

## CHAPTER VI

*The Duty Not to ‘Recognize as Lawful’ a Situation  
Created by the Illegal Use of Force or Other  
Serious Breaches of a Jus Cogens Obligation:  
An Obligation without Real Substance?*

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## I. INTRODUCTION

1) The Articles of the International Law Commission (ILC) on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility) provide in Art. 41(2) that ‘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.<sup>1</sup> A peremptory norm of general international law (*jus cogens*) is defined as a norm which is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>2</sup> The ILC identified as *jus cogens* the prohibition of aggression and the illegal use of force, the prohibitions against slavery and the slave trade, genocide and racial discrimination and apartheid, the prohibition against torture, the basic rules of international humanitarian law and the right of self-determination.<sup>3</sup> The following norms have been added to these:

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<sup>1</sup> General Assembly Resolution 56/83 (2001), 12 December 2001, Annex. The General Assembly took note of the articles and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action (*ibid.*, para. 3).

<sup>2</sup> Vienna Convention on the Law of Treaties (VCLT), 23 May 1969 (1155 UNTS 331), Art. 53.

<sup>3</sup> Report of the International Law Commission, 53<sup>rd</sup> Session, GAOR, 56<sup>th</sup> Session, Supp. No. 10 (A/56/10), 2001, pp. 283-284, paras. 4,5.

the prohibition of cruel, inhuman or degrading treatment<sup>4</sup> and crimes against humanity, the prohibition of piracy, and the principle of permanent sovereignty over natural resources.<sup>5</sup> The German Constitutional Court considered even the 'basic rules for the protection of the environment' as forming part of *jus cogens*.<sup>6</sup>

The obligation of non-recognition as laid down in the ILC Articles recently gained prominence in the advisory opinion of the International Court of Justice (ICJ) on the *Wall in the Occupied Palestinian Territory* (2004).<sup>7</sup> The Court advised that the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, were contrary to international law. It held that Israel had violated certain obligations *erga omnes* including the obligation to respect the right of the Palestinian people to self-determination, certain rules of humanitarian law applicable in armed conflict which are fundamental to the respect of the human person and elementary considerations of humanity, and Art. 1 common to the four Geneva Conventions.<sup>8</sup> The Court then stated:

'Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.'<sup>9</sup>

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<sup>4</sup> German Federal Constitutional Court, 2<sup>nd</sup> Chamber, Order of 24 June 2003, 2 BvR 685/03, BVerfGE 108, p. 129, at para. 67.

<sup>5</sup> See e.g. Ian Brownlie, *Principles of Public International Law*, 6<sup>th</sup> edn., Oxford 2003, p. 489.

<sup>6</sup> Order of the German Federal Constitutional Court of 26 October 2004, 2 BvR 955/00, *Deutsches Verwaltungsblatt* 2005, pp. 175-183, at p. 178 (translation supplied).

<sup>7</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004 (hereinafter *Wall in the Occupied Palestinian Territory*), available at <[www.icj-cij.org](http://www.icj-cij.org)>.

<sup>8</sup> *Ibid.*, paras. 155-158.

<sup>9</sup> *Ibid.*, para. 159. See also the written statement by France to the ICJ, dated 30 January: 'Since it is internationally wrongful, the act of constructing the wall on the Occupied Palestinian Territory also entails legal consequences for third States and international organizations. *Inter alia*, they are under an obligation not to recognize as lawful the situation created by the route taken by this wall.' The statement is available at <<http://www.icj-cij.org>>.

This was the second time that the ICJ had found that States were under an obligation not to recognize an illegal situation. In the *Namibia* advisory opinion of 1971, the Court held that the presence of South Africa in Namibia was illegal and that States Members of the United Nations were under an obligation to refrain from any act and in particular any dealings with the Government of South Africa implying the recognition of the legality of South Africa's presence and administration.<sup>10</sup>

State practice also knows of numerous examples of collective non-recognition of situations created by a serious breach of the prohibition of the use of force and other *jus cogens* obligations. For example, on 11 March 1932, in the wake of the Manchurian conflict between Japan and China, the Assembly of the League of Nations 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.'<sup>11</sup> The political organs of the United Nations have frequently called upon States not to recognize illegal States such as Rhodesia, the South African Bantustans and the Turkish Republic of Northern Cyprus,<sup>12</sup> the annexation of territory,<sup>13</sup> governments in-

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<sup>10</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, p. 16 (hereinafter *Namibia*).

<sup>11</sup> LNOJ, Spec. Supp. No. 101, 1932, pp. 87-88. On the collective non-recognition of Manchukuo, see David Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law', *Chinese Journal of International Law* 2 (2003), 105-143; Stefan Talmon, *Kollektive Nichtanerkennung illegaler Staaten*, Tübingen 2006 (forthcoming), ch. 2.I.

<sup>12</sup> There is ample literature on the question of non-recognition of new States created by a violation of *jus cogens*: see John Dugard, *Recognition and the United Nations*, Cambridge 1987, pp. 123-163; Vera Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law*, Dordrecht 1990; Heike Krieger, *Das Effektivitätsprinzip im Völkerrecht*, Berlin 2000, pp. 176-256; Talmon, *op. cit.* (note 11), ch. 1-3.

<sup>13</sup> See e.g. Commission of Human Rights resolution 2005/8, 14 April 2005, para. 5 (non-recognition of the Israeli annexation of the Syrian Golan Heights), Security Council resolution 478 (1980), 2 August 1980, para. 5 (non-recognition of the Israeli annexation of East Jerusalem); Security Council resolution 662 (1990), 9 August 1990, para. 2 (non-recognition of the Iraqi annexation of Kuwait).

stalled by a foreign illegal occupying power,<sup>14</sup> the legality of the presence and administration of an occupying power,<sup>15</sup> and even the result of elections.<sup>16</sup>

2) In the advisory opinion on the *Wall in the Occupied Palestinian Territory*, the ICJ confirmed that the obligation 'not to recognize as legal' territorial acquisitions resulting from the threat of use of force reflects customary international law.<sup>17</sup> This finding is supported by a long list of declarations and instruments to this effect, starting in 1949 with the Draft Declaration on the Rights and Duties of States which provided in Art. 11 that 'every State has the duty to refrain from recognizing any territorial acquisition by another State' in violation of the prohibition of the threat or use of force.<sup>18</sup> In 1964, the Second Conference of Heads of State and Government meeting in Cairo stated in a Declaration on Peaceful Coexistence and the Codification of its Principles by the United Nations that 'States must abstain from all use or threat of force directed against the territorial integrity and political independence of other States; a situation brought about by the threat or use of force shall not be recognized.'<sup>19</sup> The obligation 'not to recognize as legal' the acquisition or occupation of territory resulting from aggression or the threat or use of force was also included in 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 (Friendly Relations Declaration), the 1970 Declaration on the Strengthening of International Security, the 1974 Definition of Aggression, the 1975 Helsinki Final Act of the Conference of Security and Co-operation in Europe, and the 1987

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<sup>14</sup> See e.g. Security Council Resolution 661 (1990), 6 August 1990, para. 9(b) (non-recognition of any regime set up by the occupying power); Presidential Statement of 3 May 1985 (non-recognition of interim government in illegally occupied Namibia).

<sup>15</sup> See e.g. Security Council Resolution 283 (1970), 29 July 1970, paras. 1, 2 (non-recognition of South African presence in Namibia).

<sup>16</sup> See e.g. Security Council Resolutions 554 (1985), 17 August 1984, para. 5 (non-recognition of the results of the so-called 'elections' in South Africa); 439 (1978), 13 November 1978, para. 3 (non-recognition of organs established by elections in Namibia).

<sup>17</sup> *Wall in the Occupied Palestinian Territory, ICJ Reports 2004*, para. 87.

<sup>18</sup> ILC Yb. 1949, pp. 286-290, at p. 288.

