear-cut legal position. Rather, these terms describe a state of *actual* dependency.⁷⁹ Depending on the extent of that dependency, the 'State' is either a mere organ of an occupying power or sponsor State, or a State with its own personality in international law. In 1979, the International Law Commission (ILC) stated in its commentary on Art. 28 of its then Draft Articles on the Origin of State Responsibility,⁸⁰ which dealt with the question of 'Responsibility of a State for an internationally wrongful act of another State':

The Commission had therefore concluded [at its thirtieth session⁸¹] that the problems of international responsibility arising out of the conduct of organs of a 'puppet' State could, like those arising out of the conduct of organs of any dependent State, fall within the notion of responsibility 'for the act of another [State]'. Reverting more specifically to the question at its present session, the Commission distinguished between the case in which *the puppet State would, in fact, be deprived of international personality* and would thus be only a sort of 'territorial governmental entity' of the occupying State, within the meaning of article 7, paragraph 1, of the draft,⁸² and the other case, in which *it would have*

⁷⁶ See the statement of the Republic of Cyprus in *Loizidou v Turkey (Merits)* (1996), (1997) 36 ILM 438, para. 50 ('an unlawful "puppet" regime'); *Loizidou v Turkey (Preliminary Objections)* (1995), ECHR, Series A, Vol. 310, para. 56 ('a "puppet" State'); *Cyprus v Turkey* (1996), 86-A DR 104 at p. 130 ('puppet institutions'). See also the statement of the Foreign Minister of the Republic of Cyprus before the Security Council: UN Doc. S/PV.2497, 17 November 1983, para. 89.

⁷⁷ See *Autocephalous Greek-Orthodox Church of Cyprus and The Republic of Cyprus v Goldberg & Feldman Fine Arts Inc.*, 717 F.Supp. 1374 at p. 1378 (S.D. Ind. 1989) where Noland J. noted that '[a]fter the invasion, the Turkish military established in essence a *puppet government* in northern Cyprus.'

⁷⁸ A. James, *Sovereign Statehood. The Basis of International Society* (1986), p. 142 ('puppet State'); A. Filos, 'Die Entwicklung der Zypern-Frage unter besonderer Berücksichtigung der geplanten EU-Mitgliedschaft der Republik Zypern', *ZaöRV*, 59 (1999), pp. 185-211 at p. 198 ('Marionettenstaat'). See also R.St.J. Macdonald, 'International Law and the Conflict in Cyprus', *Canadian YIL*, 19 (1981), pp. 3-49 at p. 43 who saw the Turkish Federated State as an 'instrument of a foreign State'.

⁷⁹ On the Communist puppet states, see W. Abendroth, 'Satellitenstaaten', in: K. Strupp/H.-J. Schlochauer (ed.), *Wörterbuch des Völkerrechts*, vol. 3 (1962), pp. 162-3.

⁸⁰ Article 28 (1) of the 1979 ILC Draft Articles on State Responsibility: 'An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.' (ILC Yb. 1980 II/2, p. 33).

⁸¹ Cf. ILC Yb. 1978 II/2, pp. 100-1, para. 7, n. 475: 'the problems of international responsibility arising out of the conduct of organs of a puppet or dependent State would fall [. . .] within the notion of "indirect responsibility", which is dealt with in the following article of chapter IV [i.e. Art. 28]'. See also ILC Yb. 1979 II/1, p. 22, para. 36.

⁸² Article 7 (1) of the ILC Draft Articles on State Responsibility: 'The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.'

its own international personality. In the first case the occupying State would be responsible for internationally wrongful acts committed by the puppet State or Government as its 'own acts', attributable to itself. In the second case, it would be responsible for the 'acts of another [State]', in that the acts took place in a sphere of activity under its direction or control.⁸³

The ILC, however, did not give any indication as to when a puppet State would be deprived of its international personality and thus its statehood. In deciding that question, the degree of factual outside control should be considered.⁸⁴ If an entity has its own executive and other organs, conducts its foreign relations through its own organs, has its own legal system and courts, then there is at least *prima facie* evidence of a certain independence. It is not always easy to draw the line between agency and control, on the one hand, and *ad hoc* interference and 'friendly advice', on the other. It is only in cases of 'foreign control overbearing the decision-making of the entity concerned on a wide range of matters of high policy and doing so systematically and on a permanent basis',⁸⁵ that the puppet State must be assumed to be devoid of international personality due to lack of independence. But that would be very rare.

So far, State practice has denied factual outside control such an effect in international law, as the examples of Croatia (1941–1944), the Italian Social Republic (1943–1945) and the Republic of the Philippines (1943–1945) demonstrate. These States were founded during World War II on Axis occupied territory and are generally considered puppet States.

Croatia was founded as an 'independent State' by Croatian nationalists on Yugoslav territory on 10 April 1941, the date of the German occupation of Zagreb. It existed until 8 September 1944, when the Croatian leadership fled to Germany or were arrested.⁸⁶ Only the Axis Powers, their allies and the Vatican recognized the new State.⁸⁷ However, US⁸⁸ and German courts,⁸⁹ in decisions rendered after the War, did not regard the Croatian authorities as a mere 'territorial governmental entity'⁹⁰ of

(ILC Yb. 1980 II/2, p. 31). During its 50th session of the ILC in 1998, it was noted that '“puppet States” should not be equated with territorial governmental entities.' (UN Doc. A/53/10, 1998, para. 395).

⁸³ ILC Yb. 1979 II/2, p. 101, n. 519 (emphasis added). The wording used by the ILC shows that 'puppet States' can have international legal personality; see *ibid.*, pp. 94–104 and, in particular, p. 94.

⁸⁴ Cf. I. Brownlie (above, n. 16), p. 439.

⁸⁵ *Ibid.*, p. 72.

⁸⁶ On Croatia, see R. Lemkin, *Axis Rule in Occupied Europe* (1944), pp. 252–60, 606–27; A.P. Sereni, 'The Status of Croatia under International Law', *American Political Science Review*, 35 (1941), pp. 1144–51.

⁸⁷ Croatia was recognized by Germany (15 April 1941), Italy (15 April 1941), Slovakia (15 April 1941), Hungary (19 April 1941), Bulgaria (22 April 1941), Rumania (6 May 1941), Vatican (6 June 1941), Japan (7 June 1941), Spain (17 June 1941), Manchukuo (31 July 1941), Denmark (31 July 1941), Thailand (23 April 1943).

⁸⁸ The US International Claims Commission considered Croatia to be 'a local de facto government' (*Socony Vacuum Oil Company Claim* (1954), 21 ILR 55 at p. 60).

⁸⁹ See the decisions of the German Higher Regional Courts of Berlin of 25 October 1965, *Rechtsprechung zum Wiedergutmachungsrecht*, 17 (1966), p. 58 and of 7 June 1966, *ibid.*, p. 494. Similarly, the decision of the Higher Regional Court of 12 November 1965, *ibid.*, pp. 268–9. See also T. Oppermann, *Deutsche Veranlassung im Sinne des § 43 Bundesentschädigungsgesetz* (2nd edn., 1962), pp. 30–1.

⁹⁰ Cf. Art. 7 (1) 1979 ILC Draft Articles on State Responsibility.

the German occupying power without international legal personality. For example, the Court of Appeal for West Berlin held that, in spite of their undoubted political dependency, the Croatian authorities were not 'mere tools' of the German Reich.⁹¹

The Italian Social Republic (sometimes known as the 'Republic of Salò'), established in German-occupied Northern Italy by Benito Mussolini on 27 September 1943, was treated as independent of the German Reich by the Italian-American Arbitration Commission, although only the Axis Powers and their allies had recognized the State,⁹² and Switzerland had maintained *de facto* relations with it.⁹³ The Italian view, that the Republic was merely an agency of the German Reich, did not prevail.⁹⁴ The Arbitration Commission held in the *Treves Claim* (1956):

[. . .] on the evening of September 8, 1943 the German forces became *de facto* the masters of Italy [. . .]. They did not, however, take over the direct government of this part of the country. [. . .] Also the Italian Social Republic, *which cannot be considered as an agency of the German Reich*, had its own Government [. . .] which exercised legal powers with effective extrinsicality, by means of appropriate agencies; these agencies carried out *de facto* a legislative, jurisdictional and executive activity [. . .].⁹⁵

Thus, in the Commission's view, it was perfectly possible for a subject of international law, distinct from the occupying power, to emerge or exist on occupied territory. This was the case even though 'when making decisions, [the Republic of Salò] had to reckon with, up to a certain point, the intent of its ally.'⁹⁶

In the case of the 'Republic of the Philippines', the legal adviser to the US State Department seems to have adopted a similar position. In a memorandum of 29 June 1951, he considered the question of whether the Philippines could lay claim to a building in Tokyo, which the 'Republic of the Philippines' had purchased in 1944 from a private person for use as its embassy to Japan. The group of islands in the Pacific under US sovereignty was occupied by Japanese troops around the turn of the year 1941/42. On 14 October 1943, the independent 'Republic of the Philippines' was inaugurated under Japanese sponsorship which was

⁹¹ Decision of the Higher Regional Court of Berlin of 26 February 1968, *Rechtsprechung zum Wiedergutmachungsrecht*, 19 (1968), pp. 348, 349.

⁹² The Republic of Salò was recognized by Germany, Japan, Bulgaria, Rumania, Slovakia (all 27 September 1943), Croatia (28 September 1943), Manchukuo (28 September 1943), Hungary (29 September 1943), Nanking China (29 September 1943), Thailand (29 September 1943), Burma (30 September 1943). ⁹³ See *Documents Diplomatiques Suisses*, vol. XV, Nos. 11 and 87.

⁹⁴ But see the dissenting opinion of the Italian Commissioner in *Mossé Claim* (1953), RIAA XIII, p. 486 at p. 495: 'The self-styled Salò Government was regarded, both by Italy and by the United Nations [. . .] as a *longa manus* or, in other words, as an organ of the occupier.'

⁹⁵ RIAA XIV, p. 262 at pp. 265, 266 (emphasis added). On the legal status of the government of the Republic of Salò, see E. Stein, 'Application of the Law of the Absent Sovereign in Territory Under Belligerent Occupation: The Schio Massacre', *Michigan LR*, 46 (1948), pp. 341-70 at p. 349.

⁹⁶ *Fubini Claim* (1959), RIAA XIV, p. 429.

recognized by Japan and its allies.⁹⁷ The State Department's legal adviser assumed that the Philippines, as successor to 'the "Republic of the Philippines"', which was vested with governmental authority subject to the overriding will of the Japanese military who continued the occupation of the territory', had attained ownership of the building.⁹⁸ This would not have been possible if the Republic of the Philippines had merely been an agency of the Japanese occupying power. In that case, Japan would have become the owner of the building.

Factual independence of public authority as an additional criterion for statehood does not appear to be borne out by State practice. As these examples show, even so-called 'puppet States' that are politically, economically, or militarily dependent on another State, or that are founded on occupied territory, may be regarded as independent (States) for the purposes of international law.⁹⁹ The same should also hold true for the Turkish Republic of Northern Cyprus¹⁰⁰ and the other collectively non-recognized States.

(c) *Capacity to enter into relations with other States*

Some authors have cited a lack of 'capacity to enter into relations with the other States' as one of the reasons for denying the collectively non-recognized States statehood. As the argument runs, the non-recognized States lack statehood because, not being recognized, they are unable to enter into relations with other States.¹⁰¹ But this is a circular argument: whoever is not recognized is unable to enter into relations with other States and, precisely because of this inability to enter into relations, does not meet the conditions for recognition as a State. The capacity-to-enter-into-relations-criterion is mentioned in the definition of 'State' found in Art. 1 (d) of the Inter-American Convention on Rights and Duties of States (Montevideo Convention) of 26 December 1933,¹⁰² and has also been used in statements by various governments.¹⁰³ This criterion can be traced to the writings of Latin American international lawyers, but it

⁹⁷ The Republic of the Philippines was recognized by Japan, Manchukuo (14 October 1943), Nanking China (15 October 1943), Burma (16 October 1943), Croatia (18 October 1943), Bulgaria (20 October 1943), Thailand (20 October 1943), Slovakia (21 October 1943), Republic of Salò (27 October 1943).

⁹⁸ M. Whiteman, *Digest of International Law*, vol. 2 (1963), pp. 769–70.

⁹⁹ See Dahm/Delbrück/Wolfrum (above, n. 58), p. 131. See also Uibopuu (above, n. 16), pp. 102–3; J.J.G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961), pp. 74, 92.

¹⁰⁰ It has been pointed out that 'the fact that a country is under the military control of a third State does not exclude recognition', see I. von Münch, 'Legal Problems of a Divided State', in: Cyprus Bar Council (ed.), *International Law Conference on Cyprus* (1981), pp. 109–29 at p. 133.

¹⁰¹ Cf. Gowlland-Debbas (above, n. 41), p. 213; Dugard (above, n. 47), pp. 74–7. See also *Caglar and Others v Billingham (Inspector of Taxes) and Related Appeals* [1996] STC (SCD) 150 at pp. 180–3.

¹⁰² Article 1 reads: '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.' (165 LNTS 19).

¹⁰³ See, e.g., Whiteman (above, n. 98), pp. 221–3; *AJIL*, 68 (1974), p. 309 (USA); *AYBIL*, 16 (1995), p. 420; *ibid.*, 13 (1992), p. 231 (Australia).

does not accord with general State practice.¹⁰⁴ The capacity to enter into relations with other States is merely a condition for recognition, as it is a consequence of, and not a precondition for, statehood.¹⁰⁵ Another reason why the criterion is unsuitable to distinguish a State from other entities is that liberation movements,¹⁰⁶ autonomous national authorities¹⁰⁷ and insurgents are all capable of maintaining relations with States and other subjects of international law. This line of argument really focuses on the *opportunity* to enter into relations and not on the *capacity* to do so. That the non-recognized States have the capacity to enter into relations can be observed in their relations with those States that recognize them.¹⁰⁸ Finally, recognition is made an indirect precondition for statehood and thus accorded constitutive effect¹⁰⁹—which raises the question of how many States have to accord recognition for the capacity to enter relations to arise and thus for statehood to be affirmed.

(d) *The non-recognized States and the classic criteria for statehood*

There are good arguments in favour of ascribing statehood to the collectively non-recognized States on the basis of the classic criteria of population, territory, and public authority. It appears that the majority of international lawyers would presume statehood for Manchukuo,¹¹⁰ the State of Rhodesia,¹¹¹ the homeland States (Transkei, Bophuthatswana,

¹⁰⁴ Ipsen/Epping (above, n. 57), § 5, Rn. 3. Yemen, for example, was admitted to membership of the United Nations on 30 September 1949, at a time when it did not maintain diplomatic relations with any State, see ILC Yb. 1949, p. 82, para. 69 (Ricardo J. Alfaro).

¹⁰⁵ Devine (above, n. 17), p. 410; Crawford (above, n. 1), pp. 47, 73, 119; Tomuschat (above, n. 28), p. 96.

¹⁰⁶ See, e.g., J. Barberis, 'Nouvelles questions concernant la personnalité juridique internationale', *RdC*, 179 (1983-I), pp. 145–304 at pp. 264–6; S. Bennigsen, 'Befreiungsbewegungen', in: R. Wolfrum (ed.), *Handbuch Vereinte Nationen* (2nd edn., 1991), pp. 38–45 at pp. 41–3.

¹⁰⁷ On the international relations of the Palestinian Authority, see Art. VI, 2b and 2c of the Agreement between Israel and the Palestine Liberation Organization on the Gaza Strip and the Jericho Area, done at Cairo, 4 May 1994: (1994) 33 ILM 622–720 at p. 630.

¹⁰⁸ See *S. v Banda* [1989 (4)] SALR 519 at p. 543: '[t]he fact that [Bophuthatswana] is precluded from doing so due to political considerations in no way detracts or derogates from its ability to do so [. . .]. An entity possessing all the other essentials of being a State cannot be regarded as not having the capacity to enter into relations with other States if it is denied the opportunity to demonstrate this capacity in practice.' See also *ibid.*, pp. 530, 531.

¹⁰⁹ See Gowlland-Debbas (above, n. 41), p. 213: 'collective non-recognition, as a fact, has constitutive effect'.

¹¹⁰ F.A. Middlebush, 'Non-Recognition as a Sanction of International Law', *ASIL Proc.*, 27 (1933), pp. 40–55 at p. 52; H.A. Smith, 'Recognition of States. Manchukuo', *The Times*, 8 November 1934, p. 12 and *ibid.*, 13 November 1934, p. 13; L. Cavaré, 'La reconnaissance de l'Etat et le Mandchoukouo', *RGDIP*, 42 (1935), pp. 5–99 at pp. 29–37, 98; T. Baty, 'Abuse of Terms: "Recognition", "War"', *AJIL*, 30 (1936), pp. 377–99 at p. 380, n. 4; G.F. Scalfati, *Il riconoscimento di Stati nel diritto internazionale* (1938), p. 215; N. Padelford, 'Non-Recognition of Title by Conquest and Limitations on the Doctrine', *ASIL Proc.*, 34 (1940), pp. 82–9 at pp. 83–5; E.M. Borchard, 'Recognition and Non-Recognition', *AJIL*, 36 (1942), pp. 108–11 at p. 109; W. Wengler, *Völkerrecht*, vol. 1 (1960), p. 779; B.R. Bot, *Nonrecognition and Treaty Relations* (1968), p. 146; Blix (above, n. 17), pp. 657–9; E. Usuki, 'Non-Recognition in International Law: The British Practice as Revealed Chiefly in the Foreign Office Papers 1931–1961' (unpublished diss., Cambridge, 1996), p. 38.

¹¹¹ J. Hopkins, 'International Law—Southern Rhodesia—United Nations—Security Council', *Cambridge Law Journal*, 26 (1967), pp. 1–5 at p. 5; G. Marston, 'Termination of Trusteeship', *ICLQ*, 18 (1969), pp. 1–40 at p. 33, n. 136; E. Schramm, *Völkerrechtliche Aspekte des Rhodesien-Konflikts*

Venda, and Ciskei),¹¹² and the Turkish Republic of Northern Cyprus.¹¹³ The press also seems to perceive these as States: the *Neue Zürcher Zeitung* on 27 October 1976 carried the headline 'Transkei achieves independence

(1970), pp. 54–70, 82; Devine (above, n. 5), pp. 78–89; R.M. Cummings, 'The Rhodesian Unilateral Declaration of Independence and the Position of the International Community', *New York Univ. JILP*, 6 (1973), pp. 57–84 at p. 82; E. Binavine, 'Canadian Practice in Matters of Recognition', in: R.St.J. Macdonald/G.C. Morris/D.M. Johnston (eds.), *Canadian Perspectives on International Law and Organization* (1974), pp. 153–83 at p. 163; Combacau (above, n. 10), p. 137, n. 11; C. Okeke, *Controversial Subjects of Contemporary International Law* (1974), pp. 104–5; R. Zacklin, *The United Nations and Rhodesia* (1974), p. 47; J. Biggs-Davidson, 'Recognition and Rhodesia', *Contemporary Review*, 224 (1974), pp. 8–11 at p. 9; J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine* (1975), p. 548; A.C. Bundu, 'Recognition and Revolutionary Authorities: Law and Practice of States', *ICLQ*, 27 (1978), pp. 18–45 at p. 27; Crawford (above, n. 1), pp. 103–4; R. Hingorani, *Modern International Law* (1979), p. 72; I. Dore, 'Recognition of Rhodesia and Traditional International Law: Some Conceptual Problems', *Vanderbilt JTL*, 13 (1980), pp. 25–41 at pp. 33–38; Verdross/Simma (above, n. 8), § 386; J.C. Nkala, *The United Nations, International Law, and the Rhodesian Independence Crisis* (1985), pp. 54–8; Dugard (above, n. 4), pp. 91, 123; Stabreit (above, n. 74), pp. 135, 149; Ipsen/Gloria (above, n. 13), § 22, MN 24, Tomuschat (above, n. 28), p. 117; Krieger (above, n. 4), p. 209; Cassese (above, n. 28), p. 76.

¹¹² H. Booysen/M. Wiechers/D.H. van Wyk/W. Breytenbach, 'Comments on the Independence and Constitution of Transkei', *South African Yearbook of International Law*, 2 (1976), pp. 1–35 at pp. 26–7; G. Norman, 'The Transkei: South Africa's Illegitimate Child', *New England LR*, 12 (1977), 585–646 at pp. 619–20; D.E. de Kieffer/D.A. Hartquist, 'Transkei: A Legitimate Birth (A Response)', *New England LR*, 13 (1978), pp. 428–52 at p. 429; D.A. Heydt, 'Nonrecognition of the Independence of Transkei', *Case Western Reserve JIL*, 10 (1978), pp. 167–96 at p. 183; R. Zimmermann, 'Die Verfassungen von Transkei und Bophutatswana, der Verfassungsentwurf für die Republik Südafrika und das Konzept des "separate development"', *Jahrbuch des öffentlichen Rechts*, 27 (1978), p. 631–62 at p. 631; E. Klein, 'Die Nichtanerkennungspolitik der Vereinten Nationen gegenüber den in die Unabhängigkeit entlassenen südafrikanischen homelands', *ZaöRV*, 39 (1979), pp. 469–95 at pp. 480, 490, n. 110; H. Booysen, 'The South African Homelands and Their Capacity to Conclude Treaties', *South African Yearbook of International Law*, 8 (1982), pp. 58–91 at p. 67; D. Devine, 'Recognition, Newly Independent States and General International Law', *South African Yearbook of International Law*, 10 (1986), pp. 18–34 at p. 30; A. Beck, 'The Judicial Recognition of an Unrecognized State', *ICLQ*, 36 (1987), pp. 348–62 at pp. 350–1; Dugard (above, n. 4), pp. 100, 123 (the author takes a different position in 'Collective Non-Recognition: The Failure of South Africa's Bantustan States', in: *Boutros Boutros-Ghali Amicorum Discipulorumque Liber*, vol. 1 (1998), pp. 383–403 at p. 403 and (above, n. 47), p. 77); M. Shaw, *International Law* (5th edn., 2003), p. 182; Stabreit (above, n. 74), pp. 52–96; Crawford (above, n. 54), p. 115; Krieger (above, n. 4), pp. 224, 227.

¹¹³ S. Palmer, 'The Turkish Republic of Northern Cyprus: Should the United States Recognize It as an Independent State', *Boston Univ. ILJ*, 4 (1986), pp. 423–50 at p. 447; Dugard (above, n. 4), p. 123; the same (above, n. 47), p. 80 (but see also the contradictory statement, *ibid.*, p. 77); C. Rumpf, 'Die staats- und völkerrechtliche Lage Zyperns', *Europäische Grundrechte-Zeitschrift*, 24 (1997), pp. 533–46 at pp. 545–6; M. Leigh, 'The Legal Status in International Law of the Turkish Cypriot and Greek Cypriot Communities in Cyprus. Opinion of 20 July 1990', in: N.M. Ertekün (ed.), *The Status of the Two Peoples in Cyprus. Legal Opinions* (2nd edn., 1997), pp. 54–68 at pp. 65–6; D. Blumenwitz, 'The Legal Status of Greek Cypriots and Turkish Cypriots as Parties of a Future Agreement for Cyprus. Opinion of 19 June 1991', *ibid.*, pp. 85–95 at pp. 88–93; Heinze, 'On the Question of the Compatibility of the Admission of Cyprus into the European Union with International Law, the Law of the EU and the Cyprus Treaties of 1959/60', *ibid.*, pp. 181–229 at pp. 195–7; Z.M. Necatigil, *The Cyprus Question and the Turkish Position in International Law* (2nd rev. edn., 1998), pp. 310–30; S. Pegg, *International Society and the De Facto State* (1998), pp. 107–14; Tomuschat (above, n. 28), p. 117; Crawford (above, n. 54), p. 115 (TBSZ); Krieger (above, n. 4), p. 237; Drevet (above, n. 62), p. 283; A. Grossman, 'Nationality and Unrecognised States', *ICLQ*, 50 (2001), pp. 849–76 at p. 855; W. Graf Vitzthum, 'Article 2(6)', in: B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2nd edn., 2002), pp. 140–8 at p. 141, n. 5; M. Soysal, 'Inequality of Status: Impediment to a Solution in Cyprus', in: *Cyprus* (2002), pp. 78–85 at pp. 81–2; Nanopoulos, 'L'Union européenne, catalyseur de la réunification chypriote', *Actualité et Droit International* (février 2004) (<http://www.ridi.org/adi>), p. 3.

as Africa's 50th State'.¹¹⁴ Similarly, *The Times* opened on 16 November 1983 with 'World leaders unite in rejecting new Cypriot State.'¹¹⁵ For the most part, States have avoided referring to these non-recognized States as a 'State', preferring to call them a regime, authority or entity. This may be explained by the natural reluctance to call an entity a 'State' which one does not want to recognize as such.¹¹⁶ There is also the practical consideration that the general public would probably find it difficult to relate to statements such as 'State X is not recognized as a State'. Writers who deny statehood usually cite a lack of factual independence or a lack of capacity to enter into relations with other States as reasons for their denial.¹¹⁷ The unsuitability of these additional (far too indistinct) criteria is also shown by the fact that most authors manage to show that they have in fact been met. Therefore, if the question concerning the statehood of a political entity is to remain more than a mere subjective value judgement, the focus on Jellinek's three elements must be retained.

Another argument in favour of ascribing statehood to the collectively non-recognized State is that the League of Nations and the United Nations have never based their call for non-recognition on the non-fulfilment of the criteria for statehood, or on the dependency on another State, or on a lack of capacity to enter into relations with other States. The official records of meetings preceding the resolutions calling for non-recognition show that there was no examination of whether the political entities in question were States in the sense of international law. It is true that in some cases doubts about their independence were voiced, but these were not a decisive factor regarding the call for non-recognition. The call for non-recognition was the consequence of a breach of treaty obligations (Manchukuo), a reaction to the violation of the right of self-determination (Rhodesia), an answer to South Africa's

¹¹⁴ *Neue Zürcher Zeitung*, 27 October 1976, p. 1. See also *UN Chronicle*, vol. XVI, no. 6 (October 1979), p. 32 ('Council Urges Non-Recognition of New State').

¹¹⁵ *The Times*, 16 November 1983, p. 1. See also *Frankfurter Allgemeine Zeitung*, 21 May 1997, p. 3 ('as in two States' [translation supplied]); *Das Parlament*, no. 20 (8 May 1998), p. 15 ('two State entities' [translation supplied]).

¹¹⁶ Blix (above, n. 17), pp. 628, 631.

¹¹⁷ Manchukuo: Lauterpacht (above, n. 1), pp. 28, 46-7; R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), p. 27; Ipsen/Gloria (above, n. 13), § 22, Rn. 24; Verhoeven (above, n. 111), pp. 57-9.

Rhodesia: M. McDougal/W.M. Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern', *AJIL*, 62 (1968), pp. 1-19 at p. 11, n. 41 and 44; R. Higgins, 'International Law, Rhodesia and the UN', *World Today*, 23 (1967), pp. 94-106 at p. 98.

Homeland-States: Witkin (above, n. 62), p. 615; Verdross/Simma (above, n. 8), § 386; Ipsen/Gloria (above, n. 13), § 22, Rn. 24; Tomuschat (above, n. 28), pp. 97-8; J. Verhoeven, *Droit international public* (2000), pp. 57-8.