<sup>19</sup> Odette Jakowitsch/Karl P. Sauvart, *The Third World Without Superpowers: The Collected Documents of the Non-Aligned Countries*, Vol. 1, New York 1978, pp. 50-51.

Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.<sup>20</sup>

In its Articles on State Responsibility, the ILC has extended the obligation 'not to recognize as lawful' beyond aggression and the illegal use of force to all situations created by a serious breach of a *jus cogens* obligation. While there is some State practice with regard to the non-recognition of situations created by a serious breach of the right of self-determination of peoples and the prohibition of racial discrimination (*viz.* the prohibition of apartheid),<sup>21</sup> there is virtually no such practice to support a duty of non-recognition with regard to situations created by serious breaches of other *jus cogens* norms such as the prohibitions of slavery and the slave trade, genocide, torture and other cruel, inhuman or degrading treatment, crimes against humanity, or the basic rules of international humanitarian law. In view of the lack of State practice, it has rightly been questioned whether customary international law knows of a general duty of non-recognition of all situations created by a serious breach of *jus cogens*.<sup>22</sup>

This paper examines the content of the obligation 'not to recognize as lawful' a situation created by a serious breach of a *jus cogens* obligation, and the practical difficulties that may arise in complying with this obligation. It also asks whether an obligation of non-recognition makes legal sense in cases of serious breaches of *jus cogens* obligations, other than those resulting in the creation of a new State or the acquisition or occupation of territory.

## II. THE CONTENT OF THE OBLIGATION OF NON-RECOGNITION

1) While the obligation 'not to recognize as lawful' a situation created by a serious breach of the prohibition of the threat or use of force seems to be well established in international law, it is unclear exactly what that obliga-

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<sup>20</sup> For a detailed analysis of these instruments, see Talmon, *op. cit.* (note 11), ch. 4.III.2.a.(3).

<sup>21</sup> But see the statement made on behalf of Australia in the *East Timor* case: 'Australia denies that States are under an automatic obligation, under general international law, not to recognize or deal with a State which controls and administers a territory whose people are entitled to self-determination. There is no automatic obligation of non-recognition or non-dealing, even though that State may be denying the people the right to self-determination.' (CR 95/14, 16 February 1995, p. 36, para. 5 (James Crawford)).

<sup>22</sup> Order of the German Federal Constitutional Court of 26 October 2004, 2 BvR 955/00 (sep. op. Lübbe-Wolff), available at <<http://www.bundesverfassungsgericht.de>>.

tion entails. In his separate opinion in the advisory opinion on the *Wall in the Occupied Palestinian Territory* Judge Kooijmans stated:

‘Article 41, paragraph 2, [of the ILC Articles on State Responsibility] however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach just as operative subparagraph (3) (D) [of the Court’s Opinion<sup>23</sup>] does. In its commentary the ILC refers to unlawful situations which – virtually without exception – take the form of a legal claim, usually to territory. [...] all examples mentioned refer to situations arising from formal or quasi-formal promulgations intended to have an *erga omnes* effect. I have no problem with accepting a duty of non-recognition in such cases.

I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part of operative subparagraph (3) (D) supposed to do in order to comply with this obligation? That question is even more cogent considering that 144 States unequivocally have condemned the construction of the wall as unlawful (res. ES-10/13), whereas those States which abstained or voted against (with the exception of Israel) did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to *an obligation without real substance*.<sup>24</sup>

Most of the *jus cogens* norms which were identified by the ILC refer to factual situations or actions rather than to claims under international law. What does it mean, for example, not to recognize as lawful a situation created by acts of genocide or slavery? What actual legal consequences followed from the genocide in Rwanda for third States in terms of Art. 41(2) of the ILC Articles on State Responsibility? To say that States are under an obligation not to recognize a situation as lawful raises more questions than it answers.

The same is true in case of unlawful situations which take the form of a legal claim to territory. In contrast to Judge Kooijmans, the Court did not treat the construction of the wall as a ‘fact’ but treated it as amounting to a

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<sup>23</sup> Operative subparagraph 3(D) reads: ‘All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction’.

<sup>24</sup> *Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, paras. 43, 44 (sep. op. Kooijmans) (italics added).

*de facto* 'claim' to territory. The Court recalled that both the General Assembly and the Security Council had referred, with regard to Palestine, to the customary rule of the 'inadmissibility of the acquisition of territory by war'.<sup>25</sup> The Court noted that, since 1977, Israel had conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Art. 49(6) of the Fourth Geneva Convention, and that the route of the wall as fixed by the Israeli Government included within the 'Closed Area'<sup>26</sup> some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it was apparent that the wall's sinuous route had been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem). From this, the Court concluded that 'the construction of the wall and its associated regime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.'<sup>27</sup> The Court, in effect, spelled out the obligation of States not to recognize as lawful any territorial acquisition by Israel brought about by the construction of the wall.<sup>28</sup> However, even if the obligation is to be interpreted as an obligation not to recognize as lawful a *de facto* claim to territory, the question still remains as to what the substance of that obligation is.

As both the Court's opinion and Art. 41(2) of the ILC Articles on State Responsibility show, the obligation not to recognize as lawful a certain situation must be distinguished from the obligation not to render aid or assistance in maintaining that situation. In some respects, the latter may be seen as a logical extension of the duty of non-recognition. However, it has a sepa-

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<sup>25</sup> *Ibid.*, Advisory Opinion, para. 117.

<sup>26</sup> The 'Closed Area' is the part of the West Bank lying between the armistice demarcation line between Israeli and Arab forces as fixed in 1949 ('Green Line') and the wall (*ibid.*, para. 85).

<sup>27</sup> *Ibid.*, para. 121.

<sup>28</sup> Cf. the sep. op. of Judge Koroma: 'Equally important is the finding that the international community as a whole bears an obligation [...] not to recognize any unilateral change in the status of the territory brought about by the construction of the wall.' (*ibid.*, para. 7). See also the statement of the Brussels European Council on the Middle East Peace Process: 'The European Union will not recognise any change to the pre-1967 borders other than those arrived at by agreement between the parties' (Presidency Conclusions – Brussels 25/26 March 2004, p. 10).

rate scope of application insofar as actions are concerned which would not imply recognition of the situation created by a serious breach as lawful.<sup>29</sup> Again, difficult questions arise. Does, for example, the financing by foreign States of a web of new roads in the occupied Palestinian territory, made necessary by the construction of the wall and the Israeli settlements in the West Bank, imply recognition of the illegal situation resulting from the construction of the wall? Or does it simply aid and assist in maintaining the situation created by the wall?<sup>30</sup> It may be argued that the financing of roads in the West Bank, as well as the provision of food aid by the UN Work and Relief Agency (UNWRA) to people cut off from their fields by the wall, do neither, as they simply alleviate the plight of the Palestinians in the occupied territories.

Subsequent practice with regard to the illegal situation resulting from the construction of the wall is inconclusive. The General Assembly, at its tenth emergency special session, only acknowledged the Court's ruling and called upon all States Members of the United Nations 'to comply with their legal obligations as mentioned in the Advisory Opinion'.<sup>31</sup> The Special Rapporteur of the Commission on Human Rights on the situation of human rights in the occupied Palestinian territories reminded 'States of their obligation not to recognize the illegal situation resulting from the construction of the Wall and not to render aid or assistance in maintaining the situation created by such construction', but without specifying exactly what that means.<sup>32</sup> State practice shows that the duty of non-recognition so far has not affected the relations of third States with Israel; in particular, no State has refrained from any dealings with the Government of Israel with regard to the occupied Palestinian territory on the Israeli side of the wall (including East Jerusalem), cut funds or aid provided to Israel proportionate to the money spent by Israel on the construction and maintenance of the wall, or altered its conduct in any other way.

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<sup>29</sup> Report of the International Law Commission, 53<sup>rd</sup> Session, GAOR, 56<sup>th</sup> Session, Supp. No. 10 (A/56/10), 2001, p. 291, para. 12.

<sup>30</sup> See 'Israel seeks funds for separate Arab roads', *The Guardian*, 6 September 2004, p. 13.

<sup>31</sup> General Assembly Resolution ES-10/15, 20 July 2004, para. 3.

<sup>32</sup> Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, UN Doc. E/CN.4/2005/29, 7 December 2004, p. 19.



2) Legal literature has not contributed much to the elucidation of the content of the duty not to recognize as lawful a situation created by a serious breach of a *jus cogens* obligation. Most authors do not address the question of the content of the duty at all. Those who do, for the most part merely paraphrase the formulation used by the ILC. For Georges Abi-Saab, for example, the obligation ‘consists mainly in the non-recognition of what is considered illegal and of its results’.<sup>33</sup> But, what does ‘non-recognition’ mean; what are third States supposed to do to avoid implied recognition of the legality of what is considered illegal or of its results? For some writers, the obligation not to recognize a situation as lawful seems to amount to nothing more than a formal declaration of non-recognition in order to prevent prescriptive title or rights arising by adverse possession or negative prescription or by historical consolidation.<sup>34</sup> There are two problems with this view. First, there is serious doubt that in international law prescription can create rights out of situations brought about by illegal acts.<sup>35</sup> This applies particularly in situations created by a serious breach of a *jus cogens* obligation. Ian Brownlie has rightly pointed out that ‘the specific content of norms of this kind involves the irrelevance of protest, recognition, and acquiescence; prescription cannot purge this type of illegality.’<sup>36</sup> Thus, non-recognition does not serve any legal purpose in this context. Secondly, the question of prescriptive title or rights arises only if the object of non-recognition is not merely a factual situation but, at the same time, an asserted legal status such as statehood, or a claim to title to territory arising from the factual situation. No such claims to status or title will usually arise from acts of genocide, torture or slavery, or the violation of the basic rules of international humanitarian law.

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<sup>33</sup> Georges Abi-Saab, ‘The Concept of “International Crimes” and its Place in Contemporary International Law’, in: Joseph H.H. Weiler/Antonio Cassese/Marina Spinedi (eds.), *International Crimes of State. A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility*, Berlin 1989, pp. 141-150, at p. 149.

<sup>34</sup> See e.g. Yoram Dinstein, *War, Aggression and Self-Defence*, 3<sup>rd</sup> edn., Cambridge 2001, p. 154 (‘But probably the gist of non-recognition is that, despite a continuous and effective control over the annexed territory, no prescriptive rights evolve in favour of the aggressor.’); James Crawford, *The Creation of States in International Law*, Oxford 1979, p. 123, n. 179 (‘non-recognition is an attempt to prevent its attribution [of legal status] by the process of recognition and consolidation.’).

<sup>35</sup> See Brownlie, *op. cit.* (note 5), pp. 149-150. See also UN Doc. A/6799, 26 September 1967, p. 18, para. 77 (‘international law could not legalize the consequences of unlawful acts’).

<sup>36</sup> *Ibid.*, p. 490.

3) In order to determine the substance of the obligation ‘not to recognize as lawful’ a certain situation, it may be helpful to examine the origins of this term. The formulation first appeared in the work of the *ad hoc* Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States.<sup>37</sup> Over a period of seven years, from 1963 to 1970, the Special Committee drafted the Friendly Relations Declaration which was finally adopted by the General Assembly by consensus on 24 October 1970.<sup>38</sup> In the context of the first principle of the Declaration on the prohibition of the threat or use of force, the Special Committee dealt with the question of the non-recognition of territorial acquisitions resulting from the threat or use of force. The non-aligned countries and the Latin American States on the Committee suggested including a provision in the Declaration that ‘no territorial acquisitions or special advantages obtained either by force or by any other means of coercion shall be recognized.’<sup>39</sup> The proposal met with serious reservations on the part of the Western States<sup>40</sup> which argued that, while the doctrine of non-recognition of factual situations was superficially attractive, it was questionable whether it would work in practice. It was the task of the Special Committee to create norms which could be valid in the practical conduct of international relations, and the Committee should not blind itself to the realities of the modern world.<sup>41</sup> It was pointed out that it was difficult, as a strictly legal proposition, to deny the existence of specific situations resulting from the illegal use of force; it was doubtful whether that

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<sup>37</sup> The *ad hoc* Special Committee was established by General Assembly Resolution 1966 (XVIII), 16 December 1963. On the work of the Committee, see UN Doc. A/AC.125/12, 3 April 1970, pp. 1-26.

<sup>38</sup> General Assembly Resolution 2625 (XXV), 24 October 1970.

<sup>39</sup> UN Docs. A/AC.125/L.48, 27 July 1967, Principle A, para. 4, sentence 2 (submitted by Algeria, Cameroon, Ghana, India, Kenya, Madagascar, Nigeria, Syria, UAR and Yugoslavia); A/AC.125/L.49, Rev.1, 1 August 1967, Principle A, para. 2(h) (submitted by Argentina, Chile, Guatemala, Mexico and Venezuela), both, also reproduced in UN Doc. A/6799, 26 September 1967, p. 10, paras. 26, 27. See also the earlier proposal of 11 non-aligned countries: UN Doc. A/AC.125/L.21, 22 March 1966, paras. 4, 5 and the proposal of Chile: UN Doc. A/AC.125/L.23, 22 March 1966: ‘It shall be expressly declared that contemporary international law in no way recognizes the validity of *de facto* situations brought about by the illegal threat or use of force’. For earlier proposals, see UN Docs. A/AC.119/L.7 and A/AC.119/L.15.

<sup>40</sup> Especially Australia, Japan, the Netherlands, Sweden, the United Kingdom and the USA voiced concern about a comprehensive obligation of non-recognition.

<sup>41</sup> UN Doc. A/6230, 27 June 1966, p. 39, para. 101. For more details, see also UN Docs. A/AC.125/SR.25, 25 July 1966, pp. 16-17; A/AC.125/SR.26, 25 July 1966, pp. 12, 21-22.

idea could be transformed into a legal obligation at the present stage of development of international institutions. It was essential that rules of law should be applicable in practice. If the idea was to be retained and a principle of law applicable in international relations was to be formulated, the question would have to be raised again in more realistic terms.<sup>42</sup> There was a general fear that the duty of non-recognition might be used by some to constitute a bar to trade arrangements, normal communications, and practical contacts of any kind with the accused State. It was pointed out that it would hardly be realistic for any State to make so broad an undertaking. In any event, it was evident that the adoption of such a measure could not be based on any interpretation of Art. 2(4) of the UN Charter. The Swedish representative on the Committee, Hans Blix, led the way to a compromise by stating that, 'if States were asked merely not to "recognize" or "consider" as legal that which was illegal, there would be no great difficulty' with the obligation of non-recognition.<sup>43</sup> The idea of limiting the obligation of non-recognition in that way was taken up by the Drafting Committee which, in its Report to the Special Committee, advanced the following formula with a view to providing a basis for further debate:

'The territory of any State may not, on any grounds whatsoever, be the object of acquisition by any other State, following the use of armed force. No territorial acquisition or special advantages obtained by the illicit use of force shall be recognized *as legal*.'<sup>44</sup>

The formulation 'not to recognize as legal' was initially opposed by the non-aligned countries and the Latin American States, which had advocated in their proposals an obligation of unqualified non-recognition. The Syrian delegate stated that 'the words "as legal" [...] were unacceptable to his delegation, which was deeply concerned at attempts to interpret the statement as excluding *de facto* situations created by the illicit use of force.'<sup>45</sup> The representative of Mexico, speaking also on behalf of Argentina, Chile, Guatemala and Venezuela, declared that the delegations wished to re-state their view

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<sup>42</sup> UN Doc. A/7326, p. 31, para. 75.

<sup>43</sup> UN Doc. A/AC.125/SR.81-96 [86], 21 October 1968, p. 43.