TRNC: S.K.N. Blay, 'Self-Determination in Cyprus: The New Dimension of an Old Conflict', *AYBIL*, 10 (1987), pp. 67-100 at pp. 89-92; F. Capotorti, 'Cours général de droit international public', *RdC*, 248 (1994-IV), pp. 9-344 at p. 53 (the author accepts, however, a limited legal personality of the TRNC); G. von Laffert, *Die völkerrechtliche Lage des geteilten Zypern und Fragen seiner staatlichen Reorganisation* (1995), pp. 104-12; Conforti (above, n. 28), p. 16; Filos (above, n. 78), pp. 197-8; K. Chrysostomides, *The Republic of Cyprus. A Study in International Law* (2000), pp. 246-79.

policy of apartheid (the homeland States),¹¹⁸ or, as in the case of the Turkish Republic of Northern Cyprus, explicitly justified by the Security Council by pointing to the incompatibility of the Turkish Cypriot declaration of independence with the 1960 Treaty Concerning the Establishment of the Republic of Cyprus and the Treaty of Guarantee of the same year.¹¹⁹ Doubts relating only to their independence could not have excluded recognition as a State once and for all, as called for in the relevant resolutions. At least theoretically, an emancipation of the new States from their parent or sponsor States would have been possible.¹²⁰ If these States had not met the criteria for statehood, such a request for non-recognition would have been superfluous anyway. In that case, other States would have been prevented from according recognition, because recognition as a 'State' of an entity that does not meet the criteria for statehood is merely a fiction,¹²¹ and violates international law.¹²² It is highly unlikely that the League of Nations or the United Nations merely wanted to remind States of their obligations under international law. Furthermore, it would be difficult to explain the fear of implicit recognition, if a State that could be recognized did not exist. The German Government, for instance, expressly declared that it avoided all actions *vis-à-vis* the homeland States 'that could be construed as recognition or steps towards international recognition'.¹²³ How could the establishment of official contacts by the German Embassy in South Africa with the authorities of the homeland States, or the recognition of the judgments of their courts, replace missing criteria for statehood? In either case, the implicit recognition would have had constitutive effect. This, however, would run counter to the German Government's adherence to the declaratory theory. One therefore has to conclude that the German Government regarded the homeland States as States; it just did not want to treat them as such.

(3) Additional criteria for statehood based in legality

Another indication that the non-recognized States met the classic criteria for statehood may be seen in the fact that adherents of the declaratory theory were forced to develop additional criteria for statehood, which in the case of the collectively non-recognized States were obviously not

¹¹⁸ For the reasons given by States for their non-recognition, see Talmon (above, n. 4), ch. 2.I.6, II.9, and III.6.

¹¹⁹ S/RES/541 (1983) of 15 November 1983, preambular paras. 2 and 3. See also Talmon (above, n. 4), ch. 1.III.3.a. (1).

¹²⁰ Cf. Crawford (above, n. 41), p. 179; the same (above, n. 1), p. 226.
¹²¹ F. Münch, 'Quelques problèmes de la reconnaissance en droit international', in: *Miscellanea W.J. Ganshof van der Meersch: studia ab discipulis amicisque in honorem egregii professoris edita*, vol. 1 (1972), pp. 157-72 at pp. 171-2.

¹²² Lauterpacht (above, n. 1), pp. 7-9; H.-H. Teuscher, *Die vorzeitige Anerkennung im Völkerrecht* (1959), pp. 74-9, 86-8; H. Kelsen, *Principles of International Law* (2nd edn., 1966), p. 392; Verdross/Simma (above, n. 8), §§ 961, 384; Dahm/Delbrück/Wolfrum (above, n. 58), p. 200; P.K. Menon, *The Law of Recognition in International Law: Basic Principles* (1994), p. 28; Baer (above, n. 40), pp. 321-3.

¹²³ German Federal Parliament, *Documents (BT-Drs.)*, no 12/267 of 15 March 1991, p. 1.

met, in order to explain non-recognition as confirming the objective legal situation. According to these authors, the classic factual criteria for statehood are supplemented by criteria of legality regulating the creation of States: that is, the creation of the State must not be in breach of fundamental rules of international law.¹²⁴ Thus, only a State that was created in accordance with these fundamental rules of international law, is a State in the sense of international law.

(a) *Democratically legitimated authority*

James Fawcett was the first to introduce a criterion of legality (or rather legitimacy) into the discussion. As a reaction to the unilateral declaration of independence by the white minority regime in Southern Rhodesia, he wrote in 1966:

But to the traditional criteria for the recognition of a régime as a new State must now be added the requirement that it shall not be based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage.¹²⁵

What Fawcett actually did was to broaden the classic criterion of 'public authority' to that of 'democratically legitimated public authority'.¹²⁶ He did not provide any reason for the new criterion, apart from pointing to Art. 21, paras. 1 and 3, of the Universal Declaration of Human Rights¹²⁷ and to two United Nations General Assembly resolutions.¹²⁸ He stated that this 'principle' was affirmed in the case of Rhodesia by the virtually unanimous condemnation of its unilateral declaration of independence by the world community, and by the universal withholding of recognition of the new regime.¹²⁹ Subsequently, he also made reference to the 'idea of self-determination', although he himself considered the idea to be 'highly political'.¹³⁰ There are two arguments against this new criterion

¹²⁴ Cf. Dore (above, n. 111), p. 40; K. Serita, 'Recognition of New States and Japanese Practice after the Second World War (2)', *Kobe Univ. LR*, 16 (1982), pp. 1–20 at p. 11; N.L. Wallace-Bruce, 'Taiwan and Somalia: International Legal Curiosities', *Queen's LJ*, 22 (1997), pp. 453–85 at p. 456.

¹²⁵ J. Fawcett, 'Security Council Resolutions on Rhodesia', this *Year Book*, 41 (1965–66), pp. 103–21 at p. 112. On this new criterion for statehood, see also the same, *The Law of Nations* (1968), pp. 38–9 and the same, 'Note in Reply to D.J. Devine's The Requirements of Statehood Re-Examined', *MLR*, 34 (1971), p. 417.

¹²⁶ See Okeke (above, n. 111), pp. 104–5; M.K. Malone, 'The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflict', *Temple ICLJ*, 6 (1992), pp. 81–111 at pp. 86–90. For criticism of this approach, see D. Thürer, *Das Selbstbestimmungsrecht der Völker* (1976), p. 143.

¹²⁷ A/RES/217 (III) of 10 December 1948. Art. 21 provides: '(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. [. . .] (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or equivalent free voting procedure.'

¹²⁸ A/RES/648 (VI) of 10 December 1952; A/RES/1514 (XV) of 14 December 1960.

¹²⁹ Fawcett, this *Year Book* (above, n. 125), p. 112.

¹³⁰ Fawcett, *The Law of Nations* (above, n. 125), pp. 38, 36. In 1971, he spoke of a 'right of self-determination', *MLR* (above, n. 125), p. 417 (emphasis added).

for statehood: first, customary international law, in 1966 as in 2004, does not give each citizen the right to influence public authority by way of periodic, equal, and secret elections. This is borne out by the continued existence of a large number of undemocratic States. Secondly, there is no constant and uniform practice coupled with the required *opinio juris* to establish such a criterion for statehood in customary international law. Although quite a considerable number of the new States that were created in the 1960s and 1970s as a result of decolonization did not fulfil the criterion of having a democratically legitimated public authority, their statehood was never called into question.¹³¹ In its advisory opinion in the *Western Sahara* case, the International Court of Justice held in 1975 that 'no rule of international law [. . .] requires the structure of the State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.'¹³² Both in the literature and in State practice a tendency may be detected to give greater weight to the democratic legitimation of public authority.¹³³ But as international law stands, the question of how public authority is organized is still irrelevant to the issue of statehood.¹³⁴ Rhodesia's non-recognition cannot be explained in these terms.

(b) *The right of self-determination*

In 1976, James Crawford, another advocate of the declaratory theory,¹³⁵ took up the idea of additional criteria for statehood based on legality.¹³⁶ According to him, the reason for non-recognition of the State of Rhodesia was that independence under white minority rule violated the inalienable right of the people of Southern Rhodesia to self-determination, and that 'self-determination, to the limited extent to which it operates as a legal right in modern international law, is a criterion of statehood'.¹³⁷ Contrary to the majority view in the literature,¹³⁸ one must agree with Crawford, who correctly pointed to the development in customary

¹³¹ This criterion was also rejected by Devine (above, n. 17), pp. 410–12; the same (above, n. 5), pp. 84–6; Dugard (above, n. 4), pp. 130, 131; Stabreit (above, n. 74), pp. 140–5; Terrett (above, n. 27), pp. 291–3. Binavince (above, n. 111), p. 164 speaks of an additional criterion 'not yet recognized in international law'.

¹³² [1975] ICJ Rep 12 at pp. 43–4, para. 94.

¹³³ Cf. T. Franck, 'The Emerging Right of Democratic Governance', *AJIL*, 86 (1992), pp. 46–91; J. Crawford, 'Democracy and International Law', this *Year Book*, 64 (1993), pp. 113–33; S.D. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments', *ICLQ*, 48 (1999), pp. 545–81.

¹³⁴ This view is shared by the authors listed in n. 133 above. See also I. Brownlie, *The Rule of Law in International Affairs. International Law at the Fiftieth Anniversary of the United Nations* (1998), p. 60 who notes that 'there can be no doubt that general international law does not recognize such a criterion.'

¹³⁵ Crawford (above, n. 1), pp. 23–4, 104.

¹³⁶ See Crawford (above, n. 41), pp. 144–73; the same (above, n. 1), pp. 77–128.

¹³⁷ Crawford (above, n. 1), pp. 84–5, 103–6; the same (above, n. 41), pp. 162–4. See also Shaw (above, n. 112), pp. 184–5; Fink (above, n. 24), p. 341, who regards all criteria mentioned in A/RES/1514 (XV) as new criteria for statehood.

¹³⁸ See R. Jennings, 'General Course on Principles of International Law', *RdC*, 121 (1967-II), pp. 323–606 at p. 564; R. Emerson, 'Self-Determination', *AJIL*, 65 (1971), pp. 459–75 at pp. 461–2; Devine (above, n. 5), pp. 77–8, 154; Thürer (above, n. 126), pp. 122, 156, 190–2; S. Kadelbach, *Zwingendes Völkerrecht* (1992), pp. 258, 268–70; Tomuschat (above, n. 28), pp. 242–3.

international law of a right to self-determination of peoples under colonial rule, albeit still a very limited one.¹³⁹ However, there is no indication that non-violation of that right has become an additional criterion for statehood. Merely citing the universal non-recognition of Rhodesia is insufficient support for such a contention, as there may be other reasons for it.¹⁴⁰ Rhodesia's statehood seems to have been presumed by the ILC. In its commentary on Art. 41 of the Articles on Responsibility of States for Internationally Wrongful Acts of August 2001 (ILC Articles on State Responsibility),¹⁴¹ the ILC refers to the situation in Rhodesia as an example of non-recognition as a result of a serious breach in the sense of Art. 40.¹⁴² Article 40 of the Articles, however, requires that the serious breach of an obligation arising under a peremptory norm of general international law be committed 'by a State'.¹⁴³ As no sponsor State was involved in the case of Rhodesia, the conclusion must be that only Rhodesia itself could be the State which had violated international law.

(c) *Prohibition of apartheid*

With regard to the non-recognition of Transkei, Crawford identified the prohibition of racial discrimination (*viz* the prohibition of apartheid) as a further criterion of legality.¹⁴⁴ There is general agreement that when the homeland States were declared independent, the prohibition of racial discrimination was already a rule of customary international law. But due to lack of State practice and *opinio juris*, there was no rule of customary international law which denied statehood to a State that violated the prohibition of racial discrimination.¹⁴⁵ For example, the statehood of South Africa was never called into question, even after apartheid had been introduced there in 1948. Crawford attempts to meet this objection by exempting existing States from the application of this criterion; a

¹³⁹ On the customary international law character of self-determination, see J. Starke, *An Introduction to International Law* (5th edn., 1963), p. 115. See also Portugal's statement in the oral proceedings in the *East Timor* case: 'The right of self-determination [. . .] has been acknowledged for over 30 years a right *erga omnes*.' (CR 95/5, 2.2.1995, 20, para. 43) and the Court's judgment: 'Portugal's assertion that the right of peoples to self-determination [. . .] has an *erga omnes* character, is irreproachable. ([1995] ICJ Rep 90 at p. 102, para. 29). See also the statement of Pakistan on 15 February 1971 in the *Namibia* case: 'the right of self-determination is a recognized rule of *jus cogens*' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Pleadings, Vol. II, p. 142).

¹⁴⁰ See below s. III.2.b.(2) and s. IV.

¹⁴¹ The text of the 'Draft Articles on State Responsibility of States for Internationally Wrongful Acts' can be found in UN Doc. A/56/10 (2001), pp. 43–59. See also the commentary to the individual draft articles, *ibid.*, pp. 59–365. The articles and commentary are also reproduced in J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (2002).

¹⁴² Commentary on Art. 41 of the ILC Articles on State Responsibility: UN Doc. A/56/10 (2001) p. 289, para. 8. The ILC, referring to Rhodesia, speaks of 'the denial by a *State* of the right of self-determination' (*ibid.*—emphasis added).

¹⁴³ Article 40 (1): 'This chapter applies to the international responsibility which is entailed by a serious breach by a *State* of an obligation arising under a peremptory norm of general international law.'

¹⁴⁴ Crawford (above, n. 1), pp. 226–7; the same (above, n. 41), pp. 179–80.

¹⁴⁵ See also Stabreit (above, n. 74), p. 152.

strategy he also applies to the criterion of self-determination.¹⁴⁶ The legal status of 'State', however, describes a state of affairs, not a one-off event; therefore, the criteria for statehood serve as a test for both the creation and the continued existence of the State.¹⁴⁷

(d) *The prohibition of the use of force*

The prohibition of the use of force is, according to Crawford, another criterion of legality. Thus, an entity claiming statehood but created as a result of illegal invasion will not be a State on principle.¹⁴⁸ With foresight, Crawford wrote in 1979 that 'a "Turkish State" on Cyprus created as a result of the [Turkish] intervention' should, for that reason, not be recognized.¹⁴⁹ The only exception was the case where force was used illegally (as in the case of Bangladesh) in support of a local 'self-determination unit'.¹⁵⁰ However, as State practice shows, neither the Indian intervention nor the right of self-determination of the people of East Bengal played a role in determining the statehood of Bangladesh.¹⁵¹ Furthermore, the term 'self-determination unit' seems far too vague to determine the effect of the illegal use of force on statehood.

(e) *Legality and statehood: some considerations of principle*

If the legality of a State's creation actually were an essential prerequisite for statehood, the purpose of a call for non-recognition would have to be questioned. As Joe Verhoeven so pointedly noted, such a call would have no *raison d'être* if recognition were already impossible for lack of a recognizable subject.¹⁵² A precondition for non-recognition as a State is the existence of a State. Why should there be a call for non-recognition if no State existed that could be recognized in the first place? It would probably never occur to the Security Council to call for the non-recognition of, for example, 'The Principality of Sealand'.¹⁵³ Crawford replied to this argument that

¹⁴⁶ Cf. Crawford (above, n. 1), pp. 101, 104–6, 226–7.

¹⁴⁷ Cf. Verhoeven (above, n. 117), pp. 161–3; Craven (above, n. 36), p. 366, n. 204; Dugard (above, n. 4), pp. 128–9; Devine (above, n. 17), pp. 411–12, 414. See also *Island of Palmas Case* (1928), RIAA II, 829 at p. 839: 'It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation.'

¹⁴⁸ Crawford (above, n. 1), pp. 118, 226; the same (above, n. 41), pp. 173, 179.

¹⁴⁹ Crawford (above, n. 1), p. 118, n. 157 and the same (above, n. 54), p. 115.

¹⁵⁰ Crawford (above, n. 1), pp. 114–16. On the relationship between the right to self-determination and the territorial integrity of States, see J.C. Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (1996), pp. 92–6.

¹⁵¹ Belgium: *Revue belge de droit international*, 10 (1974), pp. 348–50; Germany: *Bulletin des Presse- und Informationsamtes der Bundesregierung*, 1972, p. 172; France: *AFDI*, 18 (1972), p. 1027; Canada: Binavince (above, n. 111), pp. 164–5; Switzerland: Klarer (above, n. 55), pp. 245–6; United Kingdom: HC Debs., vol. 820, WA, col. 26: 28 June 1971; *ibid.*, vol. 830, cols. 823, 825: 4 February 1972. See also J. Salmon, 'Naissance et reconnaissance du Bangla-Desh. Quelques réflexions sur l'application des principes du droit international touchant les relations amicales entre Etats', in: J. Tittel (ed.), *Multitudo Legum Ius Unum. Festschrift für Wilhelm Wengler zu seinem 65. Geburtstag*, vol. 1 (1973), pp. 467–90; K. Serita, 'Recognition of New States and Japanese Practice after the Second World War (1)', *Kobe Univ. LR*, 15 (1981), pp. 1–14 at pp. 12–14.

¹⁵² Verhoeven (above, n. 111), p. 611.

¹⁵³ The 'Principality of Sealand' was declared an independent State on 2 September 1967 on an abandoned artificial British military installation in the southern North Sea some six miles off the

the 'object' of non-recognition [. . .] is not merely a state of affairs but an asserted legal status arising from that state of affairs. Illegality may preclude the attribution of that status initially: non-recognition is an attempt to prevent its attribution by the process of recognition and consolidation. There is thus, it seems, no logical difficulty.¹⁵⁴

The logical difficulty is that Crawford generally ascribes recognition a declaratory effect.¹⁵⁵ An entity which does not meet the criteria for the legal status of 'State' can only attain that status 'by the process of recognition and consolidation' if recognition is ascribed constitutive effect.¹⁵⁶ A non-State entity does not become a State by the mere passage of time, which does not alter anything with regard to missing legal criteria for statehood. It is more likely that, objectively, a State existed from the outset, but that as a result of non-recognition, the legal status of a State was withheld from it. Recognition can change this state of affairs at any time.

There is a further, general argument against additional criteria of legality regulating statehood: States still make exclusive reference to the classic factual criteria of territory, population, and public authority.¹⁵⁷ The collectively non-recognized States may be 'illegal States':¹⁵⁸ they are nevertheless still 'States'. Also, most authors still make the decision about statehood solely on the basis of these three classic criteria.¹⁵⁹ The reason for this lies in the fact that the creation of a new State is a socio-political process, which is to be judged according to the principle of effectiveness.¹⁶⁰ Much like the birth of a child, the creation of a State is predominantly a question of fact, not of law, although certain legal consequences may result from the fact. This is confirmed by Opinion No. 1 of the Badinter Commission, where it stated that 'the existence [. . .] of the State is a question of fact.'¹⁶¹

coast of the United Kingdom in what was then high seas. On the question of statehood of the 'Principality of Sealand', see the decision of the Administrative Court of Cologne of 3 May 1978, *Deutsches Verwaltungsblatt*, 1978, p. 510. See also, generally, B. Oomen, 'La Principauté de Zélande; un Etat non-étatique—une tentative de création et de reconnaissance d'un Etat', *Hague Yearbook of International Law*, 2 (1989), pp. 235–41.

¹⁵⁴ Crawford (above, n. 1), p. 123, n. 172.

¹⁵⁵ Crawford (above, n. 1), pp. 23, 104.

¹⁵⁶ Crawford (above, n. 1), p. 391 also speaks of 'general (prescriptive) recognition' and of the possibility that 'the illegality [. . .] was cured by prescription or general recognition.' See also *ibid.*, pp. 121–2.

¹⁵⁷ See above s. III.2.a.(2).

¹⁵⁸ Cf. SCOR, 38th year, 2498th meeting, 17 November 1983, para. 130: 'The Australian Government has no intention of recognizing this illegal state.' Representatives of the Republic of Cyprus also used the term State for the TRNC. See e.g. UN Docs. S/PV. 2503, 15 December 1983, p. 8 ('a State created by unparalleled international crimes'); A/54/PV.10, 23 September 1999, p. 7 ('the Security Council, by its resolution, deplored the action of the Turkish side of declaring a separate State').

¹⁵⁹ See Hailbronner (above, n. 9), MN 81–85; Verhoeven (above, n. 117), pp. 59–61; Blumenwitz (above, n. 113), pp. 89, 92–3; Capotorti (above, n. 117), p. 43; Jennings/Watts (above, n. 16), pp. 120–3, 130; Dahm/Delbrück/Wolfrum (above, n. 58), p. 133; Uibopuu (above, n. 16), p. 100.

¹⁶⁰ Ipsen/Gloria (above, n. 13), § 22, Rn. 29; H. Ruiz Fabri, 'Etat (Création, succession, compétences)—Genèse et disparition de l'Etat à l'époque contemporaine', *AFDI*, 38 (1992), pp. 153–78 at p. 153; C. de Visscher, *Les Effectivités du droit international public* (1967), pp. 34–5.

¹⁶¹ *Opinion No. 1 [Disintegration of the SFRY]* (1991), 92 ILR 162 at p. 165. Affirmed in *Opinion No. 8 [Extinction of the SFRY]* (1992), 92 ILR 199 at p. 201. The US representative on the Security Council, referring to the recognition of Israel, spoke of 'the *de facto* status of a State' or, in the

A further argument against additional criteria of legality results from the inability of those who propose such criteria to explain the international responsibility of the 'non-State'. They fail to answer the question of why the breach of a fundamental rule of international law, on the one hand, prevents the creation of a State but, on the other, is able to produce a partial subject of international law capable of international responsibility.¹⁶² This leads to the conclusion that the additional criteria of legality proposed are not criteria for statehood but merely conditions for recognition, *viz* reasons for not recognizing *existing States*.

b. The State's creation is void as a result of an internationally wrongful act

The fact that the collectively non-recognized States meet the classic criteria for statehood and that additional criteria of legality cannot be proved convincingly has moved several proponents of the declaratory theory to explain the non-existence of a State by pointing to an infringement of international law in the course of its creation. Such infringement is said to void the State's creation. The nullity of a State's creation was originally based on the general principle *ex injuria jus non oritur*. In 1969, however, the concept of *jus cogens* was included in the Vienna Convention on the Law of Treaties (VCLT),¹⁶³ which provides that a treaty is void if it conflicts with a peremptory norm of general international law (*jus cogens*). Since then, the nullity of State creation has been attributed to the breach of such a norm.

(1) The principle of *ex injuria jus non oritur*

Before modern international law adopted the concept of *jus cogens* in the late 1960s,¹⁶⁴ according to John Dugard, the nullity of a State's creation resulted from the principle *ex injuria jus non oritur*, according to which an act committed in violation of a fundamental norm affecting the community rather than an individual State is null and void *ab initio*.¹⁶⁵ In Dugard's

French version, 'l'existence *de facto* d'un Etat' (SCOR, 3rd year, No. 68, 294th meeting, 18 May 1948, p. 16). See also the statement of the Bulgarian representative during the 65th Session of the Special Committee on the Question of Defining Aggression: '[. . .] the existence of a State was a question of fact and could not depend on recognition by other States.' (UN Doc. A/AC.134/SR.52-66 [65], 19 October 1970, p. 149).

¹⁶² Cf. Fink (above, n. 24), p. 341 who notes that Southern Rhodesia cannot be considered a *de facto* regime if it does not fulfil the criteria for statehood.

¹⁶³ See Arts. 53, 64 of the Vienna Convention on the Law of Treaties of 23 May 1969 (1155 UNTS 331).

¹⁶⁴ In April 1965, the German Constitutional Court examined for the first time whether a treaty provision was compatible with the 'rules of *jus cogens*' (German Constitutional Court, Order of 7 April 1965, BVerfGE 18, 441 at p. 449).

¹⁶⁵ Dugard (above, n. 4), pp. 132-4; the same (above, n. 47), pp. 89-90. On the principle *ex injuria jus non oritur*, in general, see S. Patel, *Recognition in the Law of Nations* (1959), pp. 112-13; I. Brownlie, *International Law and the Use of Force by States* (1963), p. 410; Shaw (above, n. 112), pp. 390-1. The Republic of Cyprus also bases its argument with regard to the TRNC on the principle *ex injuria jus non oritur*: UN Doc. CD/1439, 13 December 1996, p. 1.

view, this principle explained the non-recognition of Manchukuo. To support his contention Dugard cited Hersch Lauterpacht, who in a lecture entitled 'The Principle of Non-Recognition in International Law', given in December 1939 at a conference on 'Legal Problems in the Far Eastern Conflict' explained that:

[. . .] non-recognition is based on the view that acts contrary to international law are invalid and cannot [therefore] become a source of legal rights for the wrongdoer. That view applies to international law [as] one of the 'general principles of law recognized by civilized nations.' The principle *ex injuria jus non oritur* is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of legal rights to the wrongdoer.¹⁶⁶

Hersch Lauterpacht still made a general reference to 'acts contrary to international law'. Dugard, on the other hand, probably with an eye to his later theory that the creation of a State in violation of a norm of *jus cogens* is void, limits the legal consequence of nullity to violations of 'fundamental norms' of international law.

There are several reasons to reject Dugard's view that the Japanese aggression against China in violation of Art. 10 of the Covenant of the League of Nations nullified the creation of the State of Manchukuo.¹⁶⁷ Firstly, it should be noted that the conference on 'Legal Problems in the Far Eastern Conflict', in its Final Report relating to the 'Problem of Non-Recognition', expressly rejected the principle *ex injuria jus non oritur* as a reason for non-recognition.¹⁶⁸ Secondly, Hersch Lauterpacht did not justify Manchukuo's non-recognition as a State on the basis of Japan's violation of the Covenant of the League of Nations and the Kellogg-Briand Pact, but on its insufficient actual independence from Japan. If it had been sufficiently independent, even a violation of international law would not have precluded its recognition.¹⁶⁹ For Ti-Chiang Chen, who, like Hersch Lauterpacht, identified the principle of *ex injuria jus non oritur* as a possible basis for non-recognition, Manchukuo was not to be recognized, 'not because of the illegality of origin, but because the "fact" of existence is farcical.'¹⁷⁰ Both authors wanted to limit the principle *ex injuria jus non oritur* to *title* to territory acquired by conquest. However, even in this area States did not always presume nullity, as can be seen in the almost universal *de jure* recognition of the Italian annexation of Ethiopia of 9 May 1936.¹⁷¹ More recent examples are the

¹⁶⁶ Lauterpacht, 'The Principle of Non-Recognition in International Law', in: Quincy Wright/Hersch Lauterpacht/Edwin Borchard/Phoebe Morrison (eds.), *Legal Problems in the Far Eastern Conflict* (1941), pp. 129–56 at p. 139; the same (above, n. 1), p. 420. The additions in square brackets reflect the 1947 version of the text to which Dugard makes reference.

¹⁶⁷ Dugard (above, n. 4), p. 35.

¹⁶⁸ 'Report on Virginia Beach Round Tables on International Law: The problem of Non-Recognition', in: *Legal Problems in the Far Eastern Conflict* (1941), pp. 179–84 at pp. 181–2. See also Q. Wright, 'The Legal Background in the Far East', *ibid.*, pp. 3–125 at p. 117 and p. 91, n. 28. For the position taken by the Conference in its final conclusions, see below s. IV.3.b.(3)(b).

¹⁶⁹ Lauterpacht (above, n. 1), p. 420. ¹⁷⁰ Chen (above, n. 1), p. 429.

¹⁷¹ At the outset of World War II only China, Mexico, New Zealand, the USSR, and the US had not recognized Italian sovereignty over Ethiopia.

de jure recognition by some or all States of the annexations of Tibet, Goa, Sikkim, East Timor (meanwhile reversed), and the Western Sahara.

The most important arguments against Dugard's view are those of principle. According to Hersch Lauterpacht, *ex injuria jus non oritur* is a 'general principle of law recognized by civilized nations'. This presupposes that the principle is found in the State's domestic law and that it is capable of being applied in international law.¹⁷² However, there is no general maxim to be found in the domestic law of States, according to which facts that are created in violation of the law are null and void and cannot give rise to new rights.¹⁷³ There are also general concerns about whether this principle can be applied in international law. Hans Kelsen, for example, wrote: 'The principle advocated by some writers—*ex injuria non oritur*—does not, or not without important exceptions, apply in international law.'¹⁷⁴ One reason for this may be the classic idea of international law as a system of legal transactions, aware only of commitments entered into by States towards certain other States. A concept of objective illegality is unknown in this view of the international legal system.¹⁷⁵ A violation of an international legal obligation only entails responsibility *vis-à-vis* the State whose rights were violated, it does not entail the general nullity of the illegal act and its consequences.¹⁷⁶ That is, a treaty between States A and B which violates A's obligations arising under an earlier treaty with C only resulted (and still results) in the responsibility of A towards C; there is no effect on the validity of the treaty between A and B.¹⁷⁷ Several other examples could be given that international law knows of the principle *ex injuria jus oritur*.¹⁷⁸ In this context, it is also interesting to consider Art. 137 (3) of the 1982 United Nations

¹⁷² See W. Graf Vitzthum, 'Begriff, Geschichte und Quellen des Völkerrechts', in: the same (ed.), *Völkerrecht* (3rd edn., 2004), pp. 1–77 at p. 70, MN 143, 146; H. Mosler, 'General Principles of Law', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2 (1995), pp. 511–27 at p. 517.