<sup>44</sup> UN Doc. A/7326, p. 41, para. 111, item 7. See also Hans Blix, 'Contemporary Aspects of Recognition', *Recueil des Cours* 130 (1970-II), 587, at 662-664; Konstantin Obradović, 'Prohibition of the Threat or Use of Force', in: Milan Šahović (ed.), *Principles of International Law Concerning Friendly Relations and Cooperation*, Belgrade 1972, pp. 51-128, at pp. 92-95.

<sup>45</sup> UN Doc. A/AC.125/SR.81-96 [96], 21 October 1968, pp. 169-170.

that ‘territorial acquisitions or advantages obtained by the use of force or other forms of coercion should not be recognized either *de jure* or *de facto*. Such an addition would maintain the universal validity of the principle, as one of the general principles of law within the meaning of Article 38 of the Statute of the International Court of Justice, and as a principle whose origins could be traced back to the first Inter-American Conference in 1889 and which had been expressly recognized in various League of Nations and United Nations resolutions.’<sup>46</sup> Such absolute non-recognition – refusing recognition both to the legality (i.e. *de jure* recognition) and the factual control of the administration of the State in breach (i.e. *de facto* recognition) – was, however, unacceptable to the Western States whose view finally prevailed.<sup>47</sup> Paragraph 10 of the first principle of the Declaration provides that ‘no territorial acquisition resulting from the threat of use of force shall be recognized as legal.’ Hans Blix, who may be regarded as the father of the term ‘non-recognition as legal’, explained its meaning in his Hague Academy lectures in 1970 as follows:

‘no formal admission may be made of the legality of a forcible territorial acquisition as described. This would appear to allow States to determine for themselves – in the absence of any collective action by the United Nations – to what extent they would allow practical co-operation and courtesies without any *formal admission of the legality* of the situation. There had been concerns that a flat provision for non-recognition could have been used for arguments against any practical relations and courtesies predicated upon an illegal situation – a position deemed unrealistic. This concern was allayed by the formulation eventually adopted. Its acceptance would not, of course, be a substitute for decisions by the United Nations Security Council on collective non-recognition in concrete cases. On the contrary, only such decisions and concrete guidance as to what restraints shall be exercised under the label of non-

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<sup>46</sup> *Ibid.*, p. 161. Mexico maintained its legal position to the very end of the negotiations. At the last session of the Special Committee on 1 May 1970 the Mexican representative declared that ‘his delegation regarded the sentence: “No territorial acquisition resulting from the threat or use of force shall be recognized as legal” as a declaration condemning as illegal any territorial gain resulting from the threat or use of force and, consequently, any *de jure* or *de facto* recognition of such gains was a violation of international law [...]’ (GAOR, 25th session, Suppl. No. 18 (A/8018), 1970, p. 107, para. 210).

<sup>47</sup> See Bernt Graf zu Dohna, *Die Grundprinzipien des Völkerrechts über die freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten*, Berlin 1973, p. 81.

recognition [...] can be expected to lead to any uniform and effective international reaction.<sup>48</sup>

The compromise on the content of the obligation of non-recognition was also adopted in the case of the 1974 Definition of Aggression, which provides in Art. 5(3) that 'no territorial acquisition or special advantage resulting from aggression shall be recognized *as lawful*.'<sup>49</sup> The initial proposals of the non-aligned countries only provided that territorial acquisitions 'shall not be recognized'.<sup>50</sup> It was at the 94<sup>th</sup> meeting of the Special Committee on the Question of Defining Aggression on 3 February 1972 when it was proposed that the words 'as legal' be added after the word recognized.<sup>51</sup> The addition of the words 'as legal' was again opposed by the Mexican delegate who stated that 'it should be laid down with the utmost clarity that States had a duty not to recognize such acquisitions either *de jure* or *de facto*.'<sup>52</sup> This, however, was unacceptable to the Western States, which were generally opposed to the inclusion of the obligation of non-recognition in the definition of aggression. As they could not prevent this, their main aim was to water down any such obligation.<sup>53</sup> The replacement of the word 'legal' by the word 'lawful' signified an editorial but not a substantive change. Several delegations expressly pointed out that Art. 5(3) of the Definition of Aggression was to be interpreted in line with the relevant provision on non-recognition in the Friendly Relations Declaration.<sup>54</sup>

Adding the words 'as legal' or 'as lawful' was intended to give States the broadest possible scope of action in their relations with the perpetrator of the illegal act and could have considerably weakened the obligation of non-

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<sup>48</sup> Blix, *loc. cit.* (note 44), 664-665. See also Brownlie, *International Law and the Use of Force by States*, Oxford 1963, 420-423 who also draws a distinction between admission of legality (i.e. *de jure* recognition) and *de facto* recognition of control over territory.

<sup>49</sup> General Assembly Resolution 3314 (XXIX), 14 December 1974, Annex (italics added).

<sup>50</sup> UN Docs. A/AC.134/L.3, and Add.1, 25 June 1968, preambular para. 6; A/AC.134/L.16 and Add. 1 and 2, 24 March 1969, para. 8. See also A/AC.134/L.12, 26 February 1969, para. 4 ('No territorial gains or special advantages resulting from armed aggression shall be recognized.').

<sup>51</sup> GAOR, 27<sup>th</sup> Session, Supp. No. 19 (A/8719), 1972, p. 17.

<sup>52</sup> UN Doc. A/AC.134/SR.100-109 [106], 29 August 1973, p. 30.

<sup>53</sup> Thomas Bruha, *Die Definition der Aggression*, Berlin 1980, p. 204.

<sup>54</sup> See e.g. GAOR, 29<sup>th</sup> Session, Supp. No. 19 (A/9619), 1974, p. 24 (USA); p. 26 (Yugoslavia). See also the Report of the Special Committee on the Question of Defining Aggression, UN Doc. A/9411, 10 December 1973, p. 13. para. 29.

recognition.<sup>55</sup> However, subsequent non-recognition practice in the cases of Rhodesia, the South African presence in Namibia, the Bantustan States in South Africa, the Turkish Republic of Northern Cyprus and the Iraqi annexation of Kuwait shows that the international community regards the obligation of non-recognition as amounting to more than the prohibition of a formal admission of legality; it requires States to refrain from any action implying recognition of the legality of the situation in question.<sup>56</sup> The concept of implied recognition is difficult to reconcile with an understanding of the obligation of non-recognition as precluding only the formal admission of legality.<sup>57</sup> The obligation of non-recognition of the legality of a certain situation thus amounts to a 'duty of active abstention'.<sup>58</sup>

4) The purely formal view of the obligation of non-recognition underlying the Friendly Relations Declaration and the Definition of Aggression was also not shared by the ICJ in the *Namibia* advisory opinion.<sup>59</sup> For the Court, the duty of non-recognition excluded not only the formal admission of the legality of a situation, but any acts or dealings that could 'imply a recognition' that the situation was legal.<sup>60</sup> The obligations of non-recognition were not restricted to obligations set forth by the Security Council. To the contrary, the Court gave advice on those dealings that were precluded 'under the Charter of the United Nations and general international law'.<sup>61</sup> The passage from the *Namibia* opinion which is usually cited in evidence for the proposition that the precise obligations of non-recognition must, in order to

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<sup>55</sup> Gaetano Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law*, Alphen aan den Rijn 1979, pp. 103-104.

<sup>56</sup> See e.g. Security Council Resolution 662 (1990), 9 August 1990, where the Council called upon 'all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation'.

<sup>57</sup> See the problems faced by Brownlie, *op. cit.* (note 48), 420, n. 4.

<sup>58</sup> The ILLC talks about a 'duty of abstention'; see Report of the International Law Commission, 53<sup>rd</sup> Session, GAOR, 56<sup>th</sup> Session, Supp. No. 10 (A/56/10), 2001, p. 287, para. 4.

<sup>59</sup> *Namibia*, ICJ Reports 1971, p. 16.

<sup>60</sup> *Ibid.*, p. 55, para. 121.

<sup>61</sup> *Ibid.* While the Court took note of Security Council Resolution 283 (1970), 29 July 1970, which defined some of the steps to be taken by States against South Africa it did not deal with that Resolution (*ibid.*, p. 55, para. 120). The Court's findings as to the dealings that could imply recognition of the legality of the South African presence in Namibia were later adopted by the Security Council in its Resolution 301 (1971), 20 October 1971, para. 11.

exist, be invoked by the appropriate political organs of the United Nations acting within their authority under the Charter<sup>62</sup>, does not relate to the obligation of non-recognition but, generally, to the appropriate measures to be taken by the United Nations and its member States to bring the illegal situation to an end.<sup>63</sup> The obligations set out in the resolutions of the United Nations organs are not always very precise. In Resolution 276 (1970), which lies at the heart of the *Namibia* opinion, the Security Council had called upon all States, in rather general terms, to refrain from any dealings with the Government of South Africa which were inconsistent with the Council's declaration that the continued presence of the South African authorities in Namibia was illegal, and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia were illegal and invalid. The question of which dealings with the Government of South Africa were inconsistent with the Council's declaration thus remained. The Court was called upon to answer precisely this question by the Security Council.

The obligation and content of non-recognition do not depend upon any action by the appropriate political organs of the United Nations.<sup>64</sup> A decision by a competent organ of the United Nations may establish legal certainty as to the existence of a serious breach of a *jus cogens* obligation. But, in the absence of such a decision, States may make their own determination at their own risk. That the obligation arises directly under customary international law is also shown by the fact that, in several cases, the call for non-recognition has been contained in a non-binding resolution of the General Assembly or in a statement of the President of the Security Council, which do not create any obligation. It is suggested that, with regard to the obligation of collective non-recognition, the function of the political organs of the United Nations is one of coordination, rather than creation, of the obligation, as uncoordinated acts of non-recognition by individual States will not usually be very effective.

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<sup>62</sup> See e.g. the statements of the representatives of Australia in the *East Timor* case: CR 95/10, 9 February 1995, pp. 24-25 (Derek Bowett); CR 95/14, 16 February 1995, p. 36, paras. 5-6 and p. 56, para. 63 (James Crawford).

<sup>63</sup> The Court deals with the determination of 'what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied' (*ibid.*, p. 55, para. 120).

<sup>64</sup> See Brownlie, *op. cit.* (note 5), p. 491 ('This duty may be observed irrespective of or in the absence of any direction from the United Nations if in the careful judgment of the individual state a situation has arisen the illegality of which is opposable to states in general.').

While the Court did not adopt a purely formal approach to non-recognition, it did not preclude all dealings with the Government of South Africa with regard to Namibia. In operative clause 2 of its opinion the Court held that Member States of the United Nations were ‘under obligation [...] to refrain from any acts and in particular any dealings with the Government of South Africa *implying recognition of the legality*’ of South Africa’s presence in Namibia.<sup>65</sup> The obligation of non-recognition is thus not so rigid as to preclude *all* dealings under all circumstances, but precludes only such dealings as would imply recognition of legality.<sup>66</sup> This distinction between dealings implying recognition of legality and those not implying recognition of legality (and thus not being excluded by the obligation not to recognize as lawful) has been confirmed by the ILC, which held that the obligation not to render aid or assistance ‘has a separate scope of application insofar as actions are concerned which do not imply recognition’ of the situation as lawful.<sup>67</sup> In practice, three categories of actions may thus be distinguished: actions implying recognition of the legality of a situation (which may also aid or assist in maintaining the illegal situation); actions amounting to aid or assistance in maintaining the situation (without implying recognition of the legality of the situation); and actions which do neither of these. This distinction, however, still leaves unanswered the question as to which actions imply recognition of a situation as lawful.

5) The ILC’s Commentary on Art. 41(2) of its Draft Articles on State Responsibility is not very instructive on the content of the obligation of non-recognition of the legality of situations created by a serious breach in the sense of Art. 40. Spain pointed out that the ‘substantive consequences’ of serious breaches as set out in Art. 41(2) were ‘largely undefined’ and called upon the ILC ‘to clarify to the extent possible the obligations of all States’ and, in particular, to ‘streamline the content of the obligation not to recognize as lawful the situation created by the breach’.<sup>68</sup> There seems to be a lot

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<sup>65</sup> *Namibia, ICJ Reports* 1971, p. 16, at p. 58, para. 133 (emphasis added).

<sup>66</sup> Cf. *ibid.*, p. 166 (sep. op. Dillard). On the limits of the duty of non-recognition, see also *ibid.*, p. 149 (sep. op. Onyeama); pp. 134-137 (sep. op. Petrán); p. 219 (sep. op. De Castro); p. 297, para. 123 (diss. op. Fitzmaurice).

<sup>67</sup> Report of the International Law Commission, 53<sup>rd</sup> Session, GAOR, 56<sup>th</sup> Session, Supp. No. 10 (A/56/10), 2001, p. 291, para. 12.

<sup>68</sup> State Responsibility. Comments and observations received from Governments, UN Doc. A/CN.4/515, 19 March 2001, p. 54.



of uncertainty among States as to the precise content of the obligation. France even stated that Art. 41(2) appears not to be essential as it adds ‘nothing of substance’.<sup>69</sup> Virtually all examples in the Commentary of situations not to be recognized as lawful refer to attempted acquisitions of sovereignty over territory. With regard to the obligation not to recognize as lawful the ILC only states that ‘it not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.’<sup>70</sup> As States will not usually formally recognize ‘as lawful’ situations created by acts of genocide or torture, the question arises as to what acts can imply such recognition and are thus precluded under Art. 41(2)?

The concept of non-recognition was first introduced in the work of the ILC by Willem Riphagen, the third Special Rapporteur on the topic of State Responsibility. Art. 6(1)(a) of the 1982 draft articles provided that ‘an internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other States not to recognize as legal the situation created by such act’. The formula was inspired by the non-recognition rule in the 1970 Friendly Relations Declaration.<sup>71</sup> In his ‘Preliminary Report on the Content, Forms and Degrees of International Responsibility’, submitted on 1 April 1980, he introduced non-recognition of a situation created by a wrongful act as one of several ‘(other) “responses”’ to such an act. For Riphagen, it was ‘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*.’<sup>72</sup> He 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.’<sup>73</sup> 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 de-

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<sup>69</sup> *Ibid.*, UN Doc. A/CN.4/515/Add.2, 1 May 2001, p. 13.

<sup>70</sup> Report of the International Law Commission, 53<sup>rd</sup> Session, GAOR, 56<sup>th</sup> Session, Supp. No. 10 (A/56/10), 2001, p. 287, para. 5.

<sup>71</sup> ILC Yb. 1982 II/1, p. 48, para. 7.

<sup>72</sup> ILC Yb. 1980/II, p. 115, para. 45 (italics added).