¹⁷³ Wengler (above, n. 110), p. 570; Dahm/Delbrück/Wolfrum (above, n. 58), p. 133.

¹⁷⁴ Kelsen (above, n. 122), pp. 316–7 and (1st edn., 1952), p. 216. Lauterpacht admitted that 'the principle *ex injuria jus non oritur* is, in the sphere of international relations, exposed to considerable strain and to wide exceptions.' ((above, n. 1), p. 421). See also Guggenheim (above, n. 42), pp. 197–8; G. Schwarzenberger, 'The Fundamental Principles of International Law', *RdC* 87 (1955-I), pp. 195–385 at pp. 209–10; G. Dahm, *Völkerrecht*, vol. 1 (1960), pp. 609–11.

¹⁷⁵ Cf. J.F. Williams, 'Some Thoughts on the Doctrine of Recognition in International Law', *Harvard LR*, 47 (1934), pp. 776–94 at pp. 787–90; the same, 'La doctrine de la reconnaissance en droit international et ses développements récents', *RdC*, 44 (1933-II), pp. 203–313 at pp. 270–1.

¹⁷⁶ Cf. P. Cahier, 'Les caractéristiques de la nullité en droit international et tout particulièrement dans la Convention de Vienne de 1969 sur le droit des traités', *RGDIP*, 76 (1972), pp. 645–91 at pp. 648, 650–1. See also *Legal Status of Eastern Greenland* (1933), PCIJ Rep Series A/B, No 53, 95 (diss. op. Anzilotti): 'A legal act is only non-existent if it lacks certain elements which are essential to its existence.' But see the decision of the Court, *ibid.*, p. 75.

¹⁷⁷ Cf. Arts. 30 (5), 46–53 VCLT. See also Williams (above, n. 175), p. 788; A.D. McNair, *Law of Treaties* (1961), pp. 218–24; P. Reuter, *Introduction to the Law of Treaties* (1995), nos. 199, 203; A. Aust, *Modern Treaty Law and Practice* (2000), p. 174.

¹⁷⁸ See the examples given by G. Fitzmaurice, 'The General Principles of International Law, Considered from the Standpoint of the Rule of Law', *RdC*, 92 (1957-II), pp. 1–223 at pp. 122–8; Jennings (above, n. 42), p. 73.

Convention on the Law of the Sea (UNCLOS),¹⁷⁹ according to which 'no State [. . .] shall claim, acquire or exercise rights with respect to the minerals recovered from the Area [i.e. the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction] except in accordance with this Part [of the UNCLOS]. Any other 'claim, *acquisition* or exercise of such rights' is not null and void, but 'shall [not] be recognized'.¹⁸⁰ If a violation to this provision were actually to result in nullity, an *acquisition of such rights* would not be possible.

A further argument against the applicability of this principle in international law is the lack of a central authority to pass binding decisions on nullity, and an executive authority to implement such decisions.¹⁸¹ All examples cited by authors in support of the principle *ex injuria jus non oritur* in international law concern cases where one of the parties simply could not rely on an illegal act as a source of legal rights.¹⁸² Therefore, an application of the principle to the creation of States is to be rejected. Indirect support for this position is found in the example of Manchukuo: if the Japanese invasion of China had resulted in the nullity of the new State, recognition would already have been impossible for lack of an object to be recognized. This, however, was not the position taken by States at the time.

(2) The concept of *jus cogens*

According to Arts. 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, a treaty is void if it conflicts with a peremptory norm of general international law (*jus cogens*).¹⁸³ Dugard argued, by analogy with the law of treaties, that a new State created in violation of a norm having the character of *jus cogens* is illegal and therefore null and void.¹⁸⁴ Vera Gowlland-Debbas adopts a similar approach; for her, nullity results from a violation of 'fundamental obligations'. These are obligations which are considered so fundamental to the international community that their violation must lead to nullity.¹⁸⁵ The fact that the 'fundamental obligations' she cites are identical to the norms Dugard refers to as having the character of *jus cogens* shows that 'fundamental obligations' is but a different name for peremptory norms of general international law. Gowlland-Debbas bases her idea of nullity on the concepts of *jus cogens*, obligations *erga omnes*, and international crimes. These concepts merely describe the various legal consequences of a violation of a peremptory

¹⁷⁹ United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 397). See also Arts. 136, 137 (1) UNCLOS.

¹⁸⁰ Emphasis added.

¹⁸¹ Cf. W. Kewenig, 'Die Anwendung wirtschaftlicher Zwangsmaßnahmen im Völkerrecht', *Berichte der Deutschen Gesellschaft für Völkerrecht*, 22 (1982), pp. 7–35 at p. 87.

¹⁸² See the cases quoted in Lauterpacht (above, n. 1), pp. 421–2; Jennings/Watts (above, n. 16), p. 184, n. 4.

¹⁸³ See also Arts. 53, 64 of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, 21 March 1986 (hereinafter: 1986 Vienna Convention on the Law of Treaties): UN Doc. A/CONF.129/15.

¹⁸⁴ Dugard (above, n. 4), p. 135. This was rejected by Friedman J with regard to Bophuthatswana in *S. v Banda* [1989 (4)] SA 519 at pp. 544–6.

¹⁸⁵ See Gowlland-Debbas (above, n. 41), pp. 237–58. See also Krieger (above, n. 4), pp. 176–256.

norm of general international law. For the concept of *jus cogens*, this consequence is the nullity of a treaty which conflicts with such a norm.¹⁸⁶ The violated norms both authors identified were, in the case of Rhodesia, the right to self-determination of the people of Southern Rhodesia;¹⁸⁷ the prohibition of racial discrimination (*vis* the prohibition of apartheid) in the case of the homeland States;¹⁸⁸ and, in the case of the Turkish Republic of Northern Cyprus, the prohibition on the use of force.¹⁸⁹

(a) *Existence of jus cogens at the time of State creation*

The abovementioned norms (with certain reservations regarding the right of self-determination) today form part of *jus cogens*.¹⁹⁰ The concept of *jus cogens* is without retroactive effect¹⁹¹ and, even if it were, this could not explain the initial non-recognition of States. According to the principle of inter-temporal law, the nullity of a State's creation as a consequence of a violation of *jus cogens* requires that the violated norm had *jus cogens* character when the State was created. As arbitrator Max Huber stated in the *Island of Palmas* case: 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.'¹⁹²

Both the prohibition on racial discrimination¹⁹³ and the prohibition on the use of force¹⁹⁴ were generally accepted rules of *jus cogens* at the time

¹⁸⁶ B. Simma, 'From Bilateralism to Community Interest in International Law', *RdC*, 250 (1994-VI), pp. 217-384 at pp. 293-4, 299-301, 308-9; C. Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations', *EJIL*, 10 (1999), pp. 353-63 at pp. 358-9; Tomuschat (above, n. 28), p. 87. See also the commentary on Part II, Chapter III of the ILC Articles on State Responsibility: 'obligations towards the international community as a whole [...] arise under peremptory norms of general international law.' (UN Doc. A/56/10 (2001), p. 281). However, not all obligations *erga omnes* must necessarily result from a norm of *jus cogens* (Simma, *ibid.*, p. 300). See further below s. IV.3.b.(3).

¹⁸⁷ Dugard (above, n. 4), pp. 135, 154; Gowlland-Debbas (above, n. 41), pp. 217, 225-9, 240-1, 251-3. In addition, Dugard bases non-recognition on the prohibition of racial discrimination ((above, n. 4), p. 154), an argument that has been convincingly refuted by Gowlland-Debbas (*ibid.*, 221-5).

¹⁸⁸ Dugard (above, n. 4), pp. 135, 154; Gowlland-Debbas (above, n. 41), pp. 262-4.

¹⁸⁹ Dugard (above, n. 4), pp. 135, 154; Gowlland-Debbas (above, n. 41), p. 264 who speaks only of a violation of the territorial integrity. ¹⁹⁰ Cf. Brownlie (above, n. 16), pp. 488-9.

¹⁹¹ See Art. 71 (2) VCLT and the commentary on Art. 50 of the ILC Draft on the Law of Treaties on which Art. 70 VCLT is modelled: ILC Yb. 1966 II, pp. 248-9. On the question of retroactivity, see also J. Sztucki, *Jus cogens and the Vienna Convention on the Law of Treaties. A Critical Appraisal* (1974), pp. 149-53; A. Gómez-Robledo, 'Le *ius cogens* international: sa genèse, sa nature, ses fonctions', *RdC*, 172 (1981-III), pp. 9-217 at pp. 123-9.

¹⁹² Arbitral Award of 4 April 1928: RIAA II, 831 at p. 835. See also the Resolution of the Institut de Droit International on the question of inter-temporal law, adopted at the Wiesbaden session on 11 November 1975: *Annuaire de l'Institut de droit international*, 56 (1975), p. 536.

¹⁹³ Cf. A. Verdross, 'Jus Dispositivum and Jus Cogens in International Law', *AJIL*, 60 (1966), pp. 55-63 at pp. 59-60; U. Scheuner, 'Conflict of Treaty Provisions with a Peremptory Norm of General International Law and its Consequences', *ZaöRV*, 27 (1967), pp. 520-32 at pp. 526-7; E. Schwelb, 'Some Aspects of International Jus Cogens as Formulated by the International Law Commission', *AJIL*, 61 (1967), pp. 946-75 at p. 956; R. Ago, 'Droit des traités à la lumière de la Convention de Vienne', *RdC*, 134 (1971-III), pp. 297-332 at p. 324, n. 37; Crawford (above, n. 1), pp. 226-7. See also *South West Africa (Second Phase)* [1966] ICJ Rep 6 at pp. 298-9 (diss. op. Tanaka); *Barcelona Traction, Light and Power Company, Limited (Second Phase)* [1970] ICJ Rep 3 at p. 304 (sep. op. Ammoun).

¹⁹⁴ Cf. Crawford (above, n. 1), pp. 106-7; Kadelbach (above, n. 138), pp. 234-6. See also *Military and Paramilitary Activities in and against Nicaragua (Merits)* [1986] ICJ Rep 14 at p. 101,

the first homeland was released into independence (October 1976) or the Turkish Republic of Northern Cyprus was proclaimed (November 1983). The same cannot be said for the right to self-determination at the time of Southern Rhodesia's unilateral declaration of independence in November 1965. According to Art. 53 VCLT, only a norm that is 'accepted and recognized by the international community of States as a whole [as a peremptory norm of general international law]' may be classified as *jus cogens*.¹⁹⁵ Although such a norm need not be accepted by all States,¹⁹⁶ but only by a very large number, in November 1965 the right to self-determination had not gained that level of acceptance. In 1966 the ILC was still unable to provide examples for *jus cogens* in its commentary on the Final Draft Articles on the Law of Treaties, as even within the Commission, consensus on certain norms was non-existent.¹⁹⁷ Among the examples given by *individual members*, the right to self-determination is not found among the 'obvious and best settled rules of *jus cogens*', but is mentioned merely as one of a couple of 'other possible examples'.¹⁹⁸ That, however, 'is a far cry, indeed, from any general recognition of self-determination as *jus cogens*.'¹⁹⁹ This lack of acceptance is also illustrated by the fact that most authors did not recognize the right to self-determination (even of peoples under colonial rule) as *jus cogens* until well into the 1970s, due to its uncertain content.²⁰⁰ This led Crawford to write in 1979: 'The invalidity of unequal treaties, and self-determination are controversial even as *jus dispositivum*: the suggestion that they constitute *jus cogens* rules is difficult to accept.'²⁰¹ Dugard and Gowlland-Debbas²⁰² have made reference to occasional statements in the literature,

para. 190 and the oral pleadings of Yugoslavia in *Legality of Use of Force*, CR/99/14, 10 May 1999, pp. 13, 25.

¹⁹⁵ See the Order of the German Constitutional Court of 7 April 1965: 'Only such norms can be regarded as norms of *jus cogens* which, in the *opinio juris* of the international community, are essential for the existence of international law as a legal order [. . .].' (BVerfGE 18, 441 at p. 449 (translation supplied)).

¹⁹⁶ A norm can be part of *jus cogens* even if one State or 'a very small group of States' (i.e. five States) does not accept it as such; see the references given by Sztucki (above, n. 191), pp. 98–100.

¹⁹⁷ See ILC Yb. 1963 I, pp. 60–78 and *ibid.* p. 214, para. 70. At the 1968 Vienna Conference on the Law of Treaties there was also no agreement on whether the right of self-determination constituted a norm of *jus cogens*, see United Nations, *United Nations Conference on the Law of Treaties, First Session, Official Records* (1969), pp. 293–334.

¹⁹⁸ ILC Yb. 1963 II, pp. 198–9; ILC Yb. 1966 II, p. 248.

¹⁹⁹ M. Pomerance, *Self-Determination in Law and Practice. The New Doctrine in the United Nations* (1982), p. 71.

²⁰⁰ See e.g. Verdross (above, n. 193), pp. 58–60; Scheuner (above, n. 193), pp. 524–5; H. Mosler, 'Jus Cogens im Völkerrecht', *Schweizerisches Jahrbuch für internationales Recht*, 25 (1968), pp. 9–40 at pp. 28–37; Ago (above, n. 193), p. 324, n. 37; the same, ILC Yb. 1976 II, p. 32, n. 148; S. Calogéropoulos-Stratis, *Le droit des peuples à disposer d'eux mêmes* (1973), pp. 270–1; S.P. Sinha, 'Has Self-Determination Become a Principle of International Law Today?', *Indian JIL*, 14 (1974), pp. 332–56 at pp. 351–3; Thürer (above, n. 126), pp. 89–90; Pomerance (above, n. 199), pp. 70–2. Kadelbach (above, n. 138), pp. 268–70 has shown that self-determination has the character of a norm of *jus cogens* only in cases of colonial domination. He treats Rhodesia and the homeland States as cases of non-colonial domination. See also the authors referred to in n. 138 above who, in 1965, opposed the principle of self-determination as a rule of customary international law.

²⁰¹ Crawford (above, n. 1), p. 81.

²⁰² Dugard (above, n. 4), pp. 158–62; Gowlland-Debbas (above, n. 41), pp. 251–8.

separate and dissenting opinions by judges of the ICJ, or speeches by individual members of the ILC. Yet, however important these may be for the development of international law, they do not suffice as proof that the right to self-determination of peoples in November 1965 was already accepted and recognized by the international community of States as a whole as a norm of *jus cogens*. The fact that the right of all peoples to self-determination was included in Art. 1 (1) of the International Covenants of Human Rights of 19 December 1966²⁰³ also does not carry particular weight. The Covenants were adopted by the United Nations General Assembly in two non-binding resolutions. Although 107 and 106 States respectively had voted for the resolutions,²⁰⁴ the treaties entered into force only at the beginning of 1976 when the 35th instrument of ratification was finally deposited with the Secretary-General of the United Nations. Even today, they are not universally applicable.²⁰⁵ Dugard himself wrote, in 1987, that the principle of *jus cogens* has only emerged as a key principle in modern international law in the past twenty years,²⁰⁶ and Gowlland-Debbas cites the 1977 Additional Protocol I to the Geneva Conventions²⁰⁷ as a 'further element in the creation of a customary rule regarding the right to self-determination'.²⁰⁸ If a treaty of the year 1977 merely constituted a further element in the creation of a rule of customary international law, that rule could not have been part of customary international law in 1965, let alone a norm of *jus cogens* or a fundamental norm of international law. If, at that point in time, the right to self-determination was not a norm of *jus cogens*, the creation of the State of Rhodesia could not be null and void for that reason alone, due to the lack of a violation of *jus cogens*. The non-recognition of Rhodesia cannot be explained in line with the declaratory theory by the nullity of the creation of that State. This is supported by the fact that neither organs of the United Nations nor individual States referred to 'nullity' in the context of Rhodesia.²⁰⁹ The creation of a State could—if at all—only have been null and void in the cases of the homeland States and of the Turkish Republic of Northern Cyprus. This, however, would require that violating a norm of *jus cogens* actually resulted in the nullity of the State's creation.

(b) *Applicability of the concept of jus cogens to State creation*

So far, the concept of nullity as a consequence of a violation of a norm of *jus cogens* has only emerged in treaty law. According to Art. 53 VCLT, a treaty is void if, at the time of its conclusion, it conflicts with a

²⁰³ International Covenant on Civil and Political Rights (999 UNTS 172) and International Covenant on Economic, Social and Cultural Rights (993 UNTS 3), both opened for signature on 19 December 1966.

²⁰⁴ A/RES/2200 A (XXI) of 16 December 1966.

²⁰⁵ On 31 December 1970, only nine States had ratified both Covenants. On 4 October 2004 the Covenants had 153 and 150 parties, respectively.

²⁰⁶ Dugard (above, n. 4), p. 132.

²⁰⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (1125 UNTS 3).

²⁰⁸ Gowlland-Debbas (above, n. 41), p. 153.

²⁰⁹ See Talmon (above, n. 4), ch. 2.II.

peremptory norm of general international law, or, according to Art. 64 VCLT, it becomes void and terminates when a new such norm emerges after its conclusion. However, whether the resulting nullity can also be applied to the creation of States is a contentious issue.²¹⁰ While some authors expressly reject the applicability of the concept to the creation of States,²¹¹ others are in favour of applying it to unilateral acts and actions.²¹² According to Gowlland-Debbas, it is 'difficult to accept the view that a rule should be sacrosanct in one context and not in another, and that if a *jus cogens* rule cannot be derogated from by treaty it cannot, *a fortiori*, be violated by a unilateral act or omission without having the same legal effects.'²¹³ In taking this view, however, she does not appreciate the difference between the derogation from, and the violation of, a norm of *jus cogens*. From the very beginning, the concept of *jus cogens* related to treaty law, both in international and domestic law.²¹⁴ The issue has always been one of derogation or 'contracting out'²¹⁵ from peremptory norms by way of an agreement between the parties concerned, not the violation of such norms.²¹⁶ Accordingly, Art. 53 VCLT defines *jus cogens* as a 'norm from which no *derogation* is permitted'. The concept of *jus cogens* stands in contrast to the freedom to shape legal relations within a legal order. It limits the legal subjects' contractual freedom. The parties to a treaty decide on a particular legal position between themselves. The lawbreaker, however, does not make arrangements for rights and obligations; he violates them.²¹⁷ It is possible to

²¹⁰ Cf. Jennings/Watts (above, n. 16), p. 184: 'There is, however, no settled view how far as a matter of international law the unlawful act is to be regarded as null and void [. . .]'

²¹¹ Crawford (above, n. 1), p. 84; the same (above, n. 41), p. 148. See also Scheuner (above, n. 193), pp. 520, 525 n. 19 who considers the concept of *jus cogens* not applicable to territorial questions. See further Y. Dinstein, *War, Aggression and Self-Defence* (3rd edn., 2001), p. 153 ('the notion of nullity of unilateral acts inconsistent with *jus cogens* is problematic').

²¹² Dahm, *Völkerrecht*, vol. 3 (1961), p. 60; E. Suy, 'The Concept of *Jus Cogens* in Public International Law', in: Carnegie Endowment for International Peace (ed.), *The Concept of Jus Cogens in International Law, Conference on International Law, Papers and Proceedings II, Lagonissi (Greece), April 3-8, 1966* (1967), pp. 17-77 at p. 75; G. Abi-Saab, 'Introduction', *ibid.*, pp. 7-15 at pp. 10-11. See also Gómez-Robledo (above, n. 191), pp. 192-8 with further references.

²¹³ Gowlland-Debbas (above, n. 41), p. 248 who refers to Abi-Saab (above, n. 212), pp. 10-1. However, Abi-Saab wrote that 'the question of the *jus cogens* character of a rule does not arise when a State violates a norm of international law [. . .]. The test of a *jus cogens* rule is the legality of establishing a contrary legal regime and not the legality of violating it which is the test of legal rules at large.' (*Ibid.*, p. 10).

²¹⁴ Cf. Oscar Chinn (1934), PCIJ Rep Series A/B, No 63, 65 at pp. 149-50 (ind. op. Schücking); F.A. von der Heydte, 'Die Erscheinungsformen des zwischenstaatlichen Rechts; *jus cogens* und *jus dispositivum*', *Zeitschrift für Völkerrecht*, 16 (1932), pp. 461-78 at pp. 469-70; J. Jurt, *Zwingendes Völkerrecht (Ein Beitrag zur Lehre vom objektiven Völkerrecht)* (1933), pp. 81-3.

²¹⁵ Cf. ILC Yb. 1966 II, p. 248 (commentary on Art. 50 of the ILC Draft Articles on the Law of Treaties). See also the statement of Tunkin, reported in: Carnegie Endowment for International Peace (ed.), *The Concept of Jus Cogens in International Law, Conference on International Law, Papers and Proceedings II, Lagonissi (Greece), April 3-8, 1966* (1967), p. 87: 'the concept of *jus cogens* itself was definable: principles from which States could not contract out.' Similarly, Tabata, *ibid.*, p. 93.

²¹⁶ See also the Order of a Chamber of the German Constitutional Court of 12 December 2000: 'Jus cogens cannot be derogated from.' (*Juristen-Zeitung*, 56 (2001), p. 975 at p. 976 (translation supplied)).

²¹⁷ Mosler (above, n. 200), pp. 25-6; Sztucki (above, n. 191), pp. 67-9.

violate both peremptory and dispositive law; the legal consequence in both cases is the responsibility of the lawbreaker.²¹⁸ Applying the concept of *jus cogens* to unilateral legal acts is not excluded in principle,²¹⁹ but it is limited to such unilateral legal acts as are directed at creating a special legal situation that deviates from *jus cogens*. This would include, for example, reservations to international treaties conflicting with *jus cogens*, promises not to observe a norm of *jus cogens*, declarations of consent to an action contrary to a norm of *jus cogens*,²²⁰ or the recognition of a situation that violates *jus cogens*.

Another argument against the application of the concept of nullity to the creation of States as a consequence of a violation of *jus cogens* is its inapplicability to actual (socio-political) events.²²¹ As early as 1868, Johann Caspar Bluntschli stated that 'international law regulates the relations between the actual States even if they do wrong and the question, if an actual State exists, does not depend on the impeccability of its birth.'²²² The concept of nullity was developed for unilateral and multilateral *legal transactions*, in particular declarations of intention. It is not easily applied to physical actions or to factual situations created thereby. One only has to look at acts of genocide and slavery, which both violate *jus cogens*: in these cases, nullity as a legal consequence of the acts would obviously be pointless.²²³

The following example from domestic law may also serve to illustrate the point: the concept of nullity is not of much use with regard to a building erected in contravention of zoning or planning laws. Even if the law stipulated that such an illicit building was null and void, it would still be there. The same holds true for the illegally created State. Even if the illegal State is declared null and void by international law, it will still have a Parliament that passes laws, an administration that implements those laws, and courts that apply them. It will still exercise sovereign authority over all people (both local and foreign) and objects on its territory; marriages will be performed in accordance with its laws by its officials, as will divorces; claims for debts will be brought before its courts and the judgments will be enforced by its agents; internationally active trading

²¹⁸ See Arts. 40, 41 of the ILC Articles on State Responsibility and the commentaries thereto: UN Doc. A/56/10 (2001), pp. 277–92.

²¹⁹ The concept of *jus cogens* may also be found in the reports of the ILC's Special Rapporteur on 'Unilateral Acts of States'; see, e.g., UN Docs. A/CN.4/500/Add.1, 10 May 1999, p. 9, para. 109 and p. 13, para. 139 ('A unilateral act is also void if it is contrary [...] to a peremptory or *jus cogens* norm.'). A/CN.4/505, 17 February 2000, p. 20, paras. 150–2. See also the replies of States to a questionnaire on the topic of unilateral acts: UN Doc. A/CN.4/511, 6 July 2000, pp. 8, 21 (Sweden); 16 (Netherlands).

²²⁰ The German Constitutional Court examined whether the German Government's (unilateral) declaration of consent to the stationing of missiles with nuclear warheads violated a norm of *jus cogens*. See the decision of 18 December 1984: BVerfGE 68, 1 at p. 83.

²²¹ Authors opposed to 'nullity' of States as a consequence of a violation of *jus cogens* include Kelsen (above, n. 122), pp. 420–33; J. Touscoz, *Le Princip d'effectivité dans l'ordre international* (1964), pp. 125–8; Wengler (above, n. 110), pp. 571–2.

²²² Bluntschli (above, n. 29), p. 71, § 37 (translation supplied).

²²³ Cf. the ILC's Report on its 50th Session: UN Doc. A/53/10 (1998), para. 301.

companies will be set up under its laws; it will grant citizenship, issue passports and grant concessions; it will issue its own currency, government bonds and stamps, have a national airline, armed forces and a merchant fleet, have a register for ships and aircraft, and grant them the right to fly its flag. It will send its representatives to other countries and establish missions in other States and at the seat of international organizations; it will import and export goods and services and, in some cases, will violate the rights of other States (e.g. by transboundary air pollution from its industries or by the military actions of its armed forces). If international law does not want to appear to be out of touch with reality, it cannot completely disregard States which exist in fact. As Judge Friedman correctly stated: 'If an entity satisfies the formal actual requirements of a State, to contend that it does not exist is unrealistic and absurd.'²²⁴

Article 71 (1) (a) VCLT also shows that the concept of nullity is restricted to the bilateral or multilateral legal transaction, i.e. the treaty, and does not extend to an ensuing factual situation. According to this provision, the 'consequences of any act performed in reliance on any [treaty] provision which conflicts with the preemptory norm of general international law' are not void, but shall be 'eliminate[d] as far as possible' by the parties. The obligation to eliminate the consequences of an illegal act already derives from the law of State responsibility.²²⁵ Prescribing nullity would bring no additional gain. To apply this argument to the homeland States: if the South African Government, in order to perpetuate apartheid, had first entered into treaties with the autonomous governments of the homelands concerning their release into independence, these treaties would have been void because they violated the prohibition of apartheid. The States that would have been created in implementing the treaties would not have been nullities, but would have had to be eliminated. The same should apply where a State is created not on the basis of a treaty, but by being released into independence by the parent State or a unilateral declaration of independence.

If the concept of *jus cogens* were to apply to factual situations, existing States would also be affected by a corresponding application of Art. 64 VCLT. Existing States whose existence violated a new norm of *jus cogens* would then lose their statehood. If it is assumed that, in the case of the homeland States, the reason for the nullity of their creation was the policy of apartheid (i.e. a violation of the prohibition of racial discrimination), then this would also have applied to South Africa itself. But no State went so far as to deny South Africa statehood.²²⁶ A special law for new contenders for statehood that requires them to meet further, more

²²⁴ *S. v Banda*, 1989 (4) SA 519 at p. 539.

²²⁵ See Art. 35 of the ILC Articles on State Responsibility: UN Doc. A/56/10 (2001), p. 52.

²²⁶ States only denied the apartheid regime the right to represent the South African people; see, e.g., the resolution of the Council of Ministers of the Organization of African Unity: CM/Res.538 (XXVIII) of 28 February 1977, para. 1.

severe preconditions than existing States cannot be reconciled with a uniform concept of statehood.²²⁷

Several United Nations General Assembly resolutions that deal with questions of territorial acquisitions in violation of the prohibition of the use of force are a further indication that international law does not opt for the consequence of nullity in the case of factual situations that violate a norm of *jus cogens*. For example, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations states that 'no territorial acquisition resulting from the threat or use of force shall be recognized as legal'.²²⁸ Article 5 (3) of the 1974 resolution on the Definition of Aggression reads: 'No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.'²²⁹ However, the order that something 'shall not be recognized as legal [lawful]'²³⁰ requires, as a logical precondition, its existence, albeit unlawful existence. A proposal during the negotiations of the Definition of Aggression to replace the present text with the formulation that 'any territorial gains [acquisition] or special advantage resulting from aggression shall be null and void' was not acted upon.²³¹

The ILC has adopted the approach of these resolutions in its Articles on State Responsibility of August 2001, and has extended it to all violations of norms with *jus cogens* character.²³² According to Art. 41 (2) of the ILC Articles, 'no State shall recognize as lawful a situation created by a serious breach' of an obligation arising under a peremptory norm of general international law.²³³ Gowlland-Debbas correctly notes that by imposing a duty of non-recognition, the article intended to 'deny the legal effects of the wrongful act'.²³⁴ Although both may lead to the same result, there is a significant theoretical difference between an illegal but effective act which is *denied any legal effect*, and an act that is null and void *ab initio* and, for that reason, is *incapable of producing any legal effect*. ILC-member Díaz-González noted in relation to the obligation not to recognize a situation as lawful: 'A breach resulting from an international wrongful act produced legal effects, but it was not legal.'²³⁵ The fact that

²²⁷ See also Stabreit (above, n. 74), p. 130.

²²⁸ A/RES/2625 (XXV) of 24 October 1970, annex, 1st principle, para. 10.

²²⁹ A/RES/3314 (XXIX) of 14 December 1974, annex.

²³⁰ On the meaning of the wording that something is 'not to be recognized as legal', see below s. IV.3.b.(1). On the historical development of the formula, see Talmon (above, n. 4), ch. 4.II.2.b.

²³¹ See GAOR, 27th session, Suppl. No. 19 (A/8719), p. 17.

²³² See Riphagen, Third Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles) (hereinafter: Third Report on State Responsibility), ILC Yb. 1982 II/1, p. 48, para. 7: 'The formula is inspired by the rules embodied in the 1970 Declaration on Principles of International Law [. . .]'. See also ILC Yb. 1985 II/2, p. 23, para. 148. The statement referred to Art. 6 (1) (a) of the 1982 Draft Articles which is identical with Art. 41 (2) of the ILC Articles on State Responsibility.

²³³ Article 41 (2) provides: 'No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [. . .]' (UN Doc. A/56/10 (2001), p. 53). On this provision, see also below s. IV.3.b.(3).

²³⁴ Gowlland-Debbas (above, n. 41), p. 249 (emphasis added).

²³⁵ ILC Yb. 1985 I, p. 134, para. 2.

the provision on non-recognition is found in the Part of the ILC Articles on the 'Content of the International Responsibility of a State', i.e. the legal consequences of an internationally wrongful act, shows that the illegality of a situation results in its non-recognition and not in its nullity. Furthermore, according to Art. 41 (1) of the ILC Articles, States shall co-operate to 'bring to an end' any serious breach of a peremptory norm of international law. However, there would be no need to bring to an end something that is a nullity.

A further argument against the application of the concept of *jus cogens* to State creation is that there is no procedure outside the two Vienna Conventions on the Law of Treaties for reaching a binding decision as to which norms are part of *jus cogens* and whether these norms have been violated in a particular case.²³⁶ According to the ILC, the concept can only be applied in a satisfactory manner if it is accompanied by a system of independent and authoritative adjudication.²³⁷ Any rule of nullity requires 'procedural safeguards' designed to prevent its arbitrary application.²³⁸ Like the ILC, States consider the concept of *jus cogens* in the Vienna Conventions on the Law of Treaties as 'inextricably linked' to the provisions on the compulsory settlement of disputes concerning its application.²³⁹ The organs of the United Nations cannot play the role of independent arbiter in a dispute concerning the creation of a State for several reasons. The General Assembly is not competent to take a binding decision on the question. In the case of the Security Council, the legal question of whether the creation of a State is null and void cannot depend on political considerations or on the exercise of the veto power by one of its permanent members. In addition, the States have no legal right to a Security Council decision on whether the creation of a State violated *jus cogens*.²⁴⁰ In this context, the Indonesian annexation of East Timor in 1976 should be remembered. Although both the former colonial power Portugal²⁴¹ and most authors considered²⁴² it a violation of the prohibition of the use of force and of the right to self-determination,

²³⁶ Articles 65, 66 VCLT.

²³⁷ ILC Yb. 1966 II, pp. 247, 248 (commentary on Art. 50 of the ILC Draft Articles on the Law of Treaties).

²³⁸ ILC Yb. 1966 II, p. 262 (commentary on Art. 62 of the ILC Draft Articles on the Law of Treaties).

²³⁹ See, e.g., the German declaration submitted on ratification of the 1986 Vienna Convention on the Law of Treaties: German Federal Parliament, *Documents (BT-Drs.)*, no. 11/5728 of 17 November 1989, p. 57. See also Cassese (above, n. 28), p. 205.

²⁴⁰ On the discretionary powers of the Security Council, see B. Lorinser, *Bindende Resolutionen des Sicherheitsrats* (1996), pp. 50–1.

²⁴¹ Cf. *Affaire relative au Timor orientale, Mémoire du Gouvernement du Portugal*, vol. 1 (18 November 1991), pp. 161–93 and *East Timor, Counter Memorial of the Government of Australia* (1 June 1992), pp. 94–101. See also the position taken by Nicaragua: UN Doc. A/C.4/35/SR.13, 30 October 1980, p. 14.

²⁴² C. Chinkin, 'East Timor Moves into the World Court', *EJIL*, 4 (1993), pp. 206–22 at pp. 215–8; P. Lawrence, 'East Timor', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2 (1995), pp. 3–4 at p. 4; R.S. Clarke, 'The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression', *Yale Journal of World Public Order*, 7 (1980), pp. 2–44.

neither the Security Council nor the General Assembly expressly condemned it as such.²⁴³

Irrespective of these arguments, there has been not a single case so far where the United Nations has explicitly determined there to have been a violation of a norm of *jus cogens*. The case of the Turkish Republic of Northern Cyprus is a particularly stark example. Security Council resolutions on the topic, unlike the literature, make no express reference at all to a violation of the prohibition of the use of force, let alone to a violation of *jus cogens*. The reason for the invalidity of the Turkish Cypriot declaration of independence given in the resolutions is its incompatibility with the 1960 Treaty Concerning the Establishment of the Republic of Cyprus and the Treaty of Guarantee of the same year.²⁴⁴

If it is assumed for the sake of argument that the violation of a norm of *jus cogens* results in the nullity of the State's creation, i.e. that there is no State to be recognized, it must then be asked what purpose non-recognition serves. According to Gowlland-Debbas, non-recognition is to 'prevent the validation of what is a legal nullity', in other words to preserve the nullity'.²⁴⁵ This, however, means nothing other than that, without non-recognition, the creation of the State which initially was null and void would, probably through recognition, become legally valid. Apart from the difficulty in explaining how the granting of landing rights for a national airline, the recognition and enforcement of court decisions, or the conclusion of a treaty can create a State, the recognition (implied by these acts) would in this case have constitutive effect.²⁴⁶ Gowlland-Debbas fails to appreciate that violations of a norm of *jus cogens* cannot be 'purged' by recognition, acquiescence, or prescription.²⁴⁷ A State is only able to relinquish its own rights, not those of the community of States as a whole. Elsewhere she writes that 'an act in breach of *jus cogens* [. . .] cannot be validated.'²⁴⁸ But if the creation of a State in breach of *jus cogens* cannot be validated through recognition, then calls for non-recognition by the United Nations are superfluous.

²⁴³ Cf. S/RES/384 (1975) of 22 December 1975; S/RES/389 (1976) of 22 April 1976; A/RES/3485 (XXX) of 12 December 1975; A/RES/31/53 (1976) of 1 December 1976; A/RES/32/34 (1977) of 28 November 1977; A/RES/33/39 (1978) of 13 December 1978; A/RES/34/40 (1979) of 21 November 1979; A/RES/35/27 (1980) of 11 November 1980; A/RES/36/50 (1981) of 24 November 1981; A/RES/37/30 (1982) of 23 November 1982. Cf. also *East Timor* [1995] ICJ Rep 90 at pp. 102-4.

²⁴⁴ See S/RES/541 (1983) of 18 November 1983, preambular paras. 3 and 4 ('Considering that this declaration [by the Turkish Cypriot authorities issued on 15 November 1983 which purports to create an independent State in northern Cyprus] is incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee, Considering, therefore, that the attempt to create a "Turkish Republic of Northern Cyprus" is invalid [. . .]').

²⁴⁵ Gowlland-Debbas (above, n. 41), p. 277 quoting Lauterpacht (above, n. 1), pp. 413, 420. Similar, Dugard (above, n. 4), p. 134 ('not to contribute by a positive act to rendering valid the results of an act which is in itself devoid of legal force'). Both authors refer to H. Lauterpacht (above, n. 1), pp. 413, 420, who, of course, was a proponent of the constitutive doctrine of recognition.

²⁴⁶ Cf. s.II.2.a.(3) on the effect of recognition in case of additional legal criteria for statehood.

²⁴⁷ Brownlie (above, n. 16), p. 490; Kadelbach (above, n. 138), p. 335; Verdross/Simma (above, n. 8), § 529; Abi-Saab (above, n. 212), pp. 10-11. See also Jennings (above, n. 42), p. 74.

²⁴⁸ Gowlland-Debbas (above, n. 41), p. 288.

Furthermore, any recognition by individual States with the aim of bringing about a legal situation that deviates from *jus cogens* would in itself be null and void. This would especially be the case if the concept of *jus cogens* were generally applied to unilateral acts, as Gowlland-Debbas applies it.

(c) *The concept of jus cogens in State practice*

State practice does not support the contention that the creation of a State, the acquisition of territory, or any other situation in violation of a norm having the character of *jus cogens* is illegal and therefore 'null and void', i.e. without any effect in law. The *jus in bello* and the rules of international humanitarian law also apply to the aggressor; his actions in the occupied territory are legally valid, so long as they remain within the limits of the international law on occupation.²⁴⁹ For example, although the Turkish Republic of Northern Cyprus is meant to be a nullity due to Turkey's violation of the prohibition on the use of force, the European Court of Human Rights (ECHR), has treated the Turkish-Cypriot courts as effective domestic remedies provided by the occupying power Turkey.²⁵⁰ National courts, much like the ECHR, have applied the laws of the Turkish Republic of Northern Cyprus;²⁵¹ a 'void State' cannot pass laws.

The *Namibia* Advisory Opinion of the International Court of Justice shows that even the continued occupation of a mandated territory or of a non-self-governing territory, in violation of the right of self-determination (which both authors cited above consider part of *jus cogens*),²⁵² does not automatically void all actions by the occupying power. Certain administrative acts, for example, were to continue to have legal effect. Furthermore, bilateral treaties that South Africa entered on behalf of or concerning Namibia were not to be invoked or applied, only insofar as they involved 'active intergovernmental co-operation'.²⁵³ The nullity of some acts but not of others is difficult to reconcile with the concept of *jus cogens*.²⁵⁴ In that the Court found that 'States Members of the United Nations are under an obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or

²⁴⁹ See Brownlie (above, n. 165), pp. 406–8; L.C. Green, *The contemporary law of armed conflict* (2nd edn., 2000), pp. 1, 256–67. See also House of Commons, *Research Paper 03/51: Iraq: Law of occupation* (2 June 2003), p. 3 ('The status of occupying power is a matter of *de facto* control. It does not matter whether their military campaign was lawful').

²⁵⁰ *Cyprus v Turkey (Report)* (1999), Transcript, paras. 122, 123, 124. See also *Cyprus v Turkey (Judgment)* (2001), ECHR Rep 2001-IV, 1, paras. 86, 98.

²⁵¹ See Talmon (above, n. 4), ch. 6.III.

²⁵² Dugard (above, n. 4), pp. 121–2, 154; Gowlland-Debbas (above, n. 41), pp. 261–2.

²⁵³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 at p. 55, para. 122; p. 56, para. 125. See also *ibid.*, pp. 136–7 (sep. op. Petrán); p. 149 (sep. op. Onyeama); pp. 218–9 (sep. op. De Castro); p. 297 (diss. op. Fitzmaurice) and, in particular, *ibid.*, p. 167 (sep. op. Dillard): 'The legal consequences flowing from a determination of the illegal occupation of Namibia do not necessarily entail the automatic application of a doctrine of nullity.' See further S/RES/301 [1971] of 20 October [1971], para. 11 (b).

²⁵⁴ Cf. Art. 44 (5) VCLT.

concerning Namibia',²⁵⁵ invalidity did not result directly from the violation of the right of self-determination but, as was expressly stated, from Security Council resolution 276 (1970), which was considered to be *binding* on Member States.²⁵⁶ This conclusion is also supported by the ICJ's reasoning, where it is explained that 'no [non-member] State which enters into relations with South Africa concerning Namibia *may expect* the United Nations or its Members *to recognize the validity* or effects of such relationship, or of the consequences thereof.'²⁵⁷ If nullity had resulted directly from international law, a distinction between members and non-members would not have been necessary. The cautious phrasing of the Court's statement does not suggest a concept of absolute nullity. This also finds support in the reaction of UN Member States in the case of East Timor, where an equivalent Security Council resolution was lacking. They did not assume the nullity of Indonesia's actions in or relating to East Timor.²⁵⁸ Even Portugal, which accused Australia of violating the East Timorese people's right of self-determination by entering into a treaty with Indonesia for the exploration and exploitation of the resources of the continental shelf in the area of the Timor Gap, did not claim that the treaty was null and void, but invoked Australia's international responsibility.²⁵⁹

India's military intervention in support of the insurgents in East Pakistan did not prevent the creation of the State of Bangladesh, although several States regarded this intervention as a violation of the prohibition of the use of force.²⁶⁰ Thus, the collective non-recognition of Rhodesia, the homeland States, and the Turkish Republic of Northern Cyprus alone is no proof of their nullity. If the thesis were correct that situations that violated a norm of *jus cogens* were void, then all governments that came to power (and all States that were created) in violation

²⁵⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 at p. 58, para. 133.

²⁵⁶ *Ibid.*, p. 297, para. 123 (diss. op. Fitzmaurice). See also S/RES/276 (1970) of 30 January 1970: 'The Security Council, [. . .] 2. Declares that [. . .] all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid [. . .].'

²⁵⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep. 16 at p. 56, para. 126 (emphasis added). On the effect of the resolution on non-members of the organization, see *ibid.*, p. 149 (sep. op. Onyeama), p. 219 (sep. op. De Castro).

²⁵⁸ The ICJ had held in the *Namibia* advisory opinion that, as a consequence of the declaration of illegality and invalidity made in Security Council resolution 276 (1970) member States were under an obligation to abstain from entering into treaty relations with South Africa in all cases in which it purports to act on behalf of or concerning Namibia ([1971] ICJ Rep 16 at p. 55, para. 122). Between 1976 and 1992 Indonesia concluded 41 multilateral and 31 bilateral treaties without a single State making any reservation with regard to their application to East Timor. See *East Timor, Counter Memorial of the Government of Australia* (1 June 1992), pp. 72-4, 213.

²⁵⁹ Cf. *East Timor* [1995] ICJ Rep 90 at pp. 94-5. One reason for this may have been that neither Indonesia nor Portugal have been parties to the VCLT; see also M.C. Maffei, 'The Case of East Timor Before the International Court of Justice—Some Tentative Comments', *EJIL*, 4 (1993), pp. 223-38 at pp. 234-5.

²⁶⁰ See Okeke (above, n. 111), pp. 142-57; Dugard (above, n. 4), pp. 75-6.

of the prohibition of the use of force would be non-existent as far as international law is concerned. This is clearly not the case, as is demonstrated by the many governments that have come to power through armed intervention and which are recognized, despite their illegal creation, by the vast majority of States and the United Nations as the governments of their respective States.²⁶¹ For example, the communist government that was installed in Kabul by Soviet troops in December 1979 represented the country at the United Nations, in spite of strong criticism of the intervention by the UN General Assembly,²⁶² and entered into several bilateral and multilateral agreements on behalf of Afghanistan.

c. The declaration of independence is declared invalid

In the case of the homeland States, Transkei, Bophuthatswana, and Venda, the General Assembly has declared the 'declaration of the so-called "independence" [. . .] as *totally invalid*',²⁶³ i.e. void. The Security Council followed suit in two statements by its President in relation to Venda and Ciskei.²⁶⁴ In relation to Rhodesia and the Turkish Republic of Northern Cyprus, the Security Council noted that it regarded the independence declaration as 'legally invalid'²⁶⁵ or 'as having no legal validity'.²⁶⁶ It later also referred to the 'legally invalid "Turkish Republic of Northern Cyprus"'.²⁶⁷ As these States meet the criteria for statehood and are not *ipso jure* invalid because of a violation of a norm of *jus cogens*, the question needs to be asked whether the above-mentioned United Nations organs are competent to declare invalid a State that was created in violation of international law. Such a declaration would have to be accorded *status-destroying*, i.e. destructive, effect. The inverse application of the ICJ's dictum in the *Reparation for Injuries* case could be considered, according to which '[. . .] the vast majority of members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone.'²⁶⁸ This line of argument, however, cannot be transferred to States, and certainly cannot be inverted. The legal personality of a State, unlike

²⁶¹ One may think of the governments of Hungary (1956), Yemen (1962), Czechoslovakia (1968), Afghanistan (1979), Cambodia (1979), or Panama (1980). See B. Roth, *Governmental Illegitimacy in International Law* (1999), pp. 263–8, 274–6, 280–3, 284, 289, 310–8.

²⁶² A/RES/ES-6/2 (1980) of 14 January 1980, para. 2 ('strongly deplores').
²⁶³ A/RES/31/6 A (1976) of 26 October 1976, para. 2; A/RES/32/105 N (1977) of 14 December 1977, para. 2; A/RES/34/93 G (1979) of 12 December 1979, para. 2. There is no such declaration with regard to Ciskei.

²⁶⁴ SCOR, 34th year, 2168th meeting, 21 September 1979, p. 1; SCOR, 36th year, 2315th meeting, 15 December 1981, p. 1.

²⁶⁵ S/RES/541 (1983) of 18 November 1983, para. 2.

²⁶⁶ S/RES/217 (1965) of 20 November 1965, para. 3.

²⁶⁷ S/RES/550 (1984) of 11 May 1984, preambular para. 6.

²⁶⁸ *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174 at p. 185. This was the ICJ's reasoning with regard to the objective legal personality of the United Nations *vis-à-vis* the non-member State Israel.

that of an international organization (to which the constitutive theory applies),²⁶⁹ derives from it meeting the factual criteria for statehood, not from recognition by other States. A declaration by the international community—even a binding decision of the Security Council—cannot replace criteria for statehood which are otherwise missing. Similarly, fulfilled criteria for statehood cannot be declared missing with legally binding effect. As the British delegate to the General Assembly pointed out in relation to Rhodesia: ‘A General Assembly resolution could not [. . .] confer on a territory a status different from what it actually possessed.’²⁷⁰

Statements that a ‘declaration of independence’ is totally invalid must be viewed in the context of other such pronouncements. Organs of the United Nations have also pronounced the following acts ‘invalid’, as being ‘without validity’ or ‘null and void’: the purported exchange of ambassadors and other secessionist acts;²⁷¹ all acts taken by a Government on behalf of or concerning a territory;²⁷² any acts which are contrary to certain Security Council resolutions;²⁷³ all statements by a State repudiating its foreign debt;²⁷⁴ certain legislative and administrative measures;²⁷⁵ elections and their results;²⁷⁶ the preparation for elections;²⁷⁷ annexations;²⁷⁸ the holding of a referendum or its results;²⁷⁹ and all legislative and administrative acts that altered or were intended to alter the geographic, demographic, and historical character and status of a town or occupied territory, including the expropriation of land and buildings,²⁸⁰ as well as the installation of an interim government and that government itself.²⁸¹ These pronouncements are quite general and fail to provide any legal reasoning. They show that ‘invalid’ does not necessarily mean absolutely void in a legal sense; rather, they suggest that the Security Council and the General Assembly merely want to express

²⁶⁹ Doehring (above, n. 28), MN 213, 965.

²⁷⁰ GAOR, 16th year, 1120th plenary meeting, 28 June 1962, para. 23. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 at p. 294, para. 115 (diss. op. Fitzmaurice) and R. Jennings, *The Acquisition of Territory in International Law* (1963), p. 85.

²⁷¹ S/RES/550 (1984) of 11 May 1984, para. 2.

²⁷² S/RES/276 (1970) of 30 January 1970, para. 2; S/RES/283 (1970) of 29 July 1970, preambular para. 2.

²⁷³ S/RES/670 (1990) of 25 September 1990, preambular para. 8; Presidential Statement of 3 May 1985, para. 1 (UN Doc. S/17151).

²⁷⁴ S/RES/687 (1991) of 3 April 1991, para. 17.

²⁷⁵ S/RES/478 (1980) of 20 August 1980, para. 3.

²⁷⁶ S/RES/439 (1978) of 13 November 1978, preambular para. 7; S/RES/445 (1979) of 8 March 1979, para. 6; S/RES/448 (1979) of 30 April 1979, para. 2.

²⁷⁷ S/RES/435 (1978) of 29 September 1978, para. 6.

²⁷⁸ S/RES/662 (1990) of 9 August 1990, para. 1; S/RES/664 (1990) of 18 August 1990, para. 3.

²⁷⁹ S/RES/554 (1984) of 17 August 1984, para. 1.

²⁸⁰ A/RES/2253/ES-V (1967) of 4 July 1967, para. 1; S/RES/252 (1968) of 21 May 1968, para. 2; S/RES/267 (1969) of 3 July 1969, para. 4; S/RES/298 [1971] of 25 September [1971], para. 3; Presidential Statement of 11 November 1976, para. 4 (UN Doc. S/12233); A/RES/33/113 C (1978) of 18 December 1978, para. 6; S/RES/476 (1980) of 30 June 1980, para. 4; S/RES/497 (1981) of 17 December 1981, para. 1, with regard to Jerusalem and the Israeli occupied Arab territories.

²⁸¹ Presidential Statement of 3 May 1985, para. 3 (UN Doc. S/17151); S/RES/566 (1985) of 19 June 1985, para. 4, with regard to the Interim Government in Namibia.

that they do not (or will not) treat as valid an act that has already taken place or will take place in the future. If absolute nullity were assumed, questions as to the legal basis of such pronouncements and their binding legal effect would have to be raised. The addressees of these pronouncements usually regarded them as 'without effect'.²⁸² In certain cases, such as when the General Assembly pronounced the Camp David Peace Accords between Egypt and Israel partially invalid,²⁸³ such pronouncements may also have been politically motivated. A further argument against absolute nullity is that in several cases the pronouncement of invalidity was accompanied by a call to rescind or annul the measures taken. For example, the Security Council in resolution 541 (1983) considered the declaration of independence by the Turkish Cypriot 'as legally invalid and call[ed] for its withdrawal'. However, the withdrawal of a void declaration hardly makes any legal sense.²⁸⁴ In addition to these arguments, all the arguments cited earlier in relation to the nullity of a State which actually exists could also be put forward here.

3. *Preliminary conclusions*

As the collectively non-recognized States meet all three classic criteria for statehood, adherents of the declaratory theory have been forced to explain non-recognition by pointing to a violation of fundamental norms of international law in the context of the States' creation. They have identified as such norms the right to self-determination of peoples under colonial rule, the prohibition of racial discrimination (as in the prohibition of apartheid), and the prohibition of the use of force. These were either regarded as additional criteria of legality regulating the creation of States, or as reasons for the nullity of the State's creation. Additional legal criteria for statehood cannot be proven, and a violation of international law in the context of the State's creation does not result in the new State's nullity. Neither the principle of *ex injuria jus non oritur* nor the concept of *jus cogens* can be applied to a State which actually exists. There is no rule of customary international law that holds a State created in violation of international law void. If the General Assembly or Security Council declares an independence declaration invalid, that does not void a State either. If a State exists and if its legal status as a 'State' solely results from its factual existence and not from recognition by other States (a view shared by the declaratory theory) then it is not possible

²⁸² Cf. the Response of the Minister of Foreign Affairs of the Republic of South Africa to the statement of the President of the Security Council of 3 May 1985: UN Doc. S/17152, 4 May 1985, Annex I, p. 2.

²⁸³ A/RES/34/65 B (1979) of 29 November 1979, para.4 ('The General Assembly [. . .] declares that the Camp David accords and other agreements have no validity [. . .]'); adopted with 75 votes in favour, 33 against, and 37 abstentions.

²⁸⁴ Cf. J.H. Wolfe, 'Cyprus: International Law and the Prospects for Settlement, Remarks', *ASIL Proc.*, 78 (1984), pp. 107-14 at p. 111: 'one might question the utility of withdrawing a statement which is purportedly invalid.'

for non-recognition to have declaratory, i.e. *status-confirming*, effect. The objective legal situation—the existence of a State—would then not correspond to the confirmed legal situation, namely the non-existence of a State. If non-recognition of a State that was created in violation of international law has neither constitutive nor declaratory effect it must have a different, third effect. This third effect will be examined in the following part.

IV. NEGATORY EFFECT

1. *Withholding from a State its legal status*

As non-recognition of an existing State is without *status-destroying* effect,²⁸⁵ other States can only use non-recognition as a reaction to a violation of international law in the context of the State's creation, in order to express their intention not to treat it as a State in international law, in spite of it meeting all the criteria for statehood. That is, States employ non-recognition as a means of withholding from a State its legal status,²⁸⁶ or 'the juridical effects which are attached to [its] existence'.²⁸⁷ Such an approach is illustrated by the reference of the Finnish President, Martti Ahtisaari, to non-recognition of a situation as 'denying that situation's legal effects'.²⁸⁸ Similarly, the Third Restatement of Foreign Relations Law of the United States, in relation to States created in violation of the prohibition of the use of force, states that:

- (1) A state is not required to accord formal recognition to any other state but is required to treat as a state an entity meeting the requirements of [statehood], except as provided in Subsection (2).
- (2) A state has an obligation not to recognize or *treat as a state* an entity that has attained *the qualifications for statehood* as a result of the threat or use of armed force in violation of the UN Charter.²⁸⁹

It is suggested that non-recognition has a negatory, i.e. *status-denying*, effect when a State that has reached the conditions for statehood by violation of international law is not accorded the treatment of a State, as

²⁸⁵ See Williams (above, n. 175), p. 794: Refusal of recognition cannot alter the existence of facts [. . .]. A refusal of recognition does not by itself alter the legal character of that to which recognition is refused.'

²⁸⁶ Cf. P. Heilborn, *Die Anerkennung neuer Staaten* (1931), p. 6; Baty (above, n. 110), pp. 378–80; Blix (above, n. 17), p. 657.

²⁸⁷ Cf. Art. 1 (3) of the Brussels Resolutions of the Institut de Droit International concerning the Recognition of New States and New Governments of 23 April 1936, reproduced in *AJIL Suppl.*, 30 (1936), pp. 185–7 at p. 185 and in the original French version in *Annuaire de l'Institut de Droit International*, 39-II (1936), p. 300.

²⁸⁸ Martti Ahtisaari, Speech delivered in Helsinki on 27 August 1998 at the Symposium on Global Governance, UN and the Role of International Law: *Finnish Yearbook of International Law*, 9 (1998), p. 5. See also the Fifth Report on State Responsibility by the Special Rapporteur Gaetano Arangio-Ruiz: UN Doc. A/CN.4/453/Add.2, 8 June 1993, p. 29, para. 50.