<sup>73</sup> *Ibid.*, p. 117, para. 54. See also Report of the International Law Commission, 53<sup>rd</sup> Session, GAOR, 56<sup>th</sup> Session, Supp. No. 10 (A/56/10), 2001, p. 289, para. 8 (‘where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nevertheless to be withheld.’).

nied. In particular, the rights, competences and privileges that are inherent in statehood – and only those – are to be withheld from the new State. Riphagen cites ‘immunities of foreign States and their property’ under general international law as an example of a legal consequence that may be ignored if the factual situation giving rise to that immunity was created in violation of international law.<sup>74</sup> Riphagen’s successor as Special Rapporteur, Gaetano Arangio-Ruiz, also interpreted ‘the obligation not to recognize as “legal”’ in the sense of not ‘producing legal effects at the international level and in the respective national systems’.<sup>75</sup> Imposing a duty of non-recognition of a situation ‘as legal’ was thus intended to deny any legal effect to a situation created by a serious breach of a *jus cogens* obligation.<sup>76</sup>

There are, however, very few factual situations created by such serious breaches that, under customary international law or treaties, automatically give rise to legal consequences, i.e. rights or privileges, that can be denied by other States.<sup>77</sup> Acts of aggression, the illegal use of force, the denial of the right of self-determination of peoples, acts of genocide or crimes against humanity may result in the creation of an illegal State or the illegal acquisition or occupation of territory.<sup>78</sup> International law knows of only a very limited number of rights inherent in statehood, such as State immunity and the right to exercise jurisdiction over the State’s territory and over all persons

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<sup>74</sup> *Ibid.*, pp. 115-116, para. 46. See also Willem Riphagen, ‘The Legal Consequences of Illegal Acts under Public International Law’, *Nederlands Tijdschrift voor Internationaal Recht* 20 (1973), 27, at 34.

<sup>75</sup> UN Doc. A/CN.4/453/Add.2, 8 June 1993, 29, para. 50. See also Art. 18(1)(a) of the draft articles submitted by Gaetano Arangio-Ruiz: ‘all States shall [...] refrain from recognizing as legal or valid, under international or national law, the situation created by the international crime.’ (ILC Yb. 1995 II/2, p. 45, n. 14).

<sup>76</sup> Cf. Gowlland-Debbas, *op. cit.* (note 12), p. 249 with regard to the duty of non-recognition in Art. 14(2)(a) of the 1984 version of the Draft Articles on State Responsibility.

<sup>77</sup> The Commentary on the Harvard Draft Convention on Rights and Duties of States in Case of Aggression described the content of non-recognition as follows: ‘Rights flowing from acts of force would not be recognized.’ (AJIL Supp. 33 (1939), 818-909, at 890).

<sup>78</sup> See the statement of the observer for Malaysia in the Human Rights Commission: ‘It was imperative that the international community should firmly uphold the principle of non-recognition of territories acquired through Serbian aggression, ethnic cleansing and other illegal acts.’ (UN Doc. E/CN.4/1992/S-2/SR.3, 4 December 1992, p. 16, para. 71).

and things within it.<sup>79</sup> Non-recognition of an illegal State thus means denying the State the rights and privileges inherent in statehood. Belligerent occupation of foreign territory gives rise to limited rights of administration of the occupying power under customary international law and treaties.<sup>80</sup> It is arguable that, subject to humanitarian considerations and the interests of the civilian population in the occupied territory, these rights are to be denied to an aggressor. States may, for example, refuse to recognize and enforce laws enacted by the aggressor for the occupied territory or may deny recognition to title to property even if the acquisition of property was within the 1907 Hague Regulations on Land Warfare.<sup>81</sup> The aggressor may also be denied the customary international law privilege that belligerents are not responsible for damages caused to subjects of neutral States by military operations in accordance with the laws of war.<sup>82</sup> Acquisition of territory usually entails the extension of the territorial scope of existing treaties and the right to conclude treaties for the acquired territory;<sup>83</sup> it may also have an effect on voting and other rights, under treaties that provide for proportionate voting or other rights depending on the size of a party's territory or population. In the case of illegal acquisition of territory, these rights are to be denied.

While the denial of legal effects may make sense in the situations mentioned above, the question remains: what are the legal effects that can be denied by other States arising from factual situations created by acts of slavery, genocide, crimes against humanity, racial discrimination, torture, the violation of the basic rules of international humanitarian law and other norms of *jus cogens*? While acts of genocide entail consequences under international criminal law and, depending on the circumstances, the law of State responsibility, these consequences are, of course, not to be denied by third States. The denial of the legal effects of a situation could be interpreted in a wider

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<sup>79</sup> For an overview of the rights inherent in statehood, see Stefan Talmon, 'The Constitutive versus the Declaratory Theory of Recognition: *Tertium Non Datur*?', *British Year Book of International Law* 75 (2004) (forthcoming).

<sup>80</sup> See e.g. Arts. 42-56 of the Regulations Respecting the Laws and Customs of War on Land, Annexed to the 4<sup>th</sup> Hague Convention, 18 October 1907 (100 BFSP 338) and Arts. 47-78 of the 4<sup>th</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (75 UNTS 287). See also the Order of the German Federal Constitutional Court of 26 October 2004, 2 BvR 955/00, *Deutsches Verwaltungsblatt* 2005, 175-183, at 179.

<sup>81</sup> Cf. Brownlie, *op. cit.* (note 48), p. 406, n. 3 with further references.

<sup>82</sup> See Talmon, *op. cit.* (note 11), ch. 12.III.2.a; Brownlie, *op. cit.* (note 5), p. 490.

<sup>83</sup> See VCLT, Art. 29.

sense. It could be argued that any property or other rights predicated on acts of genocide or convictions secured by acts of torture are to be denied any legal effect by other States. It is also arguable that the general legal consequences of acts of State under international law, such as the personal and functional immunity of State officials from the jurisdiction of foreign courts or State immunity, may be denied if the acts in question constitute genocide or other serious breaches of *jus cogens* obligations.<sup>84</sup> At least the latter interpretation, however, would not be in conformity with the recent ruling of the ICJ in the *Arrest Warrant* case.<sup>85</sup> The German Federal Court of Justice expressly stated in its decision of 26 June 2003 that ‘recent attempts to limit the principle of State immunity and, in case of violations of norms of *jus cogens* not to recognize it’ were ‘not in conformity with general international law’.<sup>86</sup>

6) The answer to the question of what conduct the obligation of non-recognition imposes on States must be sought in customary international law, as reflected in the settled practice of States, the decisions of international and national courts and tribunals, and the resolutions of the appropriate political organs of the United Nations.<sup>87</sup> The content of the obligation will differ according to the factual situation which is not to be recognized as lawful. There is ample practice in respect of the non-recognition of States created by a serious breach of a *jus cogens* obligation. The violated norms identified were, in the case of Rhodesia, the right of self-determination of the people of Southern Rhodesia; in the case of the South African homeland States the prohibition of racial discrimination (*viz.* the prohibition of apartheid); and, in the case of the Turkish Republic of Northern Cyprus, the prohibition of the use of force.<sup>88</sup> The State not to be recognized as lawful is to be denied all rights, capacities and privileges inherent in statehood. In this connection, it is necessary to distinguish between the rights *inherent in statehood*, i.e. the rights a State can demand under general international law be-

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<sup>84</sup> Cf. *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet*, 24 March 1999, *ILM* 38 (1999), 581, at 651 (*per* Lord Millet) but only with regard to functional immunity.

<sup>85</sup> *Arrest Warrant of 11 August 2000*, *ICJ Reports* 2002, para. 58.

<sup>86</sup> German Federal Supreme Court, 3<sup>rd</sup> Senate, Decision of 26 June 2003, III ZR 245/98, BGHZ 155, p. 279, para. 15 (translation supplied). See also *ibid.* for further references to the literature on this question.

<sup>87</sup> See *Namibia*, *ICJ Reports* 1971, p. 16, at p. 134 (*sep op.* Petrán).

<sup>88</sup> See Talmon, *op. cit.* (note 11), ch. III.2.b(2) with further references.

cause 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. Only the former are subject to the duty of non-recognition; the latter may be precluded by the obligation not to render aid or assistance in maintaining the illegal State.<sup>89</sup>

Governments of existing States installed by an act of aggression, the illegal use of force or the denial of the right of self-determination are not to be treated as having the capacities of a government in international law.<sup>90</sup> It is argued that the same should apply in cases of governments coming to power by acts of genocide.