²⁸⁹ American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States*, vol. 1 (1987), p. 77 (emphasis added).

a result of such non-recognition. To that extent, non-recognition operates as a sanction. Thus, the UN Secretary-General wrote in his Report on the Promotion and Protection of Human Rights of 20 December 2001 that 'the sanction of non-recognition should never affect the basic rights of the population.'²⁹⁰ In the legal literature, non-recognition has also been referred to as a 'sanction', albeit not always in the strict sense of the term.²⁹¹ Cristos L. Rozakis, the Greek member of the European Commission of Human Rights, aptly brought out the character of non-recognition as a sanction in his opinion in the case of *Chrysostomos and Papachrysostomou v Turkey* (1993):

The non-existence of this entity [the Turkish Republic of Northern Cyprus] is the result of a decision of the international community not to attribute the quality of statehood to the northern part of the island. This attitude of the international community is manifested [. . .] by the resolution of the same world organization [the United Nations] calling upon the States of the international community to *negate the existence of the northern part of Cyprus as a separate international entity*. [. . .] the *non-recognition*, proposed here by the Security Council, *amounts virtually to a sanction inflicted by the international community against the primary illegality of the use of force* to attain the political purpose of secession of the northern part of Cyprus from the Republic [. . .]. In other words, the concept of non-recognition is used here [. . .] to prevent the attribution of statehood to an illegal entity [. . .].²⁹²

Non-recognition *as a State* in response to a violation of international law has, in contrast to the politically motivated non-recognition *of a State*, a clearly defined scope. In the case of non-recognition as a State, it is not the individual State's subjective will to recognize, i.e. to enter into discretionary relations, but the objective legal status of 'State' that is at issue. A good example is provided by open multilateral treaties between *States*. While accession by a non-recognized State, according to current

²⁹⁰ UN Doc. E/CN.4/2002/103, 20 December 2001, p. 6, para. 20. This statement related to the duty of States not to recognize as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law in Art. 41 of the ILC Articles on State Responsibility. See also the declarations of States with regard to Art. 41 in the Sixth Committee of the UN General Assembly: UN Docs. A/C.6/56/SR.14, 13 November 2001, p. 9, para. 54 (Mongolia: 'the collective sanctions of non-recognition and non-assistance, which had proved useful in the case of Namibia and Southern Rhodesia'), A/C.6/56/SR.12, 9 November 2001, p. 4, para. 21 (South Africa: 'non-recognition and non-assistance had been the sanctions applied to South Africa's administration of Namibia and the Bantustan States and to Rhodesia'). See further GAOR, 27th session, Suppl. No. 20 (A/7620), p. 23, where non-recognition was seen as one of the 'political and moral sanctions' to be imposed by the Security Council.

²⁹¹ Cf. Middlebush (above, n. 110), p. 40; P.C. Jessup, *A Modern Law of Nations* (1946), pp. 43, 162; F.A. Mann, 'The Doctrine of Jus Cogens in International Law', in: H. Ehmke/J.H. Kaiser/W.A. Kewenig/K.M. Meessen/W. Rüdner (eds.), *Festschrift für Ulrich Scheuner zum 70. Geburtstag* (1973), pp. 399–418 at pp. 413, 414; C.L. Brown-John, *Multilateral Sanctions in International Law. A Comparative Analysis* (1975), pp. 15–6; E. Klein, 'Die Nichtanerkennungspolitik der Vereinten Nationen gegenüber den in die Unabhängigkeit entlassenen südafrikanischen *homelands*', *ZaöRV*, 39 (1979), pp. 469–95 at p. 478; Z.M. Necatigil, 'United Nations Resolutions on Cyprus', in: Foreign Policy Institute (ed.), *Cyprus* (2002), pp. 39–56 at p. 49.

²⁹² *Chrysostomos and Papachrysostomou v Turkey (Report)* (1993), 86-A DR p. 4 at pp. 43, 44 (emphasis added). C.L. Rozakis then draws the wrong conclusions from the negatory effect of non-recognition denying the TRNC any international legal status at all (not just the status of a 'State').

opinion, cannot imply recognition by the other parties which do not recognize the State,²⁹³ it is impossible for an entity to accede to 'a treaty between States' without being implicitly accorded the legal status of 'State'. Willem Riphagen, the ILC's third Special Rapporteur on State Responsibility, described non-recognition in the following terms: 'non-recognition [as a response to an internationally wrongful act] is refusing to give an otherwise mandatory follow-up to the event that has taken place.'²⁹⁴ If this is applied to the non-recognition of a State created in violation of international law, it requires that the legal consequences that arise *ipso jure* from a State's creation be denied. In particular, the rights, competences and privileges that are inherent in statehood—and only those—are to be withheld from the new State. Thus, non-recognition is not limited, as some have assumed, to prevention of validation of what is a legal nullity,²⁹⁵ or exclusion of governmental acts of somewhat symbolic nature such as diplomatic relations.²⁹⁶ The *fact* of an existing State is replaced by the *fiction* of the *status quo ante*.²⁹⁷ For example, Manchuria, after the State of Manchukuo was proclaimed, was still treated as part of the Chinese State. During a debate in the House of Lords, the Earl of Iddesleigh, a sharp critic of the policy of collective non-recognition of Manchukuo, declared: 'If we adopt that interpretation [of non-recognition] it will mean, amongst other consequences, that we shall never be able to recognize the independence of Manchuria. We have to treat that country as an integral part of the Chinese Republic, although every fact is contrary to that course of action.'²⁹⁸ The United Nations, after the white minority government in Southern Rhodesia unilaterally declared independence, continued to treat it as a non-self-governing territory under Chapter XI of the Charter of the United Nations. The homeland States, even after being granted independence, were regarded as part of South Africa, much as Northern Cyprus is still considered part of the Republic of Cyprus. Non-recognition is not to preserve the *status quo ante* forever, as the subsequent independence of Southern Rhodesia under the name of Zimbabwe shows;²⁹⁹ it is merely

²⁹³ See Bot (above, n. 110), pp. 121–2.

²⁹⁴ Riphagen, Preliminary Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles on State Responsibility) (hereinafter: Preliminary Report on State Responsibility), ILC Yb. 1980 II/1, p. 117, para. 54. See also the commentary on Art. 41 of the ILC Articles on State Responsibility: UN Doc. A/56/10 (2001), p. 289, para. 8: 'in a situation that might otherwise call for recognition, this has nonetheless to be withheld.'

²⁹⁵ See Gowlland-Debbas (above, n. 41), pp. 181, 276–7; Lauterpacht (above, n. 1), p. 413. For criticism of this position, see above s. III.2.b.(2)(b).

²⁹⁶ See the diss. op. of Judge Petrén in the *Namibia* advisory opinion [1971] ICJ Rep 134.

²⁹⁷ On replacing a factual situation by a fiction, see Riphagen, Preliminary Report on State Responsibility, ILC Yb. 1980 II/1, p. 117, para. 54; p. 122, para. 73. See also the decision of the Court of Appeals of Rabat of 5 July 1963 which held that 'the non-recognition of a State [...] implies that it is *deemed* not to exist.' (40 ILR 40 at p. 41 (emphasis added)).

²⁹⁸ House of Lords Debate of 20 February 1935, reproduced in International Law Association, *Report of the Thirty-Eighth Conference held at Budapest (1935)*, p. 335.

²⁹⁹ In the cases of Manchukuo and the homeland States, States did not rule out recognition once and for all. Subsequent developments may well have led to recognition; see Talmon (above, n. 4), ch. 2.I and III.

to reverse the state of affairs that was brought about by an internationally wrongful act. Substituting the actual with the previous state of affairs leads to the situation where the *de jure* government of the parent State or the colonial power may continue to exercise its competences in relation to the non-recognized State's territory. This distinguishes the negation of the legal status of 'State' from a mere withholding of optional or discretionary relations. This fiction, however, finds its limits where the governmental competences require factual control of the territory or its inhabitants.

Withholding the legal status of 'State' does not mean that the non-recognized State is to be treated as a nullity. Rights, powers and privileges are only to be withheld to the extent that they express a claim to statehood. The non-recognizing States do not close their eyes to the (illegal) reality insofar as the non-recognized State exercises *de facto* authority over its territory. This is reflected in the terminology used. In the case of the Turkish Republic of Northern Cyprus, for example, both States and the United Nations speak of the 'Turkish-Cypriot authorities'³⁰⁰ or the '*de facto* Turkish-Cypriot administration'.³⁰¹ The Commission of the European Community, in its statement on the application of the Republic of Cyprus for membership, also made reference to the '*de facto* authorities of the northern part of the island'³⁰² and in the Country Reports on Human Rights Practices of the United States Department of State it is noted that 'the northern part [of Cyprus] is ruled by a Turkish Cypriot administration'.³⁰³ The language used also shows that the international community (unlike the Government of the Republic of Cyprus) sees the Turkish Cypriot authorities not as mere organs or subordinate bodies of the occupying power, Turkey, but as having a separate legal personality.³⁰⁴

If the non-recognized States are denied the legal status of 'State', such that they are not treated as States, then it must be asked what the non-recognizing States see in them. Their position can best be described as 'local *de facto* governments'.³⁰⁵ This term shows that the non-recognized

³⁰⁰ See the Reports of the Secretary-General on the United Nations Operation in Cyprus (UN Docs. S/1994/1407, 12 December 1994, para. 23; S/1996/411, 7 June 1996, para. 12; S/1998/488, 10 June 1998, paras. 14–16) and the Council of Europe's Parliamentary Assembly Recommendations No. 1259 (1995), para. 7 and No. 1197 (1992), paras. 1, 6, 9.

³⁰¹ See HC Debs., vol. 210, WA, col. 211: 24 June 1992.

³⁰² *EC Bulletin, Suppl.* 5/1993, p. 7. Judge Jambrek in his dissenting opinion in *Loizidou v Turkey (Merits)* (1996) also spoke of 'the "TRNC" *de facto* Government' ((1997) 36 ILM 464).

³⁰³ United States, Department of State, *Country Report on Human Rights Practices. Cyprus—2000* (2001), p. 1.

³⁰⁴ A. Husheer, 'Die völkerrechtliche Verantwortlichkeit der Türkei für Menschenrechtsverletzungen in Nordzypern nach den Entscheidungen der Europäischen Kommission und des Europäischen Gerichtshofs für Menschenrechte im Fall Loizidou/Türkei', *Zeitschrift für Europarechtliche Studien*, 1 (1998), pp. 389–422 at p. 399; M.C. Vitucci, 'Atti della Repubblica turca di Cipro del nord e responsabilità della Turchia: il caso Loizidou', *Rivista di Diritto Internazionale*, 81 (1998), pp. 1065–83 at pp. 1073–7. Wolfe has argued that the term 'authorities' indicates legal personality (Wolfe (above, n. 284), p. 111).

³⁰⁵ On the term 'local *de facto* government', see J. Spiropoulos, *Die de facto-Regierung im Völkerrecht* (1926), p. 8 and *passim*.

States *factually* perform all functions of government, i.e. legislation, administration and adjudication (which makes the term '*de facto* government' preferable to the terms '*de facto* authorities' or '*de facto* administration'). Furthermore, it shows that the territory under the control of the non-recognized State continues to be regarded as part of an existing State (hence the attribute 'local'), and that the government of the parent State is still considered the *de jure* government of the (seceding) territory. The major difference between a 'local *de facto* government' and Frowein's '*de facto* regime'³⁰⁶ is the legal fiction that the territory of the *de facto* government continues to be part of the territory of the parent State with the consequence that the parent State's *de jure* government may exercise certain (limited) competences with regard to that territory and its inhabitants.

2. *The legal status of States in international law*

If a State's legal status is to be withheld from it, then the question arises as to what precisely that legal status is. States are 'born' subjects of international law. Their existence confers on them, the most comprehensive legal personality and capacity to act of all subjects of international law.³⁰⁷ *Capacity* or *competence*, however, are not to be mistaken for *rights*: for example, a State has the capacity to conclude treaties with other States (treaty-making power)³⁰⁸ but, under customary international law, it does not have the right to demand that other States make treaties with it. Statehood merely bestows certain rudimentary rights. It does not automatically lead to integration of the new State into the international community of States, or to co-operation with other States. The latter to a large extent depends on the existing States' behaviour. For example, the new State is only able to exercise its capacity to conclude treaties with other States, thereby creating additional treaty-based rights, if existing States are prepared to enter into treaty relations with it. It is necessary to distinguish between *the rights inherent in statehood*, i.e. the rights a State can demand under general international law because it is a State, and the *optional relations* between States (and the resulting rights and privileges) that depend on the consent or co-operation of other States.

a. *Rights inherent in statehood*

According to Hans Blix, the rights inherent in statehood are not very numerous. He only gives two examples: the right to inviolability of the State's territory and its legal order, and some minimum rights to co-operation regarding the maintenance of world peace and international

³⁰⁶ On the term *de facto* regime, see above s. II.

³⁰⁷ See Lorimer (above, n. 29), p. 104: 'the life of States, like life in general, is the source of rights'. See also Art. 1 (3) of the Brussels Resolutions of the Institut de Droit International concerning Recognition of new States and new Governments, adopted on 23 April 1936: 'The existence of a new State with all the juridical effects which are attached to that existence [. . .]'. (*AJIL Suppl.*, 30 (1936), p. 185).

³⁰⁸ Article 6 VCLT.

security, disarmament, and the environment. He points out that the extent of these rights is, however, rather precarious.³⁰⁹

Three documents deal with the rights and duties of States and offer guidance regarding the inherent rights of States: the Draft Declaration on Rights and Duties of States which was drawn up by the ILC in 1949,³¹⁰ and which was subsequently noted but not adopted by the General Assembly,³¹¹ the Charter of Economic Rights and Duties which was adopted by the General Assembly on 12 December 1974 over the opposition of important industrial States,³¹² and the Montevideo Convention of 1933.³¹³ These documents are primarily concerned with duties rather than rights as can be seen in the Draft Declaration of 1949, which lists just four rights as opposed to ten duties.³¹⁴ The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 24 October 1974 ('Friendly Relations Declaration') also mentions certain 'rights' of States.³¹⁵

These documents suggest that the rights inherent in statehood include the inalienable right to territorial integrity and political independence,³¹⁶ as well as the inherent right of individual and collective self-defence against armed attacks.³¹⁷ The right to political independence (as well as the principle of sovereign equality of States) also entails the right of a State to be immune from suit in the courts of other States:³¹⁸ this right exists despite the fact that British and US courts accord it only to States which are recognized by their respective governments.³¹⁹ These courts

³⁰⁹ Blix (above, n. 17), pp. 625–7. See also H.-U. Scupin, 'Grundrechte und Grundpflichten der Staaten', in: K. Strupp/H.-J. Schlochauer (eds.), *Wörterbuch des Völkerrechts*, vol. 1 (1960), pp. 723–33; H.-E. Folz, 'Die unmittelbaren Rechte der Staaten', in: H. Miessler/E. Mock/B. Simma/I. Tammelo (eds.), *Ius humanitas. Festschrift zum 90. Geburtstag von Alfred Verdross* (1980), pp. 403–20; J.M. Ruda, 'States, Fundamental Rights and Duties', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4 (2000), pp. 673–82.

³¹⁰ Draft Declaration on Rights and Duties of States of 23 May 1949 (hereinafter ILC Draft Declaration 1949): ILC Yb. 1949, pp. 179, 286–90; also reproduced in *AJIL Suppl.*, 44 (1950), pp. 15–20. For earlier attempts at codification, see *Annuaire de l'Institut de droit international*, 28 (1921), pp. 202–24; *Revue de Droit International*, 8 (1931), pp. 44–55, 56–63.

³¹¹ Cf. A/RES/375 (IV) of 6 December 1949; A/RES/596 (VI) of 7 December 1951.

³¹² A/RES/3281 (XXIX) of 12 December 1974. The resolution was adopted with 120 votes in favour, 6 against, and 10 abstentions.

³¹³ See above, n. 102. See also the Charter of the Organization of American States of 20 April 1948 (OAS Charter), as amended: (1994) 33 ILM 987. The provisions of the Montevideo Convention have been adopted in Chapter III of the OAS Charter (now Chapter IV of the 1985 version).

³¹⁴ ILC Yb. 1949, p. 289, para. 48. ³¹⁵ A/RES/2625 (XXV) of 24 October 1970, Annex.

³¹⁶ Cf. Art. 2 (4) of the UN Charter; A/RES/2625 (XXV) of 24 October 1970, annex, Principle VI, para. 2 (d).

³¹⁷ Article 12 of the ILC Draft Declaration 1949; Art. 3 (1) of the Montevideo Convention; Art. 12 of the OAS Charter. Cf. also Art. 51 of the UN Charter.

³¹⁸ I. Seidl-Hohenveldern, 'Grundrechte, völkerrechtliche', in: the same (ed.), *Lexikon des Rechts/Völkerrecht* (3rd edn., 2001), p. 156; Folz (above, n. 309), pp. 412–5.

³¹⁹ But see R. Geimer, *Internationales Zivilprozessrecht* (5th edn., 2005), MN 563; H. Steinberger, 'State Immunity', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4 (2000), pp. 615–38 at p. 620; Frowein (above, n. 14), p. 198 who limit the right to immunity to recognized States. For the British practice, see, e.g., Shaw (above, n. 112), pp. 394–5; Jennings/Watts (above, n. 16), pp. 158–9.

do not deny the right of a State to immunity for its actions *jure imperii*, a right well established in customary international law. Being bound to their governments' (often politically motivated) statements regarding the legal status of a foreign entity or authority, these courts must base their decision on the assumption that no State exists at all. From their perspective, they are not denying immunity to a State but to a non-State entity.

Every State has the right to choose its political, economic, social and cultural system, without any interference by another State.³²⁰ A State also has the right to exercise jurisdiction over its territory, and over all persons and things within it.³²¹ This includes the right to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.³²² Every State also has the right to equality in law with every other State.³²³ If a multilateral treaty or the rules of customary international law grant certain rights to 'all States' or, if rights generally are enjoyed by 'States', then every State is entitled to exercise these rights which include the right to intervene in a case before the International Court of Justice,³²⁴ the right to be invited to participate, without vote, in the Security Council' discussion of a dispute if the State in question is a party to the dispute under consideration,³²⁵ or the right to accede to 'open treaties', i.e. treaties that are open to accession by all States.³²⁶ The last right in particular is rarely found in practice today. Most multilateral treaties since 1945, especially the founding treaties of international and regional organizations, have been 'closed treaties', which make accession dependent on the positive decision by one or more organs of the organization,³²⁷ or which limit, by application of the so-called 'Vienna-Formula',³²⁸ accession to a certain group of States.

The documents referred to above do not include a comprehensive listing of the rights of States.³²⁹ All States have the right to participate in

³²⁰ A/RES/2625 (XXV) of 24 October 1970, annex, Principle III, para. 4; A/RES/3281 (XXIX) of 12 December 1974, Art. 1. See also Art. 2 (7) UN Charter.

³²¹ Article 2 ILC Draft Declaration 1949; Art. 9 Montevideo Convention; Art. 15 OAS Charter.

³²² Article 3 (1) Montevideo Convention; Art. 12 OAS Charter.

³²³ Article 5 ILC Draft Declaration 1949; Art. 4 Montevideo Convention; Art. 9 OAS Charter; A/RES/2625 (XXV) of 24 October 1970, annex, Principle VI, paras. 1 and 2 (a).

³²⁴ Article 62 and Article 35 (2) ICJ Statute and A/RES/9 (I) of 15 October 1946.

³²⁵ Article 32 UN Charter. See also Blix (above, n. 17), p. 688.

³²⁶ Cf. Art. 305 (1) (a) UNCLOS; Art. 144 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War of 12 August 1949 (75 UNTS 287).

³²⁷ Cf. Art. 4 UN Charter and *Admission of a State to the United Nations* [1948] ICJ Rep 57 at pp. 62–3.

³²⁸ According to the 'Vienna-Formula' a treaty 'shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention'. See Art. 81 VCLT and United Nations, Office of Legal Affairs, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (1999), pp. 21–2, paras. 79–80.

³²⁹ This was stated expressly with regard to the ILC Draft Declaration 1949: ILC Yb. 1949, p. 64, para. 13.

the customary international law-making process, including the right to act as a 'persistent objector' and to contract out of a custom in the process of formation. States also have a right not to be subjected to international judicial process without their consent. The International Court of Justice found in the *Nottebohm Case* that every State has the right to lay down the rules governing the grant of its own nationality which are to be recognized by other States, as long as there exists a 'genuine connection' between the State and its national.³³⁰ The same is true of the nationality of aircraft³³¹ and ships.³³² The right of a State to grant its nationality also entails the right to exercise diplomatic protection on behalf of its nationals by taking diplomatic action or international judicial proceedings.³³³ Every State has the right to sail ships flying its flag on the high seas, the exclusive economic zone, and the territorial sea of other States³³⁴ and (depending on the particular maritime zone) to exercise limited or exclusive jurisdiction over these ships ('flag State jurisdiction').³³⁵ Similarly, its aircraft enjoy the right of overflight over the high seas and over the exclusive economic zone of other States, as well as the right of transit passage over straits which are used for international navigation.³³⁶ Landlocked States also have a certain limited right of access to and from the sea ('right of transit passage') for the purpose of exercising these rights.³³⁷ Coastal States have the right to establish the breadth of their territorial sea up to a limit not exceeding twelve nautical miles,³³⁸ as well as the right to declare an exclusive economic zone.³³⁹ Every State has a right to respect for its honour and dignity.³⁴⁰ Finally, in the event of a violation of its individual or collective rights, a State is entitled to hold the injuring State responsible and, if necessary, to resort to self-help (both retorsion and reprisal) against that State.³⁴¹

The international legal order still largely remains a contractual order, where rights and obligations are generally only created with the consent

³³⁰ Cf. *Nottebohm Case (Second Phase)* [1955] ICJ Rep 4 at pp. 21–2, 23. See also *ibid.*, p. 39 (diss. op. Read).

³³¹ Cf. Arts. 17–20 of the Convention on International Civil Aviation of 7 December 1944 (15 UNTS 295).

³³² Cf. Art. 91 UNCLOS; Art. 5 of the Geneva Convention on the High Seas of 29 April 1958 (450 UNTS 11).

³³³ Cf. *Nottebohm Case (Second Phase)* [1955] ICJ Rep 4 at p. 24. See also von Liszt/Fleischmann (above, n. 5), p. 166.

³³⁴ Cf. Arts. 90, 58 (2), 17 UNCLOS. The same is true for archipelagic sea lanes passage, cf. Arts. 52, 53 UNCLOS. See also Cassese (above, n. 28), p. 76.

³³⁵ Cf. Arts. 92 (1), 94 UNCLOS. ³³⁶ Articles 87 (1) (b), 58 (1), 38 UNCLOS.

³³⁷ Cf. Art. 125 (1) UNCLOS. Limits to this right may result from the fact that, according to para. 2, the terms and modalities for exercising freedom of transit shall be agreed between the parties. Portugal was of the view that Rhodesia had the right of 'non-intervention in the free access to the sea of land-locked countries.' (*New York Times*, 15 April 1966, p. 6).

³³⁸ Cf. Art. 3 UNCLOS.

³³⁹ Cf. Art. 57 UNCLOS. See also W. Graf Vitzthum/S. Talmon, *Alles fließt* (1998), p. 41.

³⁴⁰ See Seidl-Hohenveldern (above, n. 318), p. 156.

³⁴¹ Cf. Arts. 42, 49, 54 of the ILC Articles on State Responsibility: UN Doc. A/56/10 (2001), pp. 43–59.

of other States—this explains the limited number of rights inherent in statehood. On the other hand, such rights, although limited, do not depend on the recognition of the new State by other States, but accrue to it solely on the basis of its statehood. Other States, even those that do not recognize the new State, are under an obligation to respect those rights, that is, to treat the new State as a State in that respect.³⁴² This is why some commentators have spoken of an ‘obligation to recognize’ new States, an expression which is open to misinterpretation in this context.³⁴³

b. Optional relations between States

The term ‘optional relations’ (and the rights and obligations resulting from them) describes the relations that usually exist between States, but to which there is no legal entitlement.³⁴⁴ Riphagen pointed out that ‘most of the dealings [. . .] prohibited by the obligation not to recognize [. . .] are, anyway, dealings that each State is otherwise free to enter or not to enter into [. . .].’³⁴⁵ Optional relations include all advantages flowing from the rules of comity, as their application presupposes friendly relations between the States involved;³⁴⁶ relations which, in turn, are at the States’ discretion. However, other States generally enter into friendly relations with a new State in order to secure for themselves, on the basis of reciprocity, the advantages of comity.

For a start, all treaty relations are optional relations. A new State has no right to demand that other States conclude bilateral treaties or enter into treaty relations with it in the framework of open multilateral treaties, or even initiate treaty negotiations with it.³⁴⁷ The same is true for the establishment of economic and trade relations, diplomatic and consular relations,³⁴⁸ as well as any other official political, cultural, or sporting contacts. One can generally conclude that there is no *jus communicationis* in international law.³⁴⁹

³⁴² See American Law Institute (above, n. 289), p. 77, § 202 (1): ‘A state is not required to accord formal recognition to any other state but is required to treat as a state an entity meeting the requirements of [statehood].’

³⁴³ Cf. Lauterpacht (above, n. 166), p. 129, n. 2; the same (above, n. 1), pp. 73–5.

³⁴⁴ On the terminology, see Blix (above, n. 17), p. 637 who speaks of ‘“optional” co-operation and “optional” courtesies’.

³⁴⁵ Riphagen, Preliminary Report on State Responsibility, ILC Yb. 1980 II/1, p. 118.

³⁴⁶ Dahm/Delbrück/Wolfrum (above, n. 58), p. 75.

³⁴⁷ See the decision of the German Federal Supreme Court of 18 December 1959: BGHZ 31, 374 at pp. 382–3.

³⁴⁸ *United States Diplomatic and Consular Staff in Tehran, Provisional Measures* [1979] ICJ Rep 7 at p. 20, para. 41 (‘no State is under any obligation to maintain diplomatic or consular relations with another’). See also Art. 2 of the Vienna Convention on Diplomatic Relations of 18 April 1961 (500 UNTS 95); Art. 2 (1) Vienna Convention on Consular Relations of 24 April 1963 (596 UNTS 261).

³⁴⁹ The following article was not included in the ILC Draft Declaration 1949: ‘Every State has the *jus communications*, in the sense that it has the right to enter into trade relations with all other States, to maintain with them diplomatic, consular and other relations and to conclude with them treaties and conventions’, see ILC Yb. 1949, pp. 178, 266. On the non-existence of a *jus commercii*, see A.H. van Scherpenberg, ‘Welthandel, Prinzipien des’, in: K. Strupp/H.-J. Schlochauer (eds.), *Wörterbuch des Völkerrechts*, vol. 3 (1962), pp. 820–8 at p. 824.

Each State has discretion to decide whether another State can acquire property in its territory or carry out economic activities there, and whether its visiting officials enjoy any personal privileges and immunities. Similarly, whether a foreign State can be a party to judicial proceedings (i.e. initiate proceedings, intervene, or be sued), whether its laws and other sovereign acts are applied by the courts, and whether its judgments are recognized and enforced are questions of comity and will depend on the free will of the forum State.³⁵⁰ The same holds true for all questions of legal assistance and administrative co-operation, as well as the acceptance of passports, drivers' licences, and similar documents and certificates.

Existing States are not obliged to grant the new State landing-, traffic-, and overflight rights for its aircraft, nor to open their ports for ships flying the new State's flag.³⁵¹ Neither are they obliged to permit its citizens entry or to grant them visas. There is no obligation to maintain postal, telegraphic, and other means of communication with the new State³⁵² or to accept its stamps as proof of payment of postage.

That relations between States in these areas are optional is also shown by the fact that most of these issues are regulated either by bilateral or multilateral treaties, and by the fact that many of these advantages of friendly interstate relations (especially in States with an Anglo-American legal tradition), depend on the recognition of the new State.³⁵³ The Court of Appeals of New York has stated that: '[i]n the absence of recognition no comity exists.'³⁵⁴ With respect to the practice of States to make certain optional relations dependent upon recognition of the new State, some commentators have somewhat misleadingly spoken of a 'constitutive effect' of recognition.³⁵⁵ But it is important to distinguish between the effect of recognition on individual *rights* or *advantages*, and its effect on the *legal status* of a State. In the latter case, recognition is without constitutive effect.³⁵⁶

3. *Justification for the withholding of the rights inherent in statehood*

Withholding or denying the rights inherent in statehood encroaches upon the sovereignty of a State, and constitutes an internationally wrongful act.³⁵⁷ Withholding optional relations, on the other hand, is within the discretion of each State; it is lawful, although unfriendly, behaviour and does not require any further justification.³⁵⁸ Where there is no legal

³⁵⁰ Blix (above, n. 17), p. 623.