The content of the obligation of non-recognition of the illegal acquisition or occupation of territory by a State has been set out by the ICJ in the *Namibia* advisory opinion. Other States are not to enter into treaty relations with a wrongdoing State in all cases in which its government purports to act on behalf of or concerning the territory. Existing bilateral treaties or provisions of treaties with the wrongdoer, which involve active intergovernmental co-operation, must not be invoked or applied to the territory illegally occupied or annexed. States are to abstain from sending diplomatic or special missions to a wrongdoing State, or from including in their jurisdiction the territory in question. They must abstain from sending consular agents to the territory and must withdraw any such agent already there. States must also abstain from entering into economic or other forms of relationship or dealings with the wrongdoer on behalf of or concerning the territory.<sup>91</sup>

It is argued that the restraints set out in the *Namibia* opinion apply equally to the *de facto* annexed territory on the Israeli side of the wall (including East Jerusalem). For the European Union, for example, this means that the EC-Israeli Association Agreement with its preferential tariffs for products of Israeli origin must not be applied to products originating in the *de facto* annexed territory.<sup>92</sup> Products from the territory on the Israeli side of

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<sup>89</sup> For a detailed study of the content of non-recognition of illegal States with respect to the Turkish Republic of Northern Cyprus, see Talmon, *op. cit.* (note 11), ch.5-12.

<sup>90</sup> Cf. Robert Jennings/Arthur Watts (eds.), *Oppenheim's International Law*, 9<sup>th</sup> edn, Harlow 1992, p. 199. See also Security Council Resolutions 554 (1984), 17 August 1984, and 566 (1985), 19 June 1985, and the Presidential Statement of 3 May 1985 (UN Doc. S/17151).

<sup>91</sup> *Namibia, ICJ Reports* 1971, p. 16, at p. 55, paras. 121, 122.

<sup>92</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other

the wall must not benefit from preferential treatment, unless they are imported to EU Member States under the EC's association agreement with the PLO and are accompanied by a movement certificate EUR.1 issued by the customs authorities of the Palestinian Authority in the West Bank.<sup>93</sup> In addition, agricultural products which, under Community law, require a plant health certificate issued in the plants' country of origin must not be imported at all into the EU from the territory on the Israeli side of the wall, unless they are accompanied by the necessary plant health certificate issued by the competent Palestinian authorities.<sup>94</sup> Diplomatic and consular agents based in East Jerusalem must be withdrawn and the jurisdiction of any diplomatic and consular mission in Israel proper must not extend to the territory on the Israeli side of the wall (including East Jerusalem).

With regard to situations created by genocide, torture, crimes against humanity and other serious breaches of a *jus cogens* norm there is no practice of non-recognition on which to draw. This is not surprising as these situations, as a rule, do not automatically give rise to any legal consequences which are capable of being denied by other States.

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part, signed at Brussels, 20 November 1995: OJ L 147, 21 June 2000, p. 3. Art. 83 of the Agreement provides: 'This Agreement shall apply [...] to the territory of the State of Israel.'

<sup>93</sup> See Euro-Mediterranean Interim Association Agreement on Trade and Co-operation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, signed at Brussels, 24 February 1997: OJ L 187, 16 July 1997, p. 3. Art. 73 provides: 'This Agreement shall apply [...] to the territory of the West Bank and the Gaza Strip.' On the procedure for the issue of movement certificates, see Protocol 3 to the Agreement. On the question with regard to the West Bank and Gaza Strip in general, see Moshe Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip', *Fordham International Law Journal* 26 (2003), 572-594; Christian Hauswaldt, 'Problems under the EC-Israel Association Agreement: The Export of Goods Produced in the West Bank and the Gaza Strip under the EC-Israel Association Agreement', *European Journal of International Law* 14 (2003), 591-611. The difference between the West Bank and Gaza Strip and the territory on the Israeli side of the wall (including East Jerusalem) is that the EU Member States in the latter case have no discretion whether or not to accept certificates by Israeli authorities.

<sup>94</sup> See *Regina on the application of S.P. Anastasiou (Pissouri) Ltd. and Others v. Minister of Agriculture, Fisheries and Food*, Case C-140/02, ECR 2003, p. I-10635; *Regina v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and Others*, Case C-219/98, ECR 2000, p. I-5241; *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd. and others*, Case C-432/92, ECR 1994, p. I-3087.

### III. PRACTICAL DIFFICULTIES WITH THE OBLIGATION OF NON-RECOGNITION

1) The obligation not to recognize as lawful a situation created by a serious breach of a *jus cogens* obligation gives rise to practical difficulties. The first difficulty is knowing when the obligation will arise. The question has been asked as to whether the imposition of the obligation is automatic or whether it must be activated by a prior authoritative finding by the appropriate political organ of the United Nations that a serious breach has occurred; in particular, whether a specific call for non-recognition by the Security Council is a prerequisite to activation of the obligation.<sup>95</sup> It has been pointed out that, if it was left to individual States, they might arrive at different conclusions, which would adversely affect the stability of the international legal order.<sup>96</sup> While earlier drafts of the ILC Articles on State Responsibility in the 1980s provided that the performance of the obligation of non-recognition was 'subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security', and thus made it subject to a decision of the Security Council,<sup>97</sup> the final articles and the ILC's Commentary adopted in 2001 do not deal with this question. The obligations in Art. 41 of the ILC Articles on State Responsibility rest on the assumption of international solidarity in the face of a violation of a norm of *jus cogens*. They stem from an understanding that a collective response by all States is necessary to counteract the effects of such a violation. In practice, it is most likely that this collective response will be co-ordinated through the competent organs of the United Nations.<sup>98</sup> But this is not a prerequisite for the obligation of non-recognition to arise. Many, if not most, of the calls for non-recognition have been made

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<sup>95</sup> See e.g. Australia's argument in the *East Timor* case: CR 95/9, 8 February 1995, p. 26, paras. 31, 32 (James Crawford).

<sup>96</sup> UN Docs. A/C.6/56/SR.11, 9 November 2001, p. 10, para. 58; A/C.6/55/SR.14, 10 November 2000, p. 9, para. 43 and State Responsibility. Comments and observations received from Governments, UN Doc. A/CN.4/515, 19 March 2001, p. 57 (China). See also the 4<sup>th</sup> Report on State Responsibility by Gaetano Arangio-Ruiz, UN Doc. A/CN.4/461/Add.1, 26 April 1994, pp. 6-7, para. 18.

<sup>97</sup> See Art. 6(2) of the 1982 draft articles (ILC Yb. 1982 II/1, p. 48) and Art. 14(3) of the 1984 draft articles (ILC Yb. 1984 II/2, p. 101 and ILC Yb. 1985 II/1, p. 13).

<sup>98</sup> Cf. Report of the International Law Commission on the Work of its 48<sup>th</sup> Session, GAOR, 51<sup>st</sup> Session, Supp. No. 10 (A/51/10), 1996, pp. 169-170.

in non-binding resolutions of the General Assembly and in statements of the President of the Security Council, which could neither authoritatively determine the existence of a serious breach nor create an obligation not to recognize a situation as lawful. The title of Art. 41 speaks of 'particular consequences of a serious breach', not of the particular consequences of a UN resolution. The ILC considers non-recognition to be the 'minimum response' to a serious breach of *jus cogens* that is called for on the part of all States, independently of more extensive measures which may be taken by States through international organizations. The obligation of non-recognition thus arises for each State as and when it forms the view that a serious breach of a *jus cogens* obligation has been committed, and each State will bear responsibility for its decision.<sup>99</sup>

2) The temporal element of the obligation constitutes another difficulty. It has been pointed out that Art. 42(2) of the ILC Articles on State Responsibility is problematic in that it contains no reference to time-frames.<sup>100</sup> Is non-recognition an open-ended obligation that only comes to an end with the successful establishment of the status quo ante?<sup>101</sup> It is definitely not a short-term measure. Non-recognition of Rhodesia lasted for 15 years, while non-recognition of South Africa's illegal occupation of Namibia went on for 20 years. The Turkish Republic of Northern Cyprus has not been recognized for the last 22 years, the international community has refused recognition of the Israeli annexation of the Syrian Golan and East Jerusalem for 25 years, and the non-recognition of the illegal incorporation of the Baltic States into the Soviet Union lasted for 51 years. In all cases since 1945, collective non-recognition has ended only with the establishment of the *status quo ante*. However, the duty of non-recognition does not operate in a vacuum, divorced from the situation on the ground and the responses of the international community to that situation. After all, non-recognition is a collective response to protect the fundamental interests of the international commu-

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<sup>99</sup> *Ibid.*, p. 165, para. 4.

<sup>100</sup> UN Doc. A/C.6/54/SR.23, 2 November 1999, p. 7, para. 47 (Australia). See also State Responsibility. Comments and observations received from Governments: UN Doc. A/CN.4/515, 19 March 2001, p. 47 (United Kingdom).

<sup>101</sup> Cf. the rhetorical statement of James Crawford, Counsel for Australia, that such an obligation not to recognize based on customary international law would go on 'for years, for decades, indefinitely' (*East Timor*, CR 95/9, 8 February 1995, p. 39, para. 62). See also the same: 'If [...] there is an automatic and general duty of non-recognition, how can this be limited, qualified or excluded by United Nations organs?' (*ibid.*, p. 41, para. 73).



nity. The practice of the political organs of the United Nations in the cases of Rhodesia and Namibia shows that changes to the illegal situation which do not constitute a return to the status quo may well affect the obligation not to recognize. As the obligation of non-recognition was based on a denial of the right to self-determination of the peoples in these territories, the Security Council felt compelled to renew its call for non-recognition when the white minority regimes organized elections among the population in order to legitimize the situation.<sup>102</sup> The obligation of non-recognition is also subject to the possible endorsement of a settlement by the international community. The Friendly Relations Declaration expressly provided that the duty not to recognize as legal any territorial acquisition resulting from the threat of use of force shall not be 'construed as affecting the powers of the Security Council under the Charter.'<sup>103</sup> A similar safeguard clause with regard to the competence of the Security Council under the Charter may be found in Art. 6 of the Definition of Aggression and Art. 59 of the ILC Articles on State Responsibility.

3) Another difficulty with the obligation not to recognize as lawful a situation created by a serious breach of a *jus cogens* obligation seems to lie in its relationship with the duty to 'co-operate to bring to an end through lawful means any serious breach' as provided for in Art. 41(1) of the ILC Articles on State Responsibility. In its Order of 26 October 2004, the German Federal Constitutional Court gave the obligation to co-operate priority over the obligation not to recognize.<sup>104</sup> The Court, assuming for the sake of argument that the expropriation without compensation of German-owned property by the Soviet Union in the Soviet zone of occupation of Germany between 1945 and 1949 constituted a serious breach of a norm of *jus co-*

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<sup>102</sup> See Security Council Resolutions 423 (1978), 14 March 1978, para. 2; 445 (1979), 8 March 1979, paras. 5, 6; 448 (1979), 30 April 1979, para. 3 (all with regard to the elections in Rhodesia). Several States did not rule out the recognition as a result of these election; see Talmon, *op. cit.* (note 11), ch. 2.II.5.c. See also Security Council Resolution 439 (1978), 13 November 1978, paras. 1,3 (Namibia).

<sup>103</sup> Friendly Relations Declaration, principle 1, para. 10(b). But see also the declaration of the representative of the United Arab Republic with regard to para. 10(b) that this general safeguard clause 'could not be interpreted in any way that would suggest that the Security Council had any power to appropriate a part of the territory of a State to another State. Such an interpretation would be contrary to the Charter and to the draft declaration itself.' (GAOR, 25<sup>th</sup> Session, Supp. No. 18 (A/8018), 1970, p. 118, para. 250).

<sup>104</sup> Order of the German Federal Constitution Court of 26 October 2004, 2 BvR 955/00, *Deutsches Verwaltungsblatt* 2005, 175-183

*gens*,<sup>105</sup> nevertheless held that the German Government was not under an obligation not to recognize as lawful the illegal expropriation and to treat it as null and void. The Court stated:

‘when there is a well-established factual situation and divergent political interests, States are only duty-bound to co-operate with a view to reaching agreement. The reason for the obligation to co-operate is that it is of prime importance to create a situation which, also in practical terms, mitigates the violation of the peremptory norms while safeguarding the interests of both parties.’<sup>106</sup>

In making this finding, the Court relied on the ICJ’s advisory opinion in the *Namibia* case. Although all States were under an obligation to recognize the invalidity of South Africa’s acts on behalf of or concerning Namibia, the prime aim was to resolve or eliminate the situation. For that reason, the Court argued, the international community had co-operated with South Africa in the termination of the occupation of Namibia. The Court held that the Federal Republic of Germany had fulfilled its obligation to co-operate in achieving reunification by way of peaceful negotiations with the former occupying power and other States.<sup>107</sup>

This reasoning has several flaws. First, the duty of co-operation in Art. 41(1) is addressed to third States; it does not stipulate a duty of third States or the injured State to co-operate with the responsible State in bringing to an end the serious breach of a *jus cogens* obligation, but rather a duty to co-operate among third States. The debates in the ILC show that Part Two, Chapter III, of the Articles on State Responsibility was to create obligations for ‘third States’.<sup>108</sup> The obligations of the responsible State are laid down in Chapters I and II of Part Two, and do not include a duty to co-operate with other States in bringing the serious breach to an end. Secondly, the injured State is also under an obligation not to recognize the situation created by a serious breach of a *jus cogens* obligation. A serious breach by definition

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<sup>105</sup> The Court had rightly denied the *jus cogens* character of a duty to protect the property of a State’s own citizens; *ibid.*, p. 180.

<sup>106</sup> *Ibid.*, p. 181.

<sup>107</sup> *Ibid.*, p. 181.

<sup>108</sup> See e.g. Fourth Report on State Responsibility, UN Doc. A/CN.4/517, 2 April 2001, p. 19, para. 48; State Responsibility. Comments and observations received from Governments: UN Doc. A/CN.4/515, 19 March 2001, p. 46 (United Kingdom) (‘obligations of non-recognition and non-assistance are imposed on third States’).

concerns the international community as a whole. Norms of *jus cogens* are thus not at the disposal of the injured State; it cannot unilaterally negotiate away the interests of the international community in ensuring a just and appropriate settlement.<sup>109</sup> If the protection of the property of its citizens against expropriation by an occupying power had indeed been a norm of *jus cogens*, it would not have been for Germany unilaterally to relinquish this property.

#### IV. CONCLUSION

Many problems still remain with regard to the obligation 'not to recognize as lawful' a situation created by the illegal threat or use of force or other serious breaches of *jus cogens* norms. There is more authority for the obligation as such (especially in cases of the illegal use of force, the denial of the right of self-determination of peoples, and the prohibition of racial discrimination) than for its particular content, and rules which readily correspond to the obligation have not yet fully developed in customary international law. In view of the content given to the obligation it is doubtful whether such rules will ever be developed with regard to serious breaches of some of the *jus cogens* norms identified by the ILC and others. The obligation of non-recognition of the legality of a specific situation amounts to a duty of active abstention. The factual situation created by the serious breach is to be denied its ordinary legal consequences. Thus, non-recognition can operate only in cases of a factual situation that also takes the form of a legal claim (to statehood, territorial sovereignty, governmental capacity, etc.) intended to have *erga omnes* effect. To the extent that factual situations entail such claims, the obligation of non-recognition does have real substance and may prove a powerful sanction by the international community against the responsible State. However, its scope of application seems to be rather limited.

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<sup>109</sup> Report of the International Law Commission, 53<sup>rd</sup> Session, GAOR, 56<sup>th</sup> Session, Supp. No. 10 (A/56/10), 2001, pp. 289-290. para. 9. See also Arts. 26 and 20 of the ILC Articles on State Responsibility.