³⁵¹ Cf. H. Haedrich, 'Unfreundliche Handlung', in: K. Strupp/H.-J. Schlochauer (eds.), *Wörterbuch des Völkerrechts*, vol. 3 (1962), pp. 469–70 at p. 469; Combacau (above, n. 10), p. 275. There is, however, such a right in cases of emergency, cf. S/RES/670 (1990) of 25 September 1990, para. 8.

³⁵² Cf. G. Hafner, 'Verkehr', in: I. Seidl-Hohenveldern (ed.), *Lexikon des Rechts/Völkerrecht* (3rd edn., 2001), pp. 465–6 at p. 465.

³⁵³ Cf. Jennings/Watts (above, n. 16), pp. 158–60.

³⁵⁴ *R.S.F.S.R. v Cibrario*, 235 NY 255 at p. 262 (CA NY 1923).

³⁵⁵ Cf. Brownlie (above, n. 16), pp. 88–9.

³⁵⁶ See above s. II.

³⁵⁷ See also Blix (above, n. 17), p. 697.

³⁵⁸ Blix (above, n. 17), p. 628. See also K.J. Partsch, 'Retorsion', in: K. Strupp/H.-J. Schlochauer (eds.), *Wörterbuch des Völkerrechts*, vol. 3 (1962), p. 110.

obligation upon States to perform certain actions, they are free not to take those actions at any time, without having to give any reasons. To this extent, non-recognition can be regarded as being at the unfettered discretion of States.³⁵⁹ If optional relations are withheld from a new State for political reasons it can, by way of retaliation, respond with unfriendly but lawful acts (retorsion).³⁶⁰ But reprisals will not be permitted, as there has been no internationally wrongful act on the part of the non-recognizing States. If optional relations are withheld in response to the creation of the new State by way of an illegal act *erga omnes*, then such withholding has itself the character of a retorsion. To the extent that optional relations only are withheld from the new State, non-recognition does not require any legal justification.

This does not apply to the withholding of rights inherent in statehood. Withholding such rights requires special justification if it is not to entail the international responsibility of the non-recognizing States,³⁶¹ and to entitle the non-recognized State to take reprisals. As the majority of non-recognition cases concern the withholding of optional relations, the question of justification for non-recognition has hardly been dealt with in the legal literature. In contrast to the situation before national courts, a declaration by the government of the non-recognizing State that a particular entity does not constitute a State is insufficient justification at the international level especially as these declarations are most often politically motivated and do not reflect the actual situation under international law. Two possible justifications for the withholding of rights inherent in statehood spring to mind: the call for non-recognition by organs of the United Nations and the legal regime of countermeasures (reprisals) in respect of a violation of international law by the new State.

a. Call for non-recognition by the United Nations

Most commentators, when considering whether United Nations resolutions can justify actions that would otherwise violate international law, distinguish between binding decisions of the Security Council under Chapter VII of the United Nations Charter and mere recommendations of the Security Council or the General Assembly.³⁶²

(1) Binding decisions of the Security Council

Articles 41 and 42 of the UN Charter demonstrate that the Security Council can call on member States to take measures against a State that

³⁵⁹ See Kelsen (above, n. 122), p. 390. See also Australia's statements in the oral proceedings in the *East Timor* case: 'recognition is a discretionary matter for each State (*Counter Memorial of the Government of Australia* (1 June 1992), p. 157, § 350).

³⁶⁰ Cf. M. Hahn, 'Retorsion', in: I. Seidl-Hohenveldern (ed.), *Lexikon des Rechts/Völkerrecht* (3rd edn., 2001), pp. 339–41 at p. 339; Haedrich (above, n. 351), p. 469.

³⁶¹ Cf. Art. 1 of the ILC Articles on State Responsibility: UN Doc. A/56/10, 2001, 43–59.

³⁶² Cf. Kewenig (above, n. 181), pp. 21–2; E.-U. Petersmann, 'Internationale Wirtschaftssanktionen als Problem des Völkerrechts und des Europarechts', *Zeitschrift für Vergleichende Rechtswissenschaft*, 80 (1981), pp. 1–28 at pp. 18–19.

run counter to their international legal obligations *vis-à-vis* that State or their obligations under international law in general. A 'complete or partial interruption of [. . .] air [. . .] communication,'³⁶³ for example, will usually violate obligations under existing air traffic agreements, and taking measures involving the use of armed force will violate the prohibition on the use of force. A further indication that the Security Council can order measures that would otherwise constitute an internationally wrongful act is found in Art. 103 of the Charter, which establishes that the obligations of the Members of the United Nations under the present Charter shall prevail over their obligations under any other international agreement.³⁶⁴ Obligations under the present Charter are not only those that flow directly from the Charter, but also those that result from a binding decision of the Security Council in accordance with Article 25 of the Charter.³⁶⁵ The inference generally drawn from these articles is that an internationally wrongful act can be justified by a binding decision of the Security Council calling for such an act.³⁶⁶ It must, however, be distinguished whether the action is directed against a member or a non-member of the United Nations. Article 25 of the UN Charter requires member States to 'accept and carry out the [binding] decisions of the Security Council'; the question of justification is therefore not really an issue with regard to actions directed at member States because it can be argued that any measure ordered by the Security Council against a member State is covered by its consent to the relevant Charter provisions. On the other hand, there seems to be no legal basis on which to justify otherwise unlawful measures ordered by Security Council *vis-à-vis* non-members of the organization. Non-member States have consented neither to the UN Charter, a *pactum tertii*, nor are the Council's decisions as such binding on them.³⁶⁷ In the legal literature it has been suggested that non-members can probably at least claim damages from the States that violate their obligations *vis-à-vis* them.³⁶⁸ This result, however, is not consistent: if the measure cannot be justified by a Security Council decision and thus is unlawful, the addressee of the measure will be entitled to the cessation of the internationally wrongful act and to the continued performance of the obligation.³⁶⁹ This would, at least theoretically, undermine the system of collective security in all cases where a measure against non-member States could not be justified by any other reason (for example, as a collective countermeasure). In such cases, the addressee of the measure would also be entitled to take reprisals

³⁶³ Article 41 UN Charter. ³⁶⁴ Cf. Combacau (above, n. 10), p. 268.

³⁶⁵ *Case Concerning Questions of Interpretation and Application of the [1971] Montreal Convention Arising From the Aerial Incident at Lockerbie (Libya v UK; Libya v US)* [1992] ICJ Rep 3 at p. 15, para. 39 and p. 114 at p. 126, para. 42. See also R. Bernhardt, 'Article 103', in: B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2nd edn., 2002), pp. 1292–302 at p. 1295–6, MN 9.

³⁶⁶ See Kewenig (above, n. 181), p. 21; Petersmann (above, n. 362), p. 18.

³⁶⁷ Cf. Bernhardt (above, n. 365), p. 1298, MN 18, Combacau (above, n. 10), pp. 286–8.

³⁶⁸ See Bernhardt (above, n. 365), p. 1298, MN 18.

³⁶⁹ Cf. Art. 29 of the ILC Articles on State Responsibility: UN Doc. A/56/10 (2001), p. 50.

against the UN member States implementing the decision of the Security Council. Such scenarios are conceivable, as threats to the peace which may trigger Security Council action are not necessarily identical with a violation of the prohibition on the use of force found in Art. 2 (4) of the UN Charter.³⁷⁰ Threats to the peace usually constitute a breach of an international obligation, but not necessarily so.³⁷¹ Even if there is a such a breach, it will not always be a breach of an obligation *erga omnes* that will entitle all States to take countermeasures.

To date, the Security Council has imposed sanctions under Chapter VII against two non-member States: Rhodesia³⁷² and the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY).³⁷³ The Badinter Commission opined that the Socialist Federal Republic of Yugoslavia (SFRY) ceased to exist on 27 April 1992 at the latest.³⁷⁴ The international community rejected an automatic succession of the FRY to the SFRY's membership of the United Nations.³⁷⁵ As a result, the FRY had to be admitted as a new member to the United Nations on 1 November 2000.³⁷⁶ The Security Council, in resolution 757 (1992) of 30 May 1992, imposed several sanctions against the FRY including the interruption to trade relations and air communications. As the resolution itself shows, some of these measures were contrary to the treaty obligations towards the FRY. The Security Council:

Calls upon all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted prior to the date of the present resolution [. . .].³⁷⁷

³⁷⁰ Cf. H. Kelsen, *The Law of the United Nations* (1951), p. 727.

³⁷¹ Cf. Verdross/Simma (above, n. 8), § 234.

³⁷² S/RES/232 (1966) of 16 December 1966; S/RES/253 (1968) of 29 May 1968; S/RES/277 (1970) of 18 March 1970; S/RES/388 (1976) of 6 April 1976; S/RES/409 (1977) of 27 May 1977. For the view that these sanctions were directed at a non-member State, see Combacau (above, n. 10), p. 137, n. 11; C. Leben, 'Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale', *AFDI*, 28 (1982), pp. 9–77 at p. 28.

³⁷³ S/RES/757 (1992) of 30 May 1992, paras. 4, 5, 7, 8; S/RES/1160 (1998) of 31 March 1998, para. 8.

³⁷⁴ See *Opinion No. 8 [Extinction of the SFRY]* (1992), 92 ILR 199 at p. 202; *Opinion No. 10 [Recognition of the FRY (Serbia and Montenegro)]* (1992), 92 ILR 206 at pp. 207–8; *Opinion No. 11 [Dates of Succession]* (1993) 32 ILM 1587 at p. 1588. See also above s. III.1.

³⁷⁵ Siehe S/RES/757 (1992) of 30 May 1992, preambular para. 10; S/RES/777 (1992) of 19 September 1992; A/RES/47/1 (1992) of 22 September 1992. See M. Wood, 'Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties', *Max Planck Yearbook of United Nations Law*, 1 (1997), pp. 231–57 at pp. 241–51; V. Jovanovic, 'The Status of the Federal Republic of Yugoslavia in the United Nations', *Fordham ILJ*, 21 (1998), 1718–36; and *Application for Revision of the Judgment of 11 July 1906 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Preliminary Objections, Judgment of 3 February 2003, paras. 25–51.

³⁷⁶ S/RES/1326 (2000) of 31 October 2000; A/RES/55/12 (2000) of 1 November 2000.

³⁷⁷ S/RES/757 (1992) of 30 May 1992, para. 11. Similar provisions may be found in S/RES/748 (1992) of 31 March 1992, para. 7 and S/RES/883 (1993) v. 11.11.1993, para. 12; S/RES/670 (1990) of 25 September 1990, para. 3; S/RES/841 (1993) of 16 June 1993, para. 9; S/RES/1054 (1996) of 26 April 1996, para. 5; S/RES/1333 (2000) of 19 December 2000, para. 17.

As a reaction to events in Kosovo, further sanctions were imposed on the FRY in March 1998 which contained similar provisions.³⁷⁸

It is also of interest to note in this context that the Security Council on several occasions called upon or authorized certain States to stop and search, if necessary by the use of force, ships (including ships flying the flag of non-member States) in order to implement binding or even recommendatory economic sanctions.³⁷⁹ Such measures are difficult to reconcile with the exclusive jurisdiction of the flag State over its ships on the High Seas or in Exclusive Economic Zones.³⁸⁰

As these examples show, the Security Council seems to assume that its decisions can serve as justification for such measures, irrespective of who is implementing them or who is their addressee. This view also seems to be shared by the United States. In a statement to the ILC on the question of State responsibility, it declared that 'an act of State, properly undertaken pursuant to a Chapter VII decision of the Security Council cannot be characterized as an internationally wrongful act.'³⁸¹ But, this still leaves the question as to the theoretical basis for this justifying effect of Security Council decisions *vis-à-vis* non-member States.

As the UN Charter shows, the Security Council is meant to be capable of taking measures not only against member States, but also against non-members of the organization. Article 24 (1) confers on the Security Council 'primary responsibility for the maintenance of international peace and security'.³⁸² Article 2 (5) refers to 'any State' against which the organization is taking preventive or enforcement action while the remainder of Art. 2 speaks only of 'all Members'.³⁸³ Article 2 (6), at least indirectly, extends the Charter's collective security system to non-members.³⁸⁴ The United Nations' ultimate purpose is 'to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression

³⁷⁸ S/RES/1160 (1998) of 31 March 1998, para. 8. Para. 10 of the resolution provides: '*The Security Council, [. . .] Calls upon* all States and international and regional organizations to act strictly in conformity with this resolution, notwithstanding the existence of any rights granted or obligations conferred or imposed by any international agreement [. . .]'

³⁷⁹ Siehe S/RES/221 (1966) of 9 April 1966, para. 5 ('*Calls upon* the Government of the United Kingdom [. . .] to prevent by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia'). The Security Council had not imposed binding economic sanctions on Rhodesia; cf. S/RES/217 (1965) of 20 November 1965, para. 8. See also S/RES/665 (1990) of 25 August 1990, para. 1 (Iraq); S/RES/787 (1992) of 16 November 1992, para. 12; S/RES/820 (1993) of 17 April 1993, para. 29 (FRY); S/RES/875 (1993) of 16 November 1993, para. 1; S/RES/917 (1994) of 6 May 1994, para. 10 (Haiti); S/RES/1132 (1997) of 8 October 1997, para. 8 (Sierra Leone).

³⁸⁰ See Art. 110 UNCLOS. The same applies to the Exclusive Economic Zone: Art. 58 (2) UNCLOS.

³⁸¹ UN Doc. A/CN.4/488, 25 March 1998, p. 95; also reproduced in (1998) 37 ILM 485.

³⁸² See also Art. 39 UN Charter.

³⁸³ See Art. 2 (7) UN Charter according to which the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any 'State' shall not prejudice the application of enforcement measures under Chapter VII of the Charter.

³⁸⁴ Simma (above, n. 186), p. 257 writes that Art. 2 (6) 'subjects them [non-member States] to the activities of the organization.'

of acts of aggression or other breaches of the peace [. . .]'.³⁸⁵ In the *Reparation for Injuries* case, the ICJ held that 'the vast majority of the members of the international community [assembled in the United Nations], had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone'.³⁸⁶ Following that dictum, one could argue that these States were also able to create a *universal system of collective security* and, in light of the cited articles of the Charter, that they intended to do so.³⁸⁷ The issue here is not to establish a general power of the Security Council power to decide on right and wrong, or even to turn wrong into right.³⁸⁸ Such far-reaching legislative power can neither be inferred from the Charter nor established by a binding resolution. The issue really is whether an otherwise unlawful measure is justified when the Security Council decided that it should be taken to maintain or restore international peace and security. Binding decisions by the Security Council are not listed amongst the 'circumstances precluding wrongfulness in Part I, Chapter V of the ILC Articles on State Responsibility'.³⁸⁹ Article 59, however, expressly states that 'these articles are without prejudice to the Charter of the United Nations'.³⁹⁰ The problem with this line of argument—much like the ICJ's dictum in the *Reparation for Injuries* case—is that it does not answer, within the framework of Art. 38 (1) of the ICJ Statute, the question of the legal basis of this universal system of collective security.³⁹¹ The ICJ, in the *Reparations for Injuries* case, had effectively created new law.³⁹²

In the present case, the justifying effect of binding decisions of the Security Council can be based on customary international law. This

³⁸⁵ Article 1 (1) UN Charter. See also para. 1 of the preamble of the Charter.

³⁸⁶ [1949] ICJ Rep 174 at p. 185. See also above s. III.2.c. On the binding force of customary international law rules on newly established States, see M. Schweitzer, 'New States and International Law', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 3 (1997), pp. 582–7 at pp. 584–5.

³⁸⁷ Kelsen (above, n. 370), p. 109 notes that in Art. 2 (6) the Charter shows the tendency to be the law not only of the United Nations but also of the whole international community. On the UN Charter as the 'Constitution of the international community' and the Security Council as 'guarantor of international peace and security', see Simma (above, n. 186), pp. 258–61; C. Tomuschat, 'Obligations Arising for States without or against Their Will', *RdC*, 241 (1993-IV), pp. 195–374 at pp. 252–6.

³⁸⁸ But this seems to have been the position taken by G. Dahm, 'Die völkerrechtliche Verbindlichkeit von Empfehlungen internationaler Organisationen', *Die Öffentliche Verwaltung*, 12 (1959), pp. 361–7 at p. 366; the same, *Völkerrecht*, vol. 2 (1961), p. 32.

³⁸⁹ See Arts. 20–7 of the ILC Articles on State Responsibility: UN Doc. A/56/10 (2001), pp. 48–50.

³⁹⁰ See also the commentary on Art. 54 of the ILC Articles on State Responsibility where it is expressly stated that 'institutional reactions in the framework of international organizations [. . .] where it occurs under the authority of Chapter VII of the United Nations Charter, is not covered by the Articles.' (UN Doc. A/56/10 (2001), p. 350, para. 2).

³⁹¹ The legal basis of the objective legal personality can be found neither in treaty law nor in customary international law. There is also no general principle of law that would establish such legal personality.

³⁹² Some of the individual opinions are revealing in this respect: [1949] ICJ Rep 174 at p. 191 (ind. op. Alvarez); p. 205 (diss. op. Badawi Pasha).

is suggested by the Security Council's practice of directing binding decisions for sanctions under Chapter VII of the UN Charter at 'all States'³⁹³ and its practice of imposing sanctions on non-member States. This position is also supported by the above quoted statement of the United States. Further support for this position is found in the practice of former non-members such as Switzerland,³⁹⁴ and the practice of international organizations which, in their voluntary implementation of measures ordered by the Security Council, have based their actions on the relevant Security Council resolutions rather than justifying them as individual countermeasures in response to breaches of international obligations owed to them.³⁹⁵ If non-members also base their actions on binding Security Council decisions, then these decisions must have an objective justifying effect. This is not altered by the fact that some of the measures were directed at member States, as neither non-members nor international organizations can rely on Art. 103 of the UN Charter as against those States.³⁹⁶

A binding request by the Security Council not to recognize a new State can therefore justify the withholding from a new State the rights inherent in statehood. With the exception of Rhodesia, however, the Security Council has never expressly based its call for non-recognition on Chapter VII of the Charter.³⁹⁷ Even then it only did so more than four years after the first call for non-recognition in a non-binding resolution. The issue of whether resolutions can have binding effect beyond Chapter VII is most contentious. In the case of some homeland States, the call for non-recognition is not even found in a formal resolution, but in a statement issued by the President of the Security Council after informal consultations of the Council members. These presidential statements, much like General Assembly resolutions, are not accorded binding effect.³⁹⁸ One therefore must investigate whether recommendations by the Security Council or the General Assembly can also have a justifying effect.

(2) Recommendations of the Security Council and the General Assembly

There is controversy in the legal literature over whether mere recommendations by the Security Council or General Assembly are capable of justifying an otherwise internationally wrongful act.³⁹⁹ Insofar as a justifying

³⁹³ See also Tomuschat (above, n. 387), pp. 252–3; Simma (above, n. 186), p. 261.

³⁹⁴ Switzerland became a member of the UN on 10 September 2002.

³⁹⁵ For the practice of Switzerland, see references in Graf Vitzthum (above, n. 113), pp. 143–4, MN 13.

³⁹⁶ See Bernhardt (above, n. 365), p. 1298, MN 19.

³⁹⁷ S/RES/277 (1970) of 18 March 1970, para. 2.

³⁹⁸ See S. Talmon, 'The Statements of the President of the Security Council', *Chinese Journal of International Law*, 2 (2003), pp. 419–65 at pp. 449–53. *Contra* P. Tavernier, 'Les déclarations du Président du Conseil de Sécurité', *AFDI*, 39 (1991), pp. 86–104 at pp. 100, 101.

³⁹⁹ *Contra*: K. Hailbronner/E. Klein, Article 10, in: B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2nd edn., 2002), pp. 257–75 at p. 274, MN 57; Verdross/Simma (above, n. 8), § 246; Leben (above, n. 372), p. 33; Kewenig (above, n. 181), p. 31, No. 9; Petersmann (above, n. 362), pp. 18–19. *Pro*: R. Lagoni/M. Núñez-Müller, 'Resolution, Erklärung, Beschluß',

effect is presumed, statements on this point remain quite vague: some authors argue that recommendations may have a 'legitimizing function'.⁴⁰⁰ According to others, they are 'a licence to take sanctioning measures',⁴⁰¹ or provide 'some backing for measures taken by individual states'.⁴⁰² However, these authors fail to state what they regard as the legal basis for their justifying effect. Furthermore, some of them do not seem entirely convinced themselves. Jochen Abr. Frowein, for example, while stating in one publication that 'even a resolution by the General Assembly could have a certain justifying effect',⁴⁰³ states in another that 'a recommendation [. . .] cannot create the necessary justification'.⁴⁰⁴ Authors advocating a justifying effect of recommendations usually make reference to a separate opinion by Judge Hersch Lauterpacht in the *South West Africa-Voting Procedure* case⁴⁰⁵ where he explained in relation to non-binding resolutions of the General Assembly that 'although *on proper occasions* they provide a *legal authorization* for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them.'⁴⁰⁶ As the text shows, Judge Lauterpacht's primary concern was with the non-binding effect of these resolutions, not their justifying effect. He also does not offer any reason for such justifying effect. Furthermore, it remains unclear what is to be considered a 'proper occasion' or, in particular, when such an occasion arises. Judge Petró, on the other hand, expressly favoured a justifying effect in his separate opinion in the *Namibia* case. He stated that:

[t]he resolutions of the Security Council constitute only recommendations which do not create any obligations for States. Nevertheless I consider that these resolutions may afford States, whether Members of the United Nations or not,

in: R. Wolfrum (ed.), *Handbuch Vereinte Nationen* (2nd edn., 1991), pp. 693–700 at p. 700, MN 26; P. De Visscher, 'Valeur et autorité des actes des organisations internationales', in: R.-J. Dupuy (ed.), *Manuel sur les organisations internationales* (1988), pp. 307–32 at p. 323 (but only in the relations between UN member States); D.C. Dicke, *Die Intervention mit wirtschaftlichen Mitteln im Völkerrecht* (1978), pp. 119–20; M. Virally, *L'organisation mondiale* (1972), p. 188; D. Bowett, *Self-Defence in International Law* (1958), pp. 241–2.

⁴⁰⁰ J. Delbrück, 'Apartheid', in: R. Wolfrum (ed.), *Handbuch Vereinte Nationen* (2nd edn., 1991), pp. 17–25 at p. 24, MN 21.

⁴⁰¹ P.J. Kuyper, *The Implementation of International Sanctions. The Netherlands and Rhodesia* (1978), p. 7.

⁴⁰² M.P. Doxey, *International Sanctions in Contemporary Perspective* (2nd edn., 1996), p. 6.

⁴⁰³ J.A. Frowein, 'Collective Enforcement and International Obligations', *ZaöRV*, 47 (1987), pp. 67–79 at p. 70. But see also *ibid.*, n. 15 ('It is not really a completely independent substantive justification but rather an important procedural presumption created by such a recommendation') and the same, 'The Internal and External Effects of Resolutions by International Organizations', *ZaöRV*, 49 (1989), pp. 778–90 at p. 786.

⁴⁰⁴ J.A. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', *RdC*, 248 (1994-IV), pp. 345–438 at p. 382 and the same, in: UN Charter (1995), Art. 39, MN 33 ('it does not appear possible to justify enforcement measures on the basis of a recommendation').

⁴⁰⁵ See, e.g., Jennings/Watts (above, n. 16), p. 46, n. 1. Cf. also Frowein (above, n. 403), p. 787.

⁴⁰⁶ [1955] ICJ Rep 67 at p. 115 (sep. op. Lauterpacht) (emphasis added). Judges who refer to this passage do so not because of any justifying effect but because of the non-binding force of resolutions of the General Assembly, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 at p. 339, para. 32 (diss. op. Gros).

legitimate grounds for taking up a position in their legal relationships with South Africa which otherwise would have been in conflict with rights possessed by that country. At the legal level, the resolutions in question have created, not obligations, but rights to take action against South Africa because of its continued presence in Namibia.⁴⁰⁷

In his view, the resolutions in question were meant to justify, *inter alia*, the partial interruption of economic relations with South Africa in relation to Namibia, including the non-application of existing treaties.⁴⁰⁸ Judge Petrén also did not provide any reason for his position. There are no indications in the UN Charter for a justifying effect and recommendations by the Security Council cannot alter the Charter.⁴⁰⁹ A general justifying effect of recommendations by organs of international organizations cannot be presumed; as subjects of international law, international organizations are also bound by general international law. In particular, the question of how recommendations are to legitimize the actions of non-members remains unanswered.⁴¹⁰

A justifying effect of recommendations by the General Assembly or the Security Council could only result from customary international law.⁴¹¹ However, the required State practice and *opinio juris* will be difficult to prove. Art. 2 (1) of the 1954 ILC Draft Code of Offences against the Peace and the Security of Mankind could be seen as an indication of the relevant *opinio juris*. There, the employment by the authorities of a State of armed force against another State was considered not to constitute an offence against the peace and security of mankind if it was based on 'a decision or recommendation of a competent organ of the United Nations'.⁴¹² United Nations practice itself is not very helpful on this point. Although both organs have recommended sanctions to 'all States' (and not just to the member States) against both members⁴¹³ and non-members,⁴¹⁴ these sanctions were mostly in line with international law⁴¹⁵ or were justified as collective countermeasures or measures of collective self-defence.⁴¹⁶ The 'Uniting for Peace' resolution

⁴⁰⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 at p. 137 (sep. op. Petrén). ⁴⁰⁸ Cf. *ibid.*, p. 136.

⁴⁰⁹ Cf. *Certain Expenses of the United Nations* [1962] ICJ Rep 151 at p. 256, para. 7 (diss. op. Koretsky).

⁴¹⁰ Dahm (above, n. 395), p. 366. For the view that recommendations and other non-binding pronouncements do not prevail over existing treaty obligations, see also Bernhardt (above, n. 365), p. 1296, MN 12; Combacau (above, n. 10), p. 284. ⁴¹¹ See above s. IV.3.a.(1).

⁴¹² ILC Yb. 1954 II, p. 149. The provision was not included in the ILC Draft Code of Crimes against the Peace and Security of Mankind. Adopted in July 1996: ILC Yb. 1996 II/2, pp. 17–56, including commentary on the articles of the Draft Code.

⁴¹³ See, e.g., A/RES/32/105 G (1977) of 14 December 1977; A/RES/33/183 E and H (1979) of 24 January 1979; S/RES/569 (1985) of 26 June 1985 (trade and economic sanctions concerning South Africa).

⁴¹⁴ See, e.g., A/RES/39 (I) of 12 December 1946 (concerning Spain); S/RES/83 (1950) of 27 June 1950 (concerning North Korea).

⁴¹⁵ See Hailbronner/Klein (above, n. 399), p. 274, MN 57; Frowein (above, n. 403), p. 70, both concerning the measures directed at South Africa.

⁴¹⁶ The measures involving the use of armed force directed at North Korea can be considered measures of collective self-defence.

of 3 November 1950⁴¹⁷ does not offer any additional insights. The General Assembly, on the initiative of the United States,⁴¹⁸ claimed in this resolution a secondary responsibility for the maintenance of international peace and security and the concomitant right to 'recommend' to members appropriate enforcement action, including military sanctions, when the Security Council fails to take the required action because of the veto of one of the permanent members. The resolution has proved very controversial and, insofar as its material provisions recommending collective measures are concerned, has never been applied since the Korean War in the 1950s.⁴¹⁹ Eric Stein and Richard Morrissey rightly pointed out that the resolution did not lead to a broadening of the powers of the General Assembly, as its proponents had hoped.⁴²⁰ In particular, it failed to establish a universal system of collective security.

A non-binding request by the General Assembly or Security Council not to recognize a new State does not constitute an independent justification for the withholding from a State of the rights inherent in statehood; it does, however, create a strong presumption that the requested behaviour is justified for other reasons (as a countermeasure, for example).⁴²¹

b. Collective countermeasures in respect of an internationally wrongful act

The withholding from a State of the rights inherent in statehood may, under certain circumstances, be justified as a collective countermeasure in respect of a violation of an internationally wrongful act.⁴²² According to the ILC Articles on State Responsibility 'countermeasures in respect of an internationally wrongful act' constitute a 'circumstance precluding wrongfulness'.⁴²³ Article 22 of the Articles reads:

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act

⁴¹⁷ A/RES/377 V (1950) of 3 November 1950. The resolution was adopted with 52 votes in favour, 5 against, and 2 abstentions.

⁴¹⁸ For background information on this resolution, see Verdross/Simma (above, n. 8), §§ 244–246; E. Stein/R. Morrissey, 'Uniting for Peace Resolution', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4 (2000), pp. 1232–5; Bowett (above, n. 399), p. 242, n. 1.

⁴¹⁹ The resolutions in question are A/RES/498 (V) of 1 February 1951 and A/RES/500 (V) of 18 May 1951. See also Hailbronner/Klein (above, n. 399), pp. 266–7, MN 36.

⁴²⁰ Stein/Morrissey (above, n. 418), p. 1235. See also Leben (above, n. 372), p. 33 and the references to the French literature, *ibid.*, p. 33, n. 81.

⁴²¹ Dahm, *Völkerrecht*, vol. 2 (1961), p. 32. See also Frowein (above, n. 403), p. 70, n. 15; the same, (above, n. 403), p. 786; the same (above, n. 404), pp. 382, 433.

⁴²² Cf. Williams (above, n. 175), pp. 292–7; Wengler (above, n. 110), pp. 571–2; Kelsen (above, n. 122), pp. 431–2. Hillgruber, an adherent of the constitutive theory, regards non-recognition as a reprisal against the sponsor State (above, n. 27, p. 377).

⁴²³ See the heading of Part I, Chapter V of the Articles on State Responsibility. In *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the ICJ held that the wrongfulness of an act may be precluded if it qualifies as a countermeasure; see [1997] ICJ Rep 7 at p. 55, paras. 82–3.

constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three [Arts. 49–54: Countermeasures].⁴²⁴

The following sections clarify whether non-recognition qualifies as a countermeasure at all, and then examine whether the conditions for the taking of countermeasures are met in the case of the collectively non-recognized States.

(1) Non-recognition as a countermeasure

The term ‘countermeasure’ was first used in 1979 in the ILC’s deliberations of the draft articles on State Responsibility.⁴²⁵ The Rapporteur had originally suggested the term ‘sanction’ which had also been used by several members of the ILC and the Commission itself in its commentaries on earlier versions of the Draft Articles on State Responsibility.⁴²⁶ The term ‘countermeasure’ was ultimately preferred over the term ‘sanction’, as it was seen to take into account the development in modern international law ‘to reserve the term “sanction” for reactive measures applied by virtue of a decision taken by an international organization.’⁴²⁷ The ILC has defined countermeasures as non-forcible measures—which would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State—taken in response to an internationally wrongful act by the latter in order to induce it to comply with its obligations under international law, i.e. to cease any internationally wrongful act and to bring about full reparation.⁴²⁸ This definition clearly shows that ‘countermeasures’ is nothing but another term for the traditional term ‘peacetime reprisals’.⁴²⁹ The ILC preferred the new term, as ‘reprisals’ had more recently been limited to action taken in time of international armed conflict, that is, as equivalent to belligerent reprisals. Countermeasures are to be contrasted with ‘retorsion’, unfriendly conduct which is not inconsistent with any international obligation of the State engaging in it, even though it may be a response to an internationally wrongful act or an unfriendly act by another State, in order to induce the latter to cease its conduct.

⁴²⁴ Article 22 of the ILC Articles on State Responsibility corresponds to Art. 30 of the 1980 ILC Draft Articles on State Responsibility (ILC Yb. 1980 II/2, pp. 30–4). See also the commentary in ILC Yb. 1979 II/2, pp. 115–22 and UN Doc. A/56/10 (2001), pp. 180–3.

⁴²⁵ ILC Yb. 1979 I, pp. 171, 175. On the term ‘countermeasures’, see E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984), pp. 45–6.

⁴²⁶ See M. Spinedi, ‘International Crimes of State. The Legislative History’, in: J. Weiler/A. Cassese/M. Spinedi (eds.), *International Crimes of State. A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (1989), pp. 7–138 at pp. 38–9, and the references there given.

⁴²⁷ ILC Yb. 1979 II/2, p. 121. See also ILC YB 1979 I, pp. 57–63, 171, 175. For criticism of the distinction between countermeasures and sanctions, see R. Wolfrum, in: *Berichte der Deutschen Gesellschaft für Völkerrecht*, 37 (1998), p. 115.

⁴²⁸ See the introductory commentary to Part III, Chapter III of the ILC Articles on State Responsibility: UN. Doc. A/56/10 (2001), pp. 324–6.

⁴²⁹ E. Klein, ‘Gegenmaßnahmen’, *Berichte der Deutschen Gesellschaft für Völkerrecht*, 37 (1998), pp. 39–71 at p. 43; W. Fiedler, ‘Gegenmaßnahmen’, *ibid.*, pp. 9–38 at p. 29 (Point 4); Capotorti (above, n. 117), p. 257. Cf. also the definition of the term peacetime reprisal of the Institut de Droit International: *Annuaire de l’Institut de droit international*, 38 (1934), p. 708.

As the term indicates, countermeasures are not just legal consequences that automatically follow from an internationally wrongful act, and which are only recorded in a declaratory statement. They are the result of certain intentional acts and require a conscious decision on the part of the State taking them.⁴³⁰ States have been expressly called upon to take countermeasures, sometimes repeatedly—a further indication that they are not automatic legal consequences. The non-recognition of States created in violation of international law is usually based on a decision by the non-recognizing State's government. Several States notified the UN Secretary-General that they had 'decided' not to recognize Rhodesia as a State. The German Federal Government listed the non-recognition of Southern Rhodesia as an independent State among the 'measures' taken in accordance with Security Council resolution 217 (1965).⁴³¹ Several States expressly wished to base the call for the non-recognition of Rhodesia on Art. 41 of the UN Charter, which authorizes the Security Council to 'decide what measures not involving the use of armed force are to be employed.'⁴³² In a resolution of 11 March 1932, the Assembly of the League of Nations had declared 'that it is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris.' On 4 May 1932 the US Acting Secretary of State stated with regard to this resolution that 'the League of Nations bound its members to a new measure of international law.'⁴³³ As non-recognition constitutes an intentional act, States can refrain from taking this action, even if they themselves thereby commit an internationally wrongful act. Every State is entitled to review the situation regularly and to consider recognizing the new State when there is a change in fact or law. This explains the Security Council's renewed calls for non-recognition of Rhodesia when important events occurred such as the proclamation of

⁴³⁰ The UN General Assembly's Committee on Collective Measures regarded non-recognition as a 'measure': UN Doc. A/1891 (1951), para. 39. ⁴³¹ See UN Doc. S/7181, 18 May 1966.

⁴³² See UN Doc. S/9676/Rev.1, 6 March 1970; SCOR, 25th year, 1530th meeting, para. 9: 'The Security Council, [. . .] 2. *Decides*, in accordance with Article 41 of the United Nations Charter, that all Members of the United Nations should refrain from recognizing that illegal régime or from rendering any assistance to it, and urges States not Members of the United Nations, having regard to the principles stated in Article 2 of the Charter, to act accordingly.' That non-recognition was considered a measure may also be seen in S/RES/388 (1976) of 6 April 1976, preambular para. 2 of which states: 'Reaffirming the measures provided for in these resolutions [including S/RES/216 (1965)].' The only measure which had been called for in S/RES/216 (1965) was that States do 'not recognize this illegal racist minority régime'. Authors who have regard non-recognition as a measure under Art. 41 of the UN Charter include L.M. Goodrich/E. Hambro/A. Simons, *Charter of the United Nations. Commentary and Documents* (3rd rev. edn., 1969), pp. 312, 313; E.R. Zivier, *Die Nichtanerkennung im modernen Völkerrecht* (2nd edn., 1969), pp. 127–8; Mann (above, n. 291), p. 413; Combacau (above, n. 10), p. 191; Capotorti (above, n. 117), pp. 310–1; Baer (above, n. 40), p. 316; B. Conforti, *The Law and Practice of the United Nations* (3rd rev. edn., 2005), p. 194. See also Nkala (above, n. 111), p. 78 who labelled non-recognition 'the first non-military enforcement measure'.

⁴³³ United States, Department of State, *Press Releases* (1932), pp. 418–19; *International Conciliation* (1933), p. 416.

the republic on 1 March 1970 or the adoption of an internal settlement in 1978.⁴³⁴

Crawford, the ILC's fifth and final Rapporteur on State Responsibility, has taken the view that collective non-recognition, whether mandatory or voluntary, does not qualify as a countermeasure.⁴³⁵ This may be explained by Crawford's view that collectively non-recognized States do not constitute States, as they do not meet his additional legal criteria for statehood;⁴³⁶ for him, non-recognition can only constitute an act of retorsion, as there is no State whose rights inherent in statehood could be violated.⁴³⁷ This is a good example of the influence that the 'teachings of the most highly qualified publicists' can have on the development of international law.⁴³⁸ However, as shown earlier, additional legal criteria for statehood cannot be proved to exist. If it is assumed that non-recognized States are States in the sense of international law, then withholding from them their rights inherent in statehood constitutes an internationally wrongful act. But if it can be shown that the non-recognized States have violated their international law obligations *vis-à-vis* the non-recognizing States, then non-recognition can constitute a countermeasure.⁴³⁹ Antonio Cassese is even of the opinion that 'the countermeasure most widely resorted to is the *refusal of legal recognition* of a situation which breaches the right of self-determination.'⁴⁴⁰ As examples from State practice, he points to the collective non-recognition of Southern Rhodesia, the South African Bantustans, and the Turkish-Cypriot State.⁴⁴¹

According to Art. 41 (2) of the ILC Articles on State Responsibility, 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. As the article's heading signifies, the duty of non-recognition is a 'particular consequence' of such serious breaches. But the legal nature of such a consequence remains unclear.⁴⁴² As the ILC explains in its commentary on Art. 41, the obligation of non-recognition not only refers to the formal recognition of the situation created by these breaches, but also prohibits acts which would imply such recognition.⁴⁴³ Under certain circumstances, the omission of any act that could imply

⁴³⁴ See S/RES/277 (1970) of 18 March 1970, para. 2; S/RES/423 (1978) of 14 March 1978, para. 2.

⁴³⁵ Crawford, 'Third Report on State Responsibility, UN Doc. A/CN.4/507/Add.4, 4 August 2000, p. 13, para. 388.

⁴³⁶ On Crawford's position, see above s. III.2.a. (3). See also the statement during the ILC's deliberations during its 52nd session in 2000 that 'non-recognition in the legal context was more a reaction to the invalidity of an act, not only to its illegality. (UN Doc. A/55/10 (2000), p. 116, para. 379).

⁴³⁷ Crawford deals with collective non-recognition in the context of "unfriendly" but not unlawful reactions to the conduct of another State (retorsion).' (Third Report on State Responsibility, UN Doc. A/CN.4/507/Add.4, 4 August 2000, p. 13, para. 388). ⁴³⁸ See Art. 38 (1) (d) ICJ Statute.

⁴³⁹ See O. Schachter, 'International Law in Theory and Practice. General Course in Public International Law', *RdC*, 178 (1982-V), pp. 9-396 at p. 184.

⁴⁴⁰ A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (1995), p. 158 (emphasis added).

⁴⁴¹ *Ibid.*

⁴⁴² Frowein has argued that non-recognition is a collective reaction below the level of formal reprisals (above, n. 403), p. 77.

⁴⁴³ Commentary on Art. 41: UN: Doc. A/56/10 (2001), p. 287, para. 5.

recognition can constitute an internationally wrongful act. As the ICJ held in the *Namibia* case, the obligation not to recognize South Africa's presence in Namibia as legal meant, *inter alia*, that it was prohibited for members of the UN to invoke or apply existing bilateral and (with some limitations) multilateral treaties concluded by South Africa on behalf of or concerning Namibia, to the extent that these treaties required active intergovernmental co-operation.⁴⁴⁴ The unilateral suspension of treaties with South Africa constituted an internationally wrongful act.⁴⁴⁵ This non-recognition, at least to the extent that it occurred as a response to South Africa's illegal presence in Namibia, thus has the character of a countermeasure.

Riphagen, one of Crawford's predecessors as Rapporteur on State Responsibility, first suggested non-recognition as a possible 'response' to an internationally wrongful act in his report to the Commission in April 1980. The previously cited Art. 41 (2) of the ILC Articles can thus be traced back to him. He also regarded the non-recognition of a 'situation as "legal"' as a countermeasure. In Riphagen's view, it was obviously possible that a primary rule of international law required a State to recognize an existing factual situation created by another State as 'legal', that is as entailing legal consequences. But if the situation was created by an internationally wrongful act, there might be a duty not to recognize the situation as legal, that is to say to ignore its legal consequences.⁴⁴⁶ As examples of such consequences, Riphagen cited national jurisdiction as well as the immunity of foreign States and their property. Under certain circumstances, non-recognition could constitute an intervention in the internal affairs of a State which is prohibited by the general rules of international law. The prohibition of intervention could, however, be 'lawfully' breached' if it was committed as a countermeasure in respect of an internationally wrongful act.⁴⁴⁷ Other members of the ILC also made express reference to non-recognition as a countermeasure.⁴⁴⁸

The question of whether non-recognition can be qualified as a countermeasure must be answered not just by reference to the declaration

⁴⁴⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 at p. 55, para. 122.

⁴⁴⁵ The ICJ based the suspension of existing treaties on the obligation of non-recognition and did not rely on a fundamental change of circumstances (cf. Art. 62 VCLT).

⁴⁴⁶ See Riphagen, Preliminary Report on State Responsibility, ILC Yb. 1980 II/1, p. 115, para. 45: 'It is obviously possible that a primary rule of international law requires a State to recognize an existing factual situation created by another State as "legal", that is as entailing legal consequences. The question then may arise whether or not the fact that the situation is created by an internationally wrongful act of that State has an impact on that obligation. [. . .] There may even be a duty, under international law, of the injured State or, for that matter, of third States, not to recognize the situation as legal [. . .].' See generally, *ibid.*, pp. 115-18 and Riphagen, Third Report on State Responsibility, ILC Yb. 1982 II/1, p. 49, para. 8.

⁴⁴⁷ Riphagen, Preliminary Report on State Responsibility, ILC Yb. 1980 II/1, p. 117, para. 53. Riphagen expressly referred to Art. 30 of the 1980 Draft Articles on State Responsibility (ILC Yb. 1980 II/2, p. 33) which is largely identical with Art. 22 of the ILC Articles on State Responsibility.

⁴⁴⁸ See, e.g., ILC Yb. 1982 II/1, p. 223, para. 42. See also ILC Yb. 1983 II/1, p. 5, para. 9 and ILC Yb. 1984 I, p. 307, para. 24 ('collective sanction').

of non-recognition, but by reference to the legal consequences of non-recognition in a particular case. Non-recognition constitutes a countermeasure if it constitutes an internationally wrongful act in itself. Withholding from a State the rights inherent in statehood (unlike the withholding of optional relations) always constitutes an internationally wrongful act and must therefore be classified as a countermeasure.

(2) The non-recognized State as proper addressee of the countermeasure

A countermeasure must fulfil certain basic conditions in order to be lawful. In the first place, it must be taken in response to a previous internationally wrongful act by another State and must be directed against that State; countermeasures against third States are illegal according to the principle of individual responsibility.⁴⁴⁹ The following internationally wrongful acts may be considered: in the case of Manchukuo, breach of international treaties; in the case of Rhodesia, disregard for the right of self-determination; in the case of the homeland States, violation of the prohibition on apartheid; and in the case of the Turkish Republic of Northern Cyprus, violation of the prohibition on the use of force and the internationally wrongful occupation of foreign territory. With the exception of Rhodesia, these internationally wrongful acts were committed not by the non-recognized State itself but by another State, the so-called 'sponsor State', that was heavily involved in the creation of the new State (i.e. Japan, South Africa, and Turkey, respectively). John Fischer Williams raised this point in the context of the non-recognition of Manchukuo. In the section of his 1933 Hague Lecture on non-recognition as a 'Sanction against the Violation of Treaties', he stated:

A fairly important distinction must be noted between cases of non-recognition of annexation and non-recognition of a new State accused of taking its origin from violation of a treaty. In the case of annexation, the measure taken is immediately directed against the State deemed guilty of the unjust act; in the case of a new State, it is this State alone which is affected in the first place, even though hypothetically it could not exist at the time of the violation of the treaty and thus could not render itself guilty of any irregularity. It is not possible to say to what extent, in a given case, this distinction bears a deep difference; the non-recognition of the new State may cause few direct inconveniences (if any) to the State which is, in fact, responsible. However, in theory, the non-recognition of the new State has the effect of making the child bear the burden of events occurring before it was born, thereby visiting on the son the crimes of the father.⁴⁵⁰

A new State may not have been able to commit an internationally wrongful act that occurred before its creation, but such an act may be

⁴⁴⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7 at p. 55, para. 83; *Naulilaa* (1928), RIAA II, p. 1013 at p. 1027; *Cysne* (1930), RIAA II, p. 1035 at p. 1057. See also Art. 49 (1) of the ILC Articles on State Responsibility: UN. Doc. A/56/10 (2001), p. 56 and the commentary thereon, *ibid.*, pp. 329–31 as well as ILC Yb. 1996 II/2, p. 68, paras. 7, 8.

⁴⁵⁰ Williams (above, n. 175), p. 294 (my translation).

attributable to it. According to Art. 11 of the ILC Articles on State Responsibility, such attribution is possible if the State 'acknowledges and adopts' the wrongful conduct as its own.⁴⁵¹ For example, the Permanent Court of Arbitration held Greece responsible for a Cretan breach of a treaty of concession, which occurred at a time when the autonomous island State still belonged to the Ottoman Empire, because Greece had endorsed the breach after it gained sovereignty over the island.⁴⁵² The same is also said to hold true for internationally wrongful acts *per se*, such as the entering of neutral territory or the arbitrary destruction of a ship that is not subject to prize law.⁴⁵³ The State must not merely approve of the conduct, but must acknowledge and adopt it 'as its own'. Where the acknowledgement and adoption is unequivocal and unqualified, it may be given retroactive effect.⁴⁵⁴ The attribution to a State of conduct that occurred before its creation also arises from Art. 10 (2) of the ILC Articles on State Responsibility which establishes that 'the conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State [. . .] shall be considered an act of the new State under international law.'⁴⁵⁵

In the case of Manchukuo, unequivocal approval and acknowledgement of the Japanese conduct may be found in the declaration of independence of 1 March 1932 which reads: 'Happily, through the aid of the army of a neighbour Power, it has been possible to expel these corrupt elements from the area where they had entrenched themselves for many years past. [. . .] The present situation places us in a position to strive for our own national independence.'⁴⁵⁶ The Turkish Cypriots have called the Turkish intervention of July 1974 a 'peace operation' and refer to Turkish troops as a 'liberating army'⁴⁵⁷ which is stationed in northern Cyprus at the request of and with the approval of the Turkish Republic of Northern Cyprus.⁴⁵⁸ Acknowledgement and adoption of an internationally wrongful act by a new State as its own need not be expressly declared, but can be inferred from its conduct.⁴⁵⁹ If the new State takes

⁴⁵¹ Article 11: 'Conduct which is not attributable to a State [. . .] shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.' See also the ILC' commentary thereon: UN Doc. A/56/10 (2001), pp. 118–22.

⁴⁵² *Affaire relative à la concession des phares de l'Empire ottoman* (1956), RIAA XII, p. 155 at p. 198. ⁴⁵³ *Ibid.*, pp. 198–9.

⁴⁵⁴ Commentary on Art. 11 of the ILC Articles on State Responsibility: UN Doc. A/56/10 (2001), p. 120.

⁴⁵⁵ See also the commentary on Art. 10 of the ILC Articles in State Responsibility: UN Doc. A/56/10 (2001), pp. 114–18 and the references there given.

⁴⁵⁶ Manchukuo Government, Department of Foreign Affairs, *Proclamations, Statements and Communications of the Manchukuo Government* (1932), pp. 3–6.

⁴⁵⁷ See the statement of Rauf Denktaş, the leader of the Turkish Cypriot community, before the Foreign Affairs Committee of the House of Commons: House of Commons, Foreign Affairs Committee, *Third Report* (1987), p. 5.

⁴⁵⁸ See Z.M. Necatigil, 'The Cyprus Conflict in International Law', in: C.H. Dodd (ed.), *The Political, Social and Economic Development of Northern Cyprus* (1993), pp. 46–74 at p. 68.

⁴⁵⁹ See the commentary on Art. 11 of the ILC Articles on State Responsibility: UN Doc. A/56/10 (2001), p. 122, para. 9.

advantage of the internationally wrongful conduct of another State for its own purposes, this clearly constitutes an unequivocal acknowledgment and adoption of the conduct in question as its own. In the case of a State that owes its existence to the internationally wrongful conduct of another State, acknowledgement and adoption of this conduct as its own is inevitable. But attribution of conduct will only lead to international responsibility if the conduct is unlawful in terms of the adopting State's own international obligations.⁴⁶⁰ If the Japanese occupation of Manchuria is regarded merely as a breach of international agreements,⁴⁶¹ then the international responsibility of Manchukuo cannot be established, since Manchukuo was not a party to these treaties and so could not violate any treaty obligations. On the other hand, a violation of the prohibition on the use of force fails, as that prohibition had not yet acquired the force of customary international law. But the fact that Greece was not a party to the breached concession treaty did not prevent the Permanent Court of Arbitration from holding it responsible for Crete's conduct. It could be argued that, in the case of breach of treaty, the international responsibility of the adopting State will depend on whether it would have committed an internationally wrongful act in a similar situation (i.e. if it had been a party to the agreement).

However, the new States may be held responsible not just for the conduct of their sponsor States (to the extent that this conduct can be attributed to them), but also for their own internationally wrongful acts. According to Art. 16 of the ILC Articles on State Responsibility, a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so, if it does so with the knowledge of the circumstances of the internationally wrongful act and if the act would be internationally wrongful if committed by that State. In the case of the collectively non-recognized States, the aid can be seen in their creation or their actual existence. Both Manchukuo and the Turkish Republic of Northern Cyprus were created on territory occupied in violation of international law. Occupation of territory is—like apartheid or the maintenance by force of colonial domination—an internationally wrongful act which has a continuing character.⁴⁶² The creation of an allied State on occupied territory perpetuates and entrenches the occupation, and thus aids the occupying State. The occupying State regularly has the presence of its troops legalized by a treaty with the new State's government, and declares the new State's defence the common concern of both States.⁴⁶³ The

⁴⁶⁰ *Ibid.*, p. 122, para. 7.

⁴⁶¹ I.e. Art. 10 of the Covenant of the League of Nations, the Kellogg–Briand Pact, or the Treaty Relating Principles and Policies to be followed in matters concerning China, signed at Washington on 6 February 1922 (Washington Nine Power Treaty).

⁴⁶² See the commentary on Art. 14 of the ILC Articles on State Responsibility: UN Doc. A/56/10 (2001), p. 139, para. 3.

⁴⁶³ See, e.g., the Protocol between Japan and Manchukuo of 15 September 1932: LNOJ, Spec. Suppl. No. 111, p. 79.

homeland States, by their very existence, supported South Africa's unlawful conduct. Although they did not themselves pursue a policy of apartheid, their declaration of independence facilitated the consolidation and perpetuation of apartheid in South Africa proper. Creating independent States with their own citizenship made it possible to deprive millions of black South Africans of their political and economic rights in South Africa.

The creation of a new State on illegally occupied territory does not simply aid or assist in the commission of an internationally wrongful act. It is itself an internationally wrongful act. While the forcible secession of parts of a State (without outside intervention) is not prohibited by international law,⁴⁶⁴ the independence declaration of an illegally occupied territory, even if it is, as in the case of northern Cyprus, supported by the majority of its population, violates the territorial integrity of the parent State.⁴⁶⁵ Principle 1, paragraph 10, of the Friendly Relations Declaration requires that 'the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force.'⁴⁶⁶ 'Another State' can be construed to include the new State created in the occupied territory,⁴⁶⁷ as the new State acquired its territory through the use of force by its sponsor State whose conduct can be attributed to it. The only exception seems to be where, as in the case of Bangladesh, the people living in the occupied territory can claim the right to self-determination. Such a right, however, has not been accepted by the international community in the cases of the non-recognized States.

The conduct which entails the international responsibility of the non-recognized States lies in their creation or existence. Such conduct either is itself an internationally wrongful act, or constitutes aid or assistance in the commission of an internationally wrongful act of continuing character by the sponsor State. This is corroborated by various resolutions in which the Security Council and the General Assembly condemned 'the illegal declaration of independence in Southern Rhodesia'⁴⁶⁸ and rejected 'the declaration of "independence" of the Transkei' on 26 October 1976 (rather than the South African law of 9 July 1976 that released Transkei into independence).⁴⁶⁹ Similarly, in the case of the Turkish Republic of Northern Cyprus the Security Council did not deplore the conduct of

⁴⁶⁴ *Reference re Secession of Quebec* (1998) 37 ILM 1340 at p. 1369, para. 112 and p. 1374, paras. 140, 141.

⁴⁶⁵ Cf. S/RES/550 (1984) of 11 May 1984, paras. 2 and 4 where the Security Council condemned the 'secessionist actions' and called upon all States to respect, *inter alia*, the territorial integrity of the Republic of Cyprus. ⁴⁶⁶ A/RES/2625 (XXV) of 24 October 1970, annex.

⁴⁶⁷ See also ILC Yb. 1949, p. 112 where it was stated that 'territorial acquisitions by another State' in Art. 11 of the ILC Draft Declaration 1949 also included acquisitions by a (puppet) State created in occupied territory. ⁴⁶⁸ See S/RES/288 (1970) of 17 November 1970, para. 1.

⁴⁶⁹ A/RES/31/6 A (1976) of 26 October 1976, para. 2. The same applies to other homeland States; see A/RES/32/105 N (1977) of 14 December 1977, para. 2; A/RES/34/93 G (1979) of 12 December 1979, para. 2. The representative of the African States spoke of the 'illegal proclamation of the alleged independence of Transkei' (SCOR, 31st year, 1981st meeting, 21 December 1976, p. 5, para. 34).

Turkey but the 'declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus'.⁴⁷⁰ According to Art. 49 of the ILC Articles on State Responsibility, the object of countermeasures is not to punish the State but to induce it to comply with its obligations, that is to cease the internationally wrongful act, if it is continuing.⁴⁷¹ By withholding from the non-recognized State the rights inherent in statehood, it is to be induced to dissolve itself. This also finds expression in Security Council resolution 541 (1983) where the Council expressly called for the 'withdrawal' of the 'declaration by the Turkish Cypriot authorities [. . .] which purports to create an independent State in northern Cyprus'.⁴⁷²

(3) The competence of non-recognizing States to take the countermeasure

The right to take countermeasures is reserved to the State that has been injured by the internationally wrongful act. A secession in violation of international law, however, usually only injures the parent State (or, as in the case of Rhodesia, the administering power). In the case of the Turkish Republic of Northern Cyprus, an injury to the other parties to the 1960 Treaties may also be relevant. If the parent State releases a part of its territory into independence contrary to international law, as in the case of the homeland States, there will be no injured State at all. States other than the injured States must also be entitled to take countermeasures, if collective non-recognition is to be justified as a countermeasure. At present, the law on the question of whether and to what extent countermeasures may be taken by third States has still not been finally settled.⁴⁷³

(a) *Countermeasures taken by States other than the injured State*

The idea that, where there has been a grave breach of certain fundamental rules of international law, not only the injured State but all States as 'representatives of mankind'⁴⁷⁴ can and should take action in defence of the international legal order, may be found in the legal literature as early as the nineteenth century. In 1886, Johann Caspar Bluntschli wrote:

If the violation of international law constitutes a public danger it is not just the injured State, but the other States which have the power to protect the international legal system, that are to take action against such violation and to act for the reestablishment and the safeguarding of the international legal order.⁴⁷⁵

⁴⁷⁰ S/RES/541 (1983) of 18 November 1983, para. 1.

⁴⁷¹ Cf. Art. 30 (a) of the ILC Articles on State Responsibility and the commentary on Art. 49 of the same Articles: UN Doc. A/56/10 (2001), pp. 328–9, para. 1. See also Frowein (above, n. 404), p. 431.

⁴⁷² S/RES/541 (1983) of 18 November 1983, para. 2.

⁴⁷³ Cf. Art. 54 of the ILC Articles on State Responsibility and the commentary thereto: UN Doc. A/56/10 (2001), pp. 349–55.

⁴⁷⁴ A.W. Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (1st edn., 1844), § 110 at p. 191.

⁴⁷⁵ Bluntschli (above, n. 29), pp. 263–4, § 471 (translation supplied). See also Heffter (above, n. 474), § 110 at p. 191; similarly in *ibid.* (8th edn. ed. by F.H. Geffcken, 1888), § 111 at p. 238. Other authors,

Bluntschli identified ten violations of international law as constituting a public danger, including armed attack against foreign territory without a cause for war and the suppression of foreign and independent peoples by brute force.⁴⁷⁶ Several modern authors are of the opinion that third States, as representatives of the international community or mankind, are entitled to take countermeasures in respect of the violation of obligations *erga omnes*, either jointly with the injured State or on their own.⁴⁷⁷ These authors mostly base their view on the judgment in the *Barcelona Traction* case, where the ICJ distinguished between ‘obligations of a State toward the international community as a whole, and those arising *vis-à-vis* another State’. The Court explained:

33. [. . .] By their very nature the former are *the concern of all States*. In view of the importance of the rights involved, all States can be held to have a *legal interest* in their protection; they are obligations *erga omnes*.
34. Such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.⁴⁷⁸

Based on the statement that all States have a ‘legal interest’ in the protection of certain rights and the fulfilment of the resulting obligations, these authors draw the conclusion that all States must be able to take countermeasures for the protection of these rights. This presumes that if an obligation towards all States exists, all States must be injured by its violation. However, in paragraph 91 of this judgment, the ICJ, expressly referring to paragraph 34, stated that ‘on the universal level, the instruments which embody human rights do not confer on States the *capacity to protect* the victims of infringements of such rights irrespective of their nationality.’⁴⁷⁹ This is an indication that a ‘legal interest’ in the protection of certain rights is not equivalent to the ‘capacity to protect’ or even the right to take countermeasures if those rights are violated. With respect to the case in question, the ICJ held that a legal interest in the protection of human rights alone does not confer on States a general right of action (*jus standi*) in order to protect such rights irrespective of the nationality of the victim. Such *jus standi* can only derive from

however, rejected such a ‘universal justice [Weltjustiz] [. . .], which would do more harm than it would prevent’; see the references in *ibid.*, p. 241, n. 8.

⁴⁷⁶ Bluntschli (above, n. 29), p. 264, § 472.

⁴⁷⁷ See, e.g., Schachter (above, n. 439), pp. 182–4; Verdross/Simma (above, n. 8), § 1343; Frowein (above, n. 404), pp. 405–22; Simma (above, n. 186), pp. 313–17; Tomuschat (above, n. 28), p. 84.

⁴⁷⁸ *Barcelona Traction, Light and Power Company, Limited, Second Phase* [1970] ICJ Rep 3 at p. 32, paras. 33, 34 (emphasis added). For other obligations *erga omnes*, see *East Timor* [1995] ICJ Rep 90 at p. 102, para. 29 (right to self-determination); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections)* [1996] ICJ Rep 595 at p. 616, para. 31 (genocide).

⁴⁷⁹ *Barcelona Traction, Light and Power Company, Limited, Second Phase* [1970] ICJ Rep 3 at p. 47, para. 91 (emphasis added).

relevant universal or regional human rights treaties.⁴⁸⁰ The judgment thus affirms the dictum in the much criticized *South West Africa* case, where the ICJ held that ‘the equivalent of an “*actio popularis*”, or right resident in any member of a community to take legal action in vindication of a public interest [. . .] is not known to international law as it stands at present.’⁴⁸¹

The work of the ILC also confirms that the *Barcelona Traction* case does not support the view that all States may take countermeasures in respect to the violation of obligations *erga omnes*. The Draft Articles on State Responsibility, provisionally adopted by the ILC on first reading in July 1996, provided for the taking of countermeasures by ‘all other States’ if the internationally wrongful act constituted an international crime, or if human rights, fundamental freedoms or certain collective interests of the States parties to a multilateral treaty had been violated.⁴⁸² As work on the Draft Articles progressed, this was held to be ‘far too broad’. In particular, a regime of countermeasures in respect of not-directly injured States was criticized, giving third States the right to take countermeasures in respect of any breach of human rights whatever.⁴⁸³ As a reaction to that criticism, the opportunities for third States to take countermeasures in the public interest were considerably curtailed in the Draft Articles provisionally adopted by the Drafting Committee on second reading in August 2000. According to these Draft Articles, third States were only to take countermeasures in two circumstances. First, at the request and on behalf of the injured State, if the obligation breached was owed to a group of States including the State taking countermeasures, or if the obligation breached was owed to the international community as a whole.⁴⁸⁴ Secondly, on its own accord, if the internationally wrongful act constitutes a serious breach of an obligation owed to the international community as a whole, and essential for the protection of its fundamental interests.⁴⁸⁵ These new Draft Articles also met strong opposition from States and from members of the Commission itself. Particular concerns were raised over the relationship between countermeasures by third

⁴⁸⁰ See A.J.J. de Hoogh, ‘The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective’, *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, 42 (1991), pp. 183–214 at pp. 197–9; M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), pp. 210–14. Contra B. Bollecker-Stern, *La préjudice dans la théorie de la responsabilité internationale* (1973), pp. 85–6; Simma (above, n. 186), p. 296.

⁴⁸¹ *South West Africa (Second Phase)* [1966] ICJ Rep 6 at p. 47, para. 88. See also *ibid.*, pp. 387–8 (diss. op. Jessup).

⁴⁸² Article 47 (1), Art. 40 (2) (e) and (f) and (3) of the 1996 ILC Draft Articles on State Responsibility: ILC Yb. 1996 II/2, pp. 58–65; also reproduced in (1998) 37 ILM 442–67. See also the commentary on Art. 47 (formerly Art. 5), ILC Yb. 1985 II/2, pp. 25–7.

⁴⁸³ See the Report of the ILC on the work of its 52nd session, UN Doc. A/55/10 (2000), p. 104, para. 347.

⁴⁸⁴ Article 54 (1) and Art. 49 (1) of the Draft Articles on State Responsibility provisionally adopted by the Drafting Committee in August 2000. For the text of the draft articles, see UN Doc. A/CN.4/L.600, 21 August 2000.

⁴⁸⁵ Article 54 (2) and Art. 41 (1) of the Draft Articles on State Responsibility provisionally adopted by the Drafting Committee in August 2000.

States and collective measures within the framework of the United Nations. The danger of an abuse of collective countermeasures outside Chapter VII of the UN Charter was pointed to, against the background of the (counter-)measures taken by NATO States against the Federal Republic of Yugoslavia during the Kosovo conflict. As State practice shows, the line between the enforcement of international law and the pursuit of national interests is not always an easy one to draw. Some States ascribed to countermeasures by third States a rather destabilizing effect.⁴⁸⁶ Others expressly favoured the possibility of countermeasures by States other than the injured State, but only to end a violation of international law.⁴⁸⁷ Other States suggested limiting countermeasures by third States to particularly serious breaches of obligations owed to the international community as a whole.⁴⁸⁸ The ILC found that 'the current state of international law on countermeasures taken in the general or collective interest is uncertain' and 'State practice is sparse'.⁴⁸⁹ Consequently, it decided not to include in its Articles on State Responsibility a provision concerning countermeasures taken by third States. According to Art. 22, the wrongfulness of countermeasures is precluded. This provision only covers countermeasures taken by States whose individual rights have been violated or specially affected.⁴⁹⁰ But this does not mean that countermeasures by third States are generally excluded; the ILC has kept this question open. Art. 54, which serves as a saving clause, provides that, in case of breaches of obligations owed to a group of States and established for the protection of a collective interest of the group or of obligations owed to the international community as a whole, any State may take 'lawful measures' against the responsible State to ensure cessation of the breach and reparation in the interests of the beneficiaries of the obligation breached. These 'lawful measures' may also have the character of countermeasures.⁴⁹¹ That one of these lawful (counter-)measures by third States is non-recognition is shown in the following section.

(b) Non-recognition as the classic countermeasure taken by third States

Unlike the general question as to whether third States are entitled to take countermeasures, there was never any controversy in the ILC on the question of whether third States are entitled not to recognize a situation

⁴⁸⁶ See, e.g., UN Doc. A/C.6/55/SR.15, para. 25 (Israel).

⁴⁸⁷ See, e.g., UN Docs. A/C.6/55/SR.17, para. 76 (Austria); A/C.6/SR/55/SR.18, para. 59 (Cuba); A/C.6/SR/55/SR.18, para. 48 (Poland); UN Doc. A/CN.4/515, 19 March 2001, p. 54 (Spain).

⁴⁸⁸ See, e.g., UN Docs. A/C.6/55/SR.17, para. 63 (Costa Rica); A/C.6/55/SR.16, para. 28 (Italy); A/C.6/55/SR.18, para. 51 (Russia); A/C.6/55/SR.16, para. 13 (Spain).

⁴⁸⁹ See the commentary on Art. 54 of the ILC Articles on State Responsibility, UN Doc. A/56/10 (2001), p. 355, para. 6. For examples of State practice see *ibid.*, paras. 3–5 and Frowein (above, n. 404), pp. 416–22; Leben (above, n. 372), pp. 23–4.

⁴⁹⁰ Article 49 (1), Art. 42 of the ILC Articles on State Responsibility, UN Doc. A/56/10 (2001), pp. 56, 54. See also the commentary on these provisions, *ibid.*, pp. 328–33; 294–301.

⁴⁹¹ See the commentary on Art. 54 of the ILC Articles on State Responsibility, UN Doc. A/56/10 (2001), p. 355, paras. 6, 7.

created in violation of international law. This was largely due to the clear and uniform State practice in respect of the collectively non-recognized States.⁴⁹² Influenced by the ICJ's opinion in the *Namibia* case, the ILC assumed not only a right but an obligation on all States not to recognize as legal a situation created by an internationally wrongful act.⁴⁹³ Riphagen pointed out that such an obligation necessarily implies a right.⁴⁹⁴ It was also Riphagen who introduced non-recognition as a 'response' to an internationally wrongful act into the ILC's work.⁴⁹⁵ In 1982, he suggested to the Commission a draft Art. 6, providing that:

1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State:
 - (a) not to recognize as legal the situation created by such act; [. . .]
2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.⁴⁹⁶

An international crime was considered a precondition for the obligation of non-recognition. In the ILC's definition, this is 'an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole'.⁴⁹⁷ The ILC identified as fundamental interests of the international community the maintenance of international peace and security, the safeguarding of the right of self-determination of peoples, and the safeguarding of the human being, as well as the safeguarding and preservation of the human environment. Some of the international crimes that were to correspond to these interests are aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, and apartheid, as well as massive pollution of the atmosphere or the seas.⁴⁹⁸ No express provision was made in the draft article on who was to identify the occurrence of an international crime and thus trigger the obligation of non-recognition, although para. 2

⁴⁹² Cf. B. Graefrath, 'International Crimes—A Specific Regime of International Responsibility of States and its Legal Consequences', in: J.H.H. Weiler/A. Cassese/M. Spinedi (eds.), *International Crimes of State. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989), pp. 161–9 at p. 168.

⁴⁹³ The ILC did not appreciate that the 'obligation of non-recognition' in that case resulted from S/RES/276 (1970); see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 at p. 55, para. 123.

⁴⁹⁴ Riphagen, Third Report on State Responsibility, ILC Yb. 1982 II/1, p. 48, para. 6.

⁴⁹⁵ Riphagen, Preliminary Report on State Responsibility, ILC Yb. 1980 II/1, pp. 115–18.

⁴⁹⁶ Riphagen, Third Report on State Responsibility, ILC Yb. 1982 II/1, p. 48 and commentary on Art. 6, *ibid.*, pp. 48–50. In 1984, Art. 6 (1) (a) became Art. 14 (2) (a) (ILC Yb. 1984 II/1, p. 4 and II/2, p. 101) and in 1995, it was renumbered Art. 18 (1) (a) (ILC Yb. 1995 II/2, p. 45, n. 14).

⁴⁹⁷ Article 19 (2) of the 1980 Draft Articles on State Responsibility. For the text of the article, see ILC Yb. 1980 II/2, pp. 30–4. The first part of the 1996 Draft Articles are identical with the Draft Articles adopted in 1980: ILC Yb. 1996 II/2, pp. 58–65.

⁴⁹⁸ See Art. 19 (3) of the 1980 Draft Articles on State Responsibility.

suggested that this task might be performed by the UN Security Council.⁴⁹⁹ Draft Art. 6 (1) (a) met with almost universal approval⁵⁰⁰ and was adopted with only minor linguistic alterations as Art. 53 (a) of the Draft Articles on State Responsibility provisionally adopted by the Commission on first reading in July 1996.⁵⁰¹

In 2000, the ILC shelved the concept of international crime due to massive criticism by States,⁵⁰² but retained the obligation of non-recognition for all States. At the initiative of Special Rapporteur Crawford, non-recognition was linked to a serious breach of an obligation owed to the international community as a whole and essential for the safeguarding of its fundamental interests.⁵⁰³ In the final version of the ILC Articles on State Responsibility of August 2001, the obligation of non-recognition can be found in Art. 41 (2). There it results from a serious breach by a State of an obligation arising under a peremptory norm of general international law.⁵⁰⁴ Peremptory norms of general international law also concern the collective interests of the international community, as these norms must be accepted and recognized by 'the international community of States as a whole' as norms from which no derogation is permitted.⁵⁰⁵

By replacing obligations *erga omnes* with norms of *jus cogens*, the ILC has taken account of the different focus of the two concepts. The former entitles all States to invoke the responsibility of a State for breaches of obligations owed to the international community as a whole,⁵⁰⁶ while the latter is capable of producing legal consequences not merely for the responsible State, but for all States, as shown by Arts. 53 and 64 VCLT.⁵⁰⁷ As examples of *jus cogens*, the ILC cites the norms already listed in its commentary on Art. 53 VCLT: the prohibition of aggression, and the prohibitions against slavery and the slave trade, genocide, and

⁴⁹⁹ Cf. the commentary on Art. 14 of the 1985 proposal of the Rapporteur (identical with Art. 6 of the 1982 proposal): ILC Yb. 1985 II/1, p. 14, para. 6.

⁵⁰⁰ See Spinedi (above, n. 426), pp. 101–2, 104–5, 124 with further references.

⁵⁰¹ Article 53 provides: 'An international crime committed by a State entails an obligation for every other State: a) not to recognize as lawful the situation created by the crime.' (ILC Yb. 1996 II/2, p. 64).

⁵⁰² For criticism of the concept of 'international crime', see, e.g., the statement of the US Government: (1998) 37 ILM 474–8. See also the Report of the ILC on the work of its 52nd session (UN Doc. A/55/10 (2000), pp. 104–5, 111) and the Report on the work of its 50th session (UN Doc. A/53/10 (1998), paras. 241–331).

⁵⁰³ Article 42 (2) (a) of the Draft Articles on State Responsibility provisionally adopted by the Drafting Committee in August 2000. Article 42 (2) is largely identical with the Art. 51 (3) (a) as proposed by Special Rapporteur Crawford. See Crawford, Third Report on State Responsibility, UN Doc. A/CN.4/507/Add.4, 4 August 2000, p. 24, para. 412 und UN Doc. A/55/10 (2000), pp. 109–10.

⁵⁰⁴ Article 41 (2) provides: 'No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [. . .].' Art. 40 provides: '1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.'

⁵⁰⁵ Article 53 VCLT. See above s. III.2.b.(2) (a) and (b).

⁵⁰⁶ See Art. 48 of the ILC Articles on State Responsibility (UN Doc. A/56/10 (2001), p. 56).

⁵⁰⁷ See the commentary on Part II, Chapter III of the ILC Articles on State Responsibility, UN Doc. A/56/10 (2001), pp. 281–2, para. 7.

racial discrimination and apartheid.⁵⁰⁸ As other norms, the peremptory character of which seems to be generally accepted, the ILC lists the prohibition against torture, the basic rules of international humanitarian law, and the obligation to respect the right of self-determination.⁵⁰⁹ The Articles on State Responsibility do not regulate who is to determine the existence of a serious breach of a norm of *jus cogens*. The commentary, however, indicates that such breaches are likely to be addressed by competent international organizations, including the Security Council and General Assembly.⁵¹⁰

The work of the ILC over the last thirty years shows that the breach of certain basic norms that serve to protect the fundamental interests of the international community entails an obligation (implying a right) for all States not to recognize as lawful a situation created by such a breach, particularly if called upon to do so by a competent international organization.⁵¹¹ This obligation exists regardless of what the internationally wrongful act is ultimately called, be it international crime, breach of an obligation *erga omnes*, or breach of a norm of *jus cogens*. Collective non-recognition is therefore a countermeasure taken by all States for the protection or defence of the fundamental interests of the international community. It should be noted that this is not a novel invention of the ILC. As early as 4 July 1946, Hermann Jahrreiß, in his pleadings before the International Military Tribunal at Nuremberg, described 'the idea underlying the policy of nonrecognition' in the following terms: 'the states not involved in a conflict should conduct themselves as members of the community of states, that is, they should protect the constitution of the community of states by refusing to recognize the fruits of victory, should the victor have been the aggressor.'⁵¹² By not recognizing a certain situation as lawful, States and their organs not only act in their own self interest but in the public interest, that is to say, they act as 'executive organs' of the international community (*dédoublement fonctionnel*).⁵¹³ In view of the fact that non-recognition has often been abused for political reasons, the withholding from a new State of the rights inherent in statehood (unlike the withholding of optional relations) should always be preceded by a call for non-recognition by an organ of the United Nations.⁵¹⁴

Collective non-recognition is closely linked to the development of the idea of community interests in international law, as can be seen in the

⁵⁰⁸ See the commentary on Art. 40, UN Doc. A/56/10 (2001), p. 283, para. 4.

⁵⁰⁹ UN Doc. A/56/10 (2001), p. 284, para. 5 (commentary on Art. 40); *ibid.*, p. 208 (commentary on Art. 26, para. 5).

⁵¹⁰ See the commentary on Art. 40, UN Doc. A/56/10 (2001), p. 286, para. 9.

⁵¹¹ Kelsen (above, n. 122), p. 431 with regard to violations of the prohibition on the use of force.

⁵¹² International Military Tribunal Nuremberg, *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, vol. XVII (1948), p. 473.

⁵¹³ This theory on the 'double role' of State organs was established by G. Scelle, *Précis de droit des gens*, vol. 1 (1932), pp. 43, 54-6, 217. See also A. Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law', *EJIL* 1 (1990), pp. 210-31.

⁵¹⁴ See also Cassese (above, n. 440), pp. 155-6. Contra: Klein (above, n. 429), pp. 50-1.

non-recognition of Manchukuo. Soon after World War I, the idea developed that questions of war or peace were not of concern merely to the States affected, but to all States. Article 11 (1) of the Covenant of the League of Nations expressly stated that 'any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.' It is for this purpose that Arts. 16 and 17 of the Covenant provided for sanctions by all League Members against States (including non-member States), which resorted to war contrary to the Covenant. War of aggression was characterized as an 'international crime' in the Draft Treaty of Mutual Assistance, prepared by the League in 1923.⁵¹⁵ The preamble to the Geneva Protocol for the Pacific Settlement of International Disputes of 2 October 1924, after 'recognizing the solidarity of the members of the international community', went on to assert that 'a war of aggression constitutes a violation of this solidarity and an international crime'.⁵¹⁶ This was confirmed in the resolution adopted unanimously by the League Assembly on 24 September 1927.⁵¹⁷ The parties to the Kellogg–Briand Pact of 27 August 1928 agreed to renounce war as an instrument of national policy in their relations with one another.⁵¹⁸ The Pact had reached almost universal acceptance with 63 contracting parties by 31 December 1932.⁵¹⁹ Consequently, the Japanese attack against China and the creation of Manchukuo in occupied Chinese territory was not merely an issue between these States but an issue for the international community as a whole. US Secretary of State Stimson made the following statement in a speech to the Council on Foreign Relations on 8 August 1932:

Under the former concepts of international law when a conflict occurred, it was usually deemed the concern only of the parties to the conflict. [. . .] The direct individual interest which every nation has in preventing a war had not yet been fully realized, nor had that interest been given legal recognition. But now under the covenants of the Briand–Kellogg Pact such a conflict becomes of legal concern to everybody connected with the Treaty. All of the steps taken to enforce the treaty must be judged by this new situation.⁵²⁰

The only step taken to enforce the treaty, however, was the non-recognition of the new State of Manchukuo. For Stimson, the entitlement

⁵¹⁵ LNOJ 1923, p. 1521. The Draft Treaty of Mutual Assistance was never adopted as there was no agreement on the definition of the term 'aggression'. The States, however, agreed that a war of aggression constituted an international crime.

⁵¹⁶ LNOJ, Spec. Suppl. No. 21 (1924), p. 21. The Protocol was signed by 19 States, but never entered into force. On the Protocol, in general, see F.A. von der Heydte, 'Geneva Protocol for the Pacific Settlement of International Disputes (1924)', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2 (1995), pp. 529–31.

⁵¹⁷ LNOJ, Spec. Suppl. No. 53 (1927), p. 22.
⁵¹⁸ Article 1 of the General Treaty for Renunciation of War as an Instrument of National Policy (Pact of Paris) of 27 August 1928: 94 LNTS 57. The Treaty is still in force.

⁵¹⁹ *International Conciliation*, 1933, p. 408.

⁵²⁰ The speech is reproduced in *International Conciliation*, 1933, pp. 419–20.

to non-recognition resulted from the interest of States in the prevention of war. This interpretation is confirmed in the final report on the 'Problem of Non-Recognition' of a conference on the 'Legal Problems in the Far Eastern Conflict' held in December 1939. It states that:

the legal significance of non-recognition flows from the legal interests in a given situation of the states which withhold recognition [. . .]. Recent non-aggression and anti-war treaties have given a legal interest to all parties to such treaties in case of violent occupation of the territory of one of them by another. Because of this interest all of the parties to the treaty share in the power of the victim to object to the transfer of title.⁵²¹

Both Stimson and the conference gave great weight to the Kellogg-Briand Pact. In so doing, they assumed that the violation of such a multipartite legislative treaty usually injures all the parties legally, even though it does not injure all of them materially. In the *Barcelona Traction* case, the ICJ confirmed that rights to protect the interests of the international community may either 'have entered into the body of general international law or are conferred by international instruments of a universal or quasi-universal character.'⁵²²

The interests of the international community also played an essential role in the case of Rhodesia. The United Kingdom based its request for the non-recognition of Rhodesia on the argument that the attempt to establish in Africa a system of minority rule was 'a matter of world concern'. In decolonizing Rhodesia, the concern of the Security Council was for the country to achieve 'genuine independence acceptable to the international community'.⁵²³ Fundamental interests of the international community were similarly affected in the cases of the homeland States and the Turkish Republic of Northern Cyprus, such as the prohibition on racial discrimination or apartheid and the prohibition of the use of force.

V. CONCLUSION

(1) So far, the debate about the legal effect of recognition has been dominated by the antagonism between the constitutive theory and the declaratory theory—*tertium non datur*, or so it has seemed. An examination of these theories in the context of the collectively non-recognized States shows that recognition, or better, its congener

⁵²¹ 'Report on Virginia Beach Round Tables on International Law: The Problem of Non-Recognition' (above, n. 168), pp. 181, 182.

⁵²² *Barcelona Traction, Light and Power Company, Limited, Second Phase* [1970] ICJ Rep 3 at p. 32, para. 34: 'Some of the corresponding rights of protection [. . .] are conferred by international instruments of a universal or quasi-universal character.'

⁵²³ Siehe S/RES/463 (1980) of 2 February 1980, preambular para. 4; S/RES/460 (1979) of 21 December 1979, preambular para. 4. It is of interest to note that in 1995 Portugal argued before the ICJ that 'the right of self-determination [. . .] has been acknowledged for over 30 years a right *erga omnes*.' (CR 95/5, 2.2.1995, p. 20, para. 43 (R. Higgins)).

non-recognition, can neither have *status-preventing* nor *status-confirming* effect. An internationally wrongful act does not prevent the creation of a State which is a question of fact, and a State which exists in fact attains the legal status of a State solely on the basis of its existence, independent of recognition. The creation of a State cannot be undone by non-recognition alone, and so non-recognition cannot have *status-destroying* effect either. What can be done, however, is to withhold the rights inherent in statehood from a new State. To that extent, non-recognition has a negatory, i.e. a *status-denying*, effect.

- (2) Non-recognition of new States is usually unproblematic, as they have not yet been integrated in the international community and therefore have only the minimum rights inherent in statehood. All optional relations and the resulting rights and privileges can be withheld from these new States, as they are within the discretion of the other States. This withholding of optional relations constitutes an unfriendly, although not unlawful, act. On the other hand, the withholding of the rights inherent in statehood requires special justification in international law. Such justification can result from a binding resolution of the UN Security Council. Alternatively, non-recognition may be seen as a countermeasure in respect of a serious breach of an obligation arising under a peremptory norm of general international law, which affects the interests of the international community as a whole.
- (3) Non-recognition *as a State* and politically motivated non-recognition *of a State* differ in the withholding of the legal status of a State (i.e. all rights, competences, and privileges inherent in statehood) and the continued, fictional, treatment of the new State as part of the parent State. Non-recognition *of a State* is limited to the withholding of optional relations, as there is no binding Security Council resolution or a serious breach of obligations arising under peremptory norms that would justify the withholding of the rights inherent in statehood. It can vary from non-recognizing State to non-recognizing State and from one non-recognition case to another, as can be seen in the different treatment of Israel, Mongolia, the German Democratic Republic, North Korea, and North Vietnam, all of which were not recognized over many years for political reasons. It lies within the non-recognizing State's discretion to decide which optional relations to withhold from the non-recognized State. 'Positive non-recognition, on the other hand, as Colin Warbrick so pointedly noted, is more than just 'not recognized'.⁵²⁴ Non-recognition *as a State* is a sanction. The different qualities of non-recognition could be documented by distinguishing between *States not to be recognized* (denoting factual States from which the legal status of a State is to be withheld as a consequence of

⁵²⁴ C. Warbrick, 'Review of Talmon, Recognition of Governments in International Law', this *Year Book*, 70 (1999), pp. 274-5 at p. 275.

a grave violation of international law) and *unrecognized States* (denoting States from which particular or all optional relations are withheld for political reasons).

- (4) The collective non-recognition of a new State is intended to induce the State to dissolve itself and to return to the *status quo ante*. Non-recognition can be qualified as an act of retorsion to the extent that optional relations are withheld from the new State, and as a countermeasure or reprisal insofar as the rights inherent in statehood are withheld from it. The State not to be recognized is the proper addressee of the countermeasure, as its creation or existence is the result of an internationally wrongful act. The competence of non-recognizing States to take the countermeasure is based on the fact that the creation of the new State is of fundamental interest to the international community as a whole.
- (5) In conclusion, it is worth noting that this negatory approach has advantages with regard to both legal theory and legal policy:
 - (a) It is capable of explaining the recognition of the new State by the sponsor State, as well as any subsequent recognition by the parent State and other States, without being forced to attribute constitutive effect to such recognition. However, such recognition may constitute a violation of an obligation not to recognize the new State.
 - (b) It is capable of explaining the international responsibility of the new States, without being required to take recourse to the doubtful legal construct that a violation of a norm of *jus cogens* makes the creation of a new State null and void, while allowing for the creation of a partial subject of international law which can be held responsible internationally.
 - (c) It allows States to recognize the new State once a political solution to the conflict has been found, without having to attribute recognition constitutive or retroactive effect. The State continues to exist as before. Recognition only signifies the lifting of the sanction of non-recognition.

